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EU Institutional Politics of Secrecy and Transparency in Foreign Affairs

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Editorial

EU Institutional Politics of Secrecy and Transparency in Foreign Affairs

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Abstract
This thematic issue shows how the interplays of secrecy and transparency have been a salient driver of institutional politics in EU foreign affairs. It offers a critical reading of the most recent developments in EU's international negotiations, an analysis of case law and empirical insights on public and institutional access to information. The Issue provides an interdisciplinary understanding of how information flows affect and are affect by the EU's institutional balance through synergising perspectives from the fields of political science, public administration and law. This editorial outlines the central questions raised in this thematic issue and highlights its main findings.

Keywords
access to information; European Union, foreign affairs; negotiations; oversight; politicization; secrecy; transparency

Issue
This editorial is part of the issue "EU Institutional Politics of Secrecy and Transparency in Foreign Affairs", edited by Vigjilenca Abazi and Johan Adriaensen (Maastricht University, The Netherlands).

1. Foreign Affairs and Logics of Secrecy and Transparency

Critique on the EU's foreign affairs has grown more pertinent over the last decade. Agreements like the Anti-Counterfeiting Trade Agreement (ACTA) or the trade negotiations with the US (TTIP) or Canada (CETA) attracted unseen levels of public mobilisation (see also Gheyle & De Ville, 2017). A prominent bone of contention concerns the secretive nature through which many of these initiatives originated and the lack of transparency in their negotiations. Secrecy in the conduct of international relations is not new or unique to the EU context. The norm of secrecy in international negotiations is historically traced back to the time when royal court ambassadors had to be constantly preoccupied by secrecy and find ways to protect their secrets (Colson, 2008). Despite public demands for more transparency, it remains a challenge to accommodate such demands in light of ingrained norms of secrecy in the diplomatic culture (O'Reilly, 2017). Tensions between secrecy and transparency in current foreign affairs hence require closer scholarly attention.

One aspect that makes secrecy compelling in foreign affairs is its protective function. Secrecy creates a space of trust between the parties that maintain the secret and a sense of separation from the outsiders towards whom the secrets must be guarded (Bok, 1982). Removing something from the public view endows it with power. Often the object of secrecy—the information—is less important than the organizational approach to managing access to the created secrets (Simmel, 1906). The latter empowers insiders to decide just how wide the circle of secrecy may expand but also to influence decision-making that involves the less informed outsiders. Hence, a '"secret" is a political category, not a natural one. Facts in isolation do not cry out for secrecy; facts within a specific political context do' (Chafetz, 2013, p. 86). In institutional practice, secrecy may be used to protect information that should not be shared widely due to legitimate concerns. Information relating to national security or trade negotiating positions may be justifiable reasons to limit information flows. However, from a democratic oversight perspective, secrets should be justified and politically checkable in the broad

sense that they are subordinate to policies that themselves are transparent and politically alterable (Curtin, 2014; Thompson, 1999).

This thematic issue analyses the tension between secrecy and transparency in the EU's foreign affairs. It shows how debates on access to information have been a significant driver of institutional politics and their implications for the EU's institutional balance. Whilst negotiations have a prominent role in this field, foreign affairs also involve issues of public and institutional access to information that are generally critical points of tensions between executive institutions and the public and oversight institutions. The issue focuses on the processes of disclosing and concealing information both among EU institutions as well as between the EU and its citizens. The purpose of this thematic issue is to decipher how information control affects and is affected by the EU's institutional balance. Synergising perspectives from political science, public administration and law, the issue offers a critical reading of the most recent case law on these issues and provides empirical insights on public and institutional access to information.

2. Institutional Politics and Information Control

Information is power. This also holds true in a political and administrative context. Secrecy creates a cluster of inside-insiders, i.e., only a limited number of individuals knowing the secret information. This compartmentalization of information implies that actors are involved in an incessant competition, struggling for various stakes and prizes (Kozak & Keagle, 1988, p. 7). In the issue, the contributors focus on three instances where such inter-institutional "competition" over information is particularly salient.

One such relation is that *between the legislature and the executive*. Transparency is an important condition for legislative institutions to fulfil their oversight functions. Administrative procedures governing the disclosure of information have been highlighted as important means for legislative control over the executive (McCubbins, Noll, & Weingast, 1987). Lack of transparency widens the information asymmetry between the "expert" agent (who sits at the negotiating table) and the "dilettante" principal (who can only observe the outcome but not the actions of the agent). Information asymmetry creates the opportunity for the negotiator to deviate from its principal's interests (Adriaensen, 2016; McCubbins & Schwartz, 1984). The observation of such shirking or bureaucratic drift often leads to political and public protest. As information asymmetry decreases, the scope for shirking diminishes, as the principal is able to correct the agent's actions. In short, the balance of power shifts as the agent's privately held information diminishes (Abazi & Adriaensen, 2017; Coremans, 2017).

Another relation where contestation over information flows is observed concerns the relation *between (quasi-)legislative institutions*. Tsebelis and Money (1997) highlight the existence of a "political dimension" of bicameralism. This often occurs in federal systems where each chamber represents a different interest. It is considered *political* as success for one institution often comes at the other institutions' expense. Both chambers are in a continuous struggle to ensure that—ultimately—legislation more closely reflects the interests of the electorate they represent. The EU is a particularly interesting case in this regard as historically the Council and the European Parliament (EP) have not enjoyed equal rights in decision-making. Concurrently, both institutions do not enjoy the same degree of access to information in foreign affairs. In policy areas where the nexus of power remains at the national level, member states retain ownership of sensitive information (rather than European institutions like the Commission or bodies like the European External Action Service (EEAS). Contributions in this issue study the tensions between the EP and the Council as they seek to expand or maintain their grasp on the EU's foreign policy (Hillebrandt, 2017; Rosén & Stie, 2017).

A third instance where institutional politics affect and are affected by the transparency regime concerns the *intervention by independent bodies*. Because access to information affects the distribution of power between the institutions, it does not come as a surprise that disputes often require mediation by a (quasi-) independent body like the European Ombudsman (EO) or the Court of Justice of the EU. The extent to which such actors are impartial and independent is crucial for their role in the transparency regime. The EO is appointed by and located within the EP. Whether this impedes its independence role is a question addressed in the contribution by Neuhold & Năstase (2017). The Court provides a judicial review ensuring principles of the EU, however in foreign affairs when public access to information is concerned it seems to leave more discretionary space to the executive. Yet the Court seems more interventionist when parliamentary access to information is at stake (Abazi & Adriaensen, 2017). The approaches by the EO and the Court are focused on finding a proportionate balance between the necessities of secrecy and transparency in the EU's foreign policy, but as contributors in this thematic issue show, where to strike the balance is a contentious issue.

In addition to these three instances of *institutional* relations of information flows, important questions arise about the role and position of *public* access to information, debate and participation in foreign affairs. Specifically, this issue examines whether institutional checks and processes of oversight strengthen also public access and participation and how more recent trends of closed parliamentary oversight affect public accountability (Abazi, 2016; Rosén & Stie, 2017). Whilst institutional access to information strengthens the constitutional set balance of powers among EU institutions, the issue scrutinises whether such processes lead to more informed public debate and a wider participation circle for civil society organisations.

3. Findings and Reflections

Contributions to this thematic issue show that debates about secrecy and transparency in foreign affairs are intrinsically linked to the EU's institutional balance. Information flows among institutions vary depending on the constitutionally set balance, but they also determine—in institutional practice—how the role of each institution is evolving in the EU's foreign affairs. Five main points emerge from the contributions in this thematic issue.

Firstly, through a theoretical discussion and systematic analysis of case law, contributors challenge the assumption that foreign affairs should have broader legal contours on secrecy than internal legislation in the EU. Leino (2017) shows that the *logics of secrecy and transparency are being applied both in legislation and in foreign policy proper and often the implications of the latter for EU fundamental rights are just as important* as such issues that are addressed in EU legislative acts. Similarly, Gheyle and De Ville (2017) emphasise the growing mobilisation of civil society in trade negotiations due to the regulatory nature of contemporary trade policy. Whilst there is a growing demand for more access to information in foreign affairs issues, participation by civil society is yet only emerging.

Secondly, the *Council shows significant resistance towards transparency in foreign affairs both in terms of public and institutional access to information*. Hillebrandt (2017) shows that public access to documents in foreign affairs has been a contentious issue for the Council and partly this is due to its overlapping diplomatic and legislative functions. While there has been more case law clarifying the limits of confidentiality for the Council in foreign affairs, the Council continues to argue that a diplomatic setting is more appropriate for its decision-making, a setting where secrecy norms are given more space. Rosén & Stie (2017) take the debate forward by looking at institutional access to information and in particular showing some of the information "battles" over access to information between the EP and the Council. The EP has now in place a legal framework that facilitates access to sensitive information in foreign policy, but this has not necessarily resulted in more straightforward practice of access to information. In this light, Abazi and Adriaensen (2017) show that the Council's handling of information is not only questioned by the EP, but that the Commission and the Council too disagree on the need for public disclosure of important negotiating documents, as was the case with the TTIP mandate. They also find that the *traditional divide between executive and legislative actors preferences on transparency may at times be proven to be misleading* and that the Commission has been showing an increased support for public access to information as far as trade negotiations are concerned.

Thirdly, the contributors address the role of democratic oversight in foreign affairs and how information flows affect it. The main finding in this regard is that the mere access to information in foreign affairs does not lead to better oversight. *Institutions' attention is often focused on obtaining access rather than the substantive checks that follow in an oversight process*. Rosén & Stie (2017) question whether the EP's pursuit to be informed by the Council is contributing to public deliberation and better parliamentary oversight in EU foreign affairs. With respect to public access to documents, Gheyle & De Ville (2017) argue that disagreements between the civil society organisations and the Commission on the level of transparency is partly explained by the *definitions of transparency applied*. While for the civil society organisation transparency is important as a stepping stone to participation, the Commission implements transparency policies merely to inform the institutions and the public. It is clear, however, that the publication of documents without granting CSOs a place at the table will not be sufficient stifle the critiques. Naurin (2017) echoes similar views in his commentary.

Fourthly, contributors find that *information flows between the institutions are often more successful through informal information sharing*. Coremans (2017) shows that the Commission has made significant efforts to share information with the EP through informal means. Several of such practices were informed by the EO's push for greater openness. The EO, as shown by Neuhold and Năstase (2017), has made important moves for more transparency through the strategic use of own initiatives as well as through decisions in cases of public access requests for information. Whether informality continues to develop and how it will affect information flows is an important aspect of transparency in EU foreign policy to keep on examining more closely.

Fifthly and lastly, contributions focusing on different dimensions of EU foreign policy laid bare several interesting paths for comparative research. Trade negotiations as an exclusive competency put the emphasis on the Commission to provide transparency (Coremans, 2017; Gheyle & De Ville, 2017), whereas negotiations in areas of mixed competences involve both Commission and Council. This inevitably affects the need for information exchange between Council and EP (Rosén & Stie, 2017). Hence, *the division of competencies in the EU affect both the applicable institutional design as well as the institutions access to information*.

These findings lead to some further reflections and open questions that merit more attention and (future) research. One main such reflection is to what extent we continue to see the *politicisation of access to information* and institutional "battles" around access to information. While due to many recent cases and developments, it seems the legal contours of secrecy and transparency are becoming more defined in the EU's foreign affairs, information flows will remain an inherent part of institutional politics as information asymmetries are structurally ingrained in foreign policy. The thematic issue clarifies that demands for transparency have increased and solidified (both for public and institutional access), and in fact the supply of transparency too has witnessed shifts as noted

regarding TTIP. But *the concern regarding transparency in foreign policy remains mostly with public access to information, with public debate, with public participation*. In fact, even in cases where civil society is active and there is a high demand for more information, in practice, such efforts do not seem to always translate into more meaningful participation and debate.

This thematic issue has taken stock of secrecy and transparency in the EU's foreign affairs with the hope to provide more clarity on how information control is affecting the EU's institutional politics but also to what extent the arena of international negotiations is closed for public debate and participation. Currently, the EU is undergoing one of the most consequential negotiations in its history: a member state exiting the Union. The Brexit negotiations are to some extent unique in the EU (legal) context when taking into account the specifics of the legal procedure they invoke, the role EU institutions and member states play, and of course their political implications. Yet, the Brexit negotiations share many of the features that are common in negotiation in foreign affairs, not least of which are the dynamics of secrecy and transparency as documented by the contribution of the European Ombudsman (O'Reilly, 2017). Do parliaments receive information on a timely basis of what has been discussed behind closed doors? How do bureaucracies exert influence on negotiations through the use of secrecy? Does secrecy help negotiators to exchange views in candour? Through this thematic issue we hope to inform these debates and provide more insights towards these answers.

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Conflict of Interests

The authors declare no conflict of interests.

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Article

Secrecy, Efficiency, Transparency in EU Negotiations: Conflicting Paradigms?

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Abstract
This contribution considers how the values of transparency and efficiency are realised in the context of "EU negotiations" both in the internal and the external sphere. Legislating comes with a presumption of openness in the EU, while international negotiations have traditionally been assumed to require secrecy. However, irrespective of the basic paradigms, the institutions often appear to follow a rather simple rationale that secrecy makes better decisions, both in internal and external affairs. Similar efficiency concerns seem to relate to protecting the procedure of decision-making from external influence. Therefore, the fundamental trade-off between democratic accountability and efficiency in the external and internal fields might not be all that different: efficiency is linked with secrecy, and comes at a cost for participation and openness. I explain how the two paradigms—openness and transparency in legislative work and secrecy in international negotiations have recently developed, and how the values of openness and efficiency have been addressed by the Court of Justice of the European Union in its recent jurisprudence. This discussion witnesses to a possibility that the old secrecy paradigm might be about to break in international relations while a new transparency paradigm in EU legislative work is struggling to emerge.

Keywords
EU; international relations; negotiations; secrecy; transparency

Issue
This article is part of the issue "EU Institutional Politics of Secrecy and Transparency in Foreign Affairs", edited by Vigjilenca Abazi and Johan Adriaensen (Maastricht University, The Netherlands).

1. Introduction

The 2001 Laeken Declaration, adopted by the European Council to guide the reform of the EU Treaties, illustrates a vision for Europe. It stresses how the EU institutions must be brought closer to citizens, and become more efficient *and* more open. According to the Declaration, citizens feel that "deals are all too often cut out of their sight and they want better democratic scrutiny" and wish to see a Europe that is "democratic and globally engaged" (European Council, 2001). The Lisbon Treaty, which entered into force in 2009, attempts to meet these expectations but leaves much institutional discretion in the application of these objectives. The question is not so much about whether the EU should be "open", "efficient" or "democratically and globally engaged"—of course the EU should be all of these things. But when legislative guidance is limited or outdated, the balance between these objectives is in practice drawn by the institutions when they are addressing appeals by individuals seeking access to individual documents. This paper questions whether this balance is currently the right one.

In institutional attitudes, efficiency often takes priority over other values such as openness or participation and results in secrecy rather than transparency (see Leino, 2014). As the European Ombudsman has noted, "there is an inevitable tension between the very laudable principles of public consultation and participation, and the requirements of efficient law making" (European Ombudsman, 2015, para. 44). The general function of transparency and openness in EU decision-making is defined in the preamble of Regulation No

1049/2001 on public access to documents with reference to how it:

> enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights….

According to this quote, transparency's function is seen to apply to all kinds of decision-making, both legislative and executive in nature. Efficiency is usually understood in terms of the ability to make compromises, the number of decisions adopted and the ability to implement the measures that have been adopted (see Novak, 2011). As Advocate General Cruz Villalón recently put it:

> Inconvenient though transparency may be…it has never been claimed that democracy made legislation "easier", if easy is taken to mean "hidden from public scrutiny", as public scrutiny places serious constraints on those involved in legislating. (*Council v. Access Info Europe*, 2013, para. 67)

In this contribution, I will look at how the values of transparency and efficiency are realised in the context of "EU negotiations", both in the internal sphere (legislating) and the external sphere (international negotiations, largely an executive function).[1] Legislating comes with a presumption of openness in the EU, while international negotiations have traditionally been assumed to require secrecy. However, irrespective of the field of action and the basic paradigms applicable to them, the institutions often appear to follow a rather simple rationale that secrecy leads to better decisions, both in internal and external affairs (Curtin, 2012, p. 471). Similar efficiency concerns seem to relate to protecting the procedure of decision-making from external influence. Therefore, the fundamental trade-off between democratic accountability and efficiency in the external and internal fields might not be all that different: efficiency is linked with secrecy, and comes at a cost for participation and openness.

In the following, I will explain how the two paradigms—openness and transparency in legislative work and secrecy in international negotiations—have recently developed, and how the values of openness and efficiency have been addressed by the CJEU in its recent jurisprudence, which can be seen as a sort of "game changer" (see Abazi & Hillebrandt, 2015, p. 825). This discussion reveals a possibility that the old secrecy paradigm might be about to break in international relations while a new transparency paradigm in EU legislative work is struggling to emerge.

2. Two Opposite Paradigms: Secrecy and Transparency

Secrecy in the area of international relations has been an exceptionally strong paradigm (see Leino, in press). Foreign affairs have been traditionally characterised by secret deals and treaties (Macmillan, 2011). The security paradigm in international relations dates back to a time when it was a much more exotic business than it is today. Secrets were primarily stolen for tactical reasons, in order to buttress national secrecy or political advantage, and not only for the interest of a general "right to know".

A strong secrecy paradigm is also built into the EU public access regime. The most relevant exception for international relations is included in Article 4(1)(a) of Regulation 1049/2001, which establishes that:

> The institutions shall refuse access to a document where disclosure would undermine the protection of…the public interest as regards…international relations.

It is a broadly defined exception, which not only increases discretion at the stage of deciding on public access but also the role of Courts in settling how the exception is to be interpreted.

Unlike the exceptions under Article 4(2) of the Regulation, the exceptions under Article 4(1) include no "public interest" test, which requires the institution to consider whether access should be granted despite the fact that its disclosure would be likely to cause harm. The Court has stressed that the "particularly sensitive and essential nature of the interests protected" under this exception and its mandatory nature confers on decisions on public access "a complex and delicate nature which calls for the exercise of particular care. Such a decision requires, therefore, a 'margin of appreciation'" (*Sison v. Council*, 2007, para. 35). Even a nominal reasoning can be adequate if otherwise sensitive interests would be harmed through disclosure of the very information that the exception is designed to protect (*Sison v. Council*, 2007, paras. 81–83). The way the CJEU has interpreted the exception has strengthened the understanding that international relations are hard to conduct in public, and that they should, as the main rule, remain confidential. A similar paradigm also exists in most national Freedom of Information (public access) systems.[2]

As far as legislative negotiations among EU states are concerned, the paradigm is the opposite. Since the

[1] Defining what exactly counts as "executive power" in the EU has often relied on a "residual" approach, treating executive power as the power that is not judicial or legislative in nature, i.e. as the power that is not exercised by anyone else (see Curtin, 2009, p. 53). The negotiation and conclusion of international agreements is an executive function that is neither legislative nor judicial in nature.

[2] For example, in the rather liberal Finnish system, documents relating to the conduct of foreign relations are secret, unless otherwise decided, see Act on the Openness of Government Activities, 1999, section 24. In the relevant government proposal, this secrecy regime is justified with reference to how only very few countries follow the principle of openness and, in addition, the international practice is that negotiating parties' statements and positions are not released without their consent, and that states follow each other's' confidentiality rules.

Treaty of Lisbon, EU legislative work should take place in the open (Article 15 TFEU). Regulation No 1049/2001 acknowledges the need to grant even "wider access" to "documents in cases where the institutions are acting in their legislative capacity…while at the same time preserving the effectiveness of the institutions' decision-making process". Legislative documents are defined as those that relate to procedures resulting in legally binding acts in or for the Member States. This condition certainly applies to many international agreements as well, but has so far received no attention by the Court. The provisions relating to legislative matters have been subject to the Court's landmark ruling in *Turco*, which stresses how increased openness

> enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Those considerations are clearly of particular relevance where the Council is acting in its legislative capacity…. Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights. (*Kingdom of Sweden and Maurizio Turco v. Council*, 2008, paras. 45–46)

The Lisbon principles relating to transparency specifically aim at creating a paradigm shift through an explicit acknowledgement that EU legislative work should no longer to be understood as a traditional, secretive diplomatic process (e.g. Westlake & Galloway, 2004, pp. 372–373).

The application of two different paradigms presumes that a distinction could be usefully made between what is "internal" and what is "external". This is hardly the case today. Internal logics of legislation seep into external negotiations and vice versa. Internal legislative activity has a strong international dimension. Not only are many important external measures based on "internal" policy competences (e.g. environmental policy) via the doctrine of implied external powers; today, internal legislative activity has a strong international dimension (European Commission, 2015b). The EU frequently uses legislative techniques with territorial extension and exercises global regulatory power through EU legislation (the "Brussels Effect") (see Bradford, 2012; Scott, 2014, p. 87 et seq;). The Commission has recently made a point of how "virtually all Internal Market policies carry to some degree an 'international dimension'" and require "adequate and consistent consideration" and in all other international fora "to adequately represent and promote the principles of the European Internal Market in the world" (European Commission, 2015b). In fact, many situations that in the classic internal–external dichotomy fall under "internal" activities, because they are largely based on EU legislation, deal with third states, international organisations, or citizens or companies of third states (see e.g. Scott, 2014). The interest of foreign diplomats stationed in the EU is focused more on influencing the EU legislative procedure than on secret international treaty negotiations in the classic sense. For example, a report relating to US influence in the adoption of the REACH legislation demonstrates how US diplomatic posts were directed to influencing future EU chemicals policy, and concludes with a finding that the US efforts brought about significant concessions in the draft (Waxman, 2004). This illustrates how post-Lisbon, as far as legislative matters are concerned, life should be easy for the simple spy: most stages of the process should take place in the open.

The exception that is of greatest relevance for efficiency concerns is Article 4(3) of Regulation 1049/2001, the "space to think" exception:

> Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Article 4(3) is the exception primarily invoked by the institutions when they wish to protect the efficiency of their functioning (the lead case in this regard is *Verein für Konsumenteninformation v. Commission*, 2005, para. 112).[3] It is often relied on in addition to a substantive one in Article 4(1) and (2). Denials of access are thus based both on the substance of the document and the stage of decision-making, if no final decision has yet been taken on the matter. However, there would seem to be at least two exceptions to this practice. First, in legislative matters Article 4(3) has also been invoked alone (see most notably *Council v. Access Info Europe*, 2013, where the Council relied on one exception ground only, that being the first paragraph of Article 4(3)). Second, when a matter falls substantively under the international relations exception, the institutions would seem to refrain from invoking Article 4(3) irrespective of whether they are protecting their own internal decision-making stage or the actual negotiating procedure with third states (see below). The explanation for this institutional practice is simple: the public interest test that would then become applicable in matters falling under international relations, where potential public interest in gaining access can otherwise be ignored.

3. Internal Logics in External Negotiations

The internal–external dichotomy described above is particularly questionable in the context of international reg-

[3] I have discussed this case law in Leino (2011).

ulatory agreements that have a direct impact on individuals and their rights. Many key aspects of our daily life depend on rules and decisions adopted at international level, later to be adopted into EU law (on this, see Mendes, 2015). Despite these developments, post-Lisbon case law has emphasised the formal division between legislative and non-legislative documents (Curtin & Leino, 2016). The most crucial question in determining the scope of public access has therefore become whether the documents relate to a legislative procedure. In this case, the openness paradigm should in principle apply, even though this is something with which the institutions are struggling (Leino, 2014). In practice, the distinction between legislative and non-legislative is rather artificial and does not reflect the realities of EU decision-making, where many procedures do not fall clearly under either of these two categories (see Curtin & Leino, 2016; see also *ClientEarth v. Commission*, 2015; *Schlyter v. Commission*, 2015). The openness paradigm has also offered the institutions an excuse to argue that if a document does *not* relate to a legislative procedure—which is the case with many documents relating to international relations—then the principle of openness has less relevance. It is the recent jurisprudence and other events relating to topical international negotiations that we turn to next.

3.1. Case Law

There are currently three lead cases from the European Courts that discuss transparency in the context of "new" types of international agreements. The first case, which was brought by Sophie in 't Veld MEP under the public access rules, concerned a Council Legal Service opinion on the proposed legal basis of the draft Council decision to authorise the Commission to launch negotiations for the so-called SWIFT Agreement (*Sophie in 't Veld v. Council*, 2012). In 't Veld had received partial access, with the Council invoking the exceptions relating to the protection of international relations and legal advice. While the latter exception brought in the "public interest" test, its application was difficult to avoid when the matter concerned a legal service opinion, which the Council was reluctant to disclose. It argued that disclosure would not only reveal information on certain provisions in the envisaged Agreement but also have a negative impact on the EU negotiating position and damage the climate of confidence. The legal basis issue was sensitive, since it had an impact on the Parliament's prerogatives, and was subject to disagreement between the institutions. In those circumstances, the Council felt that disclosure of an internal opinion of the Legal Service, intended only for preliminary discussions among the delegations, would be detrimental, and something that outweighed the public interest in disclosure (paras. 10 and 15 of the contested Council decision; see *Sophie in 't Veld v. Council*, 2012, para. 7). The matter was first dealt with by the General Court and then, following Council appeal, by the CJEU.

A key issue in these rulings concerned the substance of the envisaged agreement and its close connection with EU legislative activity. Advocate General Sharpston stressed that whether an institution acts in a legislative, executive or administrative capacity should not be determinative. What should be decisive is the need to conduct a careful and objective assessment and provide detailed and specific reasoning (*Council v. Sophie in 't Veld*, 2014, para. 98). The CJEU did not adopt this reasoning, but still stressed that the principle of transparency applies to decision-making in the field of EU international activity (*Council v. Sophie in 't Veld*, 2014, para. 76). It acknowledged that the considerations relating to citizen participation and the legitimacy of administration are of a particular relevance where the Council is acting in its legislative capacity. However, the General Court also pointed out that the matter concerned an international agreement with potential implications for EU legislative activity and the protection of personal data, which is a fundamental right (*Sophie in 't Veld v. Council*, 2012, paras. 89, 92). The General Court also considered the effect of the on-going procedure for concluding the international agreement and established that

> Indeed, the public interest in the transparency of the decision-making process would become meaningless if, as the Commission proposes, it were to be taken into account only in those cases where the decision-making process has come to an end. (*Sophie in 't Veld v. Council*, 2012, para. 101)

The Court accepted the non-disclosure of those elements in the document that could reveal the strategic objectives pursued by the EU in the negotiations. Outside of those parts, the Council had not demonstrated how, "specifically and actually", harm to the public interest in the field of international relations existed (*Council v. Sophie in 't Veld*, 2014, para. 46). The ruling clearly evidences a much less categorical approach to the exception than the one found in its previous jurisprudence (*Sison v. Council*, 2007).

The second case brought by Ms in 't Veld concerned a Commission decision to refuse access to a number of documents relating to the famous draft international Anti-Counterfeiting Trade Agreement (ACTA) produced during the negotiations between the parties (*Sophie in 't Veld v. Commission*, 2013). The General Court here proved more responsive to the Commission concerns. It emphasised the "particularly sensitive and essential nature of the interests" relating to international relations, which gives the decisions on access "a complex and delicate nature which calls for the exercise of particular care" and presumes "some discretion" (*Sophie in 't Veld v. Commission*, 2013, para. 108). It noted that EU positions naturally change during negotiations, depending on concessions and compromises made by others, and accepted that "the formulation of negotiating positions may involve a number of tactical considerations of the nego-

tiators, including the European Union itself" (*Sophie in 't Veld v. Commission*, 2013, para. 125). Unilateral disclosure of EU negotiating positions might have negative effects and seriously undermine the maintenance of mutual trust, which is essential to the effectiveness of negotiations and a very delicate exercise (*Sophie in 't Veld v. Commission*, 2013, paras. 125–126). Finally, since the international relations exception was mandatory and thus involved no public interest test, arguments based on an overriding public interest were rejected as "ineffective" (*Sophie in 't Veld v. Commission*, 2013, para. 131). Overall, the Court proved sensitive to considerations relating to the need to protect EU strategic objectives and the climate of negotiations.

The ACTA story has been mostly discussed from the point of view of the European Parliament (EP) defending the right to know and hold the Commission and Council accountable for their actions, reflected later in its refusal to give its consent to the conclusion of the agreement. But the EP's own transparency policy in relation to the negotiations has also been scrutinised by the European Ombudsman following complaints by 28 digital civil rights associations (European Ombudsman, 2013). They claimed that in refusing to grant full access to the negotiation documents that the EP had in its possession, largely received from the Commission based on the Framework Agreement between the two institutions (European Parliament & European Commission, 2010), it failed to act in line with the legitimate and reasonable expectation that the EP would live up to its past declarations on transparency in the ACTA process (European Parliament, 2010). In the context of the Ombudsman investigation, the EP line of defence closely followed that taken by the Council and Commission in other cases, which it had strongly criticised. The Ombudsman found no maladministration on the Parliament's part. The Ombudsman expressed an understanding for the difficulties involved in revealing negotiating positions of other parties:

> releasing the documents in question, which reveal the negotiating position of the US and Japan, would be highly likely to be detrimental to the EU's relations with those countries….It is likely that such disclosure would have a negative effect on the climate of confidence in the on-going negotiations, and that it would hamper open and constructive co-operation. (European Ombudsman, 2010, para. 33)

A particular characteristic of the ACTA case related to the agreement among the various negotiating partners that matters would remain confidential, the question then being whether the Commission in fact had the right to consent to such a solution, keeping in mind its transparency obligations under the Treaties. This issue was raised both before the General Court and the European Ombudsman. The Court did not address the appropriateness of confidentiality agreements, but accepted that the Commission's refusal had been correctly based on Article 4(1)(a). The Ombudsman was more critical and found that "serious consideration should be given by any EU body that makes such a commitment to ensure that it does not undermine the principles essential to a democratic EU that underpin the *Turco* case-law" (European Ombudsman, 2013, para. 62).

The third recent case was brought by Professor Besselink and concerned the draft Council Decision on a negotiating mandate authorising the Commission to negotiate the EU Accession Agreement to the European Convention of Human Rights (*Leonard Besselink v. Council*, 2013). The Court found that the Council had interpreted the international relations exception too broadly, and stressed that it could only be used to protect objectives that were subject to concrete negotiations. The precise content of EU negotiating directives had not been previously disclosed, and could have been exploited by the EU's negotiating partners, thus establishing a risk to the EU's international relations. The Court did not discuss the fact that, unlike in the ACTA case described above, the EU's negotiating partner, the Council of Europe, had in fact placed *all* its negotiating directives on the internet, which should have had some effect on the need to maintain a climate of confidence. But the Court did establish that those parts of the directives which merely referred to the principles included in the EU Treaties that should govern the relevant negotiations, or the list of questions to be addressed in the negotiations, should have been handed out. The Court left the identification of these parts to the Council itself, and in January 2014 the Council finally decided that "at the present point in time, the applicant may have access to document 9689/10 in its entirety" (Council, 2014, para. 5). Formally, this was justified with the passing of time and the conclusion of a draft agreement at negotiators' level (Council, 2014, paras. 4–5). The mandate is now publicly available in the Council register and it is up to anyone interested to try to identify the parts which might have fulfilled the criteria established by the Court.

3.2. Increased Transparency in Negotiations?

These cases have demonstrated that international relations are difficult to treat as a categorical exception. They include matters where it should be possible to consider the public interest relating to transparency, especially if the possible harm of disclosure seems limited or hypothetical. An important feature of this jurisprudence concerns the substance of these agreements. They are fundamentally important international agreements that have implications for the life of individual citizens. These concerns are also relevant when considering the Transatlantic Trade and Investment Partnership (TTIP), which is the most important of the new type of preferential trade agreements the EU has negotiated since 2006. Consequently, the need to ensure transparency has figured high on the agenda. Numerous NGOs have stressed how transparency in the negotiations needs to be ensured,

since the TTIP would impact domestic regulations, standards and safeguards both in the US and the EU, as well as future choices in permanent regulatory cooperation (Gheyle & De Ville, 2017). Ultimately, a failure to commit to more openness in TTIP negotiations will not only result in growing public opposition to TTIP as a whole but also create a real risk of a biased and flawed agreement (see Corporate Europe Observatory, 2017). Another example of the interest provoked by the agreement is how the Commission on-line consultation regarding the investment protection aspects of the envisaged agreement garnered approximately 150,000 replies (European Commission, 2015a). Following strong public reactions, key EU documents have been released, together with joint EU–US reports on the stage of negotiations.[4] As Cremona notes, the release of information on the TTIP is remarkable, and has signalled a new approach to transparency in trade negotiations (Cremona, 2015, p. 361).

However, doubts persist. A European Citizens' Initiative (ECI) invites the European Commission to recommend to the Council to repeal the negotiating mandate for the TTIP and not to conclude the Comprehensive Economic and Trade Agreement (CETA). One of the grounds refers in particular to how key policies should not be deregulated in non-transparent negotiations.[5] The matter is now pending before the General Court (*Efler and others v. Commission*, 2014). Following a number of complaints about the TTIP, the European Ombudsman also opened an own-initiative inquiry into the matter (see European Ombudsman, 2014a, 2014b), and subsequently set three criteria for evaluating harm in this context: disclosure would not "damage *mutual trust* between the negotiators; inhibit the development of *free and effective discussions* in the context of the negotiations and/or *reveal strategic elements* of the negotiations either to the other negotiating party or to third parties". These criteria would seem to exclude questions that are entirely internal to EU decision-making. Following the TTIP experience, it is likely to be difficult to roll back on transparency in other negotiations. After all:

> The publication of the EU's positions at different stages of elaboration and thinking, together with openness to consultation and debate, helps to fill a gap which is becoming evident as international agreements are increasingly quasi-legislative in nature. (Cremona, 2015, p. 362)

External and internal pressure to hand out Council mandates has increased (Abazi & Adriaensen, 2017). In March 2015, the Council decided to declassify the mandate given to the Commission two years earlier to negotiate an international agreement on trade in services (TiSA), as a response to "a growing public interest for this plurilateral agreement" (see Council, 2015; see also Council, 2013). Corporate Europe's Observatory's response to the Ombudsman's TTIP consultation lists out a serious number of international negotiating fora where greater transparency is routinely exercised (Corporate Europe Observatory, 2014).[6] Many of the mandates that have been subject to transparency appeals and then subsequently disclosed—after a delay, during which negotiations have certainly advanced considerably—highlight the general nature of negotiating directives. This leaves the Commission to make the substantive choices, and should raise significant accountability issues in the context of international negotiations—issues that require democratic oversight at both EU and national levels. In fact, transparency in external relations often appears just as much as an exercise in ensuring accountability than one relating to citizen participation as such.

4. External Logics in Internal Negotiations

The questions relating to openness, secrecy and the possible need to ensure a negotiating space for the institutions can be mirrored against institutional practices in the internal sphere, namely the EU law-making procedures. The Court had an opportunity to interpret Article 4(3) in the post-Lisbon legislative context when Access Info Europe, an NGO promoting freedom of information in the EU, requested access to a legislative document that included footnotes indicating the positions of individual Member States. The central question was whether disclosure of such positions decreases the effectiveness of decision-making and if yes, which one should take priority, effectiveness or openness. The Council lost in General Court and appealed to the Court of Justice, arguing that undue and excessive weight had been attached to transparency while ignoring considerations of effectiveness (*Council v. Access Info Europe*, 2013). In the Council's view, identifying the delegations was not necessary for ensuring a democratic debate. The CJEU rejected this with reference to how full access can be limited only if there is a genuine risk that the protected interests might be undermined. The high standard of proof required to establish that level of harm makes it almost impossible to rely on Article 4(3) in this context. In particular, according to the Court, proposals for amendment or re-drafting made by some Member States that were described in the requested document are a part of the normal legislative process, which "could not be regarded as sensitive…by reference to any criterion whatsoever" (*Council v. Access Info Europe*, 2013, para. 63).

This suggests that Member States' positions in the legislative context do not merit any particular protection and are subject to full transparency, in contrast to positions in an international negotiating context that might

[4] See the Commission TTIP website: http://ec.europa.eu/trade/policy/in-focus/ttip

[5] The Commission rejected the ECI with reference to how the ECI fell outside the framework of its powers to submit a proposal for an EU "legal act". See European Commission (2014).

[6] These fora include the World Trade Organisation (WTO), the United Nations Framework for Convention on Climate Change (UNFCCC), the World Intellectual Property Organisation (WIPO) and the bodies under the Aarhus Convention.

merit secrecy with reference to the need to achieve the Union's strategic objectives. The Court's lack of understanding for the necessity of secrecy in the internal context was something that the Council and certain Member States fiercely objected to during the *Access Info* proceedings, stressing also how the internal "legislative process is very fluid and requires a high level of flexibility" in order for Member States to be free to modify their positions and maximise the chances of reaching an agreement. In their view, maximum room for manœuvre for the Member States is necessary in order to ensure a "negotiating space" and thereby preserve the effectiveness of the legislative process. Identifying delegations would reduce that room for manœuvre because this would have the effect of triggering pressure from public opinion, and thus hamper the Council's decision-making process (*Council v. Access Info Europe*, 2013, para. 24). The Court rejected these arguments, but they illustrate how the Member States' view of the EU legislative process has not changed from the days when EU discussions were considered international negotiations and as such subject to diplomatic secrecy.

