Access to Documents in the EU Foreign Affairs Council: A Logic of Transparency or Encapsulation?

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Abstract
A new ‘transparency logic’ seems to have captured institutions around the world in the expectation that this will deliver better governance and lead to more democracy. In the Council of the European Union, a trend towards greater transparency is well-documented. Up until now, however, conclusions about the extent of transparency embeddedness in the Council are drawn at a general level that does not engage with the Council’s complex institutional architecture. This paper considers the case of the Foreign Affairs Council (FAC). The FAC’s strong divergence along a number of institutional factors that are expected to be salient for the development of transparency policies makes it a suitable case to establish whether the ‘transparency logic’ is generalisable throughout the Council, or whether pockets exist that are governed by a competing ‘logic of institutional encapsulation’. The case study studies the development of transparency rules and practices between 1992-2014. It is based on 17 interviews with EU foreign policy actors, 9 court cases, descriptive statistics (including 247 appeal decisions) and various regulatory and policy documents. It finds tentative evidence for the dominance of a ‘logic of encapsulation’ that has however, over time, shed some ground to a competing ‘transparency logic’.
Introduction

It is commonplace in today’s transparency research to observe that, over the past quarter-century, a global transparency wave has swept through public institutions (Michener 2011, p. 6; McDermott 2010, pp. 10-1; Roberts 2010, pp. 7-8; Hood 2006). A new ‘transparency logic’ seems to have captured institutions in the expectation that this will deliver better governance and lead to more democracy (Erkillä 2012). In the Council of the European Union, this trend towards greater transparency is well-documented. Gradually, the Council has developed a legal transparency framework, proactive and requested document disclosure has gone up, and member state votes on legislative proposals are now routinely and accessibly published (Hillebrandt et al. 2014; Driessen 2008; Settembrini 2005, p. 648-650). These developments may lead us to conclude that the EU, too, has embraced the ‘transparency logic’.

Up until now, however, conclusions about the extent of transparency embeddedness in the Council are drawn at a general level that does not engage with the Council’s complex institutional architecture. In reality, the Council –the place where the various member states interests are represented and forged into a common position– is a composite institution that carries out multiple functions using different instruments (Wallace 2002). From one area to the next, the centrality of particular actors beyond the member states, as well as these actors’ policy-specific preferences and institutional resources, varies substantially (Beach 2008; Christiansen and Vanhoonacker 2008; Lewis 2003). Variations in institutional factors are likely to impact on the interpretation and implementation of transparency requirements (Mitchell 1998). The question is therefore warranted whether the ‘transparency logic’ is generalisable throughout the Council, or whether pockets exist that are governed by a competing ‘logic of institutional encapsulation’ that resists the progressive extension of transparency.

This paper considers the case of the Foreign Affairs Council (hereinafter, the FAC) and compares transparency developments in the FAC with the overall development path of Council transparency.12 The FAC makes up one of ten policy configurations in which the Council meets, gathering the respective foreign affairs, defence, trade and development ministers of the EU’s member states, depending on the subject matter at hand.³ A policy area that has historically been rigidly separated from the so-called ‘Community method’ in the Union’s founding treaties, the FAC has largely tended to favour intergovernmental, rather than supranational modes of decision-making, with the exclusion of legislative instruments and of the EU Court of Justice (ECJ, after 2009: CJEU) as specific legal characteristics (Govaere 2004, p. 103-6). These omissions have not prevented the EU from becoming an increasingly prominent international actor with a visible impact, a fact that is underlined by the ongoing institutionalisation of this policy area (Vanhoonacker and Pomorska 2013; Wallace 2005).

The current case study is concerned with the question how the FAC transparency policy developed between 1992 and 2014, considering in particular those aspects that diverge remarkably from the overall Council transparency policy. It seeks to explain these developments on the basis of a historical institutionalist framework that traces the influence of dominant actors by way of their preferences and resources in Council policy-making (Hall and Taylor 1996). The term ‘transparency policy’ is understood broadly, as the formal and informal rules and practices that are in place to regulate the public’s access to documents of the Council (in this case, specifically the FAC).

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1 The current paper forms part of a larger comparative case study that considers variegation and similarity in the development of transparency in three policy areas of the Council. Next to the Foreign Affairs Council, the Economic and Financial Affairs (Ecofin) and Environment Councils will be analysed. The study is due to be finalised in the autumn of 2016.
2 A list of abbreviations is provided in annex 3.
3 During the 1990s, the Council had 19 constellations, while foreign policy making was spread out over two constellations: the ‘General Affairs and External Relations Council – external relations part’ (GAERC) and the Development Council (Devco). For reasons of legibility, all of the Council’s foreign policy making activities are here subsumed under the header of FAC.
The paper proceeds as follows. The next section provides a stylised account of the historical developments of access to documents in the Council, drawing extensively on earlier work by the author and colleagues (Curtin and Hillebrandt forthcoming; Abazi and Hillebrandt 2015; Hillebrandt et al. 2014; Curtin and Meijer 2006). The paper then turns to the development of access to documents policy in the FAC. To facilitate the analysis, it is broken into two time periods: one covering the years before and under the first access to documents decision (Decision 731/93, 1992-2001), the other covering the years under the legislative act that replaced it (Regulation 1049/01, 2002-2014). For each period, important changes and continuities in the access to FAC documents policy are discussed, after which a process-tracing narrative lays bare the institutional factors that best explain these changes and continuities. The section thereafter seeks to generalise the findings by way of the formulation of a number of tentative theoretical conclusions, and briefly considers whether these can be extended to other Council constellations or are rather unique to the FAC. The paper concludes by considering the significance of the findings and pointing towards avenues for further research.

A developing transparency policy in the Council

Transparency in the EU Council has seen an “inexorable rise” (Maiani et al. 2011). Before 1992, the issue of transparency was hardly discussed and did not feature on the Council agenda. Less than ten years later, a policy was in place that was governed by a treaty article, a legislative act, and a considerable body of case law, implemented by an administrative unit especially set up for this purpose (Hillebrandt et al. 2014). Another fourteen years later, the Council publishes more documents than ever on its online document register, while a consensus has emerged on the constitutional status of the principle of transparency (Curtin and Hillebrandt forthcoming). This is attested by recent case which holds that in principle, all Council documents produced in the course of a legislative procedure should be made fully and immediately public (Abazi and Hillebrandt 2015). In short, compared to the situation in 1992, today the Council has moved considerably closer to an ideal of transparent decision-making.