Access to legislative documents, in particular those relating to informal interinstitutional negotiations (trilogues), has become particularly topical. First, the new Interinstitutional Agreement on Better Regulation addresses the organisation of the ordinary legislative procedure in general, and the transparency of trilogies in particular (European Parliament, Council, & European Commission, 2016, articles 32–40). Second, the European Ombudsman has recently closed a strategic inquiry concerning the proactive transparency of trilogues, stressing their role as the forum where the deals are done and the subsequent need to consider the proper trade-off between Europeans' right to open EU law-making processes and the space to negotiate. The key consideration in the inquiry was which information and documents used in the trilogue context could be made proactively available to the public, and at what point in time (European Ombudsman, 2015; *Kingdom of Sweden and Maurizio Turco v. the Council*, 2008, paras. 45–46). The submissions received by the European Ombudsman in the context of her inquiry from citizens, NGOs, academics and national parliaments "overwhelmingly made the case for enhanced Trilogue transparency" (European Ombudsman, 2015). Finally, there are a number of pending and recently closed Court cases relating to legislative documents generally and documents relating to the trilogue stage of negotiations more specifically.[7] The pending case brought by Emilio de Capitani against his former employer, the EP, concerns especially the four-column documents used as a basis for trilogues (*De Capitani v. European Parliament*, 2015). In addition to the positions of the three institutions involved in the negotiations, these documents also include a fourth column indicating the emerging compromise.

Efficient law-making is largely promoted through bypassing the formal machinery of three readings and conciliation (Bunyan, 2009). Efficiency is counted through the number of closed legislative files for each Council Presidency and EP Rapporteur (Leino, 2017). Trilogues are the prime example of informal decision-making and have taken over as the main forum for making legislative deals between the three institutions (Centre for European Policy Studies High-Level Group, 2014, pp. 1–24; see in greater detail Leino, 2017). They are an efficient format for accommodating institutional positions, and have led to a great majority of deals being closed early in the legislative procedure. Their use is flexible: trilogies "may be held at all stages of the procedure and at different levels of representation, depending on the nature of the expected discussion" (European Parliament, Council, & European Commission, 2007). During the trilogue phase, the EU democratic process is in the hands of very few: the EP rapporteur(s), the representatives of the Council Presidency and Secretariat and a few Commission officials. This phase largely escapes public scrutiny. Civil society representatives have, for very good reasons, pointed out how trilogues represent the victory of efficient law-making over transparency (see e.g. Bunyan, 2009). National parliaments often experience difficulties following decision-making in trilogues. Amendments are made at great speed, which hinders their effective scrutiny at national level (House of Lords European Union Committee, 2009, pp. 15–16).

Against this background, the recent recommendations by the European Ombudsman on enhancing trilogue transparency can be considered somewhat weak. The Ombudsman recognises a general difficulty in tracing and locating existing public information and recommends the establishment of a joint database. She urges the institutions to provide information on trilogue dates and the institutions' initial positions on the Commission proposal—something that will prove painful for the Council, whose mandates often remain confidential when adopted at Coreper level. As far as the actual trilogue negotiations are concerned, the Ombudsman asks for general summary agendas before or shortly after the trilogue meetings, but is satisfied with information that does not reveal individual strategies or compromise negotiations. She acknowledges that access to the evolving versions of the four-column document would allow the public to follow how a final text has emerged from the institutions' different starting positions. However, the European Ombudsman proves sensitive to institutional concerns relating to efficiency: "It is arguable that the interest in well-functioning trilogue negotiations temporarily outweighs the interest in transparency for as long as the trilogue negotiations are ongoing" (European Ombudsman, 2016, para. 54). Four-column documents should however be made proactively available as soon as possible after the nego-

[7] For closed cases, see *Herbert Smith Freehills LLP v. Commission* (2016); *Herbert Smith Freehills LLP v. Council* (2016); *Philip Morris Ltd v. Commission* (2016a, 2016b).

tiations have been concluded (European Ombudsman, 2016, para. 56).

It is striking that these solutions are not familiar from the legislative context but from the Court jurisprudence and recent practices adopted in relation to international regulatory agreements. In relation to both, sufficient transparency is believed to be guaranteed through the publication of initial positions. Transparency during negotiations is reduced to communication with reference to considerations of efficiency. While in the broader context of international affairs this sort of solution might provoke celebration, in the legislative context, however, this is hardly a satisfactory solution.

5. Conclusion

This paper showed that categorical solutions relating to transparency or secrecy, or dichotomies based on a strict division between "internal" and "external", are fundamentally outdated. A more political debate is needed on the way in which the exercise of democratic rights can be effectively exhausted. In practice this often takes place through the choices of technocrats in the EU institutions addressing requests by individual citizens. The arguments used by the institutions to defend secrecy gives reason for some concern, since it reflects an understanding that is not responsive to openness and prioritises the internal efficiency of the institution's own work. A new understanding of "harm" and the importance of openness in legitimate governance would need to be introduced into institutional thinking. It is exactly this angle that has been repeatedly voiced by civil society organisations in the context of both internal and external negotiations. The challenge relates to an overly broad use of exception grounds, something that the Courts have frequently pointed out. These cases represent only a minor part of the negative decisions adopted by the institutions, but the argumentation used in them provides insights into how they reason. The rationale of openness and transparency should not be too focused on accountability or deliberation when legislative acts are adopted, but should speak to a corresponding need of public involvement in international affairs. This would seem to be exactly the point raised in the Laeken Declaration quoted in the beginning of the paper: more efficient, but at the same time more open, and more democratically accountable.

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Conflict of Interests

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Article

How Much Is Enough? Explaining the Continuous Transparency Conflict in TTIP

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Abstract
Transparency has been a central issue in the debate regarding the Transatlantic Trade and Investment Partnership (TTIP), especially on the side of the European Union (EU). The lack of transparency in the negotiating process has been one of the main criticisms of civil society organizations (CSOs). The European Commission (EC) has tried to gain support for the negotiations through various 'transparency initiatives'. Nonetheless, criticism by CSOs with regard to TTIP in general and the lack of transparency in specific remained prevalent. In this article, we explain this gap between various transparency initiatives implemented by the EC in TTIP and the expectations on the side of European CSOs. We perform a content analysis of position papers on transparency produced by CSOs, mainly in response to a European Ombudsman consultation, complemented by a number of official documents and targeted interviews. We find that the gap between the TTIP transparency initiatives and the expectations of CSOs can be explained by different views on what constitutes legitimate trade governance, and the role of transparency, participation, and accountability herein.

Keywords
accountability; European Union; legitimacy; participation; politicization; trade; transparency; TTIP

Issue
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1. Introduction

The negotiations between the European Union (EU) and the United States (US) on the Transatlantic Trade and Investment Partnership (TTIP) have led to an unprecedented public debate. In particular, the lack of transparency was one of the main criticisms of civil society organizations (CSOs)[1] with respect to these negotiations, particularly within the EU. Even though 'transparency' can have various meanings in different contexts (see Heald, 2006), it is here generally understood as public access to information about an organization's activities and policies (Tallberg, 2014). In response to this apparent lack of transparency, the European Commission (EC) introduced several measures to address these concerns. Nonetheless, CSOs remained unsatisfied and continued to criticize the opaqueness of the negotiations. This article aims to explain why transparency demands in the TTIP prevail after several transparency initiatives have been implemented.

Shortly after the launch of the TTIP negotiations in 2013, more than 80 organizations from the EU and the US wrote a letter to the then Presidents Barack Obama, José Manuel Barroso and Herman Van Rompuy expressing their 'opposition to the use of behind-closed-door trade negotiations to change and lower public interest measures for the sake of commercial interest' (Public Citizen, 2013). Together with the substantial issues of regula-

[1] With CSOs, we refer to 'non-market and nonstate organizations in which people organize themselves to pursue shared interests in the public domain' (United Nations Development Programme, 2013).

tory cooperation and investment protection, the alleged lack of transparency of the negotiations was central in the majority of CSOs' campaigns. In response to these criticisms, increasing transparency has been the main response of the EC to (re)gain support for the negotiations. In the mission letter to his future Commissioner for Trade Cecilia Malmström, the current President of the EC Jean-Claude Juncker wrote 'I will ask you to enhance transparency towards citizens and the European Parliament during all steps of the negotiations [of TTIP]' (Juncker, 2014, p. 4). Underlining the importance of transparency, in its first weeks in office, the EC launched transparency initiatives committing to publishing information on meetings of its Commissioners and senior officials and providing greater access to documents relating to TTIP (Coremans, 2017; European Commission, 2014). Making trade policy more transparent was also one of the three pillars of the current Commission's trade policy strategy 'Trade for all' (European Commission, 2015a).

Nevertheless, criticism with regard to the transparency of the TTIP negotiations has not withered away. According to trade union confederations of the EU and the US 'the transparency we have called for has not been achieved' (European Trade Union Confederation [ETUC], 2016). Corporate Europe Observatory [CEO] (2015) argued that 'despite the public relations [TTIP is] still under a cloak of secrecy'. Greenpeace (2016) released leaked documents 'to bring some much-needed transparency to the debate on TTIP', and even The Economist (2016) concluded that 'transparency concerns were ignored'.

In this article, we explain why the transparency initiatives of the EC in TTIP have not succeeded in muting criticism of the negotiations, particularly those from CSOs. To do so, we perform a detailed analysis of the positions regarding transparency as expressed by CSOs, business, and the EC. We go on to compare the positions and try to explain the similarities and differences between them. We complement this analysis with two targeted interviews. The remainder of this article is structured as follows: in section two, we briefly explain how transparency questions came to penetrate the international trade system. Section three empirically analyzes business' and CSOs' transparency demands in TTIP, and the response of the Commission. Section four explains the continuing transparency conflict by tapping into the literature on legitimate global governance, different models of accountability and the role of transparency and participation in these. We conclude by discussing the implications of our findings for the literature and the practice of (transparency in) EU trade negotiations.

2. Why Transparency Became an Issue in the Trade System

As the nature of the post-war international trade system changed over time its legitimacy has increasingly been questioned.

During the first decades of the post-war period, the General Agreement on Tariffs and Trade (GATT), similarly to other Bretton Woods international organizations (IOs), were seen as facilitating coordination between states, while still allowing for national policy space to preserve domestic stability (Keohane & Nye, 2001; Zürn, 2004). The fundamental rationale of this set-up lies in what John Ruggie (1982) famously dubbed 'embedded liberalism': oriented towards liberal multilateralism, but with national governments still in the driving seat as shock absorbers (cf. Rodrik, 1998). The mode of governance associated with this paradigm has been labeled 'executive multilateralism': 'governmental representatives from different countries coordinate their policies internationally, but with little national parliamentary control and away from public scrutiny' (Zürn, 2004). IOs hence operated as 'clubs' of negotiators who worked in technically advanced bargaining sessions with each other behind closed doors (Hocking, 2004; Keohane & Nye, 2001).

In the trade regime specifically, the opaqueness of the working methods of the GATT and the EU were pervasive (Florini, 2003; Woolcock, 2010). However, for several decades this was seen as both effective, in reaching the goal of progressively liberalizing trade, and unproblematic, as the system had left sufficient space for governments to pursue domestic policies. When by the 1970s world tariffs became only a fraction of what they had been in the first years of the post-war period, other elements that hampered trade came into view, so-called 'non-tariff barriers' such as cross-national differences in regulation (Winslett, 2016). Especially since the Uruguay Round (1986–1994) and the transformation of the GATT into the World Trade Organization (WTO), we have witnessed an increase in the scope, depth and legal bite of the international trade system (Araujo, 2016; Horn, Mavroidis, & Sapir, 2009). Trade negotiations had become more focused on 'behind-the-border barriers', while the meaning of what constitutes a trade 'barrier' expanded beyond clearly discriminatory policies (Lang, 2011, pp. 226–227). In this way, domestic regulations that reflect societal preferences in areas such as public services or social, environmental or health protection made their way onto the trade agenda (Woods & Narlikar, 2001; Young & Peterson, 2006; Zürn, 2004).

Awareness of this increased intrusion into sensitive domestic policy issues gradually led to the involvement of new actors in the international trade scene, such as parliaments, trade unions, but above all non-governmental organizations (Aaronson, 2002; Young & Peterson, 2006). At the turn of the millennium, coalitions of these actors were successful at (temporarily) blocking new initiatives such as the Multilateral Agreement on Investment in 1998 and the launch of a WTO trade negotiating round at Seattle in 1999 (Smith, 2001; Walter, 2001). NGOs in particular not only criticized the supposedly 'neoliberal' substance (e.g. Gill, 1998), but also the procedural characteristics of the trade system. They

argued that since trade negotiations now have a more direct and significant impact on citizens' daily life, the trade system needs to be made more transparent and include non-traditional players in the process (Goldman, 1994; Hopewell, 2015). These demands were directed at the multilateral as well as the EU level. Trade policy in the EU in the past has been depicted—also by pundits—as informal and dominated by a 'relatively small expert policy community' (Woolcock, 2010). Hence, a combination of politicization of trade policy, together with the delegation of trade authority to the supranational level, has made for a 'potentially explosive mix' in the EU (Meunier, 2003).

Both the WTO as well as the EU have over the years responded to these criticisms by somewhat increasing transparency and involvement of NGOs. Since the early 2000s, the WTO has made more documents public, established an accessible website, accepted amicus curiae briefs in dispute settlement proceedings and organized annual public outreach events (cf. Smythe & Smith, 2006; Woods & Narlikar, 2001). At the level of the EU, a specifically trade-related Civil Society Dialogue has been established, but its significance for giving input to (and receiving feedback from) the trade policy-making process has been assessed as being modest at best (Dür & De Bièvre, 2007; Hocking, 2004; Jarman, 2008). Despite (gradual) changes on both levels, the issue of transparency again became central to the TTIP debate.

3. Demand and Supply of Transparency in TTIP

Demands for increased transparency of trade negotiations have been very intense during the TTIP negotiations. It is not our aim to explain at length why this was the case. In brief, it can be argued that TTIP, through its enhanced focus on regulatory cooperation, would more than ever be about affecting domestic policies and that CSOs responded partly by reinforcing their demands for transparency (see De Ville & Siles-Brügge, 2016). Our main goal is to analyze precisely what the demands of CSOs were in terms of transparency and how the European Commission has responded. This should allow us to explain in the next section why both continue to disagree regarding the question of transparency.

Empirically, we focus on the investigation that the European Ombudsman undertook in the fall of 2014 to evaluate transparency in the TTIP talks, as a direct response to the public outcry by CSOs. Contrary to the other contributions in this issue that focused more on the institutional side of the initiative (Abazi & Adriaensen, 2017; Neuhold & Năstase, 2017), we focus in particular on the public consultation. During the period from July to October 2014, organizations and individuals were invited to provide their input on three concrete questions related to transparency: (i) concrete measures the EC could take to make the TTIP negotiations more transparent; (ii) best practices identified in other organizations; (iii) how transparency might affect the outcome of negotiations. In total, 56 written contributions were provided by non-governmental organizations (NGOs, 26), business organizations (16), trade unions (7), public service providers (4), and MEPs (3). Due to low numbers, we have excluded the latter two categories, which implies a total of 49 analyzed contributions.[2] All contributions are freely accessible on the Ombudsman's website (OI/11/2014/RA). It is worth stressing that these contributions were provided before the new Commissioner took office (November 2014). By comparing these positions with the changes implemented by the new Commission we can highlight the similarities and differences between them.

We have manually analyzed the content of these contributions and systematically distilled the demands made by different types of groups concerning the transparency deficit. As we did not have any preconception of what would be demanded, we approached this analysis inductively and constructed categories along the way. In doing so, we ended up with three distinctions. First, even though the questions were formulated narrowly regarding 'transparency', several organizations made claims that relate more to the concept of 'participation': 'the presence of and activities by non-state actors within institutional mechanisms created by an organization' (Tallberg, 2014). Second, claims were either general or specific. Third, *specific* transparency claims could be broken down into demands for 'negotiating' documents (technical texts or inside information about the process) or 'explanatory' documents to help understand the technical texts or process. Table 1 below summarizes these distinctions and gives examples of what was coded where.

Specific demands were coded cautiously, meaning that whenever it was unclear how far the demand went (e.g. 'we want to know the position of the EU'), we coded this under the least demanding category (e.g. 'position paper', which is an explanatory document outlining the overall goal of the EU in a specific domain). Ambiguous statements were discussed jointly amongst the authors prior to coding. As will be shown later, we have constructed a table concerning (the number of) specific transparency demands. We have only included claims that were voiced at least three times, to exclude marginal demands. For participation, such a table is less instructive, given that demands were both more general, and—when specific—more difficult to put under one heading. These are illustrated by characteristic examples.

Because there is considerable variation within both the business and CSO group, we have been careful not to over-generalize our findings. Nonetheless, the extent of coherence found within these groups was quite remarkable. Business groups, NGOs, and trade unions have often copy-pasted parts of (or sometimes entire) position

[2] We have also excluded 257 individual submissions (which were grouped together by the Ombudsman) for two reasons. First, we are interested in the positions by (groups of) organizations, not by individuals. Second, many individual contributions were either copy-paste answers of NGO contributions or lacked any meaningful substance (such as: 'I don't support TTIP').

Table 1. Coding classification with examples.

		Transparency	Participation
General		'So far, attempts at more transparency made by the European Commission regarding access to documents are either weak or deceiving'	'the European Union should do more to ensure a balanced participation in and influence of interests on the negotiations'
Specific	'Negotiating'	'The single most important transparency reform around the TTIP negotiations would be to make the negotiating text public'	'Public consultation before and after every negotiating round'
	'Explanatory'	'An agenda prior to each round to allow for comments by interested stakeholders'	

papers of others, adding to this sense of coherence.[3] For NGOs, this is in line with the finding that transparency has been the one thing different groups could agree upon (see e.g. Gheyle, 2016). To be as clear as possible, we have put the abbreviation of the organization(s) next to quotes and claims.[4]

3.1. Demands for Transparency

3.1.1. Business Associations

Almost all business contributions laud and commend the Commission for the work on transparency that has already been done (BE, ESF, TABC, FI, IBEC, DI, BDI).[5] AmChamEU argues that it is 'hard to imagine what more could be done to enhance transparency without undermining the ability of the EU and US officials to discuss and negotiate' while the Swedish Industry Confederation warns that going further 'risk[s] compromising the negotiations'. The Commission is urged to demand more transparency from the negotiating partner (BE, CC, BDI, ESF) and to encourage Member States to improve on transparency (SWI, ESF) and to better explain the benefits of trade negotiations (BE).

BusinessEurope argues that the role of transparency is in part to 'dispel myths and misperceptions of the TTIP agreement allowing a fact-based public debate and to making the deal more accessible and relatable to the people' (BE). There is a focus on 'explaining' what the negotiations are about and what the possible benefits and risks are (ESF). With this in mind, they stress the legitimate need to keep things confidential in order for negotiations to succeed (BE, ESF, DI, BDI).

Business organizations do make several recommendations on how the situation could be improved. In line with the general idea of 'explaining' trade negotiations more to the public, the bulk of these concern 'explanatory' documents and arrangements. All non-confidential documents should be put in an online register (FI, DI, ESF, SWI, VDA) and prior to each round an agenda should be published to allow for comments (BE, BDI, VDA). More attention should be given to the translation of technical texts into other languages (TABC) or to easy-to-understand language explanations and summaries (FI, BE, DI, SWI, VDA). Recommendations to improve access to negotiating documents are scarce. The most common demand is that there should be up-to-date digital access to confidential documents for a restricted group of stakeholders through accredited password systems instead of the reading room practice (BE, ESF, DI, SWI).

In sum, the position of business on formal transparency could be summarized as 'make sure that what is already public is better disseminated and explained to the public'. This is in line with their general remark that the Commission has already done a lot, and going much further could harm the effectiveness or outcome of negotiations.

3.1.2. Civil Society Organizations

CSOs are much more critical in terms of what has been accomplished. Praise for the Commission is hardly present, and the improvements to date have been depicted as '[coming] from a very low base, and most of its actions have been neither meaningful nor sufficient' (EDRI), 'ad-hoc initiatives…and not part of a well-thought out overall strategy' (EPHA, TACD), 'weak or deceiving' (ACC), 'omitting whatever the Commission deems controversial' (CEO) or 'does not meet minimum satisfactory level of transparency and engagement with stakeholders' (BEUC). With respect to transparency claims, therefore, the recommendations are broad and very demanding. Table 2 summarizes which demands have been put forward by NGOs and trade unions.

[3] While submissions have been made both by EU-level (22/49) and national organizations (27/49), we did not find strong variation between both. National branches of trade unions and business organizations did seem to take a slightly stronger position. Neither did we see significant difference between CSOs that have institutionalized access to TTIP negotiators, for example as part of the TTIP Advisory Group, and other, outside organizations. We thank one of the anonymous referees for bringing this possibility to our attention.

[4] The full list of abbreviations can be found in the annex.

[5] An exception are agricultural business groups: while the umbrella organization Copa-Cogeca sides with the other business groups, the sectoral European Milk Board and Irish Creamery Milk Suppliers Association take positions similar to CSOs.

Table 2. Specific transparency demands by CSO.

Demand	#	Asked by
Negotiating documents		
Textual proposals	25	CEO, FOEE, TACD, TE, AI, FI, MPE, PC, BEUC, ACC, EDRI, EPHA, FFII, BUND, CE, CWF, VB, WECF, FP, UM, ETUC, ETUCE, TUC, GMB, UUI
List of meetings (and minutes) of EC officials with third parties	20	CEO, FOEE, TACD, TE, AI, FW, FI, IGO, BEUC, ACC, EDRI, EMI, EPHA, BUND, CE, CWF, VB, WECF, FO, GMB
Consolidated texts	18	CEO, FOEE, TACD, TE, AI, FI, BEUC, ACC, EDRI, EPHA, FFII, BUND, CE, VB, WECF, FP, UM, GMB
Correspondence / submissions by third parties	16	CEO, FOEE, TACD, TE, AI, FI, BEUC, ACC, EDRI, EMI, EPHA, BUND, CE, CWF, VB, WECF
Negotiating mandate	16	CEO, TACD, AI, PC, BEUC, ACC, EDRI, EPHA, FFII, BUND, CE, VB, FP, UM, GMB, UUI
Correspondence between EC and other institutional bodies	12	FOEE, TE, AI, FI, BEUC, ACC, EDRI, BUND, CE, CWF, VB, WECF
Drafts, non-papers	8	CEO, FOEE, TE, AI, FI, EDRI, WECF, GMB
Respond to 'Access to documents' requests in timely fashion	6	CEO, AI, FW, EDRI, FFII, UUI
Legal opinions	4	FFII, ETUC, TUC, UUI
Explanatory documents		
Meaningful briefings and state of play documents	20	CEO, FOEE, TACD, TE, AI, FI, MPE, PC, BEUC, EMI, EPHA, BUND, CE, CWF, VB, WECF, FP, ETUC, ETUCE, TUC
Position papers	16	FOEE, TACD, TE, AI, FI, BEUC, ACC, BUND, CE, CWF, VB, WECF, UM, ETUC, ETUCE, TUC
Agendas of (content of) negotiating rounds	15	CEO, FOEE, TACD, TE, AI, FI, MPE, PC, BEUC, ACC, EPHA, BUND, CE, VB, WECF
Make documents easily accessible in an online register	11	CEO, TACD, FW, MPE, EDRI, EPHA, EMI, FFII, CE, ETUC, TUC
Translate documents	5	MPE, PC, ETUC, ETUCE, TUC
List of which documents are available and who has access to them	4	BEUC, EMI, EPHA, VB

The most important difference is that NGOs put much more emphasis on negotiating than on merely explanatory documents. In particular, NGOs ask for broad access to official documents of the EU and the negotiating partners: the mandate, textual proposals by the EU and the consolidated version when the US tabled its position. In addition, they ask for a list of meetings of trade officials, and all correspondence by third parties sent to them and vice versa. The kind of explanatory documents asked for are detailed agendas and meaningful briefings relating to negotiating rounds. The added adjective 'meaningful' refers to—as EDRI put it—'substantive documents, not altered in any way when released and no 'mere summaries, agendas or minutes with no specific information or 'propaganda texts''.

Trade unions take up a middle-ground position, even though they tend towards the NGO position. They argue that as a general presumption, everything should be public, but they leave room for exceptions if there is a demonstrable need (such as strategic landing zones) (ETUC, ETUCE, TUC). At least, position papers and (draft) offers should be circulated (ETUC, ETUCE, TUC, GMB, UUI). A new element they demand is the publication of legal documents containing the interpretation of draft negotiating texts or amendments (UUI, ETUC, TUC). When it comes to explanatory measures, they mainly stress the need for meaningful state of play and round reports (ETUC, ETUCE, TUC). Although the national trade unions which were analyzed (DM, VIZ, GMB, UUI) seem more critical than the European umbrella ETUC, the latter still demands several steps forward, and therefore we situate the aggregate trade union position as being close to the average NGO position. This is strengthened by the fact that three sectoral European trade union umbrellas (EPSU, EFJ, ETF) have co-signed a critical letter regarding transparency together with 250 NGOs (CEO, 2014).

In sum, while the focus of business groups with regard to transparency was on 'explaining' trade negotiations and texts to the public, CSOs differ in that they want access to the official documents of negotiations.

3.2. Demands for Participation

As business organizations expressed their satisfaction with the current state of transparency in trade negotiations, they hardly called for other additional measures. Their claims to increase participation and stakeholder consultation are very scarce. Their sole demand in this category concerns the TTIP Advisory Group, which is a group of 16 civil society and business representatives that was established early in 2014. Recommendations in this respect are about expanding the group (BDI, VDA) and about the inner-workings, such as giving the AG more time to comment on more comprehensive briefings on US positions (BE, DI, SI).

The scarcity of demands for increased participation by business becomes clear when compared to the way NGOs describe participation and its necessity as being a complement to transparency for enhancing legitimacy. First of all, several NGOs have mentioned how transparency is only a stepping-stone towards greater participation: 'Transparency must be a *sine qua non* prerequisite of trade negotiations as it brings wide-ranging benefits by enabling democratic participation and needed scrutiny in the process' (ACC); 'by disclosing and proactively publishing more information and documentation to citizens and civil society groups, the EU could more effectively open participatory mechanisms and foster healthy public debate' (AI); "openness enables citizens to participate more closely in the decision-making process' (ClientEarth).

Secondly, the difference between the demands of business and NGOs is demonstrated by how NGOs perceive transparency and participatory measures as being linked. ACCESS identifies six areas that need to be addressed together: access to documents, advisory groups, stakeholder dialogues, involvement of parliaments, reading rooms and identifying 'revolving doors'. The same goes for BEUC and TACD, who listed a whole range of claims both on transparency and participation and state that 'the proposals listed below need to be implemented and assessed in combination because they complement each other and only together they would lead as an end-result to a more credible trade deal'. TACD summarizes this point well: 'Why 'transparency'? Meaningful input by those directly affected by the negotiations will result in more balanced provisions of the agreement'.

Thirdly, existing participatory mechanisms have been a concern on their own. The 'Civil Society Dialogues' are still perceived more as briefings from the Commission, where a few questions are briefly raised at the end with only vague answers in response (EDRI, ACC, FP): 'these meetings do not enable the promised 'dialogue' to take place' (ACC). Public consultations offer 'a fig leaf of credibility to the policies adopted, they are in fact totally inadequate for gauging the needs or wishes of the citizens affected' (FW). Lastly, BEUC, as a member of the Advisory Group questioned 'to which extent the AG risks being a tool to white wash non-transparent processes' (BEUC).

Fourthly, when asked for best practices of transparency in other institutions, several examples came back repeatedly, which describe a very far-reaching view on the transparency-participation link. Both the WIPO negotiation process (see McIntosh, 2014), and the Aarhus convention are popular examples and are considered a hallmark of transparency and participation. Features of these include timely document releases, open meetings, and participatory rights in meetings and even drafting groups. By referring to these far-reaching best practices, NGOs again propose a different model of transparency and participation than what is currently in place.

Finally, there are also specific demands with respect to participation. To some extent, these are 'remedies' to the observed deficiencies with current channels outlined above. Most elaborate are the demands to improve the work of the Advisory Group. Texts being developed for future rounds (and merged legal texts) should be presented on a secure online platform, in a timely fashion to allow AG members to make sensible contributions on which the Commission should respond meaningfully (ACC, EMI, BEUC, EPHA, EDRI). The selection process should be made more transparent (ACC, EDRI) and the group should be expanded to include more stakeholders (EDRI, FFII). The group should also be included in the negotiations more fully (EMI). Secondly, the stakeholder dialogues should resemble a true 'dialogue' between stakeholders and the Commission (ACC, FP, EDRI). The criteria to be involved in the CSD must be clearly spelt out (EDRI) and the meetings would be more meaningful if sector-specific roundtables were established to provide direct input, in which stakeholders have access to technical documents, and this participation has the potential to shape the strategy and positioning of the negotiations (ACC, FP).

Besides the meaningful upgrading of existing channels, public consultation at various stages of the negotiations is a popular, but heterogeneous, demand. For some, consultations should take place before and after every negotiating round (BUND), where a technical workshop is organized to engage in dialogue about certain parts of the text (MPE; PC). For others, consultations should be held on each aspect of trade that touches on EU and national rule-making (such as ISDS or regulatory cooperation) (FOEE, TE, WECF, AI, FP, CWF). A final suggestion is to hold consultations at key stages of the negotiations: prior to the launch, on the draft mandate, on initial position papers, and on the final draft consolidated legal text (TACD, BEUC, EPHA). Whatever the exact timing or constellation, all contributions ask for the results of these public consultations to be fully reflected in the positions that negotiators take.

Trade unions also plead for more and better participatory options (UUI, ETUC, GMB) and for a more genuine dialogue (ETUCE). They specifically demand that for sectoral aspects, DG TRADE would hold discussions in the existing sectoral social dialogue committees and create new ones when non-existent (ETUC, TUC). They support the Advisory Group in principle but think that having only

two trade union representatives is insufficient and that it should be more involved in position formulation rather than simply reacting to positions that have already been made (GMB, TUC, ETUC). In general, again they seem to tend towards the NGO position, albeit with more emphasis on their own lack of participation (for those not included in the AG).

3.3. The European Commission's Response

Notwithstanding that the questions in her public consultation referred to rather more formal aspects of transparency (cf. supra), in her decision closing the inquiry, the Ombudsman concluded that the 'public consultation confirm[s] that citizens expect and demand the right to know *and to participate* when it comes to TTIP' (European Ombudsman, 2015, emphasis added). Her suggestions were included under three headings, two referring to transparency and one to participation, respectively: 'greater public access to negotiating documents', 'more proactive disclosure of documents' and 'more balanced and transparent public participation'. With regard to the latter, the Ombudsman's recommendations come down to ensuring that the Commission's contacts with CSOs make for a balanced representation and are 'transparent about participation', i.e. publishing details and substantial summaries of its contacts, including those at lower levels of the organization.

In its official response to this decision, 'the Commission appreciates the European Ombudsman's call for a more proactive approach to transparency and welcomes the suggestions made' (European Commission, 2015b, p. 1). It emphasized that on 7 January 2015, the Commission published, for the first time ever, eight EU textual proposals and a number of new position papers, accompanied by explanatory leaflets to make them more accessible to a wider audience. With regard to the Ombudsman's suggestion to ask the US to also publish 'common negotiating texts' and to justify explicitly if and when such requests are refused, the Commission stated that 'in the context of an international negotiation, the Commission's political commitment to transparency is limited to its own documents' (European Commission, 2015b), and that it has discussed transparency with the US repeatedly, but that the latter has explicitly asked the Commission not to publish US documents or consolidated texts. Consolidated documents have, however, been made available to all MEPs as well as Member State national parliamentarians. The Commission also responded negatively to the suggestion of the Ombudsman to publish proactively all relevant internal documents pertaining to the TTIP negotiations except in cases of justifiable exception as this would 'represent a disproportionate burden on the Commission services' (European Commission, 2015b, p. 3). With regard to public participation, the Commission reiterated its already implemented actions in terms of a 'TTIP Advisory Group, public consultations and stakeholder involvement' (European Commission, 2015b, pp. 4–8).

By analyzing the transparency changes since Commissioner Malmström took office, and following the Ombudsman's recommendations, we see a combination of reinforcing existing measures (such as the TTIP AG, stakeholders meetings during negotiating rounds and the publication of explanatory documents), with new steps (such as the publication of textual proposals). In this way, the EC has been able to address several of the specific demands raised by CSOs, albeit in a limited interpretation (see also CEO, 2015). Textual proposals have been published but in a piecemeal manner.[6] Lists of meetings with policy officials have been made public, but are confined to the highest policy ranks, and without reports of what was discussed. Third party correspondence has been made public, but only with respect to Commissioner Malmström (and not, as several organizations demand, regarding the main negotiators as well). Besides these partial gaps, what is missing, according to a policy officer of BEUC, are the consolidated texts (which necessitates agreement with the US), and—above all—the application of these transparency changes towards other negotiations, especially concerning the mandate (interview 1).[7]

This maximalist across-the-board application of transparency is not shared by the EC, because they stress a balance between transparency and responsibility: there is a legitimate need to keep things confidential at several points in the process (interview 2).[8] They have put most focus on increasing transparency towards the co-legislators, in order to enhance inter-interinstitutional relations. With respect to explanatory documents, the EC has acted in a very strong way, and there are numerous reader-friendly documents, agendas and round reports available. This is in line with the view that 'the best way to calm down people's concerns and fears, and to also stop and rebut myths, is to say what is really going on' (interview 2). In the same vein, the outreach of the Commissioner, her cabinet Members and senior DG Trade officials have been reinforced. As is widely recognized, Commissioner Malmström seems to have given the existing mechanisms greater priority and has adopted a more open 'style' towards CSOs.

With respect to participation, however, we do not see much convergence. The EC has considerably stepped up its interaction with the European Parliament and has reached out to other institutional partners, especially national parliaments. In relation to civil society, however, it merely reaffirmed its commitment to the AG, and to existing stakeholder mechanisms, such as the Civil Society Dialogue and debriefing 'breaks' during negotiation rounds. These installments were already in place and were part of the criticism of many of the CSO contribu-

[6] Several proposals, such as on procurement, ICT or pesticides are at the time of writing (June 2017) missing, however.
[7] Policy officer, BEUC.
[8] Policy assistant, European Commission.

tions. Both the quality of these mechanisms and the absence of new ways in which civil society is involved in two-way deliberation of the negotiations are still missing, in the eyes of the critics.

4. Explaining the Continuous Conflict

Our analysis of the contributions of different groups on the issue of transparency in the TTIP negotiations shows that there are two sides: business organizations and the EC on one hand, and CSOs on the other. The difference in position between them is both a question of *degree*, and of *kind*. The continuous conflict is partly due to the fact that CSOs ask for a level of transparency that the Commission has not fully delivered, as the EC apparently does not share a maximalist interpretation of transparency. Furthermore, CSOs view transparency as inextricably linked to (allowing for their) participation, while for the EC participation applies predominantly to institutional partners.[9] In sum, for the EC, transparency is primarily aimed at fostering citizens' trust by allowing them to *understand* what is being negotiated. For CSOs, transparency is just a stepping-stone that should allow citizens (through CSOs) to meaningfully *participate* in the negotiations, and only this can bring trust.

These different visions can be theoretically captured by the literature on accountability in IOs, which differentiates between a 'delegation model' and a 'participation model'. In an influential article, Grant & Keohane (2005) tackle the pervasive issue of the (un)accountability of IOs such as the WTO. The main question of accountability, they argue, is 'who are the actors that have the right to hold someone to account?' (p. 31). One way of looking at this involves relying on formal strings of delegation—the so-called 'delegation model' of accountability. Organizations are accountable to those who have entrusted them power (e.g. states), and hence power is legitimate 'when it is authorized by the legitimizing consent of those who delegate it' (Grant & Keohane, 2005). In this sense, there is no requirement for intense participation by non-state actors, given that they have not provided the mandate directly. Accountability here is primarily seen as vertical and concerned with compliance with rules and standards that have been laid down by a principal (Hood, 2010, p. 998). Certainly, there will need to be some transparency along these lines, but primarily towards these principals. Given that—along this reasoning—transparency can go 'too far', it is unlikely that claims for a maximalist interpretation will follow. Rather, transparency will be seen as an instrumental value (Heald, 2006) that in some situations can improve accountability.

A second model of accountability stresses that the people who are governed by an institution should be able to influence its direction (Grant & Keohane, 2005; Nanz & Steffek, 2004). If the rules of an international organization or agreement impact people's daily lives, then they should be able to have a say in the decision-making process. CSOs (who claim to represent the wider public) in this respect make normative claims for holding power-wielders to account to those groups that bear the burden of their policies (Keohane, 2005). Accountability in this sense is labeled the 'participation model'[10] and directed towards the people or the community at large. The ideal is a fully transparent society, hence the presumption towards general openness and disclosure, rather than one involving strong rules about who should be allowed access to information (Hood, 2010, p. 1000). Maximal transparency should, in this view, allow meaningful participation of representative CSOs. Rather than having an instrumental value, transparency here is seen more as being a human right in itself (Birkinshaw, 2006).

Based on our analysis, the EC and business organizations clearly tend towards a delegation model of accountability, while CSOs' vision of transparency relates to a participation model of accountability. The EC negotiates international trade agreements based on a mandate given by the Council of the EU and has to report regularly to the European Parliament. There are thus two chains of accountability that link European citizens to the EU's trade negotiations and the Commission is of the opinion that it is primarily accountable to the two co-legislators that delegated it the authority to negotiate (interview 2). Hence, the EC feels that its responsibility to be transparent and to allow participation is first and foremost towards the Member States and the European Parliament. Some degree of transparency directly to the public should allow for meaningful understanding by citizens, to build trust and allow them to exercise control through national and European elections. In this vision, it makes sense that in its transparency initiatives, the EC has gone much further in giving access to documents to European and national parliamentarians (including access to consolidated texts) and in interacting with them, than to CSOs.

CSOs, in their participation model of accountability, see a crucial role for them to represent citizens in the opaque and closed world of international trade negotiations. They perceive the increased transparency towards and involvement of national and European parliamentarians as insufficient as the chains of delegation in EU trade negotiations are too long and the transparency initiatives still prevent European and national parliamentarians from fully engaging with citizens (for example through strict confidentiality requirements). Hence, they see themselves as crucial to fill the gap between international and European trade governance and the citizens.[11] To ensure accountable and hence legitimate

[9] Business organizations' lack of criticism on participation is obviously linked to their already well-established (informal) position in trade negotiations.

[10] This view is therefore closely connected to direct rather than representative forms of democracy.

[11] As suggested by one of the anonymous referees, CSOs could also participate in trade negotiations through the national level. While transparency and participation in trade negotiations within the Member States is outside of the scope of this article, the fact that CSOs insist so much on increasing transparency and participation at the EU level, and have not mentioned a single Member State in the Ombudsman's question about best practices, might show that they do not fully believe in this national route.

trade negotiations, they demand access to all information about these negotiations and should be able to engage in meaningful dialogue with the institutions conducting the negotiations.

An alternative explanation for the continuous transparency complaints of CSOs is of course that their real frustration concerns the substance of TTIP with which they disagree as well as their lack of influence upon it. Transparency could be a handy 'rally point' with which it is difficult to disagree and which brings together diverse organizations with different substantial preferences in a joint coalition. Such 'tactical usage' of transparency is always possible, and impossible to falsify empirically because of observational equivalence with our interpretation above. But we believe this does not undermine our argument. CSOs have held a consistent position on transparency throughout the TTIP negotiations (and even since the contestation of globalization at the end of the 1990s), which—as we have shown—has not been fully accommodated. Moreover, the Ombudsman consultation central to our analysis came rather early on in the process, when it was not clear that CSOs would be unable to impact on the substance of the negotiations, so there should have been less reason to use the 'transparency argument' as a surrogate at that point.

5. Discussion and Conclusion

The empirical puzzle at the outset of this article concerned the question why CSOs still criticize the 'secrecy' of the TTIP negotiations after the Commission has initiated several transparency initiatives. To solve this question, we analyzed the contributions of CSOs and business organizations to a consultation by the European Ombudsman on transparency in TTIP and contrasted this with the position and actions of the EC. We found a clear difference between business organizations, who expressed their satisfaction with the transparency initiatives, and CSOs, who asked both for greater transparency that would go beyond 'explanatory' texts and above all complemented by more opportunities for equal as well as for more meaningful participation. Since then, the EC and its Commissioner for Trade have implemented the transparency mechanisms with more dedication, even though they disagree with a maximalist interpretation in which everything should be public as a rule. Moreover, few new initiatives to increase the participation of CSOs in the talks have been taken, even though CSOs clearly stress the importance hereof.

From the Commission's point of view, full transparency for and participation of CSOs is not seen as the most important aspect in a delegation model of accountability, in fact, it is even seen as potentially counterproductive. There is a legitimate need to keep things confidential while keeping the principals (co-legislators) as engaged as possible. CSOs, on the contrary, feel that their (and citizens') core interests are directly affected by TTIP, and therefore demand to not only have insight into all negotiating documents but also to be able to participate meaningfully. The two are seen as being two sides of the same coin (interview 1). Given these different views, it is not surprising that the reform efforts seem to have fallen on deaf ears with the broader civil society. While a shortcoming of our research has been the difficulty to rule out that CSOs use the 'transparency claim' strategically, the fact that their claims have been consistent and not fully accommodated reinforces the plausibility of our argument.

This article has both academic and societal relevance. Academically, we have linked debates about transparency to the insights of the literature on the legitimacy of IOs through the analysis of a specific politicized trade negotiation. By focusing on the gap between the demands of CSOs and the supply by the EC in TTIP, we showed that the enduring conflict on transparency can be explained by fundamentally different views on the requirements for legitimate trade negotiations. For the trade policy literature, this article underlines the significance of taking into account procedural preferences, besides substantial interests, to understand the dynamics of trade negotiations and positions taken by different societal groups. The societal relevance of this article is that it helps understand (part of) the conflict between the EC and CSOs regarding trade negotiations. As this conflict is rooted in different visions of legitimacy that have become more important as trade agreements became more intrusive into domestic politics, it is not expected to wither away easily (see also Zürn, 2014). In fact, the same transparency criticism has recently been voiced with respect to EU trade negotiations with Japan and Mexico, adding to the demand that initiatives be applied beyond TTIP.

There have recently been some analyses regarding the potential overlap between different approaches to transparency (which come with different transparency requirements) which relate to the dichotomy we identified in our case (see e.g. Abazi & Tauschinsky, 2015 on trust and control approaches). It is, however, an open question if a quest for a middle-ground between such perspectives is feasible. In an era where attitudes towards elites and public authorities quickly turn to suspicion when the slightest hint of secrecy is politicized, less than full transparency might always be seen as problematic. The same goes for the apparent participation problem between the EC and CSOs. While the kind of extensive participation demanded by the latter might be overburdening for the former when taken to its extreme, relying solely on a small Advisory Group of representatives also bears the risk of (being perceived as) 'coopting' a selection of voices in order to legitimize the case for free trade, similar to what happened after the Seattle protests (Hocking, 2004; Hopewell, 2015). As shown, CSOs are not against this AG-system per se but consider it to be insufficient to incorporate a meaningful array of voices. It seems that to make the future EU trade governance more legitimate in the eyes of civil society,

any elaboration of this future framework should also be made in a transparent and inclusive way.

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Conflict of Interests

The authors declare no conflict of interests.

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Annex

List of organizations with abbreviations

Type	Full name	Abbrevation	Level
NGO	Corporate Europe Observatory	CEO	Europe
NGO	Friends of the Earth Europe	FOEE	Europe
NGO	Transatlantic Consumer Dialogue	TACD	Transatlantic
NGO	Transport & Environment	TE	Europe
NGO	Access Info	AI	Europe
NGO	Food & Water Europe	FW	Europe
NGO	Forum Informationsfreiheit	FI	Austria
NGO	Instytut Globalnej Odpowiedzialnosci Polska	IGO	Poland
NGO	L'Assocation Environnement et Développement Alternatif	EDA	France
NGO	Maison du Peuple d'Europe — Huis van het Volk van Europa	MPE	Europe
NGO	Pacte Civique	PC	France
NGO	European Consumer Organization	BEUC	Europe
NGO	Access	ACC	International
NGO	European Digital Rights Initiative	EDRi	Europe
NGO	European Movement International	EMI	Europe
NGO	European Public Health Alliance	EPHA	Europe
NGO	Alpe Adria Green	AAG	Slovenia
NGO	Foliovision	FO	Slovakia (EU focus)
NGO	Foundation for a Free Information Infrastructure	FFII	Europe
NGO	Friends of the Earth Germany	BUND	Germany
NGO	Umweltinstitut München	UM	Germany
NGO	Client Earth	CE	Europe
NGO	Fundacja Panoptykon	FP	Poland
NGO	Compassion in World Farming	CWF	UK
NGO	Verbraucherzentrale Bundesverband e.V.	VB	Germany
NGO	Women in Europe for a Common Future	WECF	Europe
Business	Copa-Cogeca	CC	Europe
Business	European Services Forum	ESF	Europe
Business	Business Europe	BE	Europe
Business	Transatlantic Business Council	TABC	Transatlantic
Business	ELINKEINOELÄMÄN KESKUSLIITTO (Finnish Industries)	FI	Finland
Business	Standing Committee of European Doctors	CPME	Europe
Business	Bundesverband der Deutschen Industrie	BDI	Germany
Business	Irish Creamery Milk Suppliers Association	ICMSA	Ireland
Business	European Milk Board	EMB	Europe
Business	American Chamber of Commerce to the EU	AmCham	Europe
Business	Verband der Automobilindustrie	VDA	Germany
Business	Confederación Española de Organizaciones Empresariales [Spanish Industry]	SI	Spain
Business	Confederation of Danish Industry	DI	Denmark
Business	Handwerkskammer für München und Oberbayern	HMO	Germany
Business	Confederation of Swedish Enterprise	SWI	Sweden
Business	Irish Business and Employers Confederation	IBEC	Ireland
Trade Union	Dansk Magisterforening	DM	Denmark
Trade Union	Sindikat Vzgoje, Izobraževanja, Znanosti in Kulture Slovenije	VIZ	Slovenia
Trade Union	European Trade Union Committee for Education	ETUCE	Europe
Trade Union	European Trade Union Confederation	ETUC	Europe
Trade Union	Trades Union Congress	TUC	UK
Trade Union	Unite the Union Ireland Region	UUI	Ireland
Trade Union	GMB Trade Union	GMB	UK

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Article

From Access to Documents to Consumption of Information: The European Commission Transparency Policy for the TTIP Negotiations

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Abstract
To increase transparency of the Transatlantic Trade and Investment Partnership (TTIP) negotiations, the European Commission has reformed existing information sharing systems for trade policy. The Commission has moved from a strategy of providing transparency in the form of access to documents to one of access to information, geared specifically towards enhancing consumption of the available information. In both public and institutional transparency policy, the width of the target audience and the depth of the information have increased, and the manner of provision has shifted from reactive to proactive provision of information. As a result, the TTIP is now being coined as the most transparent trade negotiation ever in the EU's history and a pilot project for transparency policy in future trade negotiations. The article adopts a supply-centred perspective to explain a transparency policy that goes beyond the legal minimum imposed by formal requirements. It relies on interview data of the changes brought about in inter-institutional relations since 2014, basic quantitative and qualitative analysis of document material, and a five-month participatory observation by the author in the secretariat of the European Parliament's Committee on International Trade.

Keywords
access to documents; common commercial policy; European Commission; European Parliament; information; negotiation; trade; transparency; TTIP

Issue
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1. Introduction

Since 2014, the European Commission (henceforth Commission) has been reforming existing information sharing systems to increase transparency of the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (Cremona, 2015). The Commission has also explicitly stated that these practices will become the new rationale for future trade negotiations (European Commission, 2015b). Literature on EU trade policy assesses transparency from the perspective of the demand-side, either based on Access to Documents legislation—public transparency—or by analysing Inter-Institutional Agreements—institutional transparency (Devuyst, 2013; Hillebrandt & Abazi, 2015; Jančić, 2016; Kleimann, 2011; Meissner, 2016; see also Gheyle & De Ville, 2017; Rosén & Stie, 2017, in this issue). So far there has not been any comprehensive effort to map and analyse changes in transparency policy from the perspective of the supply-side—i.e. the Commission. Hence, a supply-centred analysis of the Commission's motivations for and methods of providing transparency offers a novel perspective to this debate.

This article gives an overview of the changes in the Commission's transparency regime for trade policy since the start of the TTIP negotiations mid-2013 until the natural pause after the United States (US) elections in November 2016. The period is inductively generated from the case study, as the end date is chosen at a time where the transparency practices are sufficiently consolidated and not much further change is expected. The analysis will discuss the changes in public transparency policy, as well as changes in institutional transparency and document—

and information-sharing at the EU level.[1] For the latter, the Commission–European Parliament (henceforth Parliament) axis will be the primary focus, as it is here that most post-TTIP innovation has taken place.[2] The analysis shows how the provision of transparency can generate procedural changes and impact inter-institutional relationships (see also Abazi & Adriaensen, 2017, in this issue). In addition, this study contributes to the debate around accountability and democratic deficit in EU policy making, as it shows the importance of qualitative changes for the consumption of information.

The data consists of interview material and participatory observation by the author in the secretariat of the Parliamentary Committee for International Trade (henceforth INTA).[3] This is supplemented by an analysis of document material consisting of memos, guidelines, or training material for staff on record creation and keeping, and on the processing of access to information requests; documents that refer to creation and keeping of agendas, lists of meetings, minutes of meetings, lists of participants in meetings, and documents justifying decisions; and institutional documents containing rules and procedures for inter-institutional information-sharing. The following section gives an overview of the existing scholarly work about transparency in the EU and identifies where this article may provide additional insights. The third section introduces the conceptual framework guiding the empirical analysis, which is set out in the fourth section. The conclusion reflects on these findings and proposes new questions for further study.

2. State of the Art

Literature on transparency in the EU has predominantly portrayed the Commission and the Council of Ministers (henceforth Council)—and more recently the European Council—as reluctant to provide the requested information out of concern for 'space to think' and efficiency of the decision-making process (Curtin, 2014; Hillebrandt & Novak, 2016). The focus has predominantly been on Council proceedings, driven by the reforms introduced by Regulation 1049/2001 on access to documents and a perceived power shift towards the Council and the European Council in EU politics (Curtin, 2014). Several studies have analysed the institutional drivers of Council transparency policies (Bjurulf & Elgström, 2004; Hillebrandt, Curtin, & Meijer, 2014). In addition, scholars have assessed the impact of changes in Council transparency policies on its inter-institutional bargaining power. Premised on informational asymmetry arising from different degrees of transparency, there may be a negative correlation between the level of transparency an institution is required to provide and that institution's leverage in inter-institutional negotiations (Hillebrandt & Novak, 2016; Meijer, 2013).[4]

More specific literature on EU trade policy assesses transparency from the perspective of the demand-side, either based on Access to Documents legislation—public transparency—or by analysing Inter-Institutional Agreements—institutional transparency. These studies tend to place the Commission on the defensive and at the losing end of the spectrum, reluctantly forced to provide more transparency by an increasingly assertive public opinion and powerful Parliament (Devuyst, 2013; Hillebrandt & Abazi, 2015; Jančić, 2016; Kleimann, 2011; Meissner, 2016; Rosén & Stie, 2017, this issue).

Yet both strands of literature remain silent about what can explain a transparency policy that goes *beyond the legal minimum* imposed by Treaty and case law or by formal requirements enacted in institutional agreements (like the one that we have seen developing in the case of TTIP). This article contributes to the literature on transparency in EU external trade policy from a supply-centred perspective: why does the Commission to provide transparency if it might reduce its bargaining power? And more specifically, why does it go beyond the legally required minimum when doing so?

Previous research on inter-institutional cooperation between Commission and Council in EU trade negotiations has found that the Commission may on its own initiative choose to provide institutional transparency and thereby balance informational asymmetries to pre-empt negotiation failure at the ratification stage (Coremans & Kerremans, 2017). With the Parliament as a new powerful player in external trade policy since 2009, I expect the Commission as the external negotiator to attach more importance to coordination with the Parliament for international negotiations, compared to the pre-Lisbon situation—as the number and power of internal stakeholders has increased (Winham, 1979). Taking into account previous experience with failed ratification in the case of the Anti-Counterfeiting Trade Agreement, such coordination could prove vital for the Commission to anticipate the reaction of Parliament to the negotiation outcome: 'since the EP might kill the agreement in the end, listening to their demands is *common sense*'

[1] The analysis refrains from detailing the legislative framework for transparency policy and inter-institutional coordination for international agreements, as this has been done elsewhere (Devuyst, 2013, 2015; European Parliament, 2015a; Leino, 2014).

[2] Relations between the Commission and the Council on trade negotiations have not changed significantly with the TTIP negotiations, and will therefore not be covered in this article (See Coremans & Kerremans, 2017).

[3] 9 interviews were conducted between November 2015 and May 2016 with Commission, Council, and Parliament officials. The respondents were selected based on their function within the institutions, which means officials from Directorate-General for Trade within the Commission (DG Trade), Parliament officials involved the INTA Committee, and officials from the Council's Directorate for Trade. In terms of substance, the interviews covered pre-Lisbon and current working practices regarding the negotiation of multi- and bilateral trade agreements, as well as the current transparency policy. Answers were cross-referenced between officials of different institutions. The participatory observation consisted of an unpaid Schuman traineeship in the INTA secretariat from October 2016 to February 2017. Clarifications and factual corrections were obtained via follow-up contacts with respondents.

[4] Still the question remains in how far formal transparency requirements reflect the true level of informational asymmetry between institutions (Adriaensen & Coremans, 2017; Coremans & Kerremans, 2017).

(Rosén, 2016, p. 9, emphasis original; see also Devuyst, 2013; Dür & Mateo, 2014; Egeberg, Gornitzka, & Trondal, 2014; Eibauer, 2012). Hence, providing transparency and thereby reducing information asymmetry might actually be beneficial for the Commission in terms of enhancing its external negotiation effectiveness—i.e. concluding an international trade agreement, instead of compromising the Commission's inter-institutional bargaining power. It can also explain why the Commission would go beyond the legally required minimum when exchanging information with the Parliament, as such engagement fosters reciprocity (Coremans & Kerremans, 2017).

By adopting a Commission-centred perspective, this article also addresses two other neglected areas in the study of transparency and EU decision-making. First, while a few studies of Commission–Parliament relations have covered daily interaction patterns between these two institutions and reasons explaining such patterns, empirical research on this inter-institutional relationship is still largely absent (Egeberg et al., 2014; Rosén, 2016). In addition, most struggles in EU trade policy are about access to information and inclusion in decision-making (Ripoll Servent & Busby, 2013). Yet the dominant focus in EU trade policy research has been on actors' influence on the final policy outcome, while the study of procedural rules and norms has generally remained merely a means to an end. By exploring inter-institutional coordination procedures between Commission and Parliament for trade negotiations, this article aims to contribute to this empirical quest.

Second, this article analyses the qualitative aspect of transparency policies. It provides insight into the type of information provided, as well as the manner of provision and the targeted audience. This is warranted as the number of published documents does not automatically reflect the actual amount of information available (Cross, 2014; Curtin & Meijer, 2006). A purely quantitative perspective does not allow for drawing conclusions on democratic legitimacy resulting from transparency, as this would assume an 'automatic link' between the amount of information available on the one hand, and legitimacy of decision-making outcomes and public perception of transparency on the other (Brandsma, 2012; De Fine Licht, 2014; Naurin, 2007). For instance, in searching a balance between the need for democratic scrutiny and need for secrecy, giving 'MEPs privileged access to documents [can] alleviate accusations of a democratic deficit while accommodating the need for secrecy' (Abazi, 2016; see also Rosén & Stie, 2017, in this issue). Differentiating between different types and dimensions of transparency allows for assessing these types of qualitative changes.

3. Three Dimensions of Transparency

Critique of insufficiently transparent negotiations indicates a lack of information about the ongoing discussions between negotiating actors (Abazi & Tauschinsky, 2015; Meijer, 2015). Transparency is therefore defined as 'the availability of [regime relevant] information about an actor that allows other actors to monitor the workings or performance of the first actor' (Meijer, 2013; Mitchell, 1998). Regime relevant information also encompasses information about the process through which a decision is made. Qualitative changes in the level of transparency can happen on three dimensions: the width, depth, and manner of provision of information.

The width of the provided information refers to the number of people that has access to the information. It can be conceptualised as a continuum of concentric circles varying from institutional transparency to public transparency. In other words, public transparency is understood as a further stage after widening institutional transparency. *Institutional transparency* refers to information exchange between institutional actors, whereas *public transparency* is conceived in the relationship between the institutions and external actors (Ostry, 2004). Institutional and public transparency are linked in the sense that extending public transparency usually automatically entails extension of institutional transparency: if information is public, institutional actors can access it as well. Of course, if the concerned information was already subject to institutional transparency, there will be no perceived change on the institutional level after introducing public access. Yet despite this overlap, institutional and public transparency are qualitatively quite distinct. Inter-institutional document exchange and interaction patterns will naturally differ from those between an institution and the broader public, and institutional transparency will remain more protected and controllable compared to public transparency. Therefore, the empirical discussion addresses institutional and public transparency separately to allow for a more clear-cut depiction of the changes in the Commission's transparency policy. These differences however, do not preclude the possibility of similar patterns in terms of expanding width and depth, and changes in the manner of provision of information.

The depth of transparency refers to the type of information provided. *Transparency in existence* points to information about the format of certain practices, whereas *transparency in substance* relates to the availability of information about the content of those practices (Cross & Bølstad, 2015).[5] The former would be achieved by publishing a notice that a particular meeting took or will take place, whereas the latter would require the availability of meeting agenda's or minutes containing information about the actual content of that meeting. Increasing depth of transparency is also reflected in the amount of detail and degree of political sensitivity that is contained in the information. The dimension of depth is analysed by assessing which documents are made available and what kind of written information they contain, as well as the

[5] It logically follows that the precondition for requesting and accessing information on the content of the practice is knowing that such information exists in distributable form. These dimensions have also been referred to as deep and shallow secrecy, respectively (Pozen, 2010).

extent of information that is provided orally in briefings and meetings.

The manner of provision pertains to the way information is provided by one actor to other actors. *Reactive transparency* is the provision of information in reaction to a specific request. *Proactive transparency* comprises information that is made available regardless of any such specific demand—and thus on the provider's own initiative (European Ombudsman, 2015a; Meijer, Curtin, & Hillebrandt, 2012). Proactive transparency is geared towards enhancing the consumption of information by providing additional information that goes beyond responding to individual access to documents requests. The manner of provision is assessed empirically by looking at whether the Commission takes the initiative for sharing documents, organising information briefings, and foreseeing room for questions and answers in meetings.

Any shift towards proactive, substantive and/or widened institutional and public transparency is defined as an increase in transparency. The following section will address each of these three dimensions in the case of the Commission's transparency policy for the TTIP. The discussion on institutional transparency only covers the Commission-Parliament relations, as it is here that the TTIP has been most transformative. Relations between the Commission and the Council are not discussed because stable working relationships were already in place prior to the TTIP negotiations (Coremans & Kerremans, 2017). The findings rely on interviews with officials from the relevant institutions, participatory observation by the author in the secretariat of the INTA Committee, and document analysis.

4. Results

The Commission as the EU's external negotiator for trade agreements is the primary institutional actor responsible for distributing information on trade negotiations. Taking instructions from Council (formally) and Parliament (informally), it is responsible for formulating a common position and defending it towards the negotiating partner, as well as providing feedback on those external negotiations afterwards.[6] More specifically, this responsibility lies with the DG Trade headed by the Commissioner for Trade (at the time of writing Ms. Cecilia Malmström, who succeeded Mr. Karel De Gucht in November 2014). Decisions about which transparency policy to follow are made in DG Trade Directorate A (Resources, Information and Policy Coordination), in coordination with the Commissioner's cabinet (Mungengová, 2016). This section will provide an overview of the main changes in the transparency policy for TTIP on the dimensions of width, depth and manner of provision of information.

4.1. Public Transparency

At the outset of the negotiations, there was no mention of making public any negotiation documents produced in the context of the TTIP negotiations—with the possible exception of EU position papers (European Commission, 2013). By spring 2014, a lack of information on the content of the negotiations fuelled speculation in public opinion about what was being negotiated (Agence Europe, 2014a). By March 2014, DG Trade published a communication in which it articulated how negotiations are conducted and which actors are involved in EU-level decision-making on TTIP (European Commission, 2014a). This can be classified as a strategy of providing transparency in existence.

In addition to this communication, DG Trade published a limited number of negotiation texts online (European Commission, 2014c). Following repeated requests from the Commission and after an own-initiative inquiry by the European Ombudsman, the Council finally released the TTIP negotiating mandate in October 2014—the first of its kind to be made public while negotiations were still ongoing (Council of the EU, 2014; European Ombudsman, 2015b).[7] Both initiatives marked the start of a paradigm shift from a strategy of transparency in existence early 2014, towards transparency in substance over the course of the latter half of 2014 and throughout 2015.

In November 2014, DG Trade formulated a more precise strategy for the provision of substantive transparency in TTIP negotiations, with the intention of demystifying misunderstandings about their content (Agence Europe, 2014b; Mungengová, 2016). This communication introduced a strategy of elaborating transparency in substance and proactive provision of information by increasing the number of EU position papers made publicly available and reviewing the manner of classification of information. From December 2014, DG Trade also started publishing lists of all unclassified TTIP documents it shares with Council and Parliament (European Commission, 2014b, 2015d, 2016b).

In January 2015, DG Trade started publishing legal texts or 'textual proposals', which contained more specific information regarding wording and binding commitments compared to the previously available EU position papers (Agence Europe, 2015a). Continued opposition by several civil society organisations however, indicated that the move towards substantive transparency did not fully address the main accusations and concerns of public opinion (Agence Europe, 2015b). DG Trade continued publishing additional factsheets on the content of the agreement and provided additional online material explaining EU negotiating positions and approaches (European Commission, 2015a). DG Trade also organised a

[6] The Commission proposes a negotiating mandate, which the Council may then alter according to its own preferences and sensitivities before adopting the final mandate. While the Parliament does not formally have a role at this stage, it has informal influence through resolutions and inter-institutional agreements.

[7] The TTIP mandate declassification already proved to be a precedent for the Trade in Services Agreement, as these directives were also released while negotiations were ongoing (Council of the EU, 2015).

public outreach event in June 2015, and provided a glossary of frequently used terms in policy documents and a reader's guide to TTIP negotiation texts (European Commission, 2015e, 2015f, 2015g). Providing these types of explanatory notes in layman's terms marks a change in the quality of the information provided and indicates a shift from access to documents to enhancing the consumption of already available information (European Parliament, 2016a).

The November 2014 Communication already hinted at the precedential value of TTIP in terms of public transparency (European Commission, 2014b). With the publication of the 'Trade for All' strategy in October 2015, DG Trade laid the groundwork for extending the TTIP transparency policy to all future and ongoing trade negotiations (European Commission, 2015b). Since then, the new strategy has been implemented mainly via the DG Trade website by proactively publishing documents on other ongoing trade agreements like the Economic Partnership Agreements, EU–Canada Comprehensive and Economic Trade Agreement, EU–Japan Free Trade Agreement, and Trade in Services Agreement, together with a database containing the meetings of the Trade Commissioner, the Commissioner cabinet members and the Director-General of DG Trade (European Commission, 2016a).

In conclusion, the Commission's paradigm shift for public transparency started in 2014. Over the course of the latter half of 2014 DG Trade moved from its initial strategy of transparency in existence to a proactive approach to transparency in substance. It did so by making EU position papers and negotiation texts available online, without waiting for any specific demand. Throughout 2015, DG Trade published additional texts in conjunction with explanatory notes, shifting the quality of the information from mere access to documents to access to information. Instead of waiting for specific access to documents requests, the Commission's current transparency policy for trade negotiations relies on increasing the depth of information provided and proactive online publication of a wide array of negotiation texts and supporting explanatory documents. Since the launch of the 'Trade for All' strategy in October 2015, DG Trade has been extending this type of proactive, in-depth transparency policy to other trade negotiations as well.

4.2. Institutional Transparency

The TTIP transparency policy has also changed the way the Commission behaves in its relationship with the other EU institutions. Since 2006, the Commission has the sole responsibility for communication with the Parliament at the start, during, and at the end of trade negotiations (European Union, 2006). This complicated the historically difficult and unstructured communication between Parliament and Council on trade policy even more, resulting in a very slowly changing mind-set within the Council regarding communication with Parliament after the Lisbon Treaty (Parliament official 2, interview, April 2016; Parliament official 4, interview, May 2016).

However, under the Commission's influence, small changes were introduced in the Council–Parliament relationship. From 2011 a limited number of INTA members was allowed by the Council to consult the final negotiation directives in secured reading rooms. Other MEPs only received the draft mandate—a Commission document—and had to rely on the Commission to provide an unofficial summary of the changes that the Council had made in the final, approved directives (Parliament official 2 and 3, interview, April 2016).[8] By openly supporting the Parliament's request to the Council for the release of those final directives before the end of negotiations, as well as calling for such a release in its draft directives for later trade negotiations, the Commission has sought to position itself as a pro-transparency actor, shifting the blame for perceived secrecy onto the Council and member states.

Commission–Parliament relations exist of four main channels: exchange of documents, monthly INTA Committee meetings, monitoring groups, and technical briefings. These are supplemented by informal contacts between administrators from DG Trade and the INTA secretariat, and bilateral contacts between DG Trade specialised units and political groups and MEP's offices (Parliament official 1, interview, March 2016). The most obvious change since 2013 has been widening the information provision from a limited number of MEPs in the INTA Committee to all MEPs. Since the commitment made by previous Trade Commissioner Karel De Gucht to consider specific arrangements for TTIP documents, access to documents has been extended from a core group of MEPs in the INTA Committee and US monitoring group to all MEPs (Council of the EU, 2013). Documents provided by DG Trade to the Parliament belong to one of three categories: 'EU Limited', 'EU Restricted', and 'consolidated negotiation texts', with sensitivity increasing respectively.

By spring 2014, DG Trade e-mailed 'EU Limited' documents to the INTA Committee secretariat, who then distributed them via e-mail to all INTA Members. Individualised, watermarked paper copies of documents marked 'EU Restricted' were initially exclusively available to a core group of MEPs.[9] This core group exists of the INTA Chair and Vice-Chairs, INTA Group Coordinators, INTA Standing and Shadow Rapporteurs for the US, and Chairs and Rapporteurs of other committees involved in the US monitoring group (European Parliament, 2014a).[10] Access to these 'EU Restricted' documents in a secure reading room, however, was extended to all MEPs from the

[8] The 2010 Framework Agreement confirmed the existing practice established by the 1995 Code of Conduct that the Commission would inform Parliament of the draft recommendations for the negotiating directives.
[9] Two individualised and watermarked paper copies were also sent to the INTA Secretariat.
[10] This arrangement applies exclusively to the US monitoring group (see below).

beginning of 2015. 'Consolidated negotiation texts' were available only to the core group of MEPs (European Commission, 2014b; European Parliament, 2015a; 2015d).

At the end of 2015 new arrangements for access to TTIP documents were put in place (European Parliament, 2015f; Malmström, 2015). These operational arrangements extended access of all documents to all MEPs, with rules varying between classifications (European Parliament, 2015f). All MEPs have access to individualized and watermarked copies of 'EU Limited' documents via an online system ('SharePoint'), with possibility to print.[11] This IT tool is considered a pilot project for other negotiations as well, however at the time of writing it is used for TTIP documents only (Parliament official 2, interview, April 2016).[12] Provisions for 'EU Restricted' remained the same. Finally, all MEPs got access to 'consolidated negotiation texts' in a secure reading room. By spring 2016, access to all documents was further extended to Members of national parliaments in reading rooms in Member State capitals—extending the width of transparency even further (European Commission, 2015c; European Parliament, 2015c, 2015d, 2016b).

Hence, access to TTIP documents has been extended from a select number of INTA Members to all MEPs and even national parliamentarians. The 'Trade for all' strategy now envisages extending these practices for similar negotiations as well.[13] As these documents are TPC documents, the Commission also uses this channel of transparency to communicate information from its discussions with the Council to Parliament. The quasi-automatic nature in which the document transfer takes place, indicates the proactive strategy of the Commission's information provision towards the Parliament. The 'EU Restricted' category has seen the largest increase, indicating that more MEPs have also gotten access to much more in-depth, sensitive information (Figure 1).

DG Trade has also shifted its efforts to enhance both the depth and the width of information exchange through the several meeting formats of the INTA Committee, including the monthly INTA meetings, US monitoring group, technical briefings, and informal briefing meetings between DG Trade and the INTA secretariat. These briefing meetings between INTA administrators and DG Trade unit for Resources, Information and Policy Coordination (Directorate A) take place before each INTA meeting, in addition to continuous e-mail and telephone contact. Since the start of the 8th Parliamentary term (July 2014), high-level Commission representatives have spoken about TTIP in INTA Committee nine times.[14] Yet, the bulk of Commission-Parliament interaction on TTIP has taken place informally. The full agenda and strict meeting schedule of the monthly INTA Committee meetings do not allow the Commission to fulfil its Treaty obligation to immediately and fully inform the Parliament (Commission official 4, interview, January 2016).

This informal interaction takes place in monitoring groups and technical briefings. Monitoring groups with specific geographical orientations were created in INTA in June 2011 (European Parliament, 2011).[15] Members are the Standing Rapporteur—an INTA Member from the political group that was allocated the respective region through the *D'Hondt* method—and Shadow Standing Rapporteurs for the remaining political groups (Parliament official 3, interview, April 2016; Parliament offi-

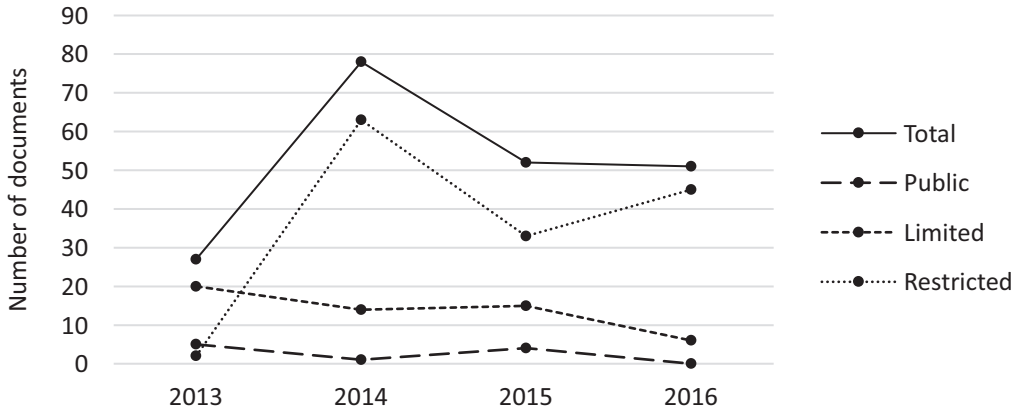

Figure 1. Number of TPC documents on TTIP, received by INTA. Source: Author's interview data.

[11] INTA Secretariat staff and Group advisors have access to 'EU Limited' documents on a need-to-know basis. The limits of such 'need-to-know' were articulated in the document setting out the operational arrangements (European Parliament, 2015f; Malmström, 2015).

[12] Documents for other trade negotiations go through INTA secretariat and are distributed by e-mail to interested INTA members (Parliament official 2, interview, April 2016).

[13] Interestingly, all documents—even consolidated texts—relating to the Trade in Services Agreement are sent by the INTA secretariat to interested INTA MEPs via e-mail (Parliament official 3, interview, April 2016).

[14] Current Trade Commissioner Malmström has been in the INTA Committee to talk about TTIP five times and current TTIP chief negotiator Bercero three times.

[15] The current rules are set out in the INTA General Principles regarding Standing Rapporteurs and Monitoring Groups for Negotiations and Implementation of International Trade Agreements (European Parliament, 2015e).

cial 4, interview, May 2016; see also Coremans & Meissner, 2017; European Parliament, 2017).[16] During monitoring group meetings DG Trade briefs the MEPs of the latest developments in negotiations and puts a lot of effort in providing detailed explanations of technical aspects. This is then followed by questions from MEPs and direct discussion on issues they might bring up. The *in-camera* quality of monitoring groups is considered important for exchanging confidential information, as the Commission uses monitoring groups for passing political messages on the state of play in external negotiations (Parliament official 2 and 3, interview, April 2016; Parliament official 4, interview, May 2016).

Following the regional organisation, the monitoring group for the US covers TTIP. Special arrangements are in place when the US monitoring group meets on TTIP. Towards the end of 2013, the INTA Committee decided to extend invitations for TTIP meetings to the Chair and Standing Rapporteurs of other opinion-giving Committees. This is currently a unique feature in INTA.[17] During the electoral transition period mid-2014, special arrangements were made for the US monitoring group, to ensure continuity of the information exchange (European Parliament, 2014b). The EU Chief negotiator for TTIP briefs MEPs before and after each negotiation round in the US monitoring group. The pre-round briefing in the US monitoring group allows MEPs to send clear messages to the TTIP chief negotiator in DG Trade and makes the US monitoring group meetings more structured and detailed (Parliament official 4, interview, May 2016). This also means the US monitoring group meets more often than others, as those only meet once after negotiation rounds (Commission official 1, interview, November 2015). With 10 meetings and an average of 22 MEPs attending in 2015, compared to an average of 3 meetings and 3 MEPs attending for all other monitoring groups, the US monitoring group was by far the most popular monitoring group that year (Parliament official 4, interview, May 2016).