Naturally, the reality underlying this success story is more complex. To a certain extent, the mounting of an access to documents policy in the Council has been underpinned by a mixture of overly optimistic assumptions and political rhetoric about the benefits of transparency (Hillebrandt 2013). In this context, it must be concluded that placing large numbers of documents on a register does not offer a shortcut to transparency and democratic legitimacy (Curtin and Meijer 2006). Equally, it is clear that access to documents in practice has given rise to transparency-evasive behaviour that manifests itself in various ways (Curtin and Hillebrandt forthcoming). This leads to a de-idealisation of the idea of transparency as a policy, which in its development is driven by a composite of institutional factors just like any other policy (Novak 2014; Bjurulf and Elgström 2004). The manner in which Council transparency developed can be convincingly argued to be a product of repeated interactions between the diverging preferences and resources of actors both inside and outside of the Council. Exogenous factors such as public opinion, technological possibilities and focusing events may alter this balance (Hillebrandt et al. 2014).

When considering the development of the Council’s access to documents policy, an interesting pattern becomes apparent: while formal transparency provisions increased dramatically after 1992, this increase has largely come to a halt since 2006 (Hillebrandt et al. 2014). The initiative for a transparency provision came from the Dutch presidency which chaired the intergovernmental negotiations on the Maastricht Treaty and was supported only

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4 The current paper applies a mixed methods framework that combines both policy process-tracing and legal analysis. It is based on 17 semi-structured interviews with officials, stakeholders and experts in the area of EU foreign policy (10 Council insiders and 7 outsiders), as well as legal and policy documents and descriptive quantitative data. Further details on the data are provided in annexes 1 and 2, the list of references, and footnote 6 and 7. Material from interview 1 was previously presented in Hillebrandt et al. 2014.
by the Danish government and the European Parliament (EP). This led to a largely symbolic compromise in the shape of a political declaration attached to the Maastricht Treaty (Declaration 17). Things might well have been left there, had the Maastricht Treaty not been rejected, respectively nearly rejected in Danish and French referendums. This sent the issue of transparency “to the top of the agenda” (Monde Économie 2000). Although the incoming UK presidency felt “a natural reluctance [. . .] to complicate the daily business of the Council by opening it up to public scrutiny” (UK 1992), it was under pressure to take action, which resulted in a Council Decision on access to documents (Decision 731/93) that entered into force as of 1994. Once in place, this rather restrictive internally adopted decision was immediately kept under pressure. Activist journalists and civil rights campaigners monitored the Council’s adherence through continuous requests and appeals, and a number of them successfully challenged negative decisions before the ECJ. Meanwhile, a minority of member states, including Sweden and Finland upon accession to the EU in 1995, kept the issue on the agenda by voting against non-disclosure and by issuing public statements (Hillebrandt et al. 2014).

By the time of the next Intergovernmental Conference (IGC) in 1996, the ‘gang of four’ (i.e., Denmark, Finland, the Netherlands and Sweden) were actively advocating the inclusion of a provision on transparency in the European Treaties. This seemed a logical ‘next step’, and as access to documents was not deemed particularly salient to a majority of member states, they felt that “transparency and all that is for the birds, but if [the pro-transparent members] want it, they can have it” (respondent #1). As a result, an article (art. 255) was included in the Amsterdam Treaty which foresaw in the adoption of secondary legislation on access to documents. Regulation 1049/01 on public access to documents followed suit at the end of May 2001, a short time after the deadline foreseen in art. 255. The regulation was adopted in co-legislation with the EP while Sweden, holding the presidency, negotiated it on behalf of the Council. Consequently, Sweden was able to present the Council majority with a ‘hard deal’ (Bjurulf and Elgström 2004).

The subsequent period saw a gradual consolidation of the Council access to documents policy. At an administrative level, arrangements were put in place for efficient cooperation between the institutions, and to facilitate greater proactive disclosure. In the meanwhile, the new possibilities in IT had resulted in the introduction of an online documents register, which now allowed the Council, like many other transparency regimes, to practice proactive disclosure next to its ‘passive’ policy of handling document requests (Pasquier and Villeneuve 2012, p. 166). Both active and passive transparency figures improved over time. Between 1999 (the first year in which the register was operational) and 2013 (most recent figures), the annual figure of documents registered doubled to 160,483, of which more than three-quarters were directly downloadable. Similarly, the rate of access provided for the procedure as a whole increased considerably from 58.7% in 1994 to 79.5% in 2013 (Council 1998, 2000d and 2014). This trend of administrative improvement was not in the last place due to a series of court cases that settled outstanding issues in the interpretation of Regulation 1049/01. Several of these cases were brought by MEPs or activists (Curtin and Hillebrandt forthcoming; Hillebrandt et al. 2014).

The trend towards wider transparency did not last indefinitely. Particularly developments in the adjudication of the public right of access pushed a number of hitherto disinterested member states into a defensive position. This is evidenced by the high rate of member state interventions in court cases as well as countervotes in access to documents appeals. Furthermore, the ‘big bang’ enlargement of the EU in 2004 meant that the pro-transparency member states found themselves in an increasingly isolated position. By the time the Commission initiated a previously foreseen revision of the access regulation, the political landscape was characterized by transparency fatigue and resistance among a Council majority and the Commission, against an entrenched and defensive Council minority supported by the EP. So far, the negotiations that began in 2008 have not led to any reform.
of Regulation 1049/01, in spite of the requirement to bring it in line with the new access provision contained in the 2009 Lisbon Treaty (Hillebrandt et al. 2014; Maiani et al. 2011).

The development path of access to documents in the Council between 1992 and 2014 thus reveals a pattern growth over time (albeit interrupted in recent years) that is explained by a combination of member state coalition-driven advocacy, outside pressure, and judicial review (Abazi and Hillebrandt 2015; Hillebrandt et al. 2014; Bjurulf and Elgström 2004). Yet this explanation provides only a rather partial account. What happened in policy areas that were more insulated from outside pressure? Were member states’ transparency preferences generalizable to all policy areas? Did policy-specific institutional arrangements alter the resources available to those actors seeking to influence the extent of transparency? And finally, were there any exogenous factors that cast the odds unusually in favour or against a presumption of transparency? In order to find answers to these questions, we must move away from a general study of Council transparency to consider its development in a specific policy context. The FAC, being a policy area that functions differently in many of the aspects that featured in the above discussion, offers a good case study to explore whether the central tenet of a ‘transparency effect’ holds under exceptional circumstances, or whether in fact the FAC came to ‘encapsulate’ the public’s right of access to documents.

The Foreign Affairs Council: an accessible policy area?