In addition to monitoring groups, DG Trade can ask the INTA secretariat to organise technical briefings with the members of the monitoring group (Commission official 1, interview, November 2015). These briefings go into depth about technical issues of a trade agreement. MEPs (or often their assistants in this case), political group advisors, and INTA secretariat administrators can ask questions to the DG Trade directly, which makes these technical briefings yet another way for DG Trade to provide in-depth information about ongoing trade negotiations (Commission official 4, interview, January 2016; Parliament official 3, interview, April 2016; Parliament official 4, interview, May 2016). On TTIP, 35 monitoring groups and 7 technical briefings took place from 2013 to 2016 (Parliament official 4, interview, May 2016).

All informal meeting formats discussed above, strengthen the MEP's and INTA staff's understanding of ongoing negotiations. DG Trade uses the meetings to give supplementary information, clarification and answers to questions that may have arisen after consulting negotiation documents. In addition, the informal nature of these exchanges also allows for orally communicating information that is not considered suitable to provide in written form. Hence, the informal communication practices between DG Trade and INTA serve to deepen the transparency in substance, compared to written communication and access to documents only. Extending the invitation to attend the US monitoring group to MEPs from other Committees—when covering TTIP matters—is also an indication of widening the institutional transparency beyond expanding institutional access to documents.

4.3. Summarising the Findings

The Commission's paradigm shift for public transparency started in 2014 when DG Trade moved from its initial strategy of transparency in existence to a proactive approach to transparency in substance. Throughout 2015, the quality of the information shifted from access to documents to access to information. Instead of waiting for specific access to documents requests, the Commission's current transparency policy for trade negotiations relies on increasing the depth of information provided and proactive online publication of a wide array of negotiation texts and supporting explanatory documents (Table 1). The 'Trade for All' strategy sets the scene for a spill-over of these changes to other trade negotiations.

The Commission has also shifted to a more proactive and in-depth communication strategy with the Parliament, mainly by extending its informal engagement with MEPs of the INTA Committee and sharing more in-depth information about the substance of the TTIP agreement. By extending access to documents from a limited number of INTA Members to all MEPs, the institutional width of transparency has increased significantly (Table 1). Moving towards more transparency on these three dimensions has fostered a more stable working relationship between Commission and Parliament, enhanced the quality of exchanges in the INTA Committee and emphasised the role of the Commission as an interlocutor between Council and Parliament while positioning the transparency-minded Commission against a secretive Council.

5. Conclusion

This article has sought to explain how and why the Commission has developed a transparency policy for TTIP that goes beyond the legal minimum imposed by Treaty and case law or formal requirements enacted in institutional agreements. Assessing transparency from the supply-side revealed that shifting from a trans-

[16] In addition, access is granted to political group advisers of INTA, assistants of INTA Members and substitutes, the INTA secretariat, the Legal Service, and the Policy Department. The Chair of the relevant Parliamentary Delegation for relations with the respective country is also invited.

[17] At the time of writing, discussions to extend this practice to the Trade in Services Agreement monitoring group were ongoing.

Table 1. Effect of TTIP on the three dimensions of transparency. Source: Author's own data.

	Public transparency	**Institutional transparency**
Depth	Communications on EU decision-making processes Lists of institutional documents EU position papers Negotiation and legal texts	Final negotiation directives Increased provision of 'EU restricted' documents Oral information through informal monitoring groups, technical briefings, staff-level meetings
Width	Online public repositories Social media Glossary and reader's guide Explanatory texts Factsheets	Access to all types of documents for all MEPs (and national MPs) Extended number of participants in US monitoring group
Manner of provision	From individual access to documents to: • Automatic online publications • Public outreach events	Automated transfer of TPC documents through dedicated IT systems Organisation of informal communication channels

parency policy based on access to documents to one fostering consumption of information is beneficial for the Commission as well. By reducing information asymmetry, the Commission enhances its external negotiation effectiveness—i.e. concluding an international trade agreement, rather than compromising its inter-institutional bargaining power.

Throughout the course of the TTIP negotiations the Commission has introduced a public transparency policy aimed at improving consumption of information. The proactive nature of DG Trade's transparency policy for TTIP—going beyond individual access to document requests—aids the Commission's public profiling as a transparent actor as opposed to a secretive Council. This became particularly clear in its steady pressure on the Council to release the negotiation mandates for trade agreements, as well as the repeated statements by Commissioner Malmström urging Member States to take up responsibility in communication with the European public. The release of the negotiation mandate also shows how institutional and public transparency are linked: with the public availability of the negotiation mandate for TTIP, the institutional transparency also widened as MEPs that did not have access to those texts before could now access them freely.

On the inter-institutional level, the Commission has taken on the role of interlocutor to facilitate the weak link between Council and Parliament in trade policy, and is investing substantial resources in developing a stable base for information exchange with the Parliament. By automatically transferring TPC documents to the INTA Committee, extending the practice of informal technical meetings (as they were in place with the Council) to interactions with INTA, as well as supporting the Parliament's demands for releasing negotiation directives, the Commission has shifted from a reactive to a proactive actor in transparency. By supplementing expanded access to documents with in-depth explanations of current issues in the monitoring groups and technical briefings, the Commission has developed a transparency policy geared towards consumption of information.

In terms of democratisation and legitimacy concerns, the Commission's focus on the consumption of information may reduce the perceived democratic deficit in EU trade policy: enhancing the quality of the information—compared to a quantitative increase in the number of documents only—strengthens the link between transparency and legitimacy of decision-making outcomes. By focusing in particular on institutional transparency, this link can be strengthened while at the same time shielding internal decision-making processes. Yet questions remain as to the selection of information that is proactively provided and the choice of means through which this provision takes place: what determines which documents are subject to public or institutional transparency, and which media or institutional channels are used to communicate the information? For instance, the rise in the number of restricted documents available to the Parliament may indicate an attempt to balance the extent of the reduction of information asymmetry with protecting a necessary level of confidentiality. In other words, how does the Commission balance the benefits and costs of lowering institutional information asymmetries?

This article has offered an alternative view of the reasoning behind the increasing transparency of EU trade policy by shifting the implicit conceptualisation of the Commission-on-the-defensive, to one of a proactive supplier of transparency—even in absence of a specific demand. Throughout the TTIP negotiations the Commission has gone beyond individual access to documents requests and is proactively providing in-depth transparency to a broader public and institutional audience. This shift, as well as the importance placed by DG Trade on communication with the Parliament's INTA Committee, are indications of the benefits related to lowering information asymmetry for the Commission as an effective external negotiator.

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Article

Transparency Watchdog: Guarding the Law and Independent from Politics? The Relationship between the European Ombudsman and the European Parliament

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Abstract
This article investigates whether the European Ombudsman acts as an 'independent' institution vis-à-vis the European Parliament (EP). This is a relevant question because while the Ombudsman is appointed by and reports to the EP, it can also conduct inquiries into the work of the EP, in instances of alleged maladministration. Based on the empirical examination of all decisions following an inquiry by the Ombudsman in cases against the EP for an eleven-year period (2004–2015), plus the review of two recent landmark own-initiative inquiries, we inductively construct three roles played by the Ombudsman in relation to the EP, namely: 'arbitrator', 'transparency watchdog', and 'vessel for civil society concerns'. These roles are used to operationalize the concept of independence. We conclude that the Ombudsman acts independently and is not a mere auxiliary organ of the European legislature. This is most apparent in the 'transparency watchdog' role, where the European Ombudsman has ensured the release of information empowering citizens to hold the Parliament accountable, or—failing that—has stimulated debate concerning such information (for instance, on the MEPs' financial allowances) both within the Parliament itself and in the wider public domain.

Keywords
European Ombudsman; European Parliament; European Union democracy; transparency

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1. Introduction

The academic debate on the European Union's (EU) democratic deficit has been described as being 'crowded waters' (Kohler-Koch & Rittberger, 2007). This article contributes to one strand of this 'crowded' debate, namely that of 'procedural' legitimacy (Lord & Magnette, 2004). According to this view, legitimacy may be enhanced as long as certain procedures—such as transparency, balance of interests, proportionality, legal certainty and the consultation of stakeholders—are adhered to, so as to increase public accountability (Meijer, Grimmelikhuijsen, & Brandsma, 2009).

The creation of the European Ombudsman (EO)[1] in 1995 represents perhaps the strongest illustration of the growing importance given to procedural legitimization in the EU. The EO is expressly tasked with investigating maladministration within EU institutions and bodies—therefore, it constitutes a channel of scrutiny dedicated exclusively to *how* public officials carry out their activities.

Although academic research regarding the EO is rather scant, most existing contributions highlight the success of this institution. Magnette (2003) argues that, despite some initial scepticism, the EO managed to define and disseminate a set of defining principles of 'good

[1] Throughout this article, we also refer to the European Ombudsman as 'the Ombudsman', or, alternatively, by using the abbreviation EO.

administration', and more generally contributed to wide-ranging reforms in European governance. Along similar lines, Kostadinova's (2015) systematic analysis of cases spanning a period of over 15 years demonstrated that EU institutions have accepted a significant share of the EO's recommendations, which lead to the implementation of practices that boosted both their transparency and accountability.

Taking as a premise this rather positive account of the EO's performance, we focus on its 'hybrid' nature as a 'cross-over' between parliamentary control body and judicial organ (on this see Magnette, 2003). To be clear, on the one hand, the EO is appointed by and reports to the European Parliament (EP).[2] On the other hand, it independently investigates cases brought to its attention and solves them by defining and applying 'general principles' (much in the manner of a court of law). This ambiguity makes for a rather paradoxical relationship with the EP, which formally appoints the EO, while at the same time being potentially subject to its investigations in instances of alleged maladministration, as with any other EU body or agency.

The question thus poses itself whether the EO acts as an 'independent' institution as stipulated in the Treaty. As the concept of independence is difficult to grasp, it will be operationalized by means of certain roles that will be inductively drawn from the analysis of cases brought in front of the EO and against the EP. The conceptualization of roles is thus derived in a bottom-up (inductive) fashion, through the empirical analysis of all decisions following an inquiry by the EO in cases against the EP for a period of more than ten years (January 2004–May 2015). This period was chosen to cover two complete legislative terms of the EP (i.e., 2004–2009 and 2009–2014), and the work of two out of the three people who have served as EOs so far, namely Nikiforos Diamandorous (2003–2013) and Emily O'Reilly (2013–present).[3] Furthermore, given the relative infrequency of inquiries against the EP, this rather lengthy time-frame also enables us to cover sufficient cases to be able to trace consistent patterns over time. In sum, these research design choices allow our findings to be generalizable.

Note that the thrust of the data used in this article is towards the 'internal' politics of the EU in general, and of the EP in particular (see Leino, 2017, in this issue). Not only has the EP a great role to play within this domain due to its co-legislative function (Hix & Hoyland, 2013), but also the cases brought to the EO mostly focus on internal EP issues (such as staff matters). Nevertheless, the role of the EP in the 'external' politics of the EU has been upgraded since the Lisbon Treaty, as the Parliament gained the right to veto international trade agreements, to just give one example (Rosén, 2016). To reflect these developments, but also to show how the EO engages the EP when it is acting in a more entrepreneurial manner, we complement the case analysis with a discussion of two landmark own-initiative inquiries of the EO. One of these concerns the internal/ institutional politics of the EU (case OI/8/2015/JAS, on the transparency of trilogues), while the other relates to the external dimension of the EU (case OI/11/2014/RA, on transparency and public participation in the Transatlantic Trade and Investment Partnership [TTIP] negotiations) (see Gheyle & De Ville, 2017, in this issue).

Due to the fact that there were no own-initiative inquiries which targeted the EP exclusively, we chose to focus on two cases that involved the EP together with other institutional players, namely the European Commission and the Council of the EU. These two particular inquiries are relevant for our analysis for two reasons. Firstly, they both deal with domains of activity and practices that have been traditionally marked by secrecy. Consequently, one of the main endeavours of the EO, the advancement of institutional transparency, is likely to come up against significant institutional resistance, including on behalf of the EP. These inquiries are thus significant tests for the EO's independence. Secondly, this choice of cases allows us to contrast a situation where the EO aligned with the EP to challenge the Commission and the Council (i.e., the TTIP inquiry) with one where the EO acted alone to challenge all three institutions equally (i.e., the trilogues inquiry) (see Abazi & Adriaensen, 2017, in this issue).

Observing this contrast is relevant for the EO's independence because it shows us whether or not an alliance with the EP has an impact on its activity.

The article proceeds as follows: the following section presents the attributions and the powers of the EO. Then we present an account of cases against the EP, which were brought forward to the EO. Based on this, we define two main roles assumed by the EO, and show how they are linked to the different subject matters of the cases under review. The third section deals with the aforementioned own-initiative inquiries and brings to light a third role played by the EP. Conclusions follow.

2. The Office of the EO and Its Relationship with the EP

The relationship between the EO and the EP can be meaningfully viewed through the lenses of agency theory. We build here on Majone's (2001) seminal distinction between two logics of delegation: on one hand, the logic of efficiency, where the principals' core aim is to reduce transaction costs and take advantage of the agent's expertise, and, on the other hand, the logic of credibility, where delegation serves to render the principals' (policy) commitments trustworthy by shielding them from ex-post legislative or administrative tinkering. This second type of delegation is prevalent where principals may face short-term interests to default on

[2] Throughout this article, we also refer to the European Parliament as 'the Parliament', or, alternatively, by using the abbreviation EP.

[3] When referring specifically to the person occupying the EO position (rather than the institution of the EO in general), we use masculine pronouns ('he', 'him' etc.) for the period of Mr. Diamandouros' tenure, and feminine pronouns ('she', 'her' etc.) for that of Ms. O'Reilly.

their initial commitments, and/or where there are reputational benefits to be reaped by having an agent whose decisions are not 'contaminated' by politics (Alter, 2008; Majone, 2001). In the EU, relevant examples of such 'fiduciary' agents or 'trustees'—as they are called in the literature—include the European Central Bank, the European Court of Justice, and the European Commission in some of its functions (Franchino, 2002; Majone, 2001; Pollack, 2007).

The different rationales for delegation presented above have far-reaching implications for the relationship between principals and agents. As Alter (2008) and Handke (2010) show, traditional agents are chosen because they have similar views and values to their principals, and are expected to execute their duties as if representing their principals. By contrast, trustees are selected primarily due to reputational and professional credentials, which may sometimes mean that their values are systematically different from those of their principals. Furthermore, trustees enjoy comparatively more discretion and are expected to carry out their mandates according to their own professional norms and best judgement. Importantly, while traditional agents act on behalf of their principals, trustees act on behalf of a third party—a beneficiary—towards whom both the trustees and their principals are bound. This beneficiary can be an artificial construction, for instance, the citizens in a democratic polity (Alter, 2008; Gehring & Plocher, 2009). Due to these factors, the principals' control over trustees is significantly looser compared to traditional agents—in particular, once appointed, a trustee will be less vulnerable to re-contracting sanctions (i.e., dismissal, budget cuts, re-writing of their mandate). These fundamental differences in both the rationale of delegation and the relationship between the relevant parties have led some authors (e.g., Alter, 2008; Handke, 2010) to argue that fiduciary relations cannot be adequately captured by the principal-agent model, while dissenting voices (e.g., Brandsma & Adriaensen, 2017; Pollack, 2007) point out that this is not the case as Majone's (2001) two logics of delegation represent opposite ends of the same continuum (as opposed to being dichotomous categories) and no trustee is ever fully independent from its principal(s).

It is beyond our scope to settle this theoretical dispute here. Rather, we draw on the distinction between traditional and trustee agents, presented above, to evaluate the independence of the EO vis-à-vis the EP, both from the standpoint of institutional design, as well as inquiry activity. In this section, we show that Majone's (2001) second logic of delegation applies in the case of the EO. While on paper the EO benefits from guarantees which are characteristic of trustees, we nonetheless identify two constraints on its independence, both stemming from its close relationship to the EP. The impact of these constraints will be assessed in the following section by looking at how the EO handles complaints against the EP.

2.1. The EO as a Trustee Agent

The EO is a trustee appointed by the EP: the EP alone elects the Ombudsman, with no role for the Member States or other European Institutions. To be accepted in the selection process via the EP, a candidate needs the support of at least 40 Members of the European Parliament (MEPs), from at least two EU member states. Those declared admissible are asked to present their priorities in a hearing in front the EP Committee on Petitions. The new Ombudsman is elected by secret ballot and by a majority of the votes cast. In line with what the literature suggests regarding the primacy of reputational and professional credentials in the appointment of trustees, the EP has so far chosen candidates with a history of being national Ombudsmen, and who were independent from the European Institutions and from their respective national governments (Former General Secretary of the EO, personal communication, May 11, 2015).

In line with Art. 228 of the Treaty on the Functioning of the European Union (TFEU), the EO's main function is to inquire into and report on instances of maladministration arising from activities of the EU institutions and bodies (only the Court of Justice of the EU, when acting in its judicial capacity, falls outside the EO's mandate). This represents a rather broad mandate, which as suggested by Handke (2010) is typical for trustee delegation (traditional agents are authorised for a narrower remit, often for a single purpose). It also suggests that the EO acts not as a representative of the EP, but on behalf of a distinct beneficiary—namely, in defending 'good administration', the EO 'serves' the European citizens, who have a right to be treated appropriately by the EU institutions.

Importantly, neither the Treaty nor the Statute of the EO define 'maladministration'. This has allowed the EO to actively shape the limits of its own mandate. It has done so by consistently adhering to the position that 'maladministration' refers to unlawful behaviour and errors of legal interpretation, but it also goes beyond this by including failure to respect principles of good administration or fundamental rights (Harden, 2005). This interpretation results in a rather wide remit for the EO (Harden, 2008).

Particularly significant for the EO's status as a trustee is that it enjoys operational independence—meaning, it decides alone regarding the opening of inquiries, either in response to complaints from citizens or residents of the Union, or based on its own initiative. Art 228 TFEU states in no uncertain terms that the EO 'shall be completely independent in the performance of his duties' and furthermore 'shall neither seek nor take instructions from any government, institution, body, office or entity'.

Finally, the EO reports to the EP, insofar as it is required to present it with an annual activity report. However, it is significant that the EP cannot dismiss the EO on its own, but has to request that the European Court of Justice does so, and only on account of the EO's overall

functioning or for 'serious misconduct'. Symbolically, the EO gives an oath to perform duties with 'complete independence and impartiality' (European Parliament, 1994) *before the Court*, not before the EP. In terms of budget, too, the EO is outside of the Parliament's direct control: being one of the seven formal institutions of the EU, its budget represents an independent section of the EU budget and is hence decided jointly by the EP and the Council, based on the Commission's proposal.

In conclusion, insofar as institutional design is concerned, the EO and the EP fit the characteristics of a typical trustee-principal relationship. Namely, while the EP has exclusive prerogatives in appointing the EO, it does not wield any other re-contracting tools. Thus, it cannot dismiss the EO alone (but can only ask the ECJ to consider doing so), it does not directly control its budget, and, although the Statute of the EO is formally an EP decision, it cannot fundamentally re-write the EO's mandate, as the crucial provisions (i.e., its mission to investigate instances of maladministration and the guarantees of operational independence) are inscribed in the Treaties, namely Art 228 TFEU.

2.2. Constraints on the Independence of the EO

Although the EO does enjoy a broad mandate, its powers are, as Peters (2005) observes, more modest compared to some of its national counterparts. Most significantly, the EO lacks the power to refer suspected illegalities to the courts, which—among other factors—leads it to cultivate a cooperative style of control. Concretely, in cases where maladministration is found, the EO has no way of obliging the institution concerned to take any redress measures. Instead, what it can do is attempt reconciliation by proposing a 'solution' to which both parties may submit observations. If the solution is accepted, this usually means that the offending institution has admitted wrongdoing, apologised to the complainant, and offered compensation for any damages (Cadeddu, 2004). In more serious cases, the EO may also choose to issue recommendations, where it proposes guidelines for good administrative practice to prevent similar instances of maladministration from occurring in the future. The institution concerned has three months to send a detailed opinion on the draft recommendations, in which it explains whether and how these would be implemented.

Additionally, the EO has at its disposal two other actions which are not explicitly mentioned in the Treaties or its Statute, but which have been shaped by practice over the years. Thus, the option of 'further remarks' allows the EO to make recommendations to the institution concerned even if no maladministration is found. On the other hand, 'critical remarks' are used when the institution cannot be persuaded to rectify the matter, or in situations where maladministration is of such nature that it cannot be rectified. The follow-up measures taken as a response to critical remarks are published annually. Cadeddu (2004) notes that 'critical remarks' are generally used in cases where the maladministration has no general or serious implications.

The 'sharpest' tool in the EO's arsenal is the special report to the EP, which only applies in cases 'of significant public interest' (European Ombudsman, 2016a, p. 4), and where the Ombudsman has issued recommendations, but the offending institution has failed to satisfactorily accept them. The importance of special reports lies in the fact that they must be debated within the EP and as such they receive political attention. Therefore, although the institution under inquiry cannot be obliged to rectify maladministration, it can be directed towards compliance through public 'naming-and-shaming'. Special reports are used very sparsely (the EO has produced only 19 by the end of 2016), precisely because they are considered 'of inestimable value' for the EO's work and regarded as its 'ultimate weapon' (Former General Secretary of the EO, personal communication, May 11, 2015).

To sum up, even though the EO's mandate provides it with a broad remit, its inability to take binding decisions leads the Ombudsman to rely exclusively on the 'soft' power of persuasion to move EU institutions to action. Here, the EO's status as a trustee appointed by the Parliament becomes particularly relevant. Namely, to be successful, the Ombudsman must be able to convince other EU institutions (and European citizens more generally) that it is, in fact, independent and impartial, and not simply an auxiliary organ controlled by the EP. Otherwise, it is doubtful that its proposed solutions and recommendations would have any force of persuasion or even be taken seriously.

On the other hand, however, in extreme cases of non-cooperation from the EU institutions, success depends not so much on the EO being perceived as independent, but on its ability to leverage the 'political muscle' of the EP in support of its actions. This is clearly illustrated by the special reports, an instrument that is seldom used but has general significance for the EO, as it strengthens its hand in interactions with other EU institutions. As highlighted by former EO Nikiforos Diamandouros, the mere possibility of a special report might 'persuade the institution or body concerned to alter its position' (European Ombudsman, 2006)—meaning, the EO conducts at least some of its inquiries 'in the shadow' of this instrument. The strategy can be effective but only so long as the special report represents a credible threat. This situation creates strong incentives for the EO to cultivate a positive, co-operative relationship with the EP. This does not automatically diminish its independence as a trustee, but it does put a constraint on it.

A second constraint on the independence of the EO comes from an overlap of its responsibilities with those of the EP's Petitions Committee (PC). Any maladministration complaint that the Ombudsman receives could equally be submitted as a petition to the PC (Peters, 2005). In fact, in the early debates concerning the creation of the EO, the EP majority proved reluctant to delegate, as the Parliament had always considered itself to

be the guardian of citizens' rights vis-à-vis other European Institutions, and the PC already provided a channel for collecting and addressing citizens' complaints (Magnette, 2003). The unclear demarcation of roles between the EP PC and the EO could potentially result in a situation where the former sees the latter as its adversary and tries to hinder its work by, for instance by cutting resources—or, conversely, it might try to 'subordinate' the Ombudsman to its needs, i.e., to have the EO do dedicated work for the Committee (Former General Secretary of the EO, personal communication, May 11, 2015). In other words, due to the overlap between their responsibilities, a risk exists that the EP would try to control the EO as if it were a traditional agent and not a trustee enjoying discretion over the execution of its own mandate.

These scenarios, however, have not come to pass, as both parties have made efforts to informally define lines of separation between their respective activities. Thus, in time, it became obvious that the petitions which represent the 'bread and butter' of the PC generally concern the Member States' alleged failure to comply with EU law, and hence matters that lie outside the EO's mandate (Former General Secretary of the EO, personal communication, May 11, 2015). For its part, the Ombudsman chose to navigate the ambiguous relationship with the EP by adhering—at least on paper—to the principle that the political work of the EP is outside its mandate, and that the concept of maladministration does not include the work of EP committees.[4] This is apparent in the very first annual report of the Ombudsman:

> All complaints against decisions of a *political* rather than an administrative nature are regarded as *inadmissible*; for example, complaints against the political work of the European Parliament or its organs, such as decisions of the Committee on Petitions. (European Ombudsman, 1996, p. 9, emphasis added)

The EO's decision to steer clear of the EP's political work represents a self-imposed constraint. It does not automatically diminish its independence as a trustee, but it does create the risk that the EO might be less assertive when handling cases against the EP that touch on its political role. This is significant because the distinction between political and administrative matters is not always clear-cut, and many of the principles of good administration which the EO defends (e.g., transparency, absence of discrimination) can easily have political implications.

In conclusion, we have identified two constraints on the independence of the EO vis-à-vis the EP. The first constraint is of a general nature: the EO depends on the support of the EP in the framework of special reports to persuade the offending EU institutions to follow its recommendations. To maintain this instrument as a credible threat—and hence use it to its full potential—the EO needs to cultivate an overall cooperative relationship with the EP. The second constraint is more specific and applies only when the EO deals with complaints against the EP: here, the EO needs to limit its inquiries to the administrative aspects of the case. Together, these two constraints create the risk that, when dealing with cases against the EP, the EO might be reluctant to decide against the Parliament in general, and especially so in cases of inquiries that have implications for or touch upon its political work.

3. Decisions by the Ombudsman Following Inquiries Against the EP

In this section, we follow up on the observations presented above by analysing the EO's performance in cases where it had to investigate alleged maladministration within the EP. By focusing on cases, we trace whether the two constraints identified in the previous section have had an impact on the EO's independence.

Before we shed light on the cases against the EP, these should be set into the political context. Note that the vast majority of cases handled by the EO concern the European Commission or EU agencies and not the EP itself. To give just one example: inquiries conducted by the EO in 2015 concerned the Commission in 145 cases (or 50.6% of the cases). 30 cases (or 11.5%) fell within the realm of EU agencies and only 8% (or 21 cases) concerned the EP (European Ombudsman, 2016c). Concretely, for the period under examination here—January 1, 2004, to May 1, 2015—a total of 124 inquiries were carried out against the Parliament.[5]

It is noteworthy that in most inquiries against the EP no maladministration was found, or the institution settled the case: this applies to 83 out of the 124 cases reviewed here (in 13 of those instances the Ombudsman did choose to add further remarks). In the remaining cases, where the Ombudsman did find that maladministration had occurred, it issued critical remarks in all but 2 instances.

We used a coding scheme to classify cases according to subject matter. As shown in Table 1 below, they fall into two broad categories: first, cases that relate to the role of the EP as an employer (alleged violations of the Staff Regulations or selection procedures), and secondly, cases pertaining to the relationship of the EP with European citizens. The former category is considerably more numerous than the latter.

To offer an in-depth account of how the Ombudsman deals with cases against the EP, in what follows we discuss several illustrative examples for each of the two main categories above.

[4] For example, a complaint about the position taken by the EP in the context of French nuclear tests in the Pacific was held inadmissible because it concerned a political decision, not a possible instance of maladministration (European Ombudsman, 1996).

[5] We only cover cases opened against the EP as the sole institution, where the EO conducted a formal inquiry. Cases where the complainant withdrew were not considered. Furthermore, we have included only decisions published on the EO website.

Table 1. Distribution of cases per subject-matter January 1, 2004–May 1, 2015.

Subject matter		*Number of cases*
A. The EP as an employer: staff matters	A.1. Violations of staff regulations[6]	25
	A.2. Violations of staff regulations: financial issues[7]	25
	A.3. Unfair treatment in competition and selection procedures	33
B. Relations between the EP and EU citizens	B.1. Problems with request of information and access to documents[8]	17
	B.2. Unfair treatment in award of tenders or grants	12
	B.3. Access of EU citizens to the EP and treatment of EU citizens by the EP as an institution[9]	12

3.1. Cases Related to Staff Matters

To begin with, many (around 20) of the cases concerning alleged violations of staff rules pertain to promotion issues and specifically to the allocation of the so-called 'merit points'. These complaints have repeatedly given rise to findings of maladministration, and the EO has striven to use some of them as basis for defining best practices of general applicability. In one interesting case, which related to lack of impartiality in the award of merit points for an EP official, the Ombudsman was even requested to consider submitting a special report to the EP. He did not do so, justifying that the case was 'not important enough to merit Parliament's attention in its role as a political body designed to represent EU citizens' (see case 3289/2008/BEH). The EO, however, issued a critical remark urging the Parliament to avoid situations where the person or authority called upon to decide on staff matters could be perceived as partial (the case at hand concerned the Secretary-General of the Parliament).

The EO has also striven to establish best practices with staff cases that entailed financial implications, and with cases concerning competition and selection procedures, often advocating for the EP to enhance the transparency of the decisions it takes. For instance, in case 3732/2004/GG, further remarks were issued, urging the EP to consider measures whereby persons dealing with tenders would be asked not only to declare any potential conflicts of interests, but also to provide relevant information on any previous dealings with, or activities involving the tenderers. In case 2222/2004/TN, where a participant in a selection procedure was excluded due to lack of professional experience, the EP committed—at the EO's behest—to provide more information and clarify certain requirements regarding future recruitment procedures.

In other inquiries, however, the Ombudsman has limited its intervention to finding a way of reconciling the complainant and the Parliament. For instance, a recent decision concerned an EP official who had been granted derogation from the mobility policy that had been put in place, because of her daughter's severe and irreversible disease. The EP administration decided to disregard this derogation, which led the complainant to approach the Ombudsman. The EO concluded that the EP could 'not lawfully revoke its derogation' (case 118/2013/AN). Although the Parliament refused to acknowledge that its position was unwarranted, it did eventually accept the EO's recommendation to respect the complainant's derogation.

3.2. Cases Concerning the Relationship with EU Citizens

Cases concerning how the EP interacts with EU citizens—when it comes access to documents and transparency—highlight the tensions inherent in the relationship with the Parliament, as they tend to often touch on its 'political' role, also in the field of external relations. The controversial Anti-Counterfeiting Trade Agreement (ACTA) has brought the Ombudsman two interesting complaints that are illustrative of these dynamics.

Firstly, case 2393/2011/RA concerns the EP's refusal to grant the complainant public access to documents regarding the negotiations leading up to the finalisation of ACTA. While no maladministration was found (the EP had validly invoked exceptions provided for in Regulation 1049/2001), the EO issued further remarks where she highlighted the EP's position as the legislature representing all EU citizens. Accordingly, the Parliament—as a 'political body'—was called upon to intervene with the Commission and the Council to ensure that, in future, the 'very nature of Parliament, which is

[6] A majority of these cases (around 20) cover issues such as promotions within EP on the basis of annual staff assessments, which can result in the award of a certain number of merit points. One exceptional case of alleged harassment of a EP staff member also falls into this category.
[7] This category covers issues such as award of allowances and reimbursement of pension costs.
[8] Issues with the EP website also fall into this category.
[9] Within this category fall issues such as the question of access to the EP as an institution or the issue of access of visitor groups or treatment of individuals by EP security services.

to openly deliberate on such issues', is not undermined (European Ombudsman, 2011).

Secondly, case 262/2012/OV stemmed from a complaint regarding the refusal of public access to the minutes of meetings of coordinators of several EP Committees relating to the ACTA negotiations (see Abazi & Adriaensen, 2017). After some debate regarding the status of these documents (the EP claimed that there were no separate minutes of meetings of committee coordinators, rather that these were included in the minutes of the committee meetings themselves) the Parliament agreed to the Ombudsman's recommendation that decisions or recommendations adopted by the coordinators would, after their endorsement by the respective EP committee, be included in the committee minutes, and be accessible via the public register as of July 2014 onwards. The Ombudsman expressed her hope that 'for the sake of consistency' the rule would also be applied retrospectively, for the 2009–2014 parliamentary term (case 262/2012/OV).

Another two significant cases—this time concerning the internal rather than the external dimension of EU politics—have raised questions regarding financial transparency in MEPs' activity, thus also touching on the political role of the Parliament. In one case, dating back to 2005, the EO dealt with a journalist's complaint regarding the refusal of Parliament to give public access to details regarding MEP's allowances, allegedly on grounds of data protection (case 3643/2005/(GK)WP). After consulting with the European Data Protection Supervisor—who advocated that the public has a right to be informed about the behaviour of MEPs—the Ombudsman called on the EP to disclose the requested information. The EP refused (again invoking data protection), but announced that it would publish general information on MEPs' allowances and alluded to the possibility of re-assessing the situation in 2009. The Ombudsman consequently issued a critical remark and through media coverage, the case gave rise to a more general debate on MEPs' allowances in the public domain.

In a somewhat related case, the Parliament refused to give access to the list of MEPs participating in the EP's supplementary pension scheme. The Ombudsman made a preliminary finding of maladministration and proposed a friendly solution, which the EP rejected. Significantly, the Parliament as a whole voted down a concrete proposal from its own Budgetary Control Committee to publish this list of names. The Ombudsman thus decided to close the case as the EP's action had made the issue one of 'political responsibility', on which as a legislature it would be accountable to the European electorate, and not the EO.

3.3. The Roles of the EO vis-à-vis the EP

The review of cases conducted above brings to the fore two main roles that the EO plays vis-à-vis the EP: 'arbitrator' and 'transparency watchdog'. In the first role, the EO focuses primarily on finding a solution that allows for reconciliation between the complainant and the EP. In most cases this leads to a settlement. When playing the 'arbitrator' role, the EO often tries to set 'best practices' concerning good administration within the EP, by giving guidance beyond the specific issue or case at stake. In its second role—'transparency watchdog'—the Ombudsman's focus is on requesting that the EP put certain documents into the public domain, or—failing that—on stimulating public debate and interest regarding EP documents.

Returning to the categories identified in Table 1, the distribution of these two roles is as follows. Firstly, with inquiries concerning violations of staff regulations (with or without financial implications), and the treatment of citizens by the EP as an institution (i.e., sub-categories A.1, A.2, and B.3), the EO performs the role of arbitrator. The cases concerning promotion decisions and the allocation of merit points, discussed briefly in the previous subsection, provide a relevant illustration. Secondly, with cases concerning requests for information and access to documents (sub-category B.1), the EO acts as transparency watchdog, as exemplified in the ACTA inquiries and the case on MEPs' allowances. Finally, in cases dealing with unfair treatment, either in competition and selection procedures (sub-category A.3), or in the award of tenders or grants (sub-category B.2), the EO acts mainly as an arbitrator, but it sometimes chooses to take on the role of transparency watchdog as well, by urging the EP to offer more information as to why certain decisions were taken. Therefore, in these few selected instances, the EO plays both roles simultaneously. This is exemplified in two cases presented above: case 3732/2004/GG and case 2222/2004/TN.

What does this tell us about the independence of the EO vis-à-vis the EP? Firstly, both roles identified above presume that the EO has positioned itself against the (short-term) interests of the Parliament. Thus, when acting as arbitrator, the EO has pushed the EP to acknowledge (and rectify) certain shortcomings in its handling of staff matters and other administrative issues. As a transparency watchdog, the EO has similarly advocated that the EP disclose information which it obviously preferred—at the time—to keep out of the public domain. This is indeed the sort of behaviour that one might expect of a trustee, which executes its mandate in line with relevant professional norms and their own best judgement, and can, therefore, take actions against its principal(s). The cases analysed here show that the first constraint identified in section 2—the EO's reliance on a cooperative relationship with the EP—does not undermine the EO's capacity to act independently.

However—and this is an important point—many of the cases that come to the attention of the EO do not have systemic value, and hence the two roles identified here do not carry equal weight. Generally speaking, inquiries related to staff matters concern the grievances of specific individuals, and although some of these may have a broader relevance, the interested audience is still relatively contained. Cases that pertain to the relation-

ship between the EP and European citizens, however, are quite different, because they often touch on the EP's political role as a democratic representative institution. In this context, the EO acting as a 'transparency watchdog' was particularly challenging for the EP, because the information requested by some complainants was of such nature as to empower citizens to hold MEPs accountable. These less numerous but far more significant cases, therefore, represent a tougher test for the independence of the EO, and our analysis has shown that here the Ombudsman has spoken out against the EP (for instance by issuing critical remarks). Thus, we can conclude that the second constraint identified in section 2, regarding cases with a political substance, also does not seem to undermine the EO's capacity to act independently.

4. The Relationship with the EP in the Context of Own-Initiative Inquiries

The EO's performance in the context of own-initiative inquiries lends further insight into its relationship with the EP. This is because the EO enjoys full discretion in choosing the issues to be investigated in the framework of these inquiries—in other words, this instrument allows the EO to set its own agenda. Thus, own-initiative inquiries are very different from regular cases, which account for most of the EO's activity, but where the space for manoeuvre is confined to the complaints received. By contrast, here the EO is a pro-active actor, which makes own-initiative inquiries particularly significant for assessing its independence.

During the period considered here (2004–2015), the EO opened 43 own-initiative inquiries. It is telling that most of these concerned either the Commission or European agencies, and none were directed specifically at the EP. However, there have been four 'horizontal' inquiries (i.e., dealing with a specific subject and encompassing several European institutions) which have involved the EP, all of them carried out after 2010. Out of these four horizontal inquiries, case OI/8/2015/JAS concerning the transparency of the so-called trilogues is by far the most consequential and has the potential to stimulate a new level of openness in what has traditionally been a tightly closed-door decision-making process. This is thus a pertinent test case when it comes to role that the EO assumes as a trustee vis a vis the EP.

Trilogues are informal tripartite meetings attended by representatives of the EP, the Council and the Commission. The level of secrecy inherent in trilogues is defended by the institutions as necessary to find a common position within the Ordinary Legislative Procedure in first reading without the pressure and exposure of the regular legislative process (Reh, Héritier, Bressanelli, & Koop, 2013). The Ombudsman's inquiry indicated that trilogues are 'increasingly heralded as the place where the negotiated content of the final legislation text is decided upon', and asked for clarifications regarding: whether and how upcoming trilogues are publicly announced; the documents produced by each institution in the context of trilogues; the public accessibility of these documents (including any requests for public access received in relation to these); and, finally, the language regime of trilogues (case OI/8/2015/JAS).

The trilogues inquiry proved controversial, with all three institutions openly stating that it partly exceeded the Ombudsman's mandate. The EP's response was the least outspoken. It merely indicated that the EO's questions required careful consideration given 'the fact that trilogues are an expression of the more political role of the Parliament', and pointed out that while the handling of requests for information regarding trilogue documents represents an administrative exercise, the organization of the trilogues as such (including the regime of minutes, the languages used etc.) was rather within the legislators' prerogatives and hence outside the EO's mandate (Schulz, 2015). The Commission and Council essentially advanced the same arguments, but the tone of their letters was certainly more outspoken than the EP's. The Council in particular chose to remind the Ombudsman of its own established practice of distinguishing between questions that pertain to the political responsibility of the EU legislators, and those that involve possible maladministration. (Tranholm-Mikkelsen, 2015).

Despite the tense situation, all three institutions eventually responded to the EO's questions and allowed her team to conduct the desired document inspections. On this basis, the EO issued a series of recommendations to make trilogue documentation publicly available.[10] The EO further noted that some of this information could be made available while trilogues were ongoing, whereas other aspects might have to wait until after their conclusion. In particular, the EO highlighted the value of transparency for building up citizens' trust in governing institutions:

> If citizens are to participate effectively in the democratic life of the European Union, by holding their representatives to account, and by voicing their opinion, then they need access to this information….This goes to the heart of EU law-making legitimacy. (European Ombudsman, 2016b)

In conclusion, in the concrete case of the trilogues inquiry, the EO has successfully tested the limits of her mandate, by obtaining cooperation in a matter that was considered to bite into what may have previously been taboo territory, namely the political activity of the EP. From this perspective, the trilogues inquiry represents a game-changer not only regarding transparency practices in the EU but also the relationship between the EO and the EP.

The own initiative inquiry on transparency and public participation in the TTIP negotiations (case OI/11/2014/RA) is of similar magnitude to the trilogues

[10] Among others, these documents concern trilogues dates and agendas, the initial positions of the three institutions, the so-called 'four-column' documents, the final compromise texts, and a list of the political decision-makers involved.

inquiry, in that it represents a bold push for transparency in a domain of activity traditionally characterised by secrecy—in this case, international trade negotiations. Although the EP is not directly targeted in this inquiry, we discuss it here given its strategic significance, and to contrast it with the trilogues inquiry where the Ombudsman did directly challenge the EP (alongside the Commission and the Council).

The background of this case is that the European Commission is currently negotiating a wide-ranging trade and investment partnership agreement with the United States (TTIP). The negotiations have attracted 'unprecedented public interest'. In July 2014, the Ombudsman opened an own-initiative inquiry, which was justified as responding to concerns raised by the EP together with civil society actors. The inquiry ended with the Council and the Commission agreeing to the pro-active publication of a range of relevant documents, including the EU's negotiating directives and opening positions.

What we see in this case is a prime example of how the EP and the EO 'join forces', which is clearly a different dynamic compared to the trilogues inquiry. However, in both inquiries, the EO was equally bold in her push for more transparency. This bodes well for the independence of the institution. Also significant is that in the TTIP case the EO has chosen to stress the role of the EP as the only directly elected EU institution. Thus, she explicitly pointed to the special 'democratic responsibility of elected representatives, at the European and national levels, in scrutinising the negotiations on behalf of their constituents'. While she acknowledged that there may always be circumstances in which elected representatives will have 'privileged access', the direct involvement of citizens is to be encouraged as much as possible (case OI/11/2014/RA). This shows that while in the TTIP inquiry the EO has responded to the concerns of the European legislature, and their interests were aligned, the Ombudsman did not act as an auxiliary organ of the EP, but rather used the opportunity to point out that the Parliament also has its own responsibility in ensuring transparency in international trade negotiations.

Before concluding, it should be stressed that EO's decisions in both the trilogues and the TTIP inquiries were preceded by public consultations. In recent years this tool has been used regularly in connection with own-initiative inquiries: seven of the own-initiative inquiries closed since 2010 have incorporated public consultations. By voluntarily using this instrument (no mention of it exists in the EO's statute or in the implementing provisions) the EO makes her office a 'vessel' for the voices of NGOs and citizens, which in turn strengthens her stance vis-à-vis other European Institutions. Thus, when looking at own-initiative inquiries, we can distinguish a third role that the EO plays, mostly in relation to other institutions, but also—albeit exceptionally—vis-à-vis the EP, as illustrated with the trilogues inquiry. This role of 'vessel' for civil society concerns is clearly linked to that of 'transparency watchdog', but it also goes beyond it. The EO does not act on behalf of a case that is brought to it by one or several parties (as in the ACTA case, for instance), but actively *asks* for input by citizens and NGOs, and thus creates a larger democratic basis for her actions. To be clear, the consultations serve not only to provide the Ombudsman with more relevant information, but also to justify the societal relevance of the own-initiative inquiries, and to shore up the kind of popular support which might strengthen its stance against the institutions that are subject to these inquiries. Therefore, with the role of 'vessel', the EO as a trustee seeks to demonstrate that it is acting on behalf of (representing) civil society concerns, i.e. a third party (a beneficiary) that is distinct from EP. Hence, this role can be seen as signalling the Ombudsman's independence.

5. Discussion and Concluding Remarks

This article pursued the question of whether the EO acts as an 'independent' institution towards the EP. This is a pertinent question because the two institutions are in a principal-trustee type of relationship. Thus, the EO is appointed exclusively by the EP, with no role to play for other EU institutions or Member States. The EO can be removed by the Court of Justice of the EU only at the request of the EP, inter alia if he is guilty of serious misconduct. On the other hand, however, the EP is among the EU institutions and bodies covered by the EO's mandate. While the political activity of the Parliament, including the work of its committees, remains outside the EO's remit, it does have the power to probe into questions of maladministration within the Parliament and to examine issues such as the refusal of access to documents or decisions taken in competitions and selection procedures. In looking at how the EO acts vis-à-vis the EP, an institution it partly depends upon, this article deals with a 'hard case' for the EO's independence. Thus, the analysis conducted here is relevant for the general performance of the EO as a guardian of good administration in the EU.

The concept of 'independence' is (obviously) not only far-reaching but also difficult to operationalize. We have opted to discern patterns of interaction between the two institutions, by probing into all cases brought forward to the EO against the EP over a time-span of more than 10 years. We then inductively established reoccurring roles the Ombudsman adopts via the European legislature.

Findings show that in the majority of cases no maladministration was found, or the EP settled the case. Thus, the most common role played by the EO is that of 'arbitrator' between the complainant(s) and the EP. The cases where maladministration was found concerned, on one hand, (alleged) violations of staff regulations, and, on the other hand, the Parliament's relation to EU citizens. Here the Ombudsman played its 'arbitrator' role, but also that of 'transparency watchdog' (by ensuring that certain documents are made public, or by bringing certain topics into the public debate). Finally, the two own-initiative inquiries reviewed here—on trilogues and

on the TTIP negotiations—reveal a third role assumed by the EO, namely that of 'vessel for civil society concerns'. This is closely allied with the role of 'transparency watchdog' and represents a more recent development, as public consultations have been a feature of (some) own-initiative inquiries only in the past few years.

The roles summarised above demonstrate that the EO acts as an 'independent' actor. From this perspective, the cases where transparency represents a core issue are the most significant, as they tend to concern the EP as an institution at the heart of the 'democratic life of the EU' and as such clearly touch on its political responsibility. Here the Ombudsman faces clear limits to its mandate, and it has generally confined the inquiries to the legal elements of the case (i.e., the respect for rules governing public access to information). Some of these cases, however, had political repercussions for the Parliament, and thus their salience lies in their 'spin off' effects. On one hand, debates about sensitive issues such as the MEPs' allowances have shifted into the public domain, and pressure for more transparency increased. On the other hand, more political debate within the EP itself was generated, along with concrete action points.

In the context of own-initiative inquiries, the EO has more clearly entered 'political' territory, on issues pertaining to both the internal politics of the EU, as well as its external relations. Both the trilogues and the TTIP inquiries have pushed the boundaries of institutional transparency within the EU in significant ways. In these contexts, the Ombudsman has called upon the EP to exercise its role as a representative institution.

Overall, the role of the EO seems to have evolved over time and it has consistently not shied away from assuming its role as an independent institution also towards the EP.

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Article

Not Worth the Net Worth? The Democratic Dilemmas of Privileged Access to Information

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Abstract
In this article, we discuss the democratic conditions for parliamentary oversight in EU foreign affairs. Our point of departure is two Interinstitutional Agreements (IIAs) between the Council and the European Parliament (EP), which provide the latter with access to sensitive documents. To shed light on this issue, we ask to what extent these contribute to the democratic accountability in EU foreign policy? It is argued that the IIAs have strengthened the EP's role in EU foreign affairs by giving it access to information to which it was previously denied. This does not mean, however, that this increase in power equals a strengthening of the EP as a democratic accountability forum. First of all, both IIAs (even if there are differences between them) fail to maximise the likelihood that the plurality of views in the EP as a whole is reproduced. Secondly, and more importantly, the EU citizens are largely deprived of opportunities to appraise how their elected representatives have exercised their role as guardians of executive power.

Keywords
democratic accountability; European Parliament; European Union; secrecy; transparency

Issue
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1. Introduction

When it comes to foreign policy, most parliaments play a very different role compared to other areas of public policy. Historically, foreign policy was a royal prerogative, and it still is largely in the hands of the executive branch. So too in the European Union (EU), where national governments tend to dominate the making of foreign policy, particularly in the area of the Common Foreign and Security Policy (CFSP). Avoiding constraints of democratic procedures is one reason for moving foreign policy decisions to the EU-level (Koenig-Archibugi, 2004). Foreign policy is rarely enacted through legislation, which contributes to reducing parliamentary involvement, and in the EU, the treaty explicitly excludes legislation from the CFSP (Article 24, Treaty on European Union [TEU]). Access to information is another major obstacle for parliaments in this field. Because executives own most of the information—whether about operational plans or international negotiations—it creates an informational asymmetry that disadvantages parliaments. In the words of Raunio and Wagner (2017, p. 9), in the area of foreign policy, "much of parliamentary activity focuses on getting timely and accurate information". Without appropriate information it is difficult for parliamentarians to hold the executive to account, particularly regarding activities within international organizations.

At the EU-level, the European Parliament (EP) is better placed than national parliaments to monitor and oversee the Union's foreign policy activities because it

is in regular contact with the EU-executives.[1] According to Article 36, TEU, the EP shall be consulted on the main aspects and basic choices of the CFSP, and is entitled to be informed about how those policies evolve. After the entry into force of the Lisbon Treaty, the EP has to give consent to international agreements, and as a corollary, is to be informed at all stages of the decision-making procedure (Article 218(10)) (see Abazi & Adriaensen, 2017, in this issue).[2] Neither article is explicit about the scope or depth of the EP's right to information. Therefore, the EP has made an effort to impose its own interpretation of the Parliament's right to information, mostly against considerable opposition from member states, but often with at least some success (Rosén, 2015, 2017). In this article, we assess two key agreements that have given the EP access to documents in external relations, and ask: *to what extent do these contribute to the democratic accountability of EU foreign policy?*

As one of the main indicators of democratic quality, accountability signifies the extent to which EU institutions "can be—and are—held to account by democratic forums" (Bovens, Curtin, & t'Hart, 2010, p. 5). Parliaments are popularly elected and well suited to perform this task, but parliamentary involvement should not automatically be equated with democracy. One also has to assess the quality of the arrangement for access to information in order to judge if these really enhance the preconditions for democracy (cf. Stie, 2013). Based on a deliberative reading of democracy, we have discerned three dimensions of accountability relations to evaluate the agreements and the practices they give rise to: First, the interinstitutional relations between the EP and the executive, secondly the intrainstitutional relations within the EP itself, and thirdly, the relationship between the EP and the EU citizens. More specifically, we look at two Interinstitutional Agreements (IIAs) that the EP and the Council have concluded on access to documents. In 2002, they agreed an IIA concerning access by the EP to sensitive information of the Council in the field of security and defence policy.[3] This agreement established an arrangement whereby five Members of the EP (MEPs) can peruse documents that the Council finds necessary to withhold from the public. A decade later, subsequent to the changes in the Lisbon Treaty, another IIA was concluded, this time on access to classified documents held by the Council on matters except CFSP.[4] Through this agreement information is available to a broader range of MEPs, albeit limited to members of the relevant committee as well as other specialised EP bodies.[5]

As shown below, these agreements raise difficult dilemmas when viewed as potential vehicles for democratisation of EU foreign policy. These pertain mainly to the internal relationship between those MEPs who get, and those who do not get, access to confidential information and to the relationship between the EP and Union citizens. We argue that how these relationships are organised and practiced affect the normative authority by which the EP can claim to speak on behalf of its electorate. Given that there are a series of strings attached to accessing these documents, what is the democratic net-worth of such IIAs to the EP?

2. Assessing the Democratic Credentials of the Interinstitutional Agreements: An Analytical Framework

Secrecy in foreign policy is often claimed to be required to protect national security and interests of the state (Hill, 2003). However, the inherent threat of secrecy is that it "obstructs the standard mechanisms for oversight utilized by representative democracies—elections, public opinion and deliberation" (Curtin, 2014, p. 4). In a democracy, access to information is a "precondition for the establishment and maintenance of realistic accountability mechanisms" (Stie, 2013, p. 44). Although one could argue that there are legitimate reasons to keep secrets in foreign policy, if parliaments are to hold the executive to account, they need access to information, including sensitive documents. How, then, can we go about assessing whether the IIAs strengthen the accountability mechanisms in EU foreign policy?

Bovens et al. (2010, p. 35) define accountability as a social "relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences". Because we want to analyse whether the IIAs have strengthened the EP as a *democratic* accountability forum, we apply a *democratic* reading of this definition, where accountability requires popular control with decision-making, and can only be met if "an arrangement or regime enables democratically legitimized bodies to monitor and evaluate executive behaviour and to induce executive actors to modify that behaviour in accordance with their preferences" (Bovens et al., 2010, p. 54). From this definition, we derive the normative benchmarks and dimensions applied in the analysis.

In this article, we have developed an analytical framework anchored in the tradition of deliberative democ-

[1] Who the main executive is depends on the policy area. For the CFSP it is mainly the Council and the European External Action Service, while for other areas of external relations, the Commission is a key executive actor together with the Council. We do not include national parliaments in the current analysis because they mainly have the possibility to control their respective national governments. Being situated at the EU-level, the EP can hold the Council as a whole to account.

[2] CFSP-agreements do not require consent, but the EP is to be kept informed throughout negotiations.

[3] OJ 2002/C298/01.

[4] OJ 2014/C095/01.

[5] We have chosen to focus on the agreements between the Council and the EP. This does not mean that we disregard the executive roles of the Commission or the European External Action Service (EEAS). However, the Council still holds a firm grip on policy-making in EU foreign affairs, especially security and defence policy, and is therefore an important, but also difficult agent, for the EP to hold to account.

racy. Here democracy is understood as "a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future" (Gutmann & Thompson, 2004, p. 7; see also Forst, 2001). Bovens et al.'s definition of accountability sits well with a deliberative approach as they are both structured around a practice of justification. However, in the democratic reading, the challenge is how to institutionalise decision-making procedures that are sufficiently open and accessible to the *viewpoints* of affected parties so that those in government do not become too independent and insulated from input and scrutiny of the electorate. In representative systems, parliaments play an important role in establishing such a link between decision-makers and citizens in the public sphere[6] because they are founded on the logic of contestation and discussion among directly elected politicians who represent a plethora of citizens' viewpoints. Even if parliaments fail to perfectly reproduce the pluralism of viewpoints that exist in society, they nevertheless represent the best institutional approximation of how citizens can see themselves as authors of the law without directly participating in decision-making themselves. Hence, when assessing the democratic accountability potential of the IIAs, the normative benchmark of deliberative democracy requires that they improve the EP's possibilities to facilitate arenas where the EU's foreign policy can be critically scrutinised against the plurality of societal viewpoints. What kind of accountability relationships this would require in more concrete terms can be structured along three dimensions.

Firstly, it compels a democratically elected body outside the executive capable of scrutinizing and controlling its powers. Hence, a crucial feature of parliaments in their function as accountability forums is their ability to exercise oversight independently of the agent. This is difficult as there is an inbuilt information asymmetry pertaining to the fact that the executive is the "owner" of secret information, not only because it initiates policies, but also because it obtains information through intelligence services and/or diplomatic channels.[7] The basis for being able to exercise control, is what Lester (2015, p. 16) has identified as an issue of *autonomy*. This requires that the accountability mechanisms "have an independent and autonomous role from the overseen; that they have a separate statutory basis for their operations, and, thus, that their activities and decisions cannot be influenced by pressure from the overseen". Crucially, this entails the possibility that parliament can interrogate or pass judgement on the executive, i.e. that holding to account has consequences or some form of sanctioning power (cf. Bovens et al., 2010). For the EP, the question is whether it possesses some form of parliamentary censure or veto that it can impose on the executive (or threaten with), if it strongly disagrees with the activities executed. Or it can mean the possibility of judicial review, i.e. the opportunity to appeal to the Court of Justice of the European Union. Sanctions also encompass less formal consequences—such as naming and shaming through parliamentary questions that may have reputational costs (Bovens et al., 2010).

Secondly, the parliament draws its authority from the fact that it is popularly elected and thus composed according to a *representative selection of viewpoints* among the electorate. To respect and reproduce this representativity during the account-holding process is vital in order to maximise the likelihood that all relevant viewpoints are included. In addition, it minimises speculations about the forum's discussions being dominated by private and strategic considerations rather than being an arena where foreign policy is scrutinised and considered for its conduciveness to the public good (Chambers, 2004). To be able to pose meaningful questions, probe intelligently into the executive's activities and pass judgement on behalf of the citizens, parliamentarians must have access to relevant documents. However, in many other countries, not all members of parliament have access to confidential documents, and this is also the case in the EU. In cases where the accountability forum meets behind closed doors (Abazi, 2016), there is always the risk that discussions become biased or narrow (cf. Chambers, 2004). In these situations it is vital that the account-holding situation is still subject to a critical and balanced treatment from across the political spectrum of viewpoints represented in the EP plenary. Hence, for a subset of MEPs to legitimately claim to act on behalf of the EP as a whole, it will, at a minimum, have to somehow reflect the overall composition of the chamber.

Thirdly, that parliament or a subset of parliamentarians knows state secrets have little *democratic* value if that information is not somehow shared with the public. How else can parliamentarians claim to be speaking on behalf of Union citizens? Consequently, although some MEPs have privileged access to information, at some point, they must demonstrate to their voters how they have made use of that information to keep the executives in check. This would mean that the EP provides the public with information on the reasoning behind decisions (cf. Mansbridge, 2009). One could for instance imagine that the EP has a plenary debate about the CFSP where MEPs lay out the reasons for supporting/ not supporting the EU's activities. Based on these justifications, members of the public can then assess whether they think MEPs have done a satisfactory job keeping score on the executive. In the case of particularly important—or particularly contested—decisions, it may not suffice that MEPs receive information in secluded fora. In some

[6] Or between strong and weak publics as Nancy Fraser (1992) has termed it.

[7] The principle of originator control is a further disadvantage to the EP because third parties, including member states, can decide not to disclose documents they have provided to the EU (Curtin, 2013).

situations it may be necessary that the public is aware of the positions and arguments of the different parties involved in the decision-making process in order to be able to reach an informed opinion.

Nevertheless, exceptions to the standard of transparency can only be dealt with through special rules which narrowly delineate how and when secrecy is justified. As these rules allow for secrecy, it is crucial that they themselves have been vetted in a publicly accessible decision-making process prior to their application. In the words of Thompson (1999, p. 185): "Secrecy is justifiable only if it is actually justified in a process that itself is not secret". In the case of the IIAs, this means that the rules for secrecy have been discussed in parliamentary fora open to the public. Furthermore, rules and procedures of secrecy—such as classification rules—should be transparent (Curtin, 2013).

The three dimensions highlight inter-connected features of the accountability relationship (1) between government branches; (2) between subsets of MEPs and the EP as a whole; and finally (3) between the EP and Union citizens, which together put us in a position to discuss if the EP's role as a democratic account-holder in foreign policy have been strengthened through the IIAs.[8] In our analysis, we assess both the formal arrangements, i.e. the text of the IIAs, and the practice resulting from them. The data material consists of official documents (EP-reports, parliamentary debates, minutes from the Conference of Presidents in charge of the negotiations of the IIA, as well as Council working documents and drafts). In addition, 34 interviews with politicians and officials from the EP, the EEAS, the Commission, and the Council have been conducted.[9]

3. The Interinstitutional Agreements (IIAs)

Most IIAs are designed to facilitate cooperation between the EU institutions, but always within the boundaries of primary and secondary law (Eiselt & Slominski, 2006). Nevertheless, the substantive impact of such agreements can be significant, and they are often sought after by the EP in an attempt to carve out a greater role for itself. With the development of EU's security and defence policy at the end of the 1990s and as a result of the intention to exchange information with NATO, the EU was put under pressure to reform its security regulations (Reichard, 2006). The issue of how to protect sensitive EU documents created two fractions with the EP and member states who favoured a more open approach on one side, and "states with a strong security interest" on the other (Bjurulf & Elgström, 2004, p. 254). After two years of negotiation, the IIA on access to sensitive information in the field of security and defence policy was agreed (Rosén, 2015). It established an arrangement where a special committee of five MEPs gains access to sensitive documents, i.e. documents classified as Top Secret, Secret or Confidential. Documents can be requested by the AFET-chairman or the EP-president, and must be consulted in camera. The members of the committee must have security clearance and are not allowed to record or share information. While some attempts have been made to replace the 2002-IIA, the talks have been at a standstill for several years, and the agreement is therefore still in use.

While the Lisbon Treaty did not entail any significant changes for the EP's role in the area of CSFP, it had massive implications for the EP's role in deciding on EU international agreements (Ripoll Servent, 2014). The EP gained consent powers over "virtually any international agreement…of any significance" (Corbett, 2012, p. 249), and shall be fully informed at all stages of the negotiations (Article 218(10), TFEU). After the Treaty entered into force, however, the EP faced considerable opposition from the Council in implementing the new provisions. One of the main contested issues was the protection of classified information. Not until the EP had refused consent to two international agreements, with reference to the lack of information they had received, was a new IIA agreed in 2012. The agreement was not implemented until 2014, awaiting the process of making the EP's security rules equivalent to those of the Council (EP#12). The new IIA established an arrangement where information is made available to a broader range of MEPs, limited to members of the relevant committee as well as other specialised EP bodies. Compared to the 2002-IIA on security and defence, the new arrangement is held—at least by some—to be more open in that more MEPs gain access to information, instead of only a small, preselected group (EP#6, EP#11).

4. Assessment: Have the IIAs Strengthened the EP as a Democratic Accountability Forum?

4.1. Inter-Institutional Relationship between Government Branches

The first dimension concerns the relationship between government branches and addresses the extent to which the IIAs have strengthened the EP's autonomy and its ability to control and check executive power. The 2002-IIA applies to the area of security and defence policy where supranational institutions, including the EP, have few formal rights and where Council decision-making processes largely take place behind closed doors. Taking this as a starting point, it could be argued that the 2002-IIA provides insight into parts of the EU's security and

[8] It should be noted that the IIAs do not in themselves establish complete accountability arrangements because they mainly deal with transparency and do not involve a process of scrutiny as such. Hence, transparency should not be treated as coextensive with accountability (Bovens et al., 2010, p. 35), but rather as a necessary (even if not sufficient) prerequisite for holding an actor to account (cf. Hood, 2010).

[9] 16 interviewees were from the EP (5 MEPs and 11 staff), 5 Commission staff, 4 from the Council secretariat, 6 from national delegations and 3 from the EEAS. Interviews have been conducted between 2010–2017, in Brussels and over the telephone. All interviewees work with external relations, and several have been involved with, or have closely observed, the negotiations of the two IIAs and/or the ensuing practice of the agreements.

defence policy that would otherwise have remained secret to the EP. According to one interviewee, prior to the adoption of the 2002-IIA there was no other opportunity to engage with the Council on classified issues (EP#6). Others have described the agreement as "a substantial step forward compared to treaty provisions on informing the EP in terms of timing, scope and quality of information" (Mittag, 2006, p. 15).

This point notwithstanding, a key criticism against the 2002-IIA was that the Council might still decide to withhold documents from the EP (EP#4). According to article 2(2) of the IIA, the EP shall be informed about the content of any sensitive information "required for the exercise of the powers conferred on the European Parliament by the Treaty on European Union…taking into account the public interest". Documents are disclosed at the request of the EP, and in order to know which documents to ask for, a list that is also classified has to be consulted (EP#6, EP#12). This makes it difficult to get a complete overview of all the existing sensitive documents, and when one does not know of a document, one cannot ask for it (EP#11). The 2002-IIA also says nothing about how and who will judge which documents are necessary in cases of conflict. While there are no direct consequences if the Council decides not to respect the IIA, the Council has to pick its battles, and behind the Council's decision to grant access to sensitive documents was the ambition to preserve a good working relationship with the EP (NAT#1). Because the Council has not yet refused access to the EP, the arrangement has not been put to the test, but the fact that documents are in the Council's possession weakens the EP's autonomy (Reichard, 2006).

Another aspect concerns the extent to which the 2002-IIA has increased the EP's ability to interrogate or pass judgement on the Council. Preliminary the answer could be yes. The MEPs in the special committee receive regular oral briefings from the High Representative (HR), during which the MEPs can express their opinions on the Council's activities and positions. In fact, rather than accessing documents, the most frequent use of the special committee has been for meetings with the HR (EP#11). This practice was commenced under Javier Solana, and has continued under Catherine Ashton and Federica Mogherini. Here, MEPs have the opportunity to ask several rounds of questions, and the arrangement has been described as 'very interactive' as the HR engages in answering questions and justifying positions (EP#6). In other words, the special committee is not only informed, but the Council via the HR, also explains and justifies its activities. One could argue that since the special committee gains further insight into for instance details about EU's operations, it leaves them in a better position to evaluate and judge the Union's considerations and conduct, but there is still a lack of consequences should the EP be dissatisfied with the arrangement. The constraints on the EP's autonomy emanating from the 2002-IIA become even clearer when compared to the IIA from 2014.

The road to the 2014 agreement was a rocky one. Shortly after the entry into force of the Lisbon Treaty, the Commission and the EP agreed on a Framework Agreement where a whole annex dealt with access to information on international agreements, much according to the EP's preferences (Devuyst, 2014). To the EP, however, it was important to receive information from the Council, such as negotiation mandates, or agendas of Council working group meetings, to be able to stay informed about when and what the Council is debating (EP#12). While the Parliament insisted that the negotiations included all stages of the process—including the mandating period—the Council was adamant that the EP did not have a role to play before the agreement was signed (EP#9). During the negotiations on SWIFT, which was the first international agreement subject to the new rules, access to confidential documents was a key demand of the EP (Meissner, 2016). Only a few weeks before the EP refused its consent to SWIFT, the Council approached it with a draft for a new IIA on access to classified documents. The draft was based on the 2002-IIA, whereby a restricted number of MEPs could gain access to certain documents, on Council premises (Bornemann, Denzel, & Nadbath, 2014). With consent powers to back its claims up, however, the EP did not accept all the Council's attempts to constrain access and was prepared to use its new powers to push its will through if the Council did not concede to its demands. As a result, the new IIA contained a set of provisions closer to the EP's position. The EP was particularly pleased having obtained provisions for access to classified information by staff, that security clearance is not necessary for documents below the level of EU confidential, and that "access will be given as appropriate depending on the dossier, to rapporteurs, shadow rapporteurs or all committee members".[10] Thus, it is clear that the EP was able to set the premises to a much greater extent in the case of the 2014-IIA, compared to the 2002-IIA. In addition, the Lisbon Treaty strengthened the EP's ability to impose consequences, including in the area of CFSP.

The EP has also twice taken the Council to the CJEU in order to ensure it remains informed about negotiations of CFSP-agreements.[11] In both cases, the EP argued that the Council had concluded agreements on transfer of captured pirates—one with Mauritius and one with Tanzania—without informing the EP. On both cases, the Court ruled in favour of the EP, and annulled the agreements on the grounds that the EP's right to be informed

[10] Report on the conclusion of an interinstitutional agreement between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy, 18 July 2012.

[11] Prior to the 2014-IIA, MEP int'Veld took both the Commission and the Council to Court—under the Regulation 1049/2001 on *public* access to documents—for failure to disclose secret documents on the Anti-Counterfeiting Trade Agreement and the Terrorist Finance Tracking Programme respectively (Abazi, 2015).

had been violated.[12] In its ruling, the Court underlined that the Parliament's right to be informed according to Article 218(10) also applies to the CFSP, and that the rule is "an expression of the democratic principles on which the European Union is founded" (*Parliament v. Council*, 2011, para. 81). The EP and the Council appear to have been interpreting the treaty, these recent judgements, and the 2014-IIA differently. The Council is not prepared to transmit documents automatically (see Hillebrandt, 2017, in this issue), which leads to a problem similar to that of the 2002-IIA, where the EP has to know in advance which documents to request (EP#12, EP#13).[13]

Finally, being able to rely on the advise from staff is crucial to the autonomy of the MEPs. Elected representatives are rarely experts in particular fields, but politicians with general knowledge. They need supporting staff who can provide them with expert information to interpret and decipher highly technical information. Generally, the executive branch has direct access to a more comprehensive apparatus of in-house competence than parliaments. This is even more acute in the EU where the EP is reliant on information from other actors such as the Commission or NGOs, since its staff can be limited (EP#14, see also Dobbels & Neuhold, 2014). When information is classified, this asymmetry is further deepened as is confirmed by one of our interviewees: "when you are not knowledgeable and know the area you are completely lost" (EP#5). The 2002-IIA where access to sensitive information is exclusive to the five MEPs further illustrates this point. Although staff is now allowed into the meetings of the special committee, they are not allowed to access sensitive documents (EP#11). The EP has tried to alleviate this problem by selecting experienced MEPs to sit in the special committee. For example, former French general Phillippe Morillon was for several years a member of the 2002-IIA special committee, and "probably got access to more information than any other MEP would have" (EP#1). In comparison, the 2014-IIA is more accommodating as it allows access to parliament staff along with the committee MEPs, but only those who have been designated in advance as need-to-know, and are security cleared (Article 4(4)). MEPs who do not have such staff available, can get frustrated because they are not allowed to talk to their assistants after having read documents in the secure reading room. This makes their job harder both because the documents are technical and because it is difficult to know what is *not* included in the documents (EP#10, EP#16). The presence of staff, albeit restricted, heightens the likelihood that MEPs understand and know what they are looking at and thus makes them better equipped to do their job as account-holders.

However, one could argue that a potential dilemma remains: Even if some MEPs—be they few or more numerous—are allowed to access classified documents, this in itself is not enough to guarantee a democratic process. One also has to assess to what extent they reflect the overall composition of the EP as a whole.

4.2. Intra-Institutional Relationship between a Subset of MEPs and the EP as a Whole

Parliaments are special because their core purpose is to accommodate and voice a wide spectrum of views as authorised through periodic elections. Hence, based on the electoral outcome, their normative authority stems from how successful they are in approximating and institutionalising this representative set of viewpoints—not only when parliamentarians act as a collective in plenary sessions, but also when they convene in smaller groups and committees to conduct parliamentary tasks on behalf of the body as a whole. Hence, the composition of EP-committees and the conditions under which interaction between plenary and committee meetings are organised are crucial in order to maximise the likelihood that all relevant viewpoints are included in the committee discussions (Stie, 2013).

The arrangement in the 2002-IIA allows five MEPs access to sensitive documents through participation in the special committee. There is little open information—in the IIA itself or in the EP's rules of procedure—about how and according to which criteria the Conference of Presidents selects the members of the special committee.[14] Based on the interviews, it seems that the EP's method has shifted slightly. There has for instance been a heated debate about whether or not the chair of the Security and Defence Committee should have a permanent seat, as is the case for the AFET-chair. Furthermore, although the goal has been a composition according to party groups, there are indications of a more pragmatic approach. As mentioned above, experienced MEPs have been preferred in order to maximise the information flow to the EP within the rather narrow limits of the IIA. Even if it can be argued that the inclusion of experienced and knowledgeable MEPs can be an important asset to the special committee, knowledge and experience are always incomplete. It is thus vital to avoid that the selected MEPs' backgrounds are so similar that certain positions get more attention and backing than if they had been confronted with other viewpoints.

Against this background, it therefore seems unlikely that it is possible to reproduce the plurality of views in the EP as a whole during the meetings in the special committee. The problem is not necessarily that the special committee is closed during session. In many cases accountability can be saved by making the information from the meetings known ex post, but because secrecy is not temporary, the link between the open EP plenary and committee settings, and the closed sessions of the spe-

[12] C-658/11 and C-263/14.

[13] As part of the new IIA on better law-making, the EP, Council and Commission have committed themselves to negotiate improved practices for information-sharing in the context of the treaty as well as the recent Court-rulings (OJ 2016/L123/01).

[14] One of the authors did obtain the names of the MEPs on the special committee by filing a request for document. So the information is not secret, but hard to obtain.

cial committee, is effectively disconnected. This representativity problem is exacerbated by the *practice* that the 2002-IIA has given rise to, where the HR also gives regular oral briefings to the special committee.[15] If we merely apply an institutional power perspective, one could argue that despite restrictions, the development of this practice has clearly strengthened the Council's obligation to inform the EP about matters concerning security and defence. From a democratic perspective, however, the problem is that the debates between the five MEPs and the HR can be too narrow and fail to "reproduce the pluralism of the public in the private" (Chambers, 2004, p. 390). As the special committee is not composed of a representative selection of elected participants, neither the plenary nor citizens can be sure that all possible positions represented in Parliament as a whole have been voiced and taken into consideration. The risk is that debates are dominated by *private reasons* instead of *public reasons* which means that the arguments presented are not arguments that all could generally accept if they were presented in a publicly open debate (i.e. egoistic and self-interested reasons). In this sense, the arrangement violates the representative nature of the EP. Interviewees underline that the members of the special committee can share some of the information they receive during the oral briefings (EP#11). However, there are no clear guidelines in the 2002-IIA itself, as opposed to the 2014-IIA, where it is explicitly stated that classified information "provided orally…shall be subject to the equivalent level of protection" as written information (Article 6(5)). Furthermore, information up to the level of EU Confidential may be discussed in camera (Article 6(6)). Thus, on the one hand, the members of the special committee get access to much more information than is provided for according to the 2002-IIA. On the other hand, it is not clear just how far they are able to use that information beyond the meetings in that particular committee.

The number of MEPs who are granted access to classified documents under the 2014-IIA—particularly when it comes to documents below the category of Secret and Top Secret—are at least higher than in security and defence policy. Moreover, the latter agreement organises access to classified documents around the relevant permanent committee and/or other specialised bodies where the selection criteria are not only formally regulated and publicly available in the rules of procedure, but also composed according to the numerical strength of the political groups. This increases the likelihood that committee meetings are not merely dominated by particular views, but reflective of the plurality of views in the Parliament as a whole. In this sense, it can be argued that the 2014-IIA has a stronger internal democratic anchoring than the 2002-IIA. Having said this, it should be noted that 2014-IIA favours some committee MEPs over others, particularly rapporteurs and committee chairs. This inbuilt inequality, which is prevalent in most of EU-legislation, *may* skew discussions and let the positions of the rapporteurs and committee chairs dominate over other relevant viewpoints.