1992-2001: A policy under construction

Transparency developments

Around 1992, foreign policy activity in the Council was only beginning just beginning its road to institutionalisation, and consequently, no access to documents arrangements were in place. Formal rules enabling or restricting public access to FAC documents only began to develop with the first access decision. This decision framed the FAC-related refusal ground of ‘the protection of international relations’ as a mandatory exception, as opposed to the protection of decision-making which was discretionary (Decision 731/93, art. 4(1) respectively (2)). As a consequence, the court was reluctant to apply more than a minimal judicial review where applicants contested a refusal by the Council. This reluctance was enhanced by the question of its jurisdiction as, according to the Maastricht Treaty, the court could not adjudicate in cases falling under the Council’s Common Foreign and Security Policy (CFSP) (Maastricht TEU, art. L). The question first surfaced in Hautala v Council (1999), when a Finnish MEP requested public access to CFSP-related documents. The court however found that, as it had jurisdiction over access to documents questions, and absent provisions to the contrary, it had jurisdiction over access to CFSP documents cases as well. However, given the nature of CFSP decision-making, the Council was given wide discretion in establishing potential exceptions to the right of access. Consequently, the court offered its first articulation of a ‘limited review’ containing four elements: compliance with the procedural requirements, proper reason-giving, and avoidance of a manifest error of assessment of the facts and abuse of powers. Hautala eventually won the case because the court ruled that the Council had breached the principle of proportionality by not considering the possibility of partial access, a procedural step which the court considered should always be applied. The Council thereafter appealed the case before the highest court where it was dismissed in its entirety.

The legal framework of access to documents in the area of foreign affairs cannot be properly understood without reference to the classification system. A second field of legal development concerns the European Parliament’s right of access to (classified) information. While parliamentary access is also important for obvious reasons, it was (and continues to be) legally and functionally distinct from the public’s right of access. This paper therefore only discusses parliamentary access to the extent that it influenced the Council’s policy of public access to documents in a notable manner.
relation between public access and classified documents developed considerably. Initially falling within the scope of access to documents, classified documents became exempted following a Council Decision in 2000 (Council 2000b; Council 2000c). After only a few months, the block exemption was again undone by new security rules (Council 2001b) which however left certain special conditions, such as the so-called originator consent ('orcon') principle and the possibility for bulk classification, in place. Under the orcon principle, classified documents submitted to the Council could not be made public without the originator’s consent. Over time, the number of classification levels also went up, from three under Decision 24/95 (applying the French terminology, ‘restreint’, ‘confidentiel’ and ‘secret’) to four (including ‘top secret’) under the consolidated access decision of 2000 and thereafter. Whereas the Council initially decided to retain references to classified documents on the new online register, this decision was equally revoked under the July 2000 rules, and only very partially restored in 2001, when documents bearing the lowest classification level were again listed on the register. The impact of the overhaul becomes apparent when the case law of the time is considered. In two similar cases involving sensitive documents, the Court of First Instance (CFI) annulled the Council’s decision in a judgment preceding the overhaul (Kuijer v Council, April 2000), while a subsequent judgment of July 2001 dismissed the applicant’s action in its entirety (Mattila v Council and Commission). Moreover, whereas in Kuijer the CFI found that the Council’s motivation to refuse partial access was below standard, in Mattila it considered “that partial access would be meaningless because the parts of the documents that could be disclosed would be of no use to the applicant”. (Mattila subsequently appealed the case, see period 2 below). At the end of May 2001, the EU adopted its first legislative act on access to documents (Regulation 1049/01, see also previous paragraph). While Regulation 1049/01 confirmed the status quo concerning classified information, it left many of the thorny issues undecided. In a carefully worded art. 9, it foresaw in the inclusion of classified information and refusal procedure in accordance with the general exception rules listed in the Regulation’s art. 4. At the same time, the regulation on classification and document handling was to take place on the basis of internally decided rules outside of the Regulation and with full respect for the orcon principle.

The introduction of an access framework resulted in an implementation practice. Following Pasquier and Villeneuve (2012, p. 166), these are divided into (pro)active and passive access practices. Beginning with proactive document disclosure, FAC documents were circulated among varying constellations of decision-makers, and registered and published in different ways, making it difficult to establish an estimate of all FAC documents produced in any given year (email correspondence, respondent #10). However, when a cross-section of FAC documents published on the register is considered, certain trends can be discerned. For example, the rate of direct access to FAC documents on the register increased steadily from 40.5% in 1999 to 58.1% in 2001. At the same time, it is clear that many FAC documents, even those not classified, were not listed on the register. The Political Security Committee (PSC) and military bodies for example registered no documents at all, while very few documents on the Common Defence and Security Policy (CSDP) were entered on the register. Thus, though annual FAC document registration increased considerably faster than the overall Council figure, this probably attests to a catch-up effect (comparing 1999 and 2002 figures, Council 2003; see also annex 2).

When Council documents are not proactively disclosed, interested individuals have the possibility to make a document request. Access requests go through an initial stage, which

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6 FAC documents were analysed for the years 1999 (first year of register) – 2002 and 2007, 2008, 2013, and 2014. Documents on the Council register are listed on the basis of a distribution code which signals the group of recipients (e.g., ‘Relex’ for members of the Relex Working Party, or ‘COPS’ for PSC ambassadors. While counting documents per distribution code offers a useful proxy to access trends, it has certain shortcomings. This is the case because documents are often circulated among varying constellations of decision-makers and are consequently registered under several distribution codes at once. When counting documents per code, this creates a problem of counting overlap and makes it, using the current register, impossible to establish definitive document figures for the FAC as a whole. Nonetheless, assuming that the extent of document overlap remains constant over time, the recorded figures do lend themselves for longitudinal comparison. Full details are provided in Annex 2.
applicants can appeal through a procedure known as the ‘confirmatory application’. As the Council generally publishes individual appeal decisions, these provide a rich data source. With a few notable exceptions, confirmatory applications for FAC documents between 1994 and 2001 showed only limited divergence from the Council average.7 Decisions leading to full or partial access were slightly lower than average (respectively 47.6% and 57.3%) while the ‘international relations’ exception, though the most-invoked, was used surprisingly little (36% compared to an overall average of 27.2%). Notable divergence was observed on the ‘back side’ of the process, both in an administrative and a political sense. In administrative terms, while confirmatory applications were usually decided on by the Working Party on Information (WPI), in July 2000 it was decided that confirmatory applications for security and defence documents were to be handled by the appropriate CSDP body (UK 2000a). On a political level, member state countervoting was considerably higher than average (respectively 70% and 52%). Contrary to most other policy areas, a number of FAC appeals barely attained the required simple majority.

The access rules also sparked off certain informal rules, that is to say, forms of behaviour that were pervasive to the point of turning into regular unwritten norms or ‘rules of the game’, thereby affecting formal rules and practices (Helmke and Levitsky 2004). In this regard, an emerging tendency to overclassify documents may be noted (respondent #15), which in turn led to frequent internal security breaches: “Often I received restreint information via regular email. Then I would think: oh well, let’s get on with it. […] There needs to be fast communication so you need to be willing to pass over bumps and formalities” (respondent #5).