A recent study by van den Putte, de Ville and Orbie (2015, p. 55) shows that not all the members of the International Trade Committee (INTA) agree that they are actually receiving the information they are entitled to: "Liberal MEPs, who generally have a good relationship with DG Trade…argue that they are treated in the same way as the [Council's Trade Policy Committee], while more left-wing MEPs and the Greens believe that the disclosed information is rather vague and selective". Sensitive documents (for example, containing detailed Commission negotiating positions), are only distributed to a limited number of INTA members". The negotiations on the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US were a game changer, particularly with regards to transparency.[16] After heavy criticism of the way in which the EU conducted the negotiations with the US, the Commission launched its new transparency strategy in November 2014 where it suggested more extensive access to TTIP documents, a review of the classification of trade information, and to provide broad access to all MEPs (and where necessary staff members).[17] In the end, all MEPs could access documents pertaining to the TTIP negotiations.[18] Even if, according to Meissner (2016, p. 282), "the EP has never been so well informed as in the TTIP negotiations", there is a remaining problem pertaining to what MEPs who gain access can do with that information. Some have argued that the existing restrictions "prohibit governments and MEPs from initiating a detailed analysis of the agreement with their advisors and colleagues, as sharing information with third parties is strictly forbidden".[19] Thus, although the access to information under the 2014-IIA is advantageous compared to the 2002-IIA, the balance between parliamentary and public access is still a problem for processes of democratic accountability.

4.3. Relationship between Accountability Forum and Citizens—Parliamentary Versus Public Access

Democratic accountability hinges on the oversight body's ability to connect with and demonstrate to its principals,

[15] This de facto extension of the function of the special committee has also never been publicly debated.

[16] It should be noted, however, that although TTIP is expected to set a precedent for future negotiations, most interviewees underline the particularities of these talks, and so far, there are few concrete changes made to the practices and procedures of other trade negotiations. International agreements beyond trade is another matter, which is why the three main EU actors have started talks on a new IIA on access to documents concerning international agreements.

[17] Press release, Commission, 25 November 2014, retrieved from http://europa.eu/rapid/press-release_IP-14-2131_en.htm

[18] Press release, INTA, 2 December 2015, retrieved from http://www.europarl.europa.eu/news/en/press-room/20151202IPR05759/all-meps-to-have-access-to-all-confidential-ttip-documents

[19] MEP Heidi Hautala, 10 July 2014, retrieved from http://ttip2016.eu/blog/ttip%20ecj%20transparency.html

i.e. the citizens, how it has conducted its role as democratic scrutiniser of executive power. As noted above, democracy can accommodate some secrecy, the question is how the IIAs strike the balance between secrecy and transparency.

In the general legal framework on access to EU documents (Regulation 1049/2001), sensitive documents encompass information that protects "essential interests" or specific areas, "notably public security, defence and military matters". According to one interviewee, the term "notably" is like saying that "anything goes. It is very open-ended and it could be misused" (EP#4). Other interviewees argued that there is an acceptance within the Parliament that this restrictive model *can* be justified for *security and defence*, but not for other fields (EP#2). MEP Brok, who negotiated the 2002-IIA for the Parliament, argued at the time that it was crucial to guarantee the necessary secrecy of certain documents but that the rules also had to maintain the level of transparency that the public expects from parliament (EP-plenary, 5 September 2000). This illustrates the central dilemma in the discussion about how to balance openness and secrecy: "Democracy requires publicity, but some democratic policies…require secrecy" (Thompson, 1999, p. 182). Hence, all sensitive documents should not be accessible, as some information may seriously undermine the security of the EU and its member states, and even mean that lives are put at risk. Most national parliaments have particular provisions and procedures that protect sensitive information. Thus, restraints in themselves need not be undemocratic, but they have to be qualified.

This point has been meticulously demonstrated in the recent work of Deidre Curtin (2013, 2014). She argues that in the EU there is "virtually no substantive internal control to combat over-classification" (Curtin, 2013, p. 456). This is confirmed by some of our interviewees, who argue that over-classification is becoming a major problem (EP#4). If such a practice is widespread, for whatever reasons, it undermines the terms on which secrecy can be accepted in the first place. In institutionalising secrecy rather than openness as default procedure, the Council runs into a problem of how to justify in whose name or on whose behalf it can legitimate and maintain such a practice.[20] To automatically classify documents without qualifying why this is necessary and reasonable is incompatible with a democratic accountability perspective, because the reasons for secrecy are in themselves in need of scrutiny and justification (Chambers, 2004, p. 389).

The 2002-IIA was negotiated by a small team of MEPs and various presidencies, and when debated in plenary, the terms were already settled. After MEP Brok had presented his report, there was a short discussion where several MEPs expressed their hesitations about the agreement. MEP Martin said: "the way in which this has been negotiated is not exactly exemplary, and the fact is that, in the final analysis, we are faced with a take it or leave it situation". Curtin (2014, p. 692) has argued that "[t]he procedure involved in such negotiations means that secrecy is applied to the process itself even when there can be no issue of necessity to negotiate behind closed doors for reasons of security or otherwise". At the same time, the Conference of Presidents, which consists of the party groups chairs and the EP-president, mandated the negotiations, and its (edited) minutes are publicly available. The Conference of Presidents is also representative in the sense that it gives voice to all party groups in the chamber. Nevertheless, although discussions about the negotiations did not take place in total secrecy, Union citizens were far from exposed to a publicly accessible debate on if and when information can be kept secret. In other words, the democratic problem pertaining to these decision-making processes is that they violate the principle that (at some point) "the decision to keep a decision or policy secret should be made publicly" available (Thompson, 1999, p. 193).

However, one thing is the procedure for reaching agreement on justified secrecy, another challenge is to exercise these rules in concrete policy situations. A former member of the 2002-IIA special committee described its work as a "bad le Carré-novel" where they were given secret documents—following the strict procedures of leaving mobile phones outside, not taking notes—and then ended up receiving documents containing information that had already been made public in the press. This is not something unique to the EU, most parliaments have procedures for privileged access for selected MPs. But the democratic problem that arises is that (s)he is no longer at liberty to discuss the issues in question neither with fellow MEPs nor in public if and when (s)he receives the information in classified form. The 2014-IIA creates a similar tension. The balance between parliamentary and public access to documents and information is a dilemma that preoccupies several of our interviewees from the EP. Those who are more pragmatist argue that the EP's ability to scrutinise the Council's external activities has greatly increased. The counter-argument, from an idealist perspective, is that the Council retains the upper hand—at the expense of democracy. One interviewee emphasised that it is valuable to be able to check that information from other sources is correct, but that it can be difficult to discuss the same issues freely afterwards—fearing that one might leak secret information (EP#10).

At the end of the day, it is the EU citizens who will judge. The recent debate on TTIP provides a good illustration of what is at stake. While the transparency initiatives following the TTIP negotiations have made more information accessible to the public at large, criticism against the secluded character of the negotiations continue (see Coremans, 2017; Gheyle & De Ville, 2017; both in this issue). This may be a consequence of the different standards used to assess how much transparency is enough. It can, however, also be taken as a sign that

[20] For a counter argument, see Galloway (2014).

Union citizens do not trust and accept that the European elites conduct entire negotiation processes behind closed doors on trade deals that will greatly impact their daily lives. In other words, there may be situations where the nature of the cases (e.g. if they are particularly contested and/or if they directly affect people's lives) requires more transparency. In such situations one could argue that parliamentary oversight committees should be authorised to make an executive-independent decision to move scrutiny discussions from a secret and over to a publicly accessible setting. As we have seen, neither of the two IIAs provide the EP with such possibilities. Rather, in effectively putting a muzzle on them, it is doubtful whether the EP can represent a strong enough safeguard against unjustified executive secrecy and thus act reliably in its role as democratic accountability forum, even if it might want to.

5. Concluding Remarks

However one approaches questions of secrecy, transparency and democratic accountability, it is important to remember that the practice of withholding certain types of documents and information from the public at large, while conveying it to a selected group of parliamentarians, is a well-known practice in countries all over the world. As a result, it makes little sense to use the IIAs and the ensuing practices only to lambast the EU for its democratic deficit. Rather, the implication of this analysis is to point at a problem that runs through foreign policy and external relations on a global scale, to illustrate what the democratic dilemmas are, and why they arise and often also persist.

The main purpose of the two IIAs discussed in this article, is to enhance transparency in the EU's foreign policy by allowing the EP (varying degrees of) access to sensitive information while at the same time accommodating the need for secrecy. It can be argued that the IIAs have reinforced the EP's role in EU foreign affairs, by giving it access to information to which it was previously denied, but this increase in power does not automatically entail a strengthening of the EP as a democratic accountability forum. Both IIAs (even if there are differences between them) fail to maximise the likelihood that the plurality of views in the EP as a whole is reproduced in the meetings of the oversight committee. However, the main reason is that the citizens are largely deprived of possibilities to gauge how their elected representatives exercise their role as guardians of executive power. As a result, the EP risks being conceived more as a "runaway guardian" than as a democratically authorised representative assembly. Short of meeting the democratic standard, it could still be argued that the IIAs contribute to making EU foreign policy less prone to power abuse or badly informed decisions because a more diverse set of actors are familiar with what is going on and can raise questions and objections to avoid the pitfalls of group-think, bounded rationality etc. Thus, the net-worth of the IIAs is therefore that they have contributed to make EU foreign affairs secrets shallower (cf. Pozen, 2010) and in this sense less incompatible with democratic decision-making. At the same time, the analysis has demonstrated how and why there is a crucial normative difference between being able to advance the parliamentary power base in foreign policy, and becoming empowered to serve the citizens through a democratic accountability forum.

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Conflict of Interests

The authors declare no conflict of interests.

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Article

Transparency as a Platform for Institutional Politics: The Case of the Council of the European Union

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Abstract
The question of transparency is widely regarded as a thermometer of the relation between the Council of the EU and the public at large. Relatively little attention however has been devoted to the implications of transparency (i.e., access for the general public) for inter-institutional information politics, even when the limited evidence suggests that the connection is considerable. This article asks how EU actors use Council transparency as a platform and for what reason. It approaches transparency as a policy that is developed in three arenas: the internal, the external political, and the external judicial arena. The article finds strong evidence in support of the view that the Council's transparency policy played a central role in EU institutions' attempt to advance their information ambitions. By strongly engaging with the issue of transparency particularly the European Parliament and its members succeeded at expanding their institutional information basis in an area where their political grip was traditionally at its weakest: the Foreign Affairs Council. Acting in turn as a bargaining chip, a political lever, or an alternative to institutional information, the Foreign Affairs Council's transparency policy was thus clearly used to advance information agendas of oversight and legislative prerogatives.

Keywords
European Parliament; Foreign Affairs Council; parliamentary information; transparency

Issue
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1. Introduction

In 2012, an applicant filed a case before the General Court of the European Union to contest the Council's decision refusing access to parts of a document. The document was a Council opinion concerning the legal basis to be used for an agreement between the EU and the United States concerning the so-called Terrorist Finance Tracking Programme (SWIFT/TFTP) agreement, and the applicant, Sophie in 't Veld, a member of the European Parliament (MEP). Dissatisfied with the negotiation information received internally via the European Parliament (hereafter: Parliament), she decided to seek access to the document in question via the public route. When the General Court ruled in favour of most of In 't Veld's pleas, the Council appealed. An attendant at the public hearing of the appeal case describes the following exchange between the Council's legal counsel and a judge:

> [So] the Council said, like: 'It is very important that that piece stays secret, because it's very sensitive…'. Then one…judge asked: 'Yes, you say that secrecy is needed to…protect the negotiations…'—[and] then he clearly referred to ACTA [the Anti-Counterfeiting Trade Agreement]—'[But] hasn't it been shown that exactly a lack of transparency is a threat to those negotiations?' (respondent #1, interview April 17, 2014)

The Court of Justice subsequently upheld the initial judgment.

The above-described episode stands out for a number of reasons. Although the law on access to documents (Regulation 1049/2001) is intended for the broad public, it was used by an institutional actor. And while institutional arrangements are in place for MEPs to receive privileged information, In 't Veld still chose the public access route. Moreover, she apparently received wider

access as a citizen than the Council had initially been willing to grant her in her capacity as an MEP. Finally, both the applicant and the Court connected the issue of transparency (i.e., access for the general public) with the Parliament's need of information in order to exercise its right of assent (a matter of institutional politics). The question may well be asked what caused this seemingly unusual use of the transparency policy.

Up until now, transparency has been primarily regarded as a thermometer of the relation between the Council of the EU and the public at large (e.g. Curtin, 2013; Hillebrandt, Curtin, & Meijer, 2014; Maiani, Pasquier, & Villeneuve, 2011; Novak, 2013). Relatively limited attention has been devoted to the central role that instruments play for the creation of public access play in inter-institutional information politics. This is the case even when much evidence suggests that in practice transparency and inter-institutional information are connected in various ways (e.g. Bjurulf & Elgström, 2004; Reichard, 2013; Rosén, 2015). The fact that the Foreign Affairs Council (FAC) represents something of an outlier in the Council in terms of the stunted advance of transparency is partially explained by the traditional norm of limited transparency in the area of foreign policy (Curtin, 2013, p. 453; Hillebrandt, 2017; Puetter, 2014). Yet the Council's policy of limiting transparency in the area of foreign affairs makes it all the more puzzling that other institutions engage with it so extensively. The Parliament, which experienced its own information limitations in interactions with the Council, appears to have taken the lead in this regard (Curtin, 2013, p. 445).

Recent scholarship highlights the diverse range of informational arrangements that support inter-institutional coordination in the European Union (EU), and their shortcomings (see e.g. Abazi, 2016; Brandsma, 2013; Maurer, Kietz, & Völkel, 2005; Rosén, 2015). Some of this academic work makes reference to the transparency rules, yet it only does so in passing, maintaining the focus primarily on information required for parliamentary oversight. This article seeks to address this gap, offering a structured analysis of the manner in which transparency acts as a platform for institutional politics. In particular, it argues that the Council's transparency policy has offered other institutions, notably the Parliament, the means to exercise significantly more influence over the FAC than would otherwise have been possible. Transparency has been used in turn as a lever, a bargaining chip, or an alternative to institutional information in ways that structurally rebalanced the institutional information relation between the FAC and the Parliament, yet were largely unforeseen and unsolicited by the former. The article proceeds as follows. In the next section, the concept of Council transparency and its role in institutional information politics is theoretically developed. Section 3 offers an empirical account of the manner in which FAC transparency's three policy arenas enabled or constrained the use of transparency as a 'platform'. Section 4 analyses the observed interactions between transparency and institutional information politics in this account in light of the theoretical framework. Section 5 concludes.

2. Council Transparency: Public Affair…and Institutional Springboard

Transparency has been described as 'the ability to look clearly through the windows of an institution' (De Boer, 1998). In the EU context, reality is more complex: because of the many institutions, the public may find it easier to see through some of the EU's windows than others. A parallel dynamic occurs in the information relations between the EU's various institutions. Setting out from the institutionalist notion that 'information is power' (Hall & Taylor, 1996, p. 18), EU institutions are expected to develop information strategies in order to increase their influence on policy processes. Information struggles are likely to be most acute in the relations between institutions acting as accountability forums and those performing executive tasks (Abazi & Adriaensen, 2017, in this issue). Traditionally, the FAC makes up such an executive institution. As the Council's formation charged with foreign policy, it stands at the centre of strategic non-legislative decision making representing member states' common interests (Puetter, 2014). Its increasing engagement in the area of trade policy moreover has made the FAC's extensive reliance on secrecy a growing source of contestation (Leino, 2017). This ambiguous position of the FAC reflects in the first place on its transparency policy, but extends to the institutional environment within which it operates. While the transparency literature has explained the development of the policy public of access to Council documents with a considerable degree of detail (e.g. Bjurulf & Elgström, 2004; Hillebrandt et al., 2014), the role that this policy played in institutional politics, particularly that of the Parliament, has remained underexposed.

Following an institutionalist perspective, this article sets out from the assumption that developing FAC transparency is perceived as a potential opportunity by the EU's primary political accountability forum, the Parliament, while being perceived as a risk by those institutions forming part of the executive branch, namely the European Commission (hereafter: Commission) and the European External Action Service (EEAS). As a result, the policy not only serves the public but also affects institutional dynamics. The central question in this article is how institutions use their involvement in matters of Council, more precisely FAC transparency policy for purposes of advancing or protecting their own information position. To this end, it is important to first outline the manner in which Council transparency policy functions, and what potential opportunities it affords as a springboard for institutional ambitions.

EU transparency has emerged as a distinct policy with a range of instruments, with public access to documents at its centre (Hillebrandt et al., 2014). An overarching

legal framework makes each institution—including the Council and, by default, its formation of the FAC—[1] responsible for the disclosure of documents that it holds. Transparency as a policy is constituted by its rules and practices. Access to EU documents is governed by a central legislative act, Regulation 1049/2001, which is specified and complemented by a number of lower-level rules. The totality of rules stipulates under what conditions and in what form the public gets access to FAC decision-making information (e.g., where and how documents are to be requested, how disclosure decisions can be appealed, etc.). These rules are subsequently implemented in practice.

Like other policies, transparency is not only constitutive, but also reflexive. The dynamics of rule-making and implementation may lead the FAC to develop coping strategies to maintain control over its information flows. When such coping strategies solidify into routines, these become informal norms regarding transparency (Helmke & Levitsky, 2004). Where rules exist, sooner or later actors will contest their interpretation before a court. In the case of the FAC, 16 cases were brought between 1994 and March 2017.[2] Relative to other Council policy areas, this number is very high, making up around 50 per cent of *all* cases to which the Council was a party (Hillebrandt, 2017, pp. 215–216, 219–220). While the influence of adjudication must ultimately be deduced from the specific content of the cases, these numbers do provide a first indication of the centrality of rule interpretation in the FAC (Derlén & Lindholm, 2014).

The various components of FAC transparency policy are shaped in three contexts of structured interaction, which are here referred to as 'arenas'. Each of these arenas presents institutional actors with a distinct set of opportunities and constraints for the advancement of their information position. A closer understanding of the decision-making dynamics in FAC transparency is therefore required to uncover the opportunity structure of institutional actors at particular points in time, and identify the motives guiding their actions in these episodes. Depending on the dynamics of the arena, transparency policy may offer institutions seeking more institutional FAC information a lever, a bargaining chip, or an alternative to existing institutional information structures, while institutions seeking to limit such information sharing may use it as either a brake or an obstacle requiring circumvention. Finally, arenas may also offer no platform for institutional politics at all.

The first arena is that of contestation *internal* to the FAC. In this arena, member states with opposing views on transparency confront each other over the adoption and implementation of internal transparency rules (e.g. Galloway, 2014). Member states have the final say in political decisions, however the Council secretariat staff, particularly when more senior, are able to press their mark on the decision-making process (Christiansen & Vanhoonacker, 2008). The implementation of the transparency rules remains entirely within the hands of Council officials and the secretariat staff (Bauer, 2004), who may end up aligning transparency rules with their working routines through informal norms (Novak, 2013). In short, the management of the internal administration remains a firm FAC prerogative, leading to the expectation that internal actors will seek to reduce institutional encroachment by treating transparency policy as a brake or alternatively, by circumventing the rules to limit the access of outsiders, including other institutions. At the same time, the rules are capable of creating rights for outsiders, a fact that extends to individuals from other EU institutions, who are enabled by the rules to request access to documents like any other EU citizen (Rossi & Vinagre e Silva, 2017, p. 45). As such, the transparency rules could come to form an alternative to institutional information channels in a policy area like foreign affairs, where such channels are limited.

In the second arena, the (Foreign Affairs) Council operates as a unitary actor facing *external* political contestation. Such contestation may take different forms. In legislative decision making, the Council shares rule-making powers with the Parliament, with the Commission holding the right of initiative. The adoption of Regulation 1049/2001 can thus be said to reflect a compromise between Council and Parliament positions that was accepted by the Commission (Bjurulf & Elgström, 2004). Inter-institutional manoeuvring of the Parliament is also described in terms of its pursuit of extended powers (Buitenweg, 2016; Rosén & Stie, 2017, this issue). The Parliament's legislative positioning on transparency might then be viewed as a means of expanding access to Council information, a search for negotiating collateral regarding (wider) parliamentary oversight arrangements, or a way of exercising public pressure on the FAC (Crisp, 2014; Rosén, 2015), turning transparency into respectively an instrument of inter-institutional policy, a bargaining chip, or a lever. Not only the Parliament seeks to influence the FAC's transparency policy; the Commission and the EEAS may in their turn be concerned that information (non-)disclosure by the FAC undermines their exercise of executive functions (Reichard, 2013, p. 328).

The third, *judicial* arena covers a type of contestation that is qualitatively different from the first two arenas. Here, contestation is structured along juridical lines. This means that it casts the (Foreign Affairs) Council against a litigant in front of the Court of Justice, in a legal conflict over the interpretation of formal transparency rules that spills over from the first or second arena. At an early stage, the legal avenue of adjudication was found to be available to applicants in spite of the

[1] Particular characteristics of transparency policy are generalisable to other EU institutions. Inside of the Council, the FAC forms only one out of several policy formations. However, as the focus in this article lies on FAC transparency, hereafter reference is made exclusively to the FAC unless further specification is required.

[2] Namely, 14 actions against Council decisions to refuse access, and 2 actions contesting the legality of an adopted legal act. March 2017 marks the time of this article's submission.

fact that the Treaty on European Union (TEU) explicitly excluded jurisdiction for the Court of Justice in Common Foreign and Security Policy (CFSP) matters (TEU, article 24(1), second indent). Other EU institutions may intervene in transparency cases to advocate their own interpretations of the rules in case, or bring an action contesting the legality of an act. Member states have the same prerogatives, meaning that conflicts in the judicial arena can also emerge from purely 'internal' FAC conflict, and 'mixed coalitions' (Hillebrandt et al., 2014, p. 12). The Court has a pertinent role in shaping the interpretation of the rules governing access to FAC documents given the large number of cases brought for adjudication,[3] its structuring capacity, and the finality of its rulings (Rossi & Vinagre e Silva, 2017). Needless to say, court judgments can lead to interpretations of the transparency rules that either enhance or limit other institutions' information position.

The three arenas provide an analytically rigorous overview of the manner in which change in the FAC's transparency policy enables or constrains institutional information politics (Table 1). In reality, policy dynamics are of course far less orderly and structured. Conflicts between institutions may be played out at various times in different arenas, or even in multiple arenas at the same time. Therefore, though analytically distinct, developments in each arena cannot be seen separately from the others. For example, when the FAC adopts internal rules, it must stay within the parameters of inter-institutionally agreed legislation, while its implementation of the rules may provoke court action. Similarly, contestation by external actors or court adjudication may cause the FAC to revise its internal rules or develop additional informal coping norms. As a consequence, FAC transparency and institutional information politics are closely interlinked. The following section traces the manner in which the three arenas of FAC transparency policy enabled or constrained other institutions' ambitions regarding their information position.[4]

3. FAC Transparency Policy: Development in the Three Arenas

A (Foreign Affairs) Council transparency policy[5] began to develop from 1993. It was shaped in different arenas of policy making, shaping transparency both constitutively and reflexively. This section offers an analytical description of the manner in which institutional actors were able to advance their information ambitions through their involvement in FAC transparency.

3.1. The Internal Arena: From Rupture to Closure

The attitude of the FAC towards transparency has traditionally been marked by 'exceptionalism' (respondent #13, interview September 12, 2014). From the beginning and throughout, the Council's transparency rules have included the protection of 'international relations' as a mandatory exception (Council, 1993, article 4(1), first indent; subsequently, European Parliament and Council, 2001, article 4(1), third indent). In practice, the FAC relies on this exception very frequently, resulting in an access refusal rate that far exceeds the Council average (Hillebrandt, 2017). The internal rules and their implementation soon cast member states against each other. Four member states (Denmark, Finland, the Netherlands and Sweden) frequently opposed what they considered to be a too narrow application of the transparency rules (Hillebrandt et al., 2014).

In 2000, the Council's new Secretary-General and High Representative for the CFSP Solana oversaw a major reform of the transparency rules. It was underpinned by an emerging awareness of the need for a strong security of information policy of which Solana was a strong proponent (respondent #17, interview November 11, 2014). As space precludes a detailed discussion of all changes, only the most important are mentioned here.[6] Importantly, the reformed rules placed CFSP and Common Security and Defence Policy (CSDP) documents outside of

Table 1. FAC transparency policy as a platform for institutional information politics.

Arena	*Policy component*	
	Constitutive (rules, practices)	*Reflexive (informal norms, court interpretation)*
Internal	Alternative (+), brake (−)	Circumvention (−)
External political	Alternative (+), bargaining chip (+), lever (+), brake (−)	No effect
External judicial	No effect	Alternative (+), brake (−)

[3] Over the years, a total of more than 200 transparency disputes were adjudicated by the Court of Justice, see Rossi and Vinagre e Silva (2017, p. 1).
[4] The empirical analysis is based on 20 expert interviews, a review of policy documents, EU rules and EU court judgments as well as quantitative datasets of administrative appeals in access to document requests (N = 348) and documents placed on the online register compiled by the author. Details concerning the interviews are provided at the end of the article.
[5] See footnote 1.
[6] See however Reichard (2013).

the scope of the transparency rules (Council Secretary-General, 2000),[7] and introduced the so-called 'orcon' principle, according to which classified documents supplied by third parties could not be disclosed without the originator's consent (Council Secretary-General, 2000, articles 2(1)(a), 3(1) and 4). Solana was supported in his efforts by the incumbent French Council presidency. Sweden, which held the next presidency, oversaw the reversal of the outright exclusion of CFSP/CSDP documents, but retained the 'orcon' principle in new internal security rules of 2001 (Council, 2001a).

After the adoption of Regulation 1049/01 (see next section), the rule framework around foreign policy 'exceptionalism' became further entrenched (respondents #15, interview September 12, 2014, and #17, interview November 11, 2014; Galloway, 2014), while internal political contestation declined. The Swedish rules of 2001 reversing the 'Solana Decision' were adopted with the requirement of only a simple majority of Council members, suggesting the emergence of a new political balance (United Kingdom Government, 2000a). The rules have thereafter remained in place with only minor (unrelated) adjustments (Council, 2011, 2013). The Decision of 2001 further foresaw in the establishment of a security committee and security office, both of which were in place by the end of the year (Council, 2001b, annex, part II, section 1). The progressive expansion of the security regime occurred largely outside of the member states' involvement, being instead overseen by top officials from Solana's cabinet (respondent #17, interview November 11, 2014).

Once by 2001 the 'exceptionalist consensus' in the FAC had been secured in the transparency rules, the incidence of member state dissent in access refusals plummeted. The (internal) depoliticisation of the transparency question went accompanied by a 'transparency ceiling'. As the numbers of FAC documents placed on the public register increased over time, the share of these that were *directly accessible* actually declined by over 10 percentage points between 2002 and 2014. A likely even larger number of documents is today not cited on the register, making it practically impossible for outsiders to know of their existence (Council, 2008, p. 1; Hillebrandt, 2017; respondents #10, interview September 10, 2014, and #18, interview December 9, 2014). The circulation of unnumbered and unregistered documents appears to be particularly prevalent in the area of trade policy (respondent #12, interview September 11, 2014).

3.2. The External Arena: Ever-Louder Knocking on the Door

In terms of institutional interference in the FAC's transparency policy, the Parliament largely set the tone. The Parliament's institutional information rights as laid down in the Treaties were initially rather limited (Reichard, 2013, p. 327), a situation that it was keen to change (Maurer et al., 2005; EP plenary, September 5, 2000, as cited in Rosén, 2015, pp. 389, 391). On several occasions, individual MEPs relied on public access to documents rules to bring attention to the FAC's secrecy or to provoke adjudication. In doing so, they were aided by their institutional platform. For example, MEP Hautala was only able to request access to a CFSP document because she had first learned about its existence from the Council's answers to her parliamentary question. The document in question had been discussed in an informal body and distributed via the closed-circuit diplomatic Coreu network (European Parliament, 1997, p. 48; respondent #18, interview December 9, 2014).

At the end of 2000 and beginning of 2001, the Parliament coupled its influence in the negotiations on the access to documents law foreseen by Article 255 of the Treaty Establishing the European Community (TEC) (Amsterdam version) to the parliamentary access question (Rosén, 2015, p. 389). It considered ongoing negotiations on an inter-institutional agreement (IIA) regarding parliamentary access to sensitive documents to progress insufficiently. Faced with a closed-rank Council majority, the Parliament's protest against the 'Solana Decision' remained ineffective (respondent #17, interview November 11, 2014; also Reichard, 2013, p. 331; United Kingdom Government, 2000b). Sustained pressure, however, eventually began to work (see next section). While the 'Solana Decision' was initially deemed to form the basis of the new Regulation on public access, only months later this position was revised (United Kingdom Government, 2000a, 2000b).

The Parliament's involvement as a co-legislator clearly strengthened its negotiating position, as it forced the Council to accept a 'grand bargain' that included, next to a compromise on Regulation 1049/01 regarding public access to documents, the prospect of parliamentary access to classified information in the short term (Bjurulf & Elgström, 2004; Reichard, 2013, p. 340; respondents #5, interview June 24, 2014, #8, interview September 4, 2014, and #18, interview December 9, 2014). The conclusion of an IIA on access to classified CSDP information eventually led the Parliament to tone down its advocacy of greater transparency, as its previous misgivings were now largely addressed (European Parliament and Council, 2002; Rosén, 2015, pp. 392–394; respondents #6, interview July 11, 2014, #11, interview September 11, 2014, and #13, interview September 12, 2014). A string of parliamentary access to CFSP information agreements subsequently ensued (European Parliament, 2010; European Parliament and Council, 2006; and most recently European Parliament and Council, 2014).

In recent years, the basic paradigm of 'exceptionalism' became again challenged where the Council initiates negotiations for international agreements. This is not in the last place due to the Parliament's growing Treaty

[7] Earlier rules on classified information laid down in Council Decision 24/95 kept classified documents within the scope of access to documents. See Council (1995), article 2.

powers in this area (respondents #6, interview July 11, 2014, #11, interview September 11, 2014, and #13, interview September 12, 2014). A new provision under the Treaty on the Functioning of the European Union (TFEU) article 218(6) now grants it the right of either consent or consultation in all international agreements except for those falling exclusively within the CFSP. Furthermore, in all international agreements, whether non-CFSP or CFSP, a revised provision entails that the Parliament 'shall be immediately and fully information *at all stages of the procedure*' (TFEU article 218(10), addition relative to the original Amsterdam TEC article 300(2) italicised). It soon transpired that the Parliament did not hesitate to vote down agreements when it was dissatisfied with either the negotiating outcome or process (respondents #11, interview September 11, 2014, #13, interview September 12, 2014).[8] This change in the institutional balance (along with widespread public protest) also proved capable of moving the Commission's generally reluctant position on transparency on at least one important occasion. In June 2013, the FAC debated the possibility of publishing the Transatlantic Trade and Investment Partnership (TTIP) negotiating mandate (a Council document). Eventually it maintained the document's classification level at 'restreint' (respondents #3, interview June 3, 2014, and #17, interview November 11, 2014). However, after a group of over 250 NGOs in May 2014 submitted a petition calling on the EU to increase transparency of the TTIP process, the Commission joined the chorus of critics (Abazi & Adriaensen, 2017, in this issue). In October 2014 the Council gave in and disclosed the document (Crisp, 2014; Quintanilla, 2014).

Other executive bodies have aligned with the FAC's 'exceptionalist consensus'. For example High Representative (HR) Ashton, who in December 2009 was appointed as an independent actor at the head of the EEAS, prioritised the protection of member state and third party intelligence, although with certain institutional innovations (respondents #4, interview June 4, 2014, and #17, interview November 11, 2014). For senior CFSP meetings in the Council, a routine was developed by which the Council Secretariat submitted a very summary draft agenda, while the EEAS in parallel submitted an annotated agenda directly to the member states, preventing outsiders from having references to the document's underlying agenda items (respondent #12, interview, September 11, 2014). The EEAS has also championed regular informal contact with individual member states to limit information flows (respondents #10 interview September 10, 2014, #12, interview September 11, 2014). Ashton largely followed the line of her predecessor in this regard. For example, Solana personally committed to a revision of the transparency rules towards NATO before the FAC had taken a decision on the matter (Reichard, 2005, p. 333). The introduction of the 'orcon' principle paved the way for an eventual EU-NATO intelligence agreement (EUR-Lex, 2003). In the years thereafter, the Council adopted similar agreements with over 20 other third parties, including Ukraine, Turkey, and the UN (Council Secretariat, 2007; Galloway, 2014, p. 678). The resultant rise of orcon-protected documents has vastly increased the power of these parties over FAC transparency.[9] In spite of constitutional guarantees protecting the principle of transparency (EUR-Lex, 2011, Article 4(2)), powerful intelligence partners such as the United States exercise a *de facto* veto over disclosures concerning documents to which it was a party (respondent #1, interview April 17, 2014; also respondent #6, interview July 11, 2014).

3.3. The Judicial Arena: Many Public Interests

In a relatively high number of cases, disputes over FAC transparency, not in the last place concerning political differences, ended up in the judicial arena. This is to an important part due to the strongly legal orientation of EU transparency, which affords wide opportunities for external parties to litigate (Rossi & Vinagre e Silva, 2017).

The judicial arena stands out as the arena in which the FAC has the weakest position. In contrast to the other arenas where it enjoys respectively policy autonomy or blocking power, in the judicial arena, the Court of Justice has the final word. This observation is not as self-evident as it may seem. The Council initially took the position that the jurisdictional exclusion of the Court in CFSP matters also applied to the question of access to documents in this area (TEU, Maastricht version, article L; later TEU, Amsterdam version, article 46). When MEP Hautala in 1998 brought a case before the Court of First Instance (CFI)[10] to seek annulment of the Council's access refusal (see previous section), the question of jurisdiction became a point of law for the Court itself to answer (*Hautala v. Council*, 1999, upheld upon appeal in *Council v. Hautala*, 2001). As many as six out of fifteen member states intervened,[11] revealing a deep rift on this matter within the FAC itself (Swedish Government, 1998). The Court affirmed its jurisdiction and struck down the Council refusal decision on grounds of proportionality. At the same time, it established that it should not go beyond a limited review that largely agreed with the Council's 'exceptionalist consensus' (*Hautala v. Council*, 1999, para. 72; also Heliskoski & Leino, 2006, pp. 761–765). Consequently, after the Hautala case no member state considered it necessary to intervene in an FAC-related transparency case.

The Court's ruling in the Hautala case set the tone for a string of remarkably restrained judgments on FAC transparency. In *Kuijer I v. Council* (2000), concerning

[8] As was the case, inter alia, in 2010 with the SWIFT/TFTP and in 2012 with the ACTA.

[9] A rough estimate on the basis of Bunyan (2014, pp. 3–4) suggests that the proportion of third-state documents classified restreint might be as high as 80 per cent or more.

[10] The CFI was later renamed General Court by the Lisbon Treaty.

[11] Namely France and Spain in support of the Council and Denmark, Finland, Sweden and the United Kingdom in support of Hautala.

a CFSP report on asylum policy, *WWF EPP v. Council* (2007), concerning documents about WTO negotiations, and *Besselink v. Council* (2013), related to a draft mandate for negotiations on EU accession to the European Convention for the Protection of Human Rights, the Court systematically reaffirmed its 'hands-off' approach towards the Council's application of mandatory exception grounds of the access regulation resulting in a limited, strictly procedural review as established in *Hautala*. Particularly relevant is the Sison case (*Sison v. Council*, 2005, and appeal, *Sison v. Council*, 2007; see also Abazi & Hillebrandt, 2015, p. 835; Heliskoski & Leino, 2006, p. 753), in which the Court arguably went beyond the CFSP's original 'exceptionalist consensus' in protecting FAC confidentiality, by finding that the Council was justified in providing only a very brief explanation of this refusal (*Sison v. Council*, 2007, para. 82). This raised questions about the Court's permissive attitude towards the Council's seemingly arbitrary application of the international relations exception (Heliskoski & Leino, 2006, p. 756).

Although the Court played a modest role in demarcating the interpretative room for the Council's transparency rules, external actors within the EU institutional system saw chances to use litigation as a pressure instrument. The negotiations around Regulation 1049/01 and the IIA on parliamentary access to CSDP documents cannot be fully understood without this pressure. Soon after the adoption of the 'Solana Decision' in 2000, both member states and the Parliament began proceedings against this Decision (respectively *Netherlands v. Council*, case dropped, with interventions by Finland and Sweden, and *European Parliament v. Council*, case dropped). Both cases were clearly instigated with the primary objective of creating leverage over the Council in subsequent negotiations. This is evidenced by internal doubts about the cases' viability, and the fact that the cases were withdrawn once the desired result was in sight (respondent #6; Rosén, 2015, p. 391). In the case of the Parliament, the focus was foremost on its institutional access and only indirectly on the transparency policy as such. This explains why it initiated new proceedings over the transparency rules *after* Regulation 1049/01 was adopted, only to drop the case after an IIA was concluded (European Parliament, 2001, point 6; Rosén, 2015, p. 393).

In recent years, the Court has proven to be more receptive to parliamentary pressure on the FAC. This is epitomised by the In 't Veld case law which gave way to a rather transparency-friendly doctrinal development (*In 't Veld v. Council*, 2012, and appeal, *Council v. In 't Veld*, 2014, described in section 1 above). The Court's review of the Council's refusal to grant access in this case revealed a more transparency-friendly attitude than in earlier foreign policy-related cases against the Council. This change in position is likely to have been influenced by the Court's growing support for strengthening the Parliament's right of institutional access, as evidenced in a judgment related to another CFSP-related international agreement handed down shortly before.[12] The Court still followed the review criteria set out in *Hautala*, but interpreted them more strictly than it had done up until then, insisting that the harm which would be caused by disclosure must be 'reasonably foreseeable and not purely hypothetical', and that to this end, such foreseeable harm must be set out in a sufficiently concrete manner. This new interpretation strengthened Court review of the international relations exception in all but name (Abazi & Hillebrandt, 2015, p. 839). Departing from its lenient position in *Sison* (2007), the Court insisted that in spite of the Council's wide discretion to determine harm to the protected interest, it 'remained obliged' to explain the risk of harm in sufficient detail (Abazi & Hillebrandt, 2015, p. 837).