A further form of accommodation became salient when the public register went online. In the area of foreign affairs, the Council had employed the secured-communications network of Coreu (Correspondence Européenne) since then 1970s (Bicchi and Carta 2012, p. 467-8; respondent #6). Coreu document traffic, mainly consisting of communication between member state capitals, was in fact so high that it represented a substantially larger volume than FAC documents published on the register, although the use of Coreu subsequently declined (respondent #5; figure 1). The fact that the existence of individual Coreu documents was not published clearly affected (uninformed) outsiders, as it made it more difficult for them to request these documents (respondent #17).

Figure 1: Number of Coreu documents per year, 1992-2010

![Figure 1: Number of Coreu documents per year, 1992-2010](image)

Source: Bicchi and Carta 2012, p. 471. Currently published figures only go up to 2010.

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7 Confirmatory applications were coded for the years 1994-2002 and 2007, 2008, 2013 and 2014. Figures for 1994-2001 confirmatory applications were N=131 (FAC n=20). Figures for 2002 and after were N=143 (FAC n=51). Although not all confirmatory application decisions were public, under a most conservative estimate this sample represents 79.4% of the total.
Overall, a number of marked changes and continuities were observed in the FAC’s access to documents policy during the first period. First, while an overall increase in FAC transparency occurred, this increase was interrupted in a number of instances. Second, the access to FAC documents policy showed a mixed trend of convergence at the level of formal rules, while practices were more convergent. By contrast, informal rules were revealing steady divergence. Third, although certain provisions were already in place and implemented from 1994 onwards, it was mostly the period between the second half of 1999 and the second half of 2001 that saw a flurry of rule-making, adjudication, and changes in practices. An overview of developments is provided in table 1.

Table 1: Access to documents policy in the FAC, developments 1992-2001

<table>
<thead>
<tr>
<th>Development</th>
<th>Material or indicator</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Formal rules</strong></td>
<td>Fluctuation in the legal relation between access to documents and classified documents: from inclusion of classified documents to exclusion to conditional inclusion (convergence, divergence, limited convergence) Court jurisdiction but strict adherence to doctrine of ‘limited review’, declining room for partial access (divergence)</td>
</tr>
<tr>
<td><strong>Practices</strong></td>
<td>Overall increase in numbers of directly accessible documents due to catch-up effect; exclusion of certain categories (1999-2001) (limited convergence) Minor differences in access rate and frequency of invoked exception grounds for confirmatory applications compared to Council average, but higher incidence of countervoting (1994-2001) (limited convergence)</td>
</tr>
<tr>
<td></td>
<td>- Registered: factor 2.9 increase (Council average no increase) - Directly accessible: 17.1 percentage point increase (no Council average available) Access rate: 47.6% (Council average:57.3%) Exception ground international relations: 36% (Council average: 27.2%) Countervoting: 70% (Council average: 52%)</td>
</tr>
<tr>
<td><strong>Informal rules</strong></td>
<td>Tendency to overclassify documents (divergence) Increase in Coreu traffic between 1992 and 2001 (divergence)</td>
</tr>
<tr>
<td></td>
<td>- Reported by respondents - Very high volume, factor 0.2 increase</td>
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</tbody>
</table>

Institutional factors
The previous section showed a number of interesting development patterns in the FAC’s access to documents policy before December 2001. This section turns to the factors that explain these developments. It is argued that while the constellation of general preferences among internal actors were similar to those in other Council policy areas, transparency advocates were only minimally effective at pursuing their objective of wide access to FAC documents. This was due to the limited institutional role foreseen for potential transparency actors such as the EP and the court, while from 1999 onward FAC decision-making came to include new actors with strong resources and their own preferences. The presidency and administrative policy discretion formed important resources for respectively member states and the Council Secretariat. By contrast, the need for vote-counting, the availability of a legal basis to contest decisions, and civil society pressure played a less significant role. Finally, the marked increase in foreign policy activity as well as the introduction of the public register towards the end of the 1990s clearly formed important policy-exogenous factors.

Beginning with general institutional developments in the FAC, the period of the 1990s marked a gradual build-up of a foreign policy architecture in the Council and a concomitant growth in foreign policy activity (respondent #4). The gradual development of an architecture is evidenced by the establishment of the CFSP in the Maastricht TEU, governed by a separate decision-making regime, and the subsequent establishment of a HR for the CFSP in the Amsterdam TEU. The fact that the EP and the court were excluded from respectively CFSP decision-making and adjudication, as well as the requirement of unanimity in all but a few
well-circumscribed situations, meant that the role of member states in the CFSP was particularly strong compared to other policy areas (respondent #4). Within the Council, the CFSP was driven by an informal group of senior national foreign policy officials (the Political Committee, or PoCo for short). While formally subordinated to the Coreper, the PoCo directly advised the ministers on CFSP matters (respondent #5; Nugent 2010, p. 389; Duke and Vanhoonacker 2006, p. 373). Following the expansion of CFSP tasks in the Amsterdam TEU, the PoCo was formalised and renamed Political and Security Committee (PSC), which began operating early 2000 and was subsequently given a permanent status (Council 2001a). A Military Committee and Military Staff were set up in parallel (Reichard 2013, pp. 64-5). In terms of proactive transparency, the increase rate of document disclosure outpaced the increase in policy activity measured in terms of ministerial agenda items. However, this indicator probably understates the actual increase in policy activity. Moreover, the newly-established bodies did not register any documents during their first years of existence. Document circulation within the PSC was characterised by a high degree of informality with little concern for formal procedures: “It was a transition period. At that time documents were flying in from everywhere. [...] They were even not classified as meeting documents” (respondent #10). In parallel, foreign policy decision-makers relied heavily on the Coreu network for document distribution (Bicchi and Carta 2012, pp. 475-7). The strong emphasis on the need for a strong security of information policy may also have accounted for a rise in document classification and overclassification. The new decisional structure was perceived as “really [...] a new format” (respondent #15). Consequently, the establishment of the public register signified only a partial transparency effect for FAC actors.

During the first period, the member states most actively involved in FAC transparency corresponded rather closely with those active in the wider transparency debate, as is evidenced by indicators of policy involvement at the level of rule-making, adjudication and implementation (table 2). Five member states (Sweden, Denmark, the Netherlands and Finland, as well as the United Kingdom) formed a block in favour of wider access, while two member states (France and Spain) repeatedly expressed their opposition to this line. Particularly in the Hautala case and subsequent appeal, in which 6 of 15 Council members intervened, polarisation was strong.

<table>
<thead>
<tr>
<th>Policy aspect</th>
<th>Member states*</th>
<th>Indicator</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rule-making</td>
<td>Finland (+), France (-), Sweden (+)</td>
<td>Accounts on major changes during presidency</td>
</tr>
<tr>
<td></td>
<td>Spain (-), Netherlands (+), Sweden (+), Finland (+), Denmark (+)</td>
<td>Statements attached to vote on Council Decision</td>
</tr>
<tr>
<td>Adjudication</td>
<td>Finland (+), Sweden (+), France (-), Denmark (+), UK (+), Spain (-)</td>
<td>Interventions in court cases</td>
</tr>
<tr>
<td>Implementation</td>
<td>Sweden (+), Denmark (+), UK (+), Netherlands (+), Finland (+)</td>
<td>Frequent countervoters in confirmatory applications</td>
</tr>
</tbody>
</table>

Data compiled by the author. * In chronological or magnitudinal order. +/- represent advocacy in favour of wider or more restricted access.

The dominant role of Finland, France and Sweden stood out in particular, and was associated with their respective presidencies (respondent #17, also Reichard 2013, pp. 330-1). The power derived from the chair is confirmed by a series of successive yet contradictory rule-making breakthroughs. Thus, during the 1999 Finnish presidency, a decision was adopted to include references to all classified documents in the newly established public register (Council 2000a, Reichard 2013, pp. 330-1). However, already less than a year later, the French presidency managed to reverse this consensus by finding a majority for the full exclusion of all documents classified confidential or higher from Decision 731/93 and of all classified documents from the register. Both decisions required only a simple majority of Council members as they related to the internal organisation of the Council (UK 2000a). Finally, when the Swedish presidency oversaw the negotiations of the ‘Art. 255 Regulation’, it
was able to roll back the a priori exclusion of classified documents. This was in large part due to the involvement of the EP as a co-legislator, which strengthened Sweden’s role and forced a qualified majority in the Council to accept a ‘grand bargain’ that included the prospect of privileged parliamentary access to classified information in the short term (respondent #25). Such access had been a long-standing demand of the EP (Rosén 2015, pp. 389–91).

The expanding institutional architecture of the CFSP impacted on all levels of the FAC transparency policy. First, the functional incorporation of the Western European Union (WEU), and thereby, closer cooperation with NATO signalled the Council’s increasing ambitions in the area of defence and security, and thereby, growing need for a security of information (SI) regime (Reichard 2013, p. 328). Second, as foreseen by the Amsterdam Treaty, the first High Representative (HR), Javier Solana, entered into office during the second half of 1999. Solana brought with him the experience of NATO and its modus operandi, as he had been its Secretary-General (SG) directly before joining the Council (respondent #15). Within the Council, he was well-positioned to advocate closer cooperation between the EU and NATO, acting as he did in the triple-hatted role of SG of the Council, SG of the WEU, and HR of the CFSP (respondent #4). Solana’s appointment thus introduced an active proponent of a strong SI policy into the Council (Reichard 2013, p. 325). He quickly developed into a powerful elite official, acting on the basis of proactivity and informality, travelling profusely and seeking support from a relatively small staff that clearly acted at some distance from other the rest of the Council Secretariat (respondents #6 and #15). This working method explains why during their first years of existence, these bodies published no documents on the register, insisting on the traditional modes of communication such as Coreu or unofficial memos.

At the same time, classified information came to play an increasingly important role, a trend that was followed critically by certain MEPs. The EP as a whole had sought to gain greater information rights but its insistence of a right of oversight in the relative new and emergent Union area of the CFSP found little resonance with the Council beyond the general information rights foreseen in the Maastricht TEU (Rosén 2015, p. 389). The court case initiated by Heidi Hautala MEP in January 1998 therefore proceeded on the basis of a public, rather than a privileged right of access. At the same time, Hautala’s case was clearly facilitated by her institutional platform, as she first learned about the existence of the specific document (a CFSP report approved by the PoCo and distributed via Coreu) through the Council’s answers to her parliamentary question, and benefitted from the direct advice of both the European Ombudsman and a representative in the Finnish delegation (respondent #17; EP 1997, p. 48). The case offered the court the opportunity to assert its jurisdiction over CFSP access cases and even to introduce an obligation on the Council’s side to consider partial access, thereby normalising the interpretation of the transparency rules in the CFSP context. However, in Hautala and subsequent art. 4(1)-related cases, it tread extremely carefully, leaving the Council wide discretion in determining the appropriateness of refusing access by interpreting its right of judicial review in the narrowest possible sense.

In July 1999, a classification overhaul took place, which came to be known as the ‘Solana Decision’. It is likely that the French presidency cooperated closely with the HR to achieve the reform, with the latter taking the initiative (respondent #31; Bunyan 2002: ch.6). It also appears that the proposal was presented in a manner that allowed the measures to be passed with the least possible resistance. It was presented in the middle of the summer, unannounced, and through the application of a two-week ‘written procedure’, meaning Decision 731/93 would be amended unless a simple majority manifested itself against the plan. The presidency cited haste because of pending access to CSDP document requests. Moreover, in an exchange of letters with NATO, the HR had already committed to a revision of the access to documents rules in place (UK 2000a; Bunyan 2002: ch.6). The decision met with vociferous criticism among a collective of pro-transparency member states, MEPs, and NGOs, although to little avail (respondent #15; Duke 2001, p. 168; Reichard 2013, p. 331). As
the UK government pointed, the Council had no obligation to consult with the EP on the internal matter of access to documents (UK 2000b). However, the newly adopted measures did give rise to a number of targeted confirmatory applications by NGOs, which in turn accounts in large part for the strong countervoting effect in the FAC during this period. The ‘Solana Decision’ was also quickly cast in the light of the ongoing negotiations for the ‘Art. 255 Regulation’. The Swedish government in particular felt that the French move had struck a blow at their negotiations agenda for their upcoming presidency:

“We were very upset about that. We saw it as this is a way of making the Swedish effort during the presidency much more difficult. [...] They didn’t admit that this was their idea and that they had worked on it. We just had to swallow that and realize that it made the starting point for our presidency more difficult.” (respondent #31)

In November 2000, the Netherlands, supported by Sweden and Finland, brought a case against the revised access decision to keep political pressure on the ongoing ‘Art. 255 Regulation’ negotiations: “[W]e carried this out con amore and leaned in quite strongly. But then we withdrew it after the Regulation had been passed” (respondent #5).

The EP, which cast the exclusion of classified documents from public access in the light of its ongoing negotiations concerning privileged access, also began proceedings in December after it became clear that an interinstitutional agreement (IIA) concerning privileged access to classified information was not forthcoming (EP plenary, 5 September 2000 cited in Rosén 2015, p. 389, also p. 391). The pressure of court action had its influence on the negotiations. Whereas in August, the UK government still assumed that the new arrangements would form the basis of the new Regulation, by November, it reported that the Council was “looking at a range of possible solutions” (UK 2000a; UK 2000b).

Reform of the formal rules followed suit. First, in March 2001, the Council adopted new internal security rules on March 2001, explicitly “without prejudice to Art. 255 of the Treaty” (Council 2001b). Second, a political compromise was laid down in Regulation 1049/01 of May 2001, which replaced Decision 731/93 (Reichard 2013, p. 340; Rosén 2015, p. 393; respondents #31, #17). The new security decision and access regulation entailed a partial roll-back of the legal situation created by the Solana Decision, by bringing classified documents back under the scope of access to documents. At the same time, their handling remained subject to an exceptionalist legal regime, the subordination of which was not wholly apparent. It is therefore not surprising that the outcome was met with a wide range of reactions. On the one hand, there was deep suspicion on the side of pro-transparency observers, who described the new arrangement as an “amended version of the Solana decision” (De Leeuw cited in Reichard 2013, p. 342) or a “Russian doll” tucked away into the general access rules (respondent #17). Others described the move as a ‘necessary component’ of package deal: “They had to give the secrecy advocates something in order to save the general principles” (Tallberg cited in Rosén 2015, p. 392).

Part of the terms of the package deal, however, had not been met. When negotiations over the IIA concerning privileged access broke down, the EP again went to the court, this time to challenge the March security rules as a lever to force the Council back to the negotiating table (Rosén 2015, p. 392). Towards the end of the period here under consideration, the Council and the EP were close to finalizing a deal on limited parliamentary access to sensitive foreign policy documents, in exchange for a withdrawal of the court case (Rosén 2015, p. 393).
2002-2014: The ‘foreign policy ceiling’ of transparency

Transparency developments
When Regulation 1049/01 entered into force on 1 December 2001, a formal legal landscape for access to FAC documents was in place which was further consolidated by subsequent reforms. Besides the horizontally applicable primary and secondary law concerning access to documents, the latest classification rules, laid out in Council Decision 264/2001 would stay in place until March 2011. Though horizontally applicable, these classification rules overwhelmingly concerned documents produced in the CFSP (Galloway 2014, pp. 674-5). A 2008 staff note from the Secretariat provided guidelines for the handling of classified information, giving document authors with the option of excluding online access or even reference to the document. The latter option was to be applied only “in exceptional cases”. Moreover, following the orcon principle, the Council only mentioned third-party classified information where it had explicit permission to do so (Council 2008, point 5). In reality, the Council listed only a fraction of the classified information that it produced or received. Subsequent revisions of the security rules in 2011 and 2013 had only a minimal impact on the right of public access to documents. Another way in which the volume of classified information held by the Council grew, was through a surge in SI agreements with third parties, beginning with NATO in March 2003 (EU 2003). A staff note of 2007 listed various new agreements, including with Ukraine, Turkey, and the UN (Council 2007). By 2014, around 20 such agreements were in place (Galloway 2014, p. 678). These agreements vastly increased the scope of orcon-protected documents.

Meanwhile, the access to documents case law in the area of foreign policy saw some minor developments, followed by a landmark case in 2013 that indicated a step towards limited convergence with the application of Regulation 1049/01 in other policy areas. The first three cases after the entry into force of Regulation 1049/01 suggested a thawing of the courts (not least because all of them upheld, or resulted in, wider access) but brought relatively limited doctrinal development. In Hautala II (2001) the ECJ dismissed the Council’s appeal in its entirety (see section above), while rhetorically, it drew a clear connection with a transparency logic. In his opinion, Advocate-General Léger held the EU’s transparency policy “discloses a progressive affirmation of individuals’ right of access to documents held by public authorities” (AG 2001). In Kuiper II (2002), the court’s for the first time showed a readiness to annul an access refusal on grounds of the incorrect application of the international relations exception. Third, in the appeal case brought by Mattila (Mattila II, 2003), the ECJ followed the Advocate-General in finding that the CFI had erred in its reasoning, and that the Council had committed an error in law by not considering the possibility of partial access.

The next judgments however confirmed the Court’s earlier adherence to CFSP exceptionalism. They concerned an access refusal contested by Mr Sison (Sison, 2005, and appeal Sison II, 2007). Sison had been targeted by a Council decision which sought to freeze funds and financial assets of a number of individuals suspected of financing terrorism. The CFI applied only a very minimal review of the Council’s decision to refuse access to the underlying documents, finding no objection to the brevity and general nature of the reasons provided by the Council. Notably, while the CFI made reference to the Hautala criteria for limited review, neither it nor the ECJ systematically applied them. The CFI consequently dismissed the application in its entirety, a decision which was upheld by the ECJ. In the appeal, AG Geelhoed emphasised the strong distinction between the mandatory exceptions under art. 4(1) and the discretionary exceptions listed under art. 4(2) and (3), finding that “[a]s the efficacy of policy in this area in many cases depends on confidentiality being observed, the Community institutions involved must have complete discretion in respect of

8 In the second period, the court delivered nine judgments in access cases related to foreign policy documents (see table 3). Five of these were handled by the CFI (later GC) and four were appeals before the ECJ (later CJEU). Only one initial judgment (Mattila) was set aside upon appeal. In all cases, art. 4(1)(a), third indent (international relations) was at least one of the legal aspects that were addressed.
determining whether one of the interests listed in Article 4(1) (a) could be undermined by disclosure of documents” (AG 2003, italics added; cf. Heliskoski and Leino 2006, p. 754 a.f.).

Finally, the most recent cases all related to documents drafted in the context of international agreements. Two of these followed the previous ‘hands-off’ approach of earlier case law. In WWF European Policy Programme (2007), related to negotiations in the context of the WTO, the court, following Sison, found that the Council’s sparsely justified refusal to grant access was nonetheless of acceptable standard. Interestingly, it passed over the opportunity to identify minimal standards of record-keeping when discussing the Council’s assertion that the requested meeting minutes did not exist, even though it established that such standards exist. In Besselink (2013), the document requested was a draft mandate for the Commission to commence negotiations on the EU’s accession to the European Convention for the Protection of Human Rights (ECHR). The court here followed the Kuijer I strategy, annulling part of the Council’s decision not for breaching the international relations exception, but for having failed to consider the possibility of partial access. However, it resisted Besselink’s argument that the refusal to disclose the document infringed his constitutional right to freedom of expression and information.