4. Institutional Information: (How) Does Transparency Make a Difference?

The empirical account of the other EU institutions' relation to the FAC's three policy arenas reveals that transparency forms an important platform upon which institutional information politics is played out. Particularly the Parliament actively engaged in the FAC's transparency policy in response to new executive structures, while the policy offered the Court a growing role as arbiter of institutional interactions. Against this stood increasingly unsuccessful attempts by the Council, the EEAS and the Commission to resist the expansion of information sharing both with the Parliament and with the public at large. Through its engagement with the FAC's transparency policy, the Parliament thus managed to expand its information base. Expanded institutional information however did not necessarily promote further transparency: both the 'orcon' principle and IIAs conspired against public access, in favour of closed-door parliamentary access.

4.1. New Executive Structures and a Growing Role for the Parliament

Transparency policy in the FAC has been to a large extent structured by the post-Maastricht policy terrain of the CFSP, and it was in this context that the Parliament eventually began to use transparency policy as a platform for expanding its information base. In doing so, it was confronted with the Council's CFSP institutional architecture which was designed to 'brake' the influence of transparency in this area. As the FAC turned into an intelligence actor, third parties (e.g. NATO, the United States) became stakeholders in the discussion in their capacity of intelligence-sharer. The FAC had an interest in offering strong guarantees of non-disclosure where these parties' or member states' intelligence was concerned, and consequently leaned strongly towards secrecy in this matter, to the point where this acute awareness turned into transparency circumvention. The other executive actors

[12] The case *European Parliament v. Council* ('*Mauritius*'), was delivered on June 24, 2014, 9 days before *Council v. In 't Veld* (2014).

(EEAS, Commission) followed this line. In this regard, the change, in 2009, of the HR from a Council insider to an outsider was far from a hard transition.

Nevertheless, initially the FAC was internally divided about the consequences of the 'exceptionalist consensus' for transparency, which was most acutely visible in the 'policy battle' over the reform of the classification rules in 2000. By connecting the issue of transparency with that of parliamentary oversight, the Parliament managed to use this conflict to its institutional benefit, stepping up its demand for greater information and oversight rights in the CFSP when this area began to expand in the early 2000s. In doing so, it used its opposition against the classification rules and elements from the transparency act for political leverage and bargaining chips. Interestingly, the Parliament did not hesitate to initiate court cases primarily to create further leverage. Meanwhile individual MEPs resorted to the public access rules as an alternative to the underdeveloped institutional channels.

The Parliament's involvement in FAC transparency policy must thus be viewed as part of a wider struggle for the expansion of its information base, in support of its rights of oversight in the areas of CFSP and international agreements negotiations. This reading is confirmed by several actions. For example, the Parliament linked its colegislative role in the Regulation 1049/01 negotiation to the issue of special information rights in the area of the CSDP as a package deal, thereby creating synergies that the Council majority preferred to avoid. It eventually secured an IIA granting privileged access in 2002, which was expanded in subsequent agreements with the Council.

Several years later, as the Parliament's role in the field of international negotiations was strengthened by the Lisbon Treaty, it again sought a revision of the 'exceptionalist consensus'. The Parliament's willingness to play institutional 'high game' was underlined by its decision to vote down two international agreements and by In 't Veld's transparency litigation in relation to one of these. This strategy, carried by the public controversy of the proposed agreements and extended into the judicial arena (see next section) now created political leverage over the Commission, which led the international negotiations on behalf of the EU. Aware of the increasing shadow cast by the Parliament as a channel of public discontent and the risk emanating from perceived secrecy, the Commission shifted its position on transparency in the TTIP negotiations, stepping up its own disclosure and calling upon the FAC to do the same (Coremans, 2017, in this issue). Thus, the Parliament successfully fomented its role in institutional politics by coupling the issues of transparency and institutional information politics.

While the Parliament's involvement in FAC transparency strengthened its hand in terms of its access to FAC information, this did not necessarily lead to an improvement in terms of transparency. After a settlement was reached in 2002 that brought classified documents formally under the access rules and created parliamentary rights of access to classified CFSP information, the Parliament removed its pressure, suggesting that expanded (privileged) information had been the Parliament's main concern from the start. In the years thereafter, no noticeable improvement could be observed in the disclosure of FAC documents or the registration of 'orcon' or otherwise classified documents, in spite of both practices being the norm under the transparency rules (Hillebrandt, 2017, pp. 193, 229–230). The Parliament's newly gained access thus formed a compromise solution that had minimal impact on FAC transparency policy itself.

4.2. The Court of Justice as Arbiter of Institutional Interactions

The role of the Court in institutional politics is more complex to gauge. As it is unable to determine either the timing, the volume or the nature of disputes, its role remains largely passive. This passive role was most extremely apparent where actors used the judicial arena in order to create leverage in their negotiations with the Council, even without the Court's interference. This occurred in actions brought by the Netherlands (supported by Finland and Sweden) in 2000 and the Parliament in 2000 and 2001. These actions were initiated for strategic reasons, likely without the intention of being seen through (and subsequently withdrawn), instrumentalising the judicial arena of FAC transparency policy beyond what was theoretically expected.

In the majority of cases however litigation led to a judgment, giving the Court the opportunity to intervene as a 'gatekeeper' of the interpretation of the transparency rules pertaining to the FAC.[13] As an alternative to institutional information channels, transparency court actions were highly successful. Both litigating MEPs were given wider access through the courts' interventions (though with a delay of years), a considerably higher rate than that of 'ordinary' applicants.[14] Against this stood the Council's efforts at 'braking' these outsiders' access, which were increasingly unsuccessful.

Although the judicial arena thus accorded external actors relatively good chances for challenging FAC secrecy, this does not in itself indicate the Court's influence as an institution.[15] Indeed, it generally followed a rather restrictive procedural interpretation of its role, on the ground that the Council acting as an executive body should be allowed wide discretion. The Court did however exercise a significant influence on the interpretation of the FAC's transparency rules in two important areas.

[13] The Court's interventions were similar to transparency cases in other Council formations in this respect.

[14] A total of 5 out of 9 litigants were given wider access through the courts' interventions (though often with a delay of years). This represented two-thirds of all FAC transparency cases, a proportion that increases to over three-quarters when only final rulings in appeal cases are counted.

[15] This stands in contrast to the Court's influence more generally, where the Court has considerably shaped the interpretation of Regulation 1049/01, cf. Rossi and Vinagre e Silva (2017).

First, it opened the door to the reliance on transparency as an alternative channel for institutional access, by both declaring the transparency rules applicable to the CFSP, and itself competent to adjudicate on potential legal disputes in this policy area. This was an interpretation of the rules that severely undermined attempts by the Council to put a brake on any spill-over effects. Second, in *In 't Veld*, it interpreted the criteria applying to mandatory exception grounds to be stricter than had hitherto been the case, thereby setting the bar higher for future access applications. In doing so, the Court incidentally supported the Parliament's judicial pressure on the FAC to offer wider parliamentary information in international negotiation processes (as expressed in the *Mauritius* case).

The Court's involvement may be seen as contributing simultaneously to the advancement of transparency and of parliamentary oversight, particularly as regards international agreements. By restricting the Council's ability to withhold information from the public, both the public debate and the parliamentary control required for a functioning democracy are enhanced. At the same time, it remains to be seen how the Court's rulings in this regard will play out. For the moment, it appears that particularly the Parliament has strengthened its (privileged) information position under article 218(10) by demonstrating its leverage as a blocking power.

5. Conclusion

The FAC has since long practiced a policy of transparency, which is generally regarded as a means to improve its relation with the general public. Less attention has been devoted to the policy's role in institutional politics. This article has sought to address this gap, by highlighting the ways in which institutional actors have engaged with FAC transparency in order to advance their ambitions regarding institutional information. It finds ample evidence in support of the view that institutional information politics was repeatedly played out in the FAC's transparency policy. A particularly large role in this regard is reserved for the Parliament, the Court, and strategic partners in intelligence exchange.

The role of FAC transparency as a platform of institutional politics is notable at various levels cross-cutting the three arenas. Whereas the Council initially sought to restrict outsiders' access to its foreign policy-related information through internal rules, the Parliament's co-legislative role concerning transparency made this braking strategy increasingly unsuccessful. Not only did the Parliament use the legislative process as a lever to establish minimal transparency standards for the FAC; it also used its legislative role as a bargaining chip to ensure its first rule-based access to CSDP documents within a reasonable timeframe. In terms of rule interpretation, the Court ensured the possibility of judicially enforceable FAC transparency, by finding itself competent to rule on access to CFSP documents cases and, in *In 't Veld*, interpreted the Council's duty of justification of an access refusal in a way that *de facto* increased the overall threshold for withholding information regarding international negotiations. In 't Veld MEP's decision to bring a case was directly related to the Parliament's effort to ensure better information and influence over the FAC's formulation of international negotiations policy. Yet the Parliament also did not hesitate to begin judicial proceedings merely as a way of creating leverage in ongoing negotiations.

The institutions' influence on transparency implementation is less apparent. On the whole, the FAC retained firm control over the internal process of document disclosure. While the transparency regime indeed offered MEPs an alternative route to the information that they were seeking, there is scarce evidence that the FAC sought to de-escalate individual information requests in order to avoid a court ruling on transparency. At the same time, EU institutions were generally either unable or unwilling to overturn the informal norm of shielding third-party intelligence from the transparency rules, thereby attempting to circumvent the pressures of institutional politics. On this matter, the HR, the EEAS and the Commission supported the FAC in prioritising the wishes of third parties and member state over the transparency rules, although the TTIP mandate episode reveals that support for the latter was, at least discursively, limited.

From a constitutional perspective, the findings in this article offer a mixed picture. The FAC generally interacted with the public and EU institutions on the basis of a self-identity as an executive actor engaged in the creation of both European policy and the coordination of national policies. This perception, particularly dominant in CFSP decision making, led to the reliance on a 'exceptionalist consensus': where the executive develops a foreign policy in the interest of the community, both the public and the Parliament must allow it wide discretion to operate in secrecy. Here, the Parliament used transparency policy as a platform to contest this view and to enhance its information position. As the FAC became increasingly engaged in concluding international agreements, particular in the (quasi-legislative) area of trade policy, the 'exceptionalist consensus' became more frequently challenged. There, the Parliament's insistence on more elaborate oversight and the Court's support for this position clearly relied on the FAC´s transparency policy both as an alternative to institutional information and a political means of generating visibility. The Parliament's increased involvement led to two parallel 'substitution processes': the introduction of (closed-door) parliamentary information as a substitute for transparency on the one hand, and that of information giving as a substitute for accountability on the other. Both developments are constitutionally problematic, as (closed-door) parliamentary oversight cannot replace the constitutional principles of transparency and accountability.

The findings presented in this article come with a disclaimer. While strong evidence is found of a central role for the FAC's transparency policy as a platform through which institutional information relations

are shaped, it is not fully clear to what extent the policy forms either a necessary or a sufficient condition for the developments described. Further research is therefore needed to clarify the FAC transparency policy's interaction with other factors in the wider constellation of institutional dynamics.

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Conflict of Interests

The author declares no conflict of interests.

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Annex

Interviews

Interview number	*Role interviewee*	*Date interview*
1.	Member of the European Parliament	17 April 2014
2.	Member, Brussels-based NGO	14 May 2014
3.	Staff member, Council Secretariat	3 June 2014
4.	Academic, specialist CFSP	4 June 2014
5.	Former senior member state representative, Brussels delegation	24 June 2014
6.	Staff member, national ministry of foreign affairs	11 July 2014
7.	Former member state representative, Brussels delegation	8 September 2014
8.	Former member state representative, Brussels delegation	4 September 2014
9.	Member state representative, Brussels delegation	10 September 2014
10.	Staff member, EEAS	10 September 2014
11.	Senior staff member, European Parliament Secretariat	11 September 2014
12.	Staff member, Council Secretariat	11 September 2014
13.	Senior staff member, Council Secretariat	12 September 2014
14.	Member state representative, Brussels delegation	12 September 2014
15.	Staff member, Council Secretariat	12 September 2014
16.	Senior staff member, Council Secretariat	12 September 2014
17.	Former staff member, HR's cabinet	11 November 2014
18.	Member of the European Parliament	9 December 2014
19.	Staff member, Council Secretariat	12 September 2014
20.	Member state representative, Brussels delegation	11 November 2014

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Article

Allies in Transparency? Parliamentary, Judicial and Administrative Interplays in the EU's International Negotiations

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Abstract
International negotiations are an essential part of the European Union's (EU) external affairs. A key aspect to negotiations is access to and sharing of information among the EU institutions involved as well as to the general public. Oversight of negotiations requires insight into the topics of negotiation, the positions taken and the strategies employed. Concurrently, however, some space for confidentiality is necessary for conducting the negotiations and defending EU interests without fully revealing the limit negotiating positions of the EU to the negotiating partner. Hence, attaining a balance between the necessities of oversight and confidentiality in negotiations is the subject of a dynamic debate between the EU institutions. This paper provides a joint analysis on EU oversight institutions' position on transparency in international negotiations. We set out to answer whether parliamentary, judicial and administrative branches of oversight are allies in pursuing the objectives of transparency but also examine when their positions diverge.

Keywords
access to information; EU; European Union; negotiations; oversight; transparency

Issue
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1. Introduction

International negotiations are an essential part of the European Union's (EU) external affairs. Only in the past decade, the EU concluded over 140 agreements[1] on diverse and highly salient issues including security, trade and climate change.[2] Article 218 of the Treaty on the Functioning of the European Union (TFEU) sets out a "single procedure of general application"[3] for the negotiation of international agreements and provides the different roles in the negotiating process for the Commission, the Council and the European Parliament (hereinafter: EP).

A key aspect of negotiations is access to and sharing of information among the EU institutions involved as well as to the general public. Oversight of negotiations requires insight into the topics of negotiation, the positions taken and the strategies employed. Concurrently, however, some space for confidentiality is necessary to conduct the negotiations and defend EU interests without fully revealing the limit negotiating positions of the EU to the negotiating partner. Attaining a balance between the necessities of oversight and confidentiality in negotiations is therefore the subject of a dynamic debate among EU institutions.

Scholars have extensively discussed the role of the EP in the context of EU international agreements (Ripoll Servent, 2014; Van den Putte, De Ville, & Orbie, 2015), including issues of the "democratisation" of external

[1] Research through the Eurlex database using Art. 218 TFEU as a legal basis, excluding protocols.
[2] For example, the Paris Agreement on Climate (2015), the Comprehensive Economic Trade Agreement (CETA) with Canada (2016), or readmission agreements for persons residing without admission for example with Cape Verde (2013).
[3] Case C-658/11 *European Parliament v. Council*, EU:C:2014:2025, para. 68.

affairs (Meissner, 2016), and how its role in external relations impacts the EU's constitutional fabric (Cardwell, 2011; Eckes, 2014; Krauss, 2000). These studies in principle point to the executive and semi-executive institutions, the Commission and Council respectively, as actors with a preference for space for confidentiality rather than openness of negotiations. By contrast, the EP, for carrying out its oversight function, often features as the protagonist pushing for greater transparency (Curtin, 2013).

The Court of Justice of the European Union (hereinafter: CJEU) and the European Ombudsman (hereinafter: EO) also play crucial institutional roles in maintaining a balance between this space for confidentiality and requirements of transparency. For example, the CJEU safeguards the EP's right to information through the interpretation of Art 218(10) (Abazi, 2016; Peers, 2014) and limits the space for confidentiality due to the exercise of the right to public access to information (Abazi & Hillebrandt, 2015). The EO, in turn, tries to mediate in cases of administrative malpractice that include questions of access to information (see also Neuhold & Năstase, 2017, in this issue).[4]

Yet what we lack is a more integrated analysis of whether and how parliamentary, judicial and administrative oversight *together* constrain EU executive secrecy in international negotiations.[5] This paper aims to fill this lacuna. Seemingly allies in transparency, we question whether parliamentary, judicial and administrative branches of oversight share similar views of transparency in international negotiations. Are these institutions allies in pursuing the objectives of transparency and/or when do their positions diverge? The notion of an alliance is used in this paper to imply an alignment of preferences and not a concerted joint action by independent institutions.

The paper analyses cases on public and institutional access to documents in the EU's international negotiations. Based on these cases, it derives institutional preferences on the support of access to documents and the degree of openness in publishing documents. The latter dimension is conceptualised as a scale, ranging from a situation where an institution provides public access to documents on the assumption that all documents should be made public, unless there is an overriding justifiable reason for some level of secrecy. The other end of the scale pertains to the institution arguing in favour of confidentiality of documents unless there is a convincing argument for public disclosure. The paper shows that most institutional preferences on the degree of openness fall between these extremes.

The paper is structured as follows: Section 2 presents the overall research design through which we derive the institutional preferences on transparency. Based on the consulted sources, Section 3 discusses the role of judicial, parliamentary and administrative oversight in furthering transparency in international negotiations. Section 4 builds upon this analysis in order to map the alignments among the institutions along their preferences. We offer conclusions in Section 5 by reflecting on the implications of our findings.

2. EU Institutional Preferences on (Limits to) Transparency in Foreign Policy

Transparency is a much-debated issue both in academic and public discourse. It is often treated as conceptually close to the notions of accountability and legitimacy, but we still lack a consensus on its specific meaning. Yet one aspect of transparency is straightforward: it is a precondition for conducting oversight, whether public or institutional. Without some transparency, how can one see what ought to be kept in check? (Bentham, 1839). This paper aims to contribute to the expanding discussion on the "accountability landscape" by examining the preferences of the institutions on the conditionality of oversight. Oversight is understood as a loose relation of checks, as opposed to an accountability arrangement that addresses a relation of principal and agent with elements of sanctions in the hands of the principal (Bovens, 2010; Brandsma & Adriaensen, 2017).

The specific contribution of this paper is to provide insights on the space where contestations on the necessary levels of transparency and secrecy between institutions are discussed. To this end, we study the positions of different EU (oversight) institutions on the limits of transparency in foreign policy. The purpose is not only to identify the institutions' positions but also to gauge whether these positions are shared or whether divergences can be observed. Preferences on secrecy and transparency are not derived in isolation but are continuously shaped and reshaped through inter-institutional interplays. Consequently, it is impossible to separate institutional preferences from the broader context in which these institutions operate. Indeed, the new-institutionalist literature has long acknowledged this conceptual struggle when searching to assess the "true preferences" of a political agent (Immergut, 1998). Hence, we first discuss the contextualisation of institutional preferences and then explain the methodology through which we seek to identify these preferences.

2.1. Contextualising Institutional Preferences

The EU oversight institutions studied in this article each play a significantly different role through their core functions. Their differences give rise to questions of whether one could expect them to have similar positions on trans-

[4] Art. 3 and 4a (OJ L 113, 4.5.1994, p. 15) and amended by its decisions of 14 March 2002 (OJ L 92, 9.4.2002, p. 13) and 18 June 2008 (OJ L 189, 17.7.2008, p. 25).

[5] Parliamentary oversight in this article is interpreted as covering only the EP. At best the Council can be regarded as a hybrid actor, carrying both traits of an executive and a legislative (Adriaensen, 2017). However, member states are often directly involved in the negotiations, granting them direct access to all available information (Delreux & Van den Brande, 2013).

parency. In this paper, a position or preference for transparency implies that the institutions would support disclosure of the document. An institution may favour the disclosure of all documents requested, may favour disclosure of certain parts of a document (otherwise known as partial disclosure), or may argue in favour of secrecy.

Taking an inductive approach, we want to identify and map (potential) similarities and differences not through a predetermined theoretical framework but on the basis of what the institutions themselves have stated in cases involving public and institutional access to information. On the one hand, one may expect that a court could be in favour of disclosure of documents in light of defending principles of transparency and good governance, which the courts are tasked to safeguard. On the other hand, executive institutions would have an interest in maintaining some secrecy in the foreign policy arena in which they function and hence may have a preference for space of confidentiality. These differences in positions would not be fully unexpected in light of existing literature that focuses on transparency in foreign policy (Abazi & Hillebrandt, 2015), and on the broader constitutional role of the institutions studied here. However, whether this is indeed the case in EU institutional practice is a matter that this paper will explore.

We do not seek to conceptualise institutional preferences as a simplistic divide between institutions favouring transparency and others that do not. Instead, our efforts are focused on the broad range of arguments provided by the institutions with the goal of improving our understanding of why institutions take their respective positions. The common thread among the oversight institutions we examine is that they deal with transparency but have a different institutional role towards transparency. The mandate of the EO pertains to maladministration and issues of public access to information. As its mandate is limited in terms of substance and scope (the institutions it can scrutinise), the EO has a track record of informally pushing the envelope of its reach. On the EO's interpretation of Regulation 1049/01, it has been noted that a "broad definition of 'document' has been adopted, matched by a narrow one as to the exemptions, thereby giving substance to the right of access" (Vogiatzis, 2018, p. 153). The Court has a role in ensuring that EU law is observed. It conducts judicial review, making sure that the EU institutions act in conformity with EU law. Hence, the role of the Court is to uphold the principle of transparency and ensure that if an exception is applied that takes place in accordance with the established limits between transparency and secrecy. The role of the EP as co-legislator is also complex. It has political significance for determining transparency levels not only through its own practice but also through its role as legislator.

2.2. Deriving Institutional Preferences

The objective of this paper is to understand the oversight institutions' preferences on transparency in the EU's international negotiations. To that end, we study the arguments they present in cases on public and parliamentary access to information, i.e. cases pertaining to Regulation 1049/01 and Article 218(10) TFEU respectively. The focus on public and parliamentary access to information as opposed to other definitions and conceptualisations of transparency (see e.g. De Fine Licht, Naurin, Esaiasson, & Gilljam, 2014; Pozen, 2010), follows from the legal regimes on which our data-gathering is based. Public access to documents enables public awareness and debate of the EU's negotiations, which are necessary for public trust in the negotiations and their potential successful outcome (Abazi, 2016). Institutional access by the EP is necessary for democratic oversight of EU negotiations (Curtin, 2014). Whilst we do not subsume these two types of access to documents under the same rationale since they serve different purposes, one of public accountability and the other of democratic oversight, both these types of access are a necessary condition for any accountability or oversight process to occur. Therefore, we find them both relevant when addressing transparency in the EU's international negotiations.

Regulation 1049/01 stipulates the regime for public access to documents.[6] Article 4(1)(a) therein provides the exceptions to public access to documents with regard to international relations. This exception is considered of mandatory nature since the institution is obliged to first explain that the disclosure of the requested document could specifically and actually undermine the protected interest and, second, that the risk deriving from the disclosure is reasonably foreseeable and not purely hypothetical.[7] If these two conditions are met, the institution is not obliged to examine whether there is an overriding public interest in disclosure, which is the case with the exceptions under Article 4(2) of Regulation 1049/01.

In the EU's international negotiations, the appointed negotiator is obliged to inform the EP "immediately and fully…at all stages of the procedure".[8] Art. 218(4) TFEU stipulates the role of the Council during the negotiations and provides that—in addition to the possibility of adopting negotiating directives—the Council may "designate a special committee in consultation with which the negotiations must be conducted".[9] The difference in wording as to the obligations of the negotiator toward the Council and the EP is already indicative of the different treatment

[6] Regulation 1049/01 of the European Parliament and of the Council regarding public access to EP, Council and Commission documents, O.J. 2001, L 145/43.

[7] Case C-350/12 P, *Council v. Sophie in 't Veld*, EU:C:2014:2039, para. 64.

[8] See Art 218(10) TFEU. In what follows, we will treat the Commission as the sole negotiator and make abstraction from instances where negotiating authority is delegated to the HR/EEAS or an ad hoc negotiating team (often comprising the Commission).

[9] For trade negotiations, this committee is determined by Art 207(3). It shall "assist" the Commission in the negotiations and the Commission—as negotiator—is due to report regularly to this committee as well as the EP.

of these institutions with regard to institutional access to information.

Preferences with respect to institutional and public access to documents are drawn from existing case law. To complement these measures, we derived a third indicator, which is more political in nature and tries to gauge the institutions' preference on the degree of transparency in international negotiations in more general terms (beyond the contested cases). Does an institution adhere to the idea that all international negotiating documents should in principle be accessible unless convincing evidence can be presented to suggest otherwise? Or should the exception of international negotiations apply to all documents related to international negotiations unless a compelling case can be made that their release to the legislative institutions or the public would not harm the negotiations? The proactive publication of documents (in the absence of an external demand for it) reflects an administrative practice informed by the acknowledgment that the logic of secrecy may not apply to certain documents. The preference on the degree of openness goes beyond such an administrative practice and appeals to the underlying rationale. This rationale is—in part—reflected in the preferences on institutional and public access as derived from case law but aims to transcend these cases by looking at the line of reasoning presented within and beyond the selected cases.

The oversight institutions' preferences cannot be studied independently from their mandated roles in the EU's constitutional fabric, as was mentioned above. Interviews as a method of data-gathering were hence deemed inadequate to gauge the position of a singular institution. As a representative, the EP covers a great plurality of voices and its role as a (co-)legislator implies its preferences cannot be fully understood without reference to the Council. Hence, it would be challenging to derive representative claims for the whole institution drawing on a series of personal interviews. The EO's involvement in matters of transparency is bound by the legislative act through which it has been created, and the EO's position in its transparency decisions is linked to case law (Neuhold & Năstase, 2017, in this issue). The Court is guided by the principles of impartiality and independence, yet at times is also seen as "activist", which may to some extent have effects on its jurisprudence. Taking this into account, it is unlikely that the CJEU or the OE would divulge a clear preference beyond stating the legislation they are to uphold. As our objective is to provide a comparative mapping of preferences across the oversight institutions, we therefore focus on revealed preferences in cases on institutional and public access to documents.

This paper offers an analysis which applies to international agreements across EU policy fields, i.e. international agreements regarding trade or related to CFSP, taking into account that accessibility to information is a procedural requirement applicable to all international agreements under Art 218 TFEU and of mandatory nature.[10] The focus on international negotiations implies that the paper does not examine the lack of transparency in EU's legislative process, specifically the trilogue negotiations (see Leino, 2017, in this issue). More clearly than in other primary law reforms, the Lisbon Treaty draws a distinction between external diplomacy and internal legislation and the latter is conditioned by requirements of lawmaking that uphold a higher level of transparency and should not be treated as a diplomatic setting of negotiations.[11]

By focusing on contested access to document requests, one could argue that the agreements covered in our analysis are self-selected and therefore do not constitute a representative sample. Yet, we consider this less problematic for two reasons. First, the preferences expressed in such contested cases either reaffirm or tilt the institutions' view on the balance between transparency and secrecy towards the former. They shape expectations in other (future) negotiations. Second, the cases we study cover a broad range of the EU's external negotiations. We incorporate cases on trade (ACTA, TTIP), transatlantic security cooperation (TFTP) and CFSP (Tanzania, Mauritius). Therefore, the focus on international agreements in which transparency is a contested issue does not lead to a selection bias.

3. Public and Institutional Access in the EU's International Negotiations

In the EU's international negotiations, it is particularly useful to distinguish between the negotiating mandate on the basis of which the negotiations take place and other documents which emerge during the process of negotiations. We focus on these sets of documents separately since different principles govern access to each.

3.1. Negotiating Mandate

International negotiations are initiated on the basis of a mandate drafted by the Commission and adopted by the Council. Whilst informal contacts take place between the Commission and the negotiating partner prior to the Commission's drafting of a mandate (Gastinger, 2015; Stein, 1988), this section focuses on the adoption of the negotiating mandate as the initiation of the negotiations. We elaborate whether and to what extent the mandate is disclosed through public and institutional access.

The mandate of negotiations is deemed to have a constitutional significance.[12] The Court maintains a distinction between the specific content of the mandate relating to the substance of negotiations and the choice of legal basis regarding those negotiations.[13] The latter

[10] Case C-658/11 *European Parliament v. Council*, EU:C:2014:2025, paras. 52, 72.
[11] See Case C-280/11 P, *Council v. Access Info Europe*, EU:C:2013:671, para. 63.
[12] Case C-350/12 P, *Council v. Sophie in 't Veld*, EU:C:2014:2039.
[13] Case C-350/12 P, *Council v. Sophie in 't Veld*, EU:C:2014:2039.

does not form part of the substance of the negotiations and as such may be considered separately. Furthermore, the institutions do not have discretion to withhold the mandate merely because it pertains to international negotiations, but rather an assessment must be conducted in line with the exceptions under Article 4(1)(a) of Regulation 1049/01.

Regarding public access, recent case law has clarified the level of proof that the institutions must establish in order to defend secrecy in international negotiations (Abazi & Hillebrandt, 2015). Namely, the institution must first establish that the disclosure of the requested document could specifically and actually undermine the protected interest and second, that the risk deriving from the disclosure is reasonably foreseeable and not purely hypothetical. This test has long been part of judicial review regarding the exceptions in Regulation 1049/01. Yet, since the case of *Council v. Sophie In't Veld* it is clearly applicable in the context of international relations.

The originator of the information has the authority to decide whether the document will be disclosed following the exceptions stipulated in Regulation 1049/01. With regard to the mandate, the fact that it is the Council that gives the mandate to the Commission for the negotiations is sometimes lost in the public debates. In the case of TTIP, the Commission received criticism that it lacked transparency and refused to share this document publicly.[14] However, it falls under the authority of the Council, which issues the mandate, to publicly release it. In the case of TTIP, however, the mandate was leaked. On the one hand, the EO targeted the Council with an own inquiry to demand the release of the negotiating mandate for TTIP.[15] The EO argued that the leaked document shows that there are no clear reasons why a publication would jeopardise the public interest. The EO argued that the release would not invalidate the applicability of Article 4 of Regulation 1049/2001 to negotiating mandates at large.[16] It would instead add credence to the view that the Council is concerned with transparency and seeks to strike a balance between efficiency and transparency. On the other hand, the Council in its opinion accentuated that it is not obliged to reveal the mandate as it concerns a non-legislative document and thus there is no instance of maladministration.[17] Throughout the exchange of letters both the Council and the EO were conscious of the risk of setting a precedent for future agreements.[18]

Under growing public pressure, the Commission has advocated the public release of the mandates by the Council. Former commissioner Karel De Gucht pushed for the release of the TTIP negotiating mandate on multiple occasions, among others in a plenary debate in the EP.[19] As part of the new trade strategy's emphasis on transparency, Commissioner Malmström indicated she would "[invite] the Council to publish all negotiating mandates immediately".[20]

Ultimately the Council released the mandate. However, more general conclusions cannot be drawn that the Council would continue to make the mandate public for other international agreements. Since the publication of the TTIP negotiating mandate, the Council has been more cooperative in releasing similar documents in highly politicised negotiations. Still, in most cases the publication took place long after the launch of the negotiations (cf. TTIP, CETA and TiSA) or through a partial release omitting critical sections of the document (e.g. EU–China investment agreement). The Commission also requested the release of the mandates for the free trade negotiations with Japan, Mexico and Tunisia in September 2016.[21] Commissioner Malmström reiterated her request in May 2017 a few weeks before Greenpeace leaked documents related to the EU Japan free trade negotiations.[22] The Council discussed the issue during a meeting of the Trade Policy Committee but could not obtain the common accord required for their public release. In sum, the Council has thus far only shown a willingness to publicly release negotiating mandates at an advanced stage in the negotiations, amidst intense pressure from civil society and the European institutions, and when the lack of transparency may jeopardise the negotiations. Hence, while they provide some tentative support for the public access to the mandate (scored low → medium), their preference regarding the degree of openness remains low as summarized in Table 1.

With regard to the position of the EP on public access to information, a stream of cases reveal that the EP has not intervened in support of the party requesting public

[14] On 19 May 2014, Friends of the Earth Europe sent a coordinated message on behalf of 250 civil society organisations to DG Trade to "open the negotiation process to the public, *by releasing the negotiating mandate*, documents submitted by the EU, and negotiating texts" (Friends of the Earth Europe, 2014, emphasis added). This demand was also the subject of an access to documents request which ultimately gave rise to a complaint with the European Ombudsman (EO Case: 119/2015/PHP).

[15] EO Case OI 11 2014 RA.

[16] EO Case OI 11 2014 RA Letter to the Council of the EU requesting an opinion in the European Ombudsman's own-initiative inquiry OI/11/2014/MMN concerning transparency and public participation in relation to the TTIP negotiations.

[17] Response from the Council Annex paragraph 5 arrived at EO on 4 October 2014.

[18] Communication of the EO to the Presidency of the Council on 30 September 2014.

[19] Plenary Debate of the EP in Strasbourg on 15 July 2014, 2014/2714(RSP).

[20] Cecilia Malmström, *The Future of EU Trade Policy*. Speech on 24 January 2017 at Bruegel institute. Retrieved from http://bruegel.org/2017/01/the-future-of-eu-trade-policy

[21] Cecilia Malmström (2016), "Cssr Malmström letter to SK Minister Peter Žiga on Transparency". Correspondence by the Commissioner, 6 September 2016 Ares(2016)5072313. Retrieved from: https://ec.europa.eu/carol/index-iframe.cfm?fuseaction=download&documentId=090166e5ac9ceb5d&title=CM%20Letter%20Mi%20nister%20%C5%B%20Diga.pdf

[22] Cecilia Malmström (2017), "Subject: Publication of EU–Japan FTA Negotiating Directives". Correspondence by the Commissioner, 24 May 2017 Ares(2017)2639445. Retrieved from: https://ec.europa.eu/carol/index-iframe.cfm?fuseaction=download&documentId=090166e5b28a816d&title=CM_signed%20Publication%20JPN%20mandate.pdf

Table 1. Mapping institutional preferences on transparency of the negotiating mandate.

	Support for Institutional Access	Support for Public Access	Preference for Degree of Openness
European Parliament	High	—	—
European Ombudsman	High	High	Medium
CJEU	Medium	Medium	—
Council	Low	Low-Medium	Low
European Commission	High	Medium/High	Medium

access to information in issues regarding international relations.[23] Hence, we do not have data from case law on what precisely the position of the EP would be with regard to the mandate; yet, it can be added that the EP does not get actively involved in furthering public access to information and does not draw sufficient attention to this issue in its Resolutions. The latter instrument is a particularly significant tool for the EP to influence the margins of disclosure for the mandate, although resolutions are not legally binding to the Council.

While the EP is not directly involved in the drafting and adoption of the mandate, in line with Art 218(10) TFEU it is supposed to be informed at all stages of the procedure. Hence, it should receive the mandate of negotiations. The Lisbon Treaty provided increased prerogatives to the EP in international negotiations by granting veto powers. Practice suggests that the EP uses its increased powers for access to information in order to affirm its institutional role. For example, on the Terrorist Finance Tracking Programme Agreement with the US, the EP first vetoed the Agreement by raising concerns on data protection safeguards to only then give its consent at a later stage although there were "no remarkable differences between the first and second agreements" (Vara, 2013, p. 20). Rather, the difference was that in the second round of negotiations, the EP was fully informed at all stages of the negotiations. This has raised questions of whether the EP's position is too focused on inter-institutional power dynamics (Eckes, 2014). A similar change of position after having received more information is also notable with regard to the Passenger Name Record Agreement with the US (Ripoll Servent & McKenzie, 2011).

In sum, the Court and the EO favour public access to the mandate. Disclosure does not necessarily apply to the entire document. The Court draws a distinction between the legal basis, which should be disclosed, and other substantive parts of the mandate that may remain confidential. The Court does not accept an argument in favour of secrecy by default for the mandate simply because this document pertains to international relations. Rather, the Council and the Commission must substantiate their reasoning for non-disclosure in light of requirements established by the Court. While the EP is generally supportive of access to information, for the mandate specifically we lack sufficient data to draw solid conclusions as to whether this support is high. Yet, when it comes to institutional access, the EP has made significant efforts to ensure that its prerogative to access information is respected and has also utilised judicial recourse towards such aims.

The Court is also in favour of an informed EP throughout all stages of international negotiations, as is evident from a few recent salient cases regarding institutional access in line with Art 218(10). Taking into account that the EO is generally aligned with the case law of the CJEU as far as transparency is concerned (Abazi & Tauschinsky, 2015), it could be noted that the EO favours institutional access to the mandate. The position of the Commission is less clear. Although in the case of TTIP the Commission argued in favour of opening up the mandate by the Council, whether this continues as the new practice and position of the Commission remains to be seen. The recent reminder to publish the mandates for the negotiations with Japan, Mexico and Tunisia supports this view. Still, the litmus proof consists of continuing this practice once politicisation subsides.