In many ways, In’t Veld (2012, and appeal, In’t Veld II, 2014) presented the most complex FAC access case of recent years, and it gave way to a rather progressive judgment. In’t Veld, an MEP, had been denied access to a document containing an opinion by the Council’s legal service concerning the legal basis to be used for opening EU-US negotiations on the exchange of financial data to prevent and combat terrorism (the so-called ‘SWIFT agreement’). The Council had refused access on the basis of the exceptions protecting international relations and legal advice. Although the court reviewed the Council’s justification of the former exception on the basis of the Hautala criteria, it interpreted this procedure more stringently that it had done up until then, by insisting that the harm which would be caused by disclosure must be “reasonably foreseeably and not purely hypothetical”, and that to this end, such foreseeable harm must be sufficiently concrete. This new interpretation narrowed the distinction between mandatory and discretionary exceptions, although the court officially left the Hautala criteria for limited review intact (Abazi and Hillebrandt 2015, pp. 835-7). The court also chose the route of convergence with regard to the legal advice exception, by rejecting the Council’s argument that a stringent review test established in an earlier access to legal advice case (Turco and Sweden v Council) did not apply in the present case because it did not relate to legislative activity as had been the case in Turco. Instead, the CFI reviewed the legal advice exception as it would have done in any other area of Council policy (Leino 2014, p. 7). This line was defended upon appeal by AG Sharpston, who problematized the creation of a hard and fast distinction between legislative and executive decision-making procedures for implying prematurely that “legislative acts generally require a high level of transparency but that other [fields] require less” (AG 2014). The increasing stringency of review from Sison to In’t Veld was palpable when the CJEU insisted that in spite of the Council’s wide discretion to determine harm to the protected interest, it “remained obliged” to explain the risk of harm in sufficient detail (Abazi and Hillebrandt 2015, p. 837).

Implementation practices from 2002 onwards saw some remarkable developments. In terms of proactive disclosure a sharp, nearly fourfold increase occurred in the annual number of documents registered between 2002 and 2007. This is partly attributable to the fact that certain groups of documents that had hitherto not been registered at all (PSC, military, and trade policy documents) began to be placed on the register after 2002, while for other categories (CFSP, CSDP, Relex), document registration rose sharply. After 2007 the increase continued, albeit less markedly, and from 2013 to 2014, FAC document registration even declined slightly. Although this increase indicates a catch-up effect in terms of FAC document registration, it indicates less convergence towards overall Council transparency trends than may seem to be the case at first sight. As it happened, while the numbers of registered FAC documents increased over time, the proportion of these documents that was directly accessible saw an inverse trend, starting at 66.3% in 2002 and settling with a more than 10
point decrease at 55.4% in 2014, an overall proactive access rate that was slightly lower than the period directly before the entry into force of Regulation 1049/01 (see annex 2). Moreover, for every year measured, an increase in the number of registered documents resulted in a decrease in the percentage that was directly accessible. In the year that the number of registered documents was highest (2013), the proactive access rate stood at 48.6%, the lowest rate of all measured years since 2000. This contrasted starkly with the overall percentage of directly accessible Council documents, which continued to rise until 2012 when it settled at around 75%.

Requests for access to documents had been characterised by relative continuity since 1994. At the appeal stage however, various changes occurred that signalled increasing diverged from the overall Council practice. Compared to the first period, FAC access appeals increased sharply, both as a proportion of the total and in real per annum terms. The access rate however remained relatively stable. As in the earlier period, the most common refusal ground in decisions leading to partial access or refusal were “international relations”. However, at 90.6% of all refusals, reliance on this argument was about 2.5 more frequent than before. Whereas previously countervoting in the FAC occurred more often than in the Council overall, after 2002 it declined at a rate that considerably exceeded the Council average (respectively a 50% and a 10% drop).

New informal rules emerged during the post-2001 period. Within the CFSP structures, member states began to regularly circulate sensitive but unclassified information in various idiosyncratic ways designed to control information flows. One strategy to achieve this has been the creation of unregulated categories of document. For example, occasionally ‘non-papers’ were submitted. Categorised by the acronym SN (‘sans numéro’), these documents confusingly do carry a serial number (respondents #3, #6, #7). Another category are so-called ‘meeting documents’ (MDs). Both SN documents and MDs are registered only informally by the Secretariat and consequently do not appear on the online register (respondent #6, #10, #12, #17). The discretionary reliance on both MDs and SN documents appears to have been highly prevalent. An internal inventory for Council documents produced in 2013 for example found that the two categories comprised 49% of the total (email correspondence, respondent #10). A body like the Art. 133 committee and its successor the TPC have tended to rely heavily on MDs in their decision-making processes, which accounts for the low number of trade policy documents on the public register (Council 2008, p.1). Neither of these documents are formally registered by the Secretariat, nor do they appear on the online register. However, although the formal status of these documents is unclear, it appears that they can be requested (respondents #3, #7, #6). Recently, the ‘informal rule’ of using unofficial documents as the basis for FAC meetings has been countered by a rule-strengthening mechanism by which preparatory bodies are now requested to issue ‘tracking documents’ that list all MDs produced over a given period (respondent #7). These may help improve the Council’s ‘institutional memory’ and are being produced increasingly frequently (respondents #20, #6). Searches by the author to locate them on the Council register however were unsuccessful.

Another informal arrangement limiting public access to documents is the circulation of documents via parallel channels. For example, since the HR (supported by the EEAS) became the formal chair of the PSC, a routine was developed by which a very summary draft agenda is formally submitted to the Council Secretariat, while in parallel, the EEAS itself submits an annotated agenda directly to the member states. This method has prevented outsiders from having references to the documents underlying agenda items (respondent #10). Apart from that, the EEAS, or member states among themselves, have regularly maintained informal contact in situations where they were reluctant to share information too broadly, or to test the waters before stating their official position: “…we’re 28, so there’s not the full trust between all of them” (respondent #6). Even where member states do share sensitive information for inspection, such as in cases where proposals for sanction listings require substantiating evidence, member states rarely submit these documents formally to the
Council, or even allow other member states to keep the documents (respondent #6). In fact, the amount of ‘hard intelligence’ that is formally circulated is minimal (respondent #14).

Finally, a number of informal arrangements actually conflicted with the formal access to documents rules. First of all, it was reported that FAC decision-making is plagued by document leaks. “There are all these small networks of officials, who all know each other. […] [I]t happens only very rarely that a document cannot be obtained at all” (respondent #2). While the issue of leaking is periodically addressed by the chair, it remains a prevalent and more or less accepted element of the policy process, as leakers are difficult to trace, and often suspected to be based within member state delegations (respondents #7, #6). While respondents highlighted that document leaking has always been around, its incidence appears to have gone up over the past ten years (respondent #14). Another competing rule that was identified was found in the handling of access requests for classified documents submitted by third countries. While in such cases the Secretariat is obliged to consult with the document originator, the refusal decision must be justified on the basis of the exception grounds in art. 4 of Regulation 1049/01. In spite of this legal framework, it was felt by some that the United States holds a de facto veto over its own documents (respondents #2, #5).

Table 3 provides an overview of the most important access to documents developments specific to the FAC that took place between 2001 and 2014. Again, a number of trends stand out in particular. The first trend may be described as a ‘transparency ceiling’ in the FAC: while annual registration continued to rise, the rate of proactive disclosure dropped inversely, significantly dampening the growth of transparency. Second, where formal rule entrenchment caused transparency policy in the FAC to diverge increasingly, court review trended in the opposite direction. Third, a seemingly contradictory trend emerged between a growing security culture on the one hand, and informal and sometimes illegal document dissemination on the other.

Table 3: Access to documents policy in the FAC, developments December 2001-2014

<table>
<thead>
<tr>
<th>Formal rules</th>
<th>Development</th>
<th>Material or indicator</th>
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<tbody>
<tr>
<td>Entrenchment of security and classification rules through new voting arrangements, third-party agreements, and administrative-level arrangements (growing divergence)</td>
<td>- EU-NATO security agreement and other agreements (2003 and after)</td>
<td></td>
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<tr>
<td>- Initial adherence to limited Court review but stricter application of both international relations exception since 2012 (growing convergence)</td>
<td>- staff note 200/08 (administrative procedure)</td>
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<tr>
<td></td>
<td>- C-353/99 P Hautala II (appeal)</td>
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<td>- T-211/00 Kuijer II</td>
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<td>- C-353/01 Matilla II (appeal)</td>
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<td></td>
<td>- C-266/05P Sison II (appeal)</td>
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<td></td>
<td>- T-264/04 WWF European Policy Programme</td>
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<td>- T-529/09 In t Veld</td>
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<td>- T-331/11 Besselink</td>
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<td></td>
<td>- C-350/12 P In ‘t Veld II (appeal)</td>
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| Practices | - Increase in annually registered documents (particularly pronounced directly between 2002-2007) accompanied by a drop in the percentage of proactive disclosures (2002-2013) (divergence) | - Registered: factor 4.3 increase (Council average circa 1.7) |
| | - Strong increase confirmatory applications, strong decrease of countervoting, stable difference in access rate (2002-2014) (limited divergence) | - Directly accessible: 17.7 percentage point decrease (Council average 21.3% increase) |

| Informal rules | Proliferation of informal meeting and ‘sans numéro’ documents (unsure) |
| | Parallel document circulation (e.g. double meeting agendas, in camera document sharing) (divergence) |
| | Document leaking (unsure) |
| | - Internal memorandum |
| | - Reported by respondents |

FAC applications as percentage of total: 35.6% (previously 18%)  
Access rate: 49% (Council average:62.2%)  
Countervoting: 21.6% (Council average: 42.7%)
Institutional factors

As became apparent from the previous section, a number of notable changes took place in the FAC’s access to documents policy after the entry into force of Regulation 1049/01. As will be argued, these can be explained by three consecutive sets of institutional developments. First, early on in this period, a consolidation of the Council’s security regime took place, that succeeded to a large extent in entrenching classification rules and practices (Galloway 2014). Second, the aftermath of the 9/11 attacks brought about a surge in counter-terrorism activity that impacted directly and notably on access to documents practices, and indirectly and to a lesser extent, rules (Eckes 2009, p. 12; Zimmerman 2006, p. 127-34). Third and finally, during the second half of the period here under consideration, the extent of foreign policy, and particular CFSP cooperation raised the political stakes for member states, affecting their attitude to the circulation of documents (Bicchi and Carta 2012, p. 470).

The consolidation of a security regime had already begun in 2001, and the main institutional outlines were in place by the end of 2002, after which the Council began engage in third-party agreements. First, the security decision of March 2001 foresaw in the establishment of a member state-staffed security committee as well as an internal security office (Council 2001b, annex, part II, section 1), which was in place by the end of the year. The subsequent construction of a watertight security regime was overseen by top officials from Solana’s cabinet. The security office furnished a situation centre (sitcen), as well as central unit for document classification and declassification, the bureau d’informations classifiées (BIC) (respondent #15). The new focus on security issues acted as its own driving force:

“It works as a cycle really. If there’s the awareness, there is the willingness to acquire the necessary tools, the IT to guarantee security, which again brings greater security consciousness. I think the emergence of a security culture has been the largest change over the past decade in the document management of the Council’s foreign policy.” (respondent #14)

In July 2002, the incoming Danish presidency oversaw a further entrenchment of the classification rules. A revision of the rules of procedure raised the bar for future changes to the security decision to a qualified Council majority (Council 2002). This arrangement stood in contrast to the general rule by which decisions on procedural matters, including the rules of procedure which formed the basis of the security rules, were adopted by a simple majority (Amsterdam TEC art. 207, later TFEU art. 240(3)). The fact that this procedural change was overseen by a pro-transparent presidency may attest to a belief on the side of the pro-transparency countries that the existing security rules, adopted under the Swedish presidency, entailed the ‘best possible deal’. Neither is it unlikely that the change was proposed by the security committee. Be as it may, the transparency-classification nexus remained stable for the next ten years, and even when the security rules were revised in 2011 and 2013, this remained largely without consequences for the right of access to documents. The new consensus was underlined by the marked drop in member state dissent in confirmatory applications (table 4). In contrast to the period before December 2001, pro-transparent member states largely ceased to vote against access refusals; this practice was only continued by Sweden. Neither did member states intervene any longer in access to FAC documents cases after the Hautala appeal, judgment on which was rendered days after the entering into force of Regulation 1049/01. This, too, was seen as indicator of waning interest among the pro-transparency minority (respondent #2). Finally, by the time the revision of the classification rules came up, the rotating presidency’s chair had been taken over by the EEAS.

In the same period, the misgivings of another proponent of access to documents, the EP, were also largely satisfied. After the conclusion of an IIA on access to classified CSDP information in November 2002, the EP withdrew its case against Decision 264/01 (EU 2002a; Rosén 2014, p. 392). The EP’s access to CFSP information continued to expand through successive agreements (EP 2005; EU 2006; EP 2010 and most recently, EP 2014).
### Table 4: Waning member state dominance in access to FAC documents policy, 2002-2014

<table>
<thead>
<tr>
<th>Policy aspect</th>
<th>Member state*</th>
<th>Indicator</th>
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<tbody>
<tr>
<td>Rule-making</td>
<td>Denmark (+/-)</td>
<td>Presidency</td>
</tr>
<tr>
<td>Adjudication</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Implementation</td>
<td>Sweden (+)</td>
<td>Interventions in court cases</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Frequent countervoters in confirmatory applications</td>
</tr>
</tbody>
</table>

Data compiled by the author. * In chronological or magnitudinal order. +/- represent advocacy in favour of wider or more restricted access.

All agreements concerned privileged access, leaving the formal legal scope of public access to documents unaffected. Indeed, parliamentary oversight had been the EP’s main concern from the start (Rosén 2014, pp. 393-4). However, it was also suggested that the conservative majority in both the EP and the Council partially explained the reluctance