3.2. Negotiating Process

Public access to information is limited during the negotiating process. The Council and the Commission continuously defend secrecy as necessary for the negotiating process, emphasising the need for trust between the negotiating partners (Abazi & Hillebrandt, 2015). Interestingly, the EP posits similar arguments in favour of nondisclosure when citizens file public access requests. For example, the EP refused access to documents regarding the ACTA arguing in favour of secrecy not only for ongoing negotiations but also for *future* negotiations, stating that:

> There is a concrete risk that disclosure of preparatory documents would prejudice not only relations with third countries in the context of ACTA, but also any other negotiation to be conducted by the EU in the future. Indeed, any future negotiating partner of the

[23] See: *Council v. Hautala* (appeal) (2001), Kuijer II (2002), Case T 264/04, *WWF-EPP v. Council* (2007), Sison II (33-39) (2007), Sweden/IFAW (2007), Case T 42/05, *Williams v. Commission* (2008), Case T59/09 *Germany v. Commission* (2012), Case T-301/10 *In 't Veld v. Commission* (2013), Case T 93/11, Stichting CEO (2013), Besselink (2013), Jurasinovic appeal case (2013), Joined Cases C 514/11 P and C 605/11 P, LPN case (2013).

> EU could doubt the EU's reliability with regards to the confidentiality of negotiations, if preparatory documents concerning the position of one of the EU's contracting partners were released to the public.[24]

The EO, although generally critical of the lack of transparency, shares the view that some level of secrecy is justified in international negotiations. The EO reaffirmed this position when handling an access to documents request vis-à-vis the EP in the context of the ACTA negotiations.[25] Similarly, regarding the Council, the EO stated that:

> Releasing the documents in question, [would] reveal the negotiating position of the US and Japan, [and] would be highly likely to be detrimental to the EU's relations with those countries. The EO also agrees that, as further argued by the Council, it is likely that such disclosure would have a negative effect on the climate of confidence in the on-going negotiations, and that it would hamper open and constructive co-operation.[26]

Nevertheless, the EO seems to pursue a balance between the opposing needs of transparency and secrecy in international negotiations. The EO opened an own-initiative inquiry levied against the Commission for access to document requests in relation to TTIP and the existence of a potential bias in the Commission's disclosure of negotiating documents to a limited group of "privileged stakeholders".[27] The EO provided five recommendations to increase transparency, including not only the hosting of all disclosed documents on their website, the creation of a public register and the publication of all meetings with civil society, but also the reinforcement of measures to ensure confidential documents stay confidential. In much of its communication, the EO also mentioned TTIP as a specific case and was cautious in drawing wide-ranging conclusions on other cases.

The Commission has taken a more proactive approach towards publishing negotiating positions, not only with respect to TTIP but also other ongoing negotiations (Coremans, 2017, in this issue). Yet whether these efforts will be maintained once politicisation subsides can be questioned (Gheyle & De Ville, 2017, in this issue).

Regarding institutional access, practice shows that the Council delays significantly in meeting its obligation to inform the EP. For example, in the case of *European Parliament v. Council*,[28] the Council shared the document for the EU–Mauritius Agreement more than three months after the adoption of that decision and the signing of that agreement.[29] In this case the CJEU held that the information requirement laid down in Article 218(10) TFEU applies to the entire process of international negotiations and significantly, that this procedural requirement also applies to agreements falling exclusively under CFSP.[30] Therefore, informing the EP is a mandatory procedural requirement within the meaning of the second paragraph of Article 263 TFEU and its infringement leads to the nullity of the measure.[31] Similarly, in the case of the EU–Tanzania agreement, the Court held that even a delay of 9 days implies that the EP was not informed "immediately" and hence the Council had failed to comply with its obligations to share information in all stages of the procedure fully and immediately.[32]

The different positions are summarised in Table 2 below. The data confirms the differences in positions on institutional access to documents between the Council and Commission, as (quasi-)executive bodies on the one hand, and the institutions responsible for legislative, judicial and administrative oversight, on the other hand. When we take a closer look at support for public access and the institution's preference on the degree of open-

Table 2. Mapping institutional preferences on transparency during negotiations.

	Support for Institutional Access	Support for Public Access	Preference for Degree of Openness
European Parliament	High	Medium (→ Low)	Medium
European Ombudsman	High	High	Medium → High
EUCJ	High	Medium (→ High)	Low
Council	Low	Low	Low
European Commission	Low (→ Medium)	Low (→ Medium)	Low (→ Medium)

[24] See EO case 90/2009/(JD)OV, para. 33 at http://www.ombudsman.europa.eu/en/cases/decision.faces/en/50947/html.bookmark
[25] Decision of the European Ombudsman in his inquiry into complaint 2393/2011/RA against the EP, paras. 50-63.
[26] EO case 90/2009/(JD)OV, para. 33.
[27] EO Case OI 10 2014 RA.
[28] Case C658/11 *European Parliament v. Council* EU:C:2014:2025.
[29] Case C658/11 *European Parliament v. Council* EU:C:2014:2025, para. 65.
[30] Case C658/11 *European Parliament v. Council* EU:C:2014:2025, paras. 72, 85.
[31] Case C658/11 *European Parliament v. Council* EU:C:2014:2025, para. 80.
[32] Case C-263/14 *European Parliament v. Council*, ECLI:EU:C:2016:435.

ness, the picture becomes more complex. The Commission in particular has undergone a notable shift in its stance. In the next section, we explain these preferences by focusing on the impact transparency may have on the institutional balance.

4. Alliances in Transparency?

This section offers a three-step analysis of the oversight institutions based on their institutional preferences on transparency as derived above. First, we will discuss preference alignment among the oversight institutions as well as the executives. Second, we turn our attention to what we classify as "unexpected alliances", i.e. cases of preference alignment between the executive institutions and institutions of oversight. Finally, we provide broader reflections on the contextual factors that help explain these alliances, thereby presenting an insight into how the EU's transparency regime may develop in the future.

4.1. Oversight Alliances

EU oversight institutions differ on their preferences on the three dimensions of transparency we have analysed: public access, institutional access and degrees of openness. In general, the EO, the Court and the EP are well aligned as far as preferences on *institutional access* are concerned. This applies both to the mandate as well as the release of documents during the negotiating process. Especially for the EP, institutional access is core to its function of democratic scrutiny, a view supported by the EO and CJEU. For example, in the consultations for TTIP, the EO stated that the MEPs have a special democratic responsibility to scrutinise the negotiations on behalf of their constituents.[33] Indeed, this is in line with the Treaty of Lisbon, which has cemented the EP's role as (co)legislator in the EU's constitutional structure, and the interpretation of Art 218(10) further supports this recognition.

When we shift our focus to *public access* to information, two patterns emerge. First, all oversight institutions support the public disclosure of the negotiating mandate. The case of *Council v. In't Veld* helped to clarify the distinctions in the document between the constitutional elements, which should be disclosed, and the substantive parts of the document, where the negotiating position may be revealed, and hence there is justification to maintain some confidentiality. Moreover, the explicit request to provide evidence that public access to the mandate would jeopardise the negotiations further raises the barrier to maintain secrecy. The EO's own-initiative inquiry with regard to the TTIP negotiating mandate builds upon this case law. The EO further added to this argument the democratic need for the Council to acknowledge the relevance of transparency in international negotiations. Second, all oversight institutions also accept—to varying degrees—the reasoning that external negotiations warrant a certain degree of secrecy to ensure that the EU's bargaining position is not compromised. The exceptions introduced by Regulation 1049/01 indicated clearly that the legislators accepted the limitations to public access to information in external negotiations. And as the Court and the EO operate within the confines of the EU's legal order, they follow the transparency regime laid down by the legislators.

Finally, with respect to the *degree of transparency*, significant variations could be found. The EO, in particular in recent practices, has taken a more proactive stance towards the publication of documents. This is not followed by the EP, which has accepted a higher degree of secrecy for negotiations, even showing concern for future agreements of the EU as we saw above with the ACTA documents and thereby potentially creating a political space for confidentiality of negotiations in the EU. By contrast, the CJEU bases its judgment on the disclosure of documents by requiring the institutions to show an actual (as opposed to a hypothetical) risk from disclosure.

We expect to find the (quasi-)executive bodies opposing the oversight institutions, as they hold information that may be disclosed to the interest of the public or its representatives. Our findings suggest that the Council and the Commission, do align preferences to a certain extent, except when cases concern public access to the mandate and the degree of openness to be pursued, as will be explained in the following section.

4.2. Unexpected Allies in Transparency?

The alliance among oversight institutions, despite their differences, may be to some extent expected. However, it is less common to see views shared by oversight and executive institutions which often find each other on opposite sides on transparency issues. Two such "unexpected" alliances emerge from our analysis regarding public access to documents. We consider these 'unexpected' as explained in line with the institutional position and role of the oversight institutions and executive actors. Generally, the literature suggests that oversight institutions are in favour of transparency and access to information, whereas due to their negotiating position in the international negotiations arena the executive institutions rely on arguments of trust and confidentiality.

In the first instance, the Commission aligned with the oversight institutions in favour of public disclosure of the mandate. It is a Council document that to a certain extent dictates the Commission's actions. As such, the mandate's release allows the Commission to deflect some of the public criticism back to the Council. Moreover, requests for the mandate's release have often arisen when the negotiations were already under way and when its contemporary strategic value had been diminished. For example, in the case of TTIP, the mandate had already been leaked which made it clear that public disclosure would not jeopardise the bargaining outcomes of the on-

[33] Decision OI/10/2014/RA.

going negotiations. Another factor that may explain this unexpected alliance is the expectation that, due to a high degree of politicisation, the risks associated with the publication of the mandate were lower than the risk of non-disclosure. Accusations of secrecy and the public's mobilisation around it could jeopardise the entire negotiations.

A second instance where an unexpected alliance emerged was in the context of the public release of negotiating documents. Similarly to the Commission and the Council, the EP supported keeping documents secret in the case of ACTA. The EP's support becomes even more evident in its response to the EO's own-initiative inquiry into the transparency of the trilogue meetings pertaining to internal negotiations. The former President of the EP, Martin Schultz, indicated the challenge to "find the right balance between ensuring transparency to the public, while at the same time ensuring that all political groups can fully follow and influence the negotiations" (European Parliament, 2015a). It is here that one of the key differences between the EP and the EO can be identified in their role as guardians of transparency. The legislative role of the EP puts it in an internal negotiating context where it also faces a "limit position", in contrast to the EO who remains largely outside of the legislative process. Furthermore, an MEP can be held to account by an electorate that is affected by their actions. This implies the MEP may find themselves in a position where they wish to be shielded from public scrutiny.

4.3. Institutional Politics of Transparency

Transparency is not merely an instrument of democratic trust and participation. Indeed, in an institutionalised setting it also becomes a tool of power dynamics in evolving constitutional structures. In our analysis three aspects of the politicised side of transparency emerge: the consolidation of the EP's legislative powers, the difficult balance between the Council's legislative and executive roles, and the evolving interpretation of the exception to public access to documents with regards to international relations.

Throughout the EU's history, the EP has always pushed for greater powers, and institutional access to information was an important pre-condition to perform these legislative functions. With Lisbon, much has been rectified and the powers granted to the EP represent a significant change. Institutional access to information featured both as an objective (cfr. SWIFT, ACTA or TTIP) but also enabled the EP to gain a similar status to the Council even in those areas where it has no legislative prerogatives, as shown in the Mauritius case. Yet, with the empowerment of the EP we have also seen a decline in its support for public access to documents. For example, following its early rejection of the TFTP agreement, the EP increasingly recognised that as co-legislator, it shared the responsibility to consider member states' security concerns. The result was a softened stance on data protection (Ripoll Servent & MacKenzie, 2011). Being exposed to the (external) negotiating context generates a greater sense of responsibility for or complicity in the agreed outcome and thus—much like the Council or the Commission—the EP must assess whether disclosure of the requested documents could undermine the protected (public) interest (Abazi, 2016). When the EP still found itself on the side-lines of EU decision-making, it was easy to take more ambitious positions on transparency (or policy-objectives) without much ramifications. As a formal co-legislator, this has clearly changed.

A second observation pertains to the increasing pressures exerted on the Council to become more transparent. Edgar Grande's paradox of weakness explained how member states' delegation of powers to the EU strengthened their autonomy vis-à-vis organised interests within their constituencies (Grande, 1996). The multi-level decision-making context led by a bureaucratic Commission provided an ideal scapegoat to advocate national policy reforms that were too difficult to sell publicly at home. A key condition for this mechanism to work was a certain degree of secrecy in Council decision-making. In short, from its inception, the Council has used secrecy both in domestic as well as international negotiations to its own advantage. Therefore, it is evident that this institution is more conservative when it comes to transparency. This secrecy paradigm is currently pressured from multiple angles. Political pressures arise from both the EP as well as the Commission, with each—for their own reasons—trying to make the Council acknowledge its legislative role and calling for a logic of (greater) transparency (Hillebrand, 2017, in this issue).

In asserting its powers as co-legislator and demanding institutional access to documents, the EP's engagement with the Council is often predicated by a desire to be treated on equal footing. For example, the EP has increasingly pushed for its own access to information when it concerns the release of the negotiating mandate, but also calls on the Council to play a larger public role (European Parliament, 2015b). Reluctance from the Council to comply with such demands is not limited to the insurance of autonomy from their constituents or the national parliaments, but also the potential shift this can create in the balance of power to their detriment. Similar to the EP, the Commission is also concerned that the silence and secrecy within the Council is becoming detrimental to the European project. The EO also corroborated such views in a recent interview:

> What I've been trying to say to the Council, and to EU institution leaders as well: If you want to break through the myths, if you want to break through the caricature, then you have to allow people to see how laws are actually made, and how power is actually distributed…between the EU institutions and the member states.[34]

[34] EUObserver, Transparency complaints keep EU Ombudsman busy. 24 May 2017.

A final reflection concerns the evolving interpretation of what is considered an acceptable level of openness. Once it has been shown that the public release of specific documents has not undermined negotiations, the bar is raised as to the evidence required to keep a document secret. The EO and CJEU recognise and uphold the exception to public access to documents when it may jeopardise international negotiations. With the EO defending an interest that stands outside the internal (and external) negotiations and the Court mostly seeking to assert its jurisdiction, their interests do not collide. On the contrary, the initiatives of the EO can lower the threshold for legal contestation. The case on the disclosure of the Council's TTIP negotiating mandate may be a case in point, as opposed to the release of the mandate in the TFTP that came about as a result of a Court judgment. When documents are actually already public, such as through leaks, both the EO and the Court maintain that there are no firm grounds to defend nondisclosure of documents.

5. Conclusions: Towards a Steady State of Oversight Interplays?

This paper questioned the general assumption in the literature that EU oversight institutions are in favour of transparency in international negotiations and that traditionally EU executive institutions prefer some level of secrecy in the international arena. In doing so, the paper sought to analyse the positions of the EU oversight institutions towards transparency in a more holistic manner and examine their interplays in delivering transparency. Through this joint analysis, we identified whether parliamentary, judicial and administrative branches of oversight are allies in pursuing the objectives of transparency but also when their positions diverge.

The role of each oversight institutions is of course different in the EU context. It may even be questioned why they should be analysed together. Indeed, the position of the Court as the legal authority to rule on issues of transparency—and thereby create conditionality of how transparency is practiced—may not be fully comparable with the institutional preferences of the EP that rather creates political dynamics on how far transparency expands in international negotiations. But the paper took these functional differences into account and questioned institutional preferences in light of such institutional variations. One such difference is the position between the Court and the EO. Namely, whereas the Court's position on transparency is evident and bound in its role to interpret transparency rules, the EO has often moved beyond its statutory roles in interpreting the scope for public transparency.

This paper showed that while there is general support from oversight and executive institutions to the idea that international negotiations warrant secrecy, variations across the institutions emerge for the degree of openness. An alliance was found among the legislative, administrative and judicial institutions as far as institutional access to documents is concerned. Yet, the image is less clear with regard to public access and the degree of openness. Moreover, our analysis reveals that some 'unexpected' alliances have emerged particularly when the negotiations were politicised.

The analysis provided in this paper contributes towards an understanding of the dynamics among oversight institutions in the field of transparency. Linking this knowledge with the institutional preferences we have derived, it becomes possible to provide some foresights on how debates on transparency will develop in the future. Foreseeable alliances most likely would feature the EO and the CJEU furthering or changing the contours of confidentiality in international negotiations. However, these changes do not impact the steadily created core to institutional and public access. Numerous cases make it clear that access to documents for the EP in international negotiations is mandatory throughout the process of negotiations. It is only a question of changes in institutional habits of the Council and the Commission to meet this legal requirement. Yet public access may prove more contentious as there is an increased public demand for transparency but it is met with a solid preference by both oversight and executive institutions for confidentiality, especially during the negotiating process. Looking forward, it seems more likely that "the degree of openness" will become the main bone of contention in the EU's international negotiations.

Conflict of Interests

The authors declare no conflict of interests.

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Commentary

The Puzzle of Transparency Reforms in the Council of the EU

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Abstract
I argue that the transparency reforms that have been implemented in the Council of the EU in the last decades are unlikely to change the perception of the Council as a non-transparent institution. My argument is based on three distinctions: the distinction between transparency (availability of information) and publicity (spread and reception of information); between transparency in process and transparency in rationale; and between plenary and committee decision-making arenas in legislatures. While national parliaments tend to have all these features, the Council of the EU only has two (transparency in process and committee decision-making). As a consequence, publishing ever more documents and detailed minutes of committee meetings is unlikely to strengthen the descriptive legitimacy of the Council. Furthermore, I argue that the democratic transparency problem is the reverse of what is most often argued: It is not the lack of transparency that causes a democratic deficit, but the (perceived) lack of a democratic infrastructure that makes more serious transparency reforms unthinkable to government representatives.

Keywords
democratic deficit; European Union; intergovernmental negotiations; legitimacy; transparency

Issue
This commentary is part of the issue "EU Institutional Politics of Secrecy and Transparency in Foreign Affairs", edited by Vigjilenca Abazi and Johan Adriaensen (Maastricht University, The Netherlands).

Over the last two decades the Council of the EU has implemented a range of transparency reforms and rules, some of which are more radical than the rules that exist in national parliaments. Thousands of documents have been released, and legislative deliberations are regularly broadcast live on the Internet. So why is it that lack of transparency in the Council is still generally accepted as one of the major democratic deficiencies of the EU?

According to Simon Hix the Council of the EU is "probably the most secretive legislative chamber in the world", including "the Chinese National People's Congress" (Hix, 2008, p. 152), while Robert Thomson concludes that "there is no other legislative body in the free world that meets in such secrecy" (Thomson, 2011, p. 263). What does the Council have to do in order to be transparent, if publishing documents and broadcasting deliberations is not enough? What is wrong with the Council compared to national, democratic legislatures when it comes to transparency?

One answer, of course, is that the Council should publish even more documents, and broadcast even more meetings.[1] If only we could see and hear exactly what not only ministers in the Council but also civil servants from the permanent representations and government ministries say to each other on each and every nitty-gritty working group meeting in the Council hierarchy, then the Council would be transparent and legitimate, and we would have solved a key democratic problem for the EU.

I think this is barking up the wrong tree. The reason why the Council is not transparent in the same way as "normal" democratic legislatures, and is unlikely to be so for the foreseeable future, is because it is not a normal legislature. In my view, the Council is already surprisingly transparent in some ways, but not in those ways that

[1] See, for example, Abazi & Adriaensen, 2017; Gheyle & De Ville, 2017; Hillebrandt, 2017, all in this issue, focusing on access to documents in the areas of foreign affairs and trade negotiations.

make people perceive it as transparent, and therefore find it legitimate.

I will make three conceptual distinctions to help sort out the puzzle of why transparency reforms in the Council do not seem to lead to (perceived) transparency. The first is the distinction between transparency and publicity. The second is the distinction between two types of transparency—transparency in process and transparency in rationale. The third is the distinction between the two faces of a normal legislature—the committees and the plenary debates.

Elsewhere I have argued for the importance of distinguishing between the concepts of *transparency and publicity* (and accountability) (Lindstedt & Naurin, 2010; Naurin, 2006). The concept of transparency captures availability of information. It refers to the degree to which information is made available about how and why decisions are produced within a certain institution. A transparent institution is one where it is possible for people inside and outside to acquire the information they need to form opinions about actions and processes within this institution. The information is there for those who are willing and able to seek it. Publicity on the other hand means that the information is spread to and taken in by people outside the institution. While transparency implies that there is documentation available about the actions of the representatives, publicity means that the content of this information has also become known among the citizens.

Clearly transparency will usually increase the chances of publicity. In most cases information that is easily accessible will stand a greater chance of also being spread. But there will be no publicity, i.e. no actual exposure of behaviour to a public audience, no matter how transparent the process or the institution in question is, if the available information about these actions is left unattended.

Jane Mansbridge has proposed the distinction between *transparency in process and transparency in rationale* as two main forms of transparency (Mansbridge, 2009; for an empirical application of the concepts, see De Fine Licht, Naurin, Esaissson, & Gilljam, 2014). Transparency in process refers to information on actions, such as deliberations, negotiations, and votes, that took place among decision makers and directly fed into the decision. Such information may be made available in real time (fishbowl transparency) or in retrospect, after the decision has been made. The latter is applied by some central banks, such as the American Federal Reserve and the Bank of England, which release minutes of meetings and votes at some delay after the decision. The live broadcasting of meetings in the Council, on the other hand, is an example of fishbowl transparency in process.

Transparency in rationale refers to information on the substance of the decision and of the facts and reasons on which it was based. Such information is normally directed toward an outside audience, which may be affected by the decision, but is not involved in the decision-making. Conclusions, declarations, press conferences after meetings, and, crucially (see below), parliamentary debates, are forms for achieving transparency in rationale.

Committees and plenary sessions are the two faces of parliaments. There is a clear division of labour between the two. The committees perform the deliberations and negotiations in the law-making process (to the extent that parliament has any real say at all, which in a parliamentary system depends on whether there is a coherent majority government in place or not), while the plenary takes care of the vote and the public debate. The behavioural logic that applies in committees prescribes focus on common ground, compromises and agreements. The logic of plenary debates is the opposite—to clarify differences between parties and positions. While committee meetings are integrative, plenary debates are adversarial. Committee meetings focus on problem-solving and concrete technical details, plenary debates on principles and ideologies.

A national democratic legislator normally has all of these five components to some extent. It has committees and plenary debates. The plenary debates, where majority and minority parties defend their positions and emphasise weaknesses of the other side, when they work well, produce both transparency in rationale and publicity. They make the technical details of committee meetings understandable to a broader audience by highlighting the political content of these technical details, and by drawing attention to alternatives and broader principles at stake. The weak spot of national legislatures is transparency in process, since committee meetings are usually closed to the public in order to provide the MPs with some space for candid talk and give-and-take negotiations. However, at least agendas and minutes of some form are normally available.

The Council of the EU, however, has only two of the five components. It has committee meetings in abundance. Committee decision-making is what the Council does all the time at all levels. The Council is decision-making machinery, and its method is committee meetings. The search for common ground among diverse interests is part of the Council's DNA. The Council also has considerable transparency in process (although it varies between different policy areas, with foreign policy clearly on the darker side) (Hillebrandt, 2017). Agendas and minutes of preparatory meetings are published (although the minutes may, on request, exclude the names of the member states that raised objections in the process). Position-taking in on-going negotiations may even be broadcast live (although under strict formats), something which hardly happens in parliamentary committees.

But the Council does not have the three interrelated components of clarifying plenary debates, publicity and transparency in rationale. When the committees have done their job, and the General Secretariat has shown the voting board to the cameras, which usually signals consensus in spite of sometimes years of tough negotia-

Table 1. The transparency and legitimacy puzzle.

Pieces of the puzzle	Meaning	National democratic legislature	Council of the EU
Transparency	Availability of information		
— in process	Pre-decision activities	Yes	Yes
— in rationale	Substance and justifications of decision	Yes	No
Publicity	Spread and reception of information	Yes	No
Committee	Negotiations	Yes	Yes
Plenary	Justification and debate	Yes	No

tions, the discussion is over. Since no minority views are heard (other than sometimes in the form of a short technical formal statement to the minutes) the majority does not need to justify its position and sharpen its arguments in public debate.

So the Council has some transparency, but not the type that makes people beyond a small circle of EU experts understand why the decision-makers decided the way they did (Table 1). Why is this the case, and what can be done about it? The first question is relatively easy, the second is much more difficult.

The reason why the Council is lacking transparency in rationale is that it is still more akin to an international organization than it is to the legislative chamber of a democratic polity. The members of the Council are representatives of states rather than parties. The conflicts played out in the Council concern national interests at the sector level, rather than general political ideas. The link between the members of the Council and their constituents is based less on political ideology than on geography.

Under these circumstances, it becomes difficult to have the type of plenary debates that create transparency in rationale and publicity. Plenary debates in the Council would not show left vs. right, or liberals vs. conservatives, but Germans vs. Greeks, and Poles vs. Italians. The reason why we do not see these debates is the fear among the members of the Council that we are not "European enough" to handle that.

Those familiar with the democratic deficit (DemDef) literature know the rest of the story: We do not have the democratic infrastructure in Europe to handle divisive public debates, according to this view. We don't have a public sphere, and a European *demos* able to deal with such conflicts. Public debates in the Council may give transparency in rationale and publicity, i.e. understanding of who won and who lost and why, but rather than helping descriptive legitimacy it will destroy it, because people will not accept being outvoted by "others" on salient issues.

The transparency and the DemDef debates are thus closely connected. However, I believe that the causality is the opposite of what is often heard in these debates.

What is often heard is that a more transparent Council will be an important step towards resolving the democratic deficit of the EU. This is a misconception. In my view, it is the lack of a democratic infrastructure in the EU that is the main cause of the lack of transparency in the Council. It is the absence of (or at least the perception of an absence of) a European *demos* that accepts defeats across borders—or, if you wish, European party politics with the potential of forming such a *demos*—that has led the Council to refrain from the debates that may produce transparency in rationale, the type of transparency that in turn may generate publicity and (maybe) legitimacy.

Can the Council be transparent not just in process but also in rationale? Is it possible to make ministers stay in Brussels, after they have found the necessary qualified majority in the committees, to give us a real public debate that demonstrates the main alternatives, identifies the interests and arguments behind each alternative, and clarifies the political ideological implications of each alternative, drawing out tensions that attract the media and create publicity? In theory, it is possible to initiate this through a simple change in the Council Rules of Procedure.

In practice, however, the ministers will want to go home after the decision is made. They fear a debate along geographical lines, invoking notions of "us" and "them". In the end, it is up to us whether they are right or not; we, the people, who are the democratic infrastructure.

Conflict of Interests

The author declares no conflict of interests.

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Commentary

EU Institutional Politics of Secrecy and Transparency in Foreign Affairs: A Commentary

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Abstract
International diplomacy has long been regarded as the domain of an elite hand-picked few, instructed and groomed in something considered an art form. Both the secrecy and the pomp have their rational place. Political interventions from regime change through to more standard economic and social challenges cue both subtle and dramatic shifts in relationships and alignments and diplomats must rightly handle such situations with great delicacy. Premature or too much public disclosure about diplomatic exchanges could risk undermining the mutual trust and confidence on which the conduct of international relations and negotiations depends. The question of course concerns the determination of what constitutes 'premature' or 'too much' and who decides the point at which public access can or should occur. We have certainly seen a trend towards greater transparency in foreign affairs in recent times, but this will always remain one of the most sensitive areas for national governments and international organisations. Contributors to this publication pose important questions about transparency in the context of foreign affairs at EU level. The question 'How much is enough?' is particularly pertinent. I welcome the exploration of topics of secrecy and transparency in this thematic issue and look forward to further contributions as the theory and practice of the ideas put forward are developed.

Keywords
access to information; diplomacy; EU foreign affairs; EU institutions; negotiations; secrecy; transparency

Issue
This commentary is part of the issue "EU Institutional Politics of Secrecy and Transparency in Foreign Affairs", edited by Vigjilenca Abazi and Johan Adriaensen (Maastricht University, The Netherlands).

International diplomacy has long been regarded as the domain of an elite hand-picked few, instructed and groomed in something considered an art form. While essentially a public service it seeks to operate as much as possible in private, free from outside scrutiny.

That considered appropriate for sharing publicly is enunciated usually by Presidents, Prime Ministers or Foreign Secretaries, in a carefully stage-managed environment, the speakers often behind an impressive podium and with an austere or imposing backdrop in order to convey the assumed import of what is being said.

Both the secrecy and the pomp have their rational place. Political interventions from regime change through to more standard economic and social challenges cue both subtle and dramatic shifts in relationships and alignments and diplomats must rightly handle such situations with great delicacy. Very often their work is precisely what keeps both individual states and the wider world safe.

Premature or too much public disclosure about diplomatic exchanges could risk undermining the mutual trust and confidence on which the conduct of international relations and negotiations depends. The question of course concerns the determination of what constitutes 'premature' or 'too much' and who decides the point at which public access can or should occur.

Public access to information laws invariably have an exception applicable to information or documents where disclosure would be likely to harm international relations. Most, including EU Regulation 1049/2001, which governs public access to documents of the EU institutions, are absolute, so not subject to any public interest test.

Where there is a public interest test, as under the United Kingdom's Freedom of Information Act, the courts have taken a restrictive approach, indicating that the public interest in disclosure must be particularly strong to override the public interest in avoiding harm to international relations. Such rulings are perhaps understandably conservative and restrictive as people outside the diplomacy 'bubble'—including judges—may be understandably reluctant to second guess the insiders.

As European Ombudsman, I am able to consider transparency more widely, as a matter of good administration, balancing the interests of citizens with the genuine needs of the administration for secrecy. I can look beyond the retrospective right to know, which can apply only to documents already in existence, to the arrangements for transparent processes in law-making and prospective negotiations. I can look at the administrative systems in place to give effect to the EU laws and values around transparency and see whether they both align.

I have used my own initiative powers to conduct inquiries into transparency and public participation in the TTIP (Transatlantic Trade and Investment Partnership) negotiations, an initiative which prompted much greater proactive disclosure by the European Commission.

I also examined the transparency of 'trilogues' (the informal meetings of the European Parliament, Council and Commission where the final form of many legislative proposals are brokered).

These are discussed elsewhere in this publication, but from my perspective these were two successful inquiries in which transparency was an issue and international diplomacy was very much in play. In both cases, transparency was advanced through the proactive use of my broad powers to deal with maladministration, making measured and achievable recommendations for improvement, rather than through the narrow prism of Regulation 1049/2001 which can only be a vehicle for disclosing documents already in existence.

The current negotiation around the terms on which the UK will leave the EU is the single most important challenge now facing the EU institutions and where transparency in the conduct of international affairs is at issue. The case for a very high degree of transparency in the public interest is, in my opinion, extremely strong. From the outset it was clear that EU citizens and businesses would have concerns about the potentially far-reaching implications of the outcome of the negotiations and as the negotiations continue we have all witnessed the confusion and often distress caused by the uncertainty around the final outcome. It is impossible to say what those outcomes will be or even when they will be felt, but it is vital to give as much information as possible at the earliest possible time so that individuals, families, and businesses can start making plans for their own futures.

In advance of the triggering of Article 50 of the Treaty by the UK Government, I wrote to the President of the European Commission and to the Secretary-General of the Council, in February and March respectively, urging a proactive approach to the timely public disclosure of relevant information and documents. This, I felt, was important for promoting citizens' trust in the negotiating process, as well as keeping people informed about progress and the issues to be aware of.

I was pleased with the positive responses I received. President Juncker noted, 'These negotiations will be unique....There is no precedent for this process. Therefore, our transparency policy will also be unique and unprecedented'.

In May, the Council issued its Guiding Principles for Transparency in Negotiations under Article 50 TEU, with the stated aim of 'facilitating effective public scrutiny and providing a steady flow of information throughout the negotiations whilst preserving the space to form EU positions and negotiate with the UK'.

This is all very welcome and it may be too early to say whether these fine aspirations will be fulfilled in practice. Nevertheless, one of the opening statements in the Council document is, 'Ensuring that the negotiations are conducted in a transparent manner will be one of the keys of their success'.

For transparency to be identified as a key performance indicator in the context of international negotiations is significant, especially as it comes so soon after the struggles to achieve important, but comparatively modest, improvements in transparency of the TTIP negotiations and conduct of trilogues. It's also true to say that the transparency issue has itself become a preliminary battleground in the negotiations, the commitments on the EU side being in stark contrast to the UK mantra of 'No running commentary'. While it's very early days, it does appear so far that the UK is being forced into a position of being more open than it would like, publishing a series of 'Position' or 'Future Partnership' papers, the content of which has been widely criticised as being vague and unsubstantial. In addition, and as I predicted, important documents are also being leaked, another reason why proactivity is important if the negotiators wish to control their agendas as much as possible.

It's often said that, as a concept, transparency has only one direction of travel. No initiative for less transparency is going to find favour in a modern democracy or with engaged and informed citizens. If that's the case, will this more open approach we are seeing in the Brexit talks be applied in future negotiations conducted by the EU? Or will the 'unique and unprecedented' nature of Brexit be used as justification for an exceptional approach to transparency which is deemed inappropriate when it comes to future negotiations involving international relations? It is clear that transparency—or lack of—is part of the diplomatic political tool-kit of both sides. They are happy to turn on or off the tap as it suits their political aim. While that may in effect be in the public interest, it doesn't necessarily mean that it is done with the public interest exclusively in mind.

Managing the information agenda, in particular the flow of communications which enter the public domain,

is an important aspect of public relations, be they political, commercial or social.

A proactive approach to transparency means keeping control of that agenda, as opposed to having to react within specified time limits when requests for information are made. Although it is good practice to publish information which helps to explain or contextualise documents or extracts disclosed in response to requests made under a public access regime, it is in fact unusual for public bodies to do so.

The processing of FOI requests is invariably done in busy offices, often by comparatively junior staff, with senior or political input only coming in at the end of the process, when legal deadlines for compliance are at issue. What is being considered for disclosure will have been defined by the person making the request for information. Withholding information will have to be justified, quite rightly, by reference to legal criteria and, sometimes, to an assessment of where the balance of public interest lies.

We also know particularly in the context of Brexit, that where contentious issues are at stake the flow of official information can be disrupted by leaks. Unauthorised leaks, such as that from the pre-negotiations dinner at 10 Downing Street, usually require a rebuttal or response of some kind and can have a lasting impact on the course of negotiations, the relationship between the parties involved and the public perception of the issues at stake.

These pressures and the loss of control of the information agenda can be avoided by taking a proactive approach to maximum transparency. By seizing the initiative, thinking about and deciding in advance what can and should be published as a matter of public interest, public bodies can win the trust and respect of citizens, businesses and other interested parties, as well as putting themselves on the front foot in terms of public relations and managing the flow of information.

It will be interesting to see how the commitment to proactive transparency in the Brexit negotiations plays out in practice. If the stated principles are not adhered to, I for one will be considering whether I need to intervene in the interests of EU citizens. It may well be that I receive complaints about transparency or other aspects of Brexit from citizens, businesses or concerned interest groups or representative organisations in the EU. As ever, I will not hesitate to use all the powers and resources available to me under the EU Treaties as Ombudsman to pursue the legitimate concerns of others.

Other contributors to this publication pose important questions about transparency in the context of foreign affairs at EU level. The question 'How much is enough?' is particularly pertinent. The protection of legitimate public and private interests is rightly provided for in access to information laws in order to preserve certain important social, economic and democratic principles. Public access to information cannot be unrestricted. Where to draw the line should, in my view, be determined by balancing the public interest in disclosure with the harm to the identified interest which disclosure might reasonably be expected to cause. That can be determined only by exercising judgement on a case by case basis and I do not underestimate the challenge that that can impose. We do not live in a static environment but rather a fluid and dynamic one and the rational judgments of one transparency era may not necessarily survive the demands of the next one.

Privileged, controlled access for the few, such as that won by MEPs in relation to the TTIP negotiations, presents different challenges. Elected representatives are in a position of trust when exercising their democratic responsibilities on behalf of their constituency, but having access to information which some of them may consider should be published because of its wider public interest poses a dilemma. The likelihood is that unilateral action might amount to a breach of a code of conduct or, in some jurisdictions, even a criminal offence. Ultimately these issues engage the conscience of the individual concerned, but there should at least be a means whereby they can officially raise their concerns and put the case for greater transparency.

I welcome the exploration of these topics in this journal and look forward to further contributions as the theory and practice of the ideas put forward are developed. We have certainly seen a trend towards greater transparency in foreign affairs in recent times, but this will always remain one of the most sensitive areas for national governments and international organisations.

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The author declares no conflict of interests.

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Emily O'Reilly was elected as the European Ombudsman in July 2013 and took office on 1 October 2013. She was re-elected in December 2014 for a five year mandate. She is an author and former journalist and broadcaster who became Ireland's first female Ombudsman and Information Commissioner in 2003 and in 2007 she was also appointed Commissioner for Environmental Information. Ms O'Reilly is a graduate of University College Dublin with a Degree in European Languages and Literature (1979) and holds a Graduate Diploma in Education from Trinity College Dublin (1980). As former political editor, broadcaster and author, her career attracted significant domestic and international recognition including a Harvard University Fellowship in 1988 and multiple national awards.

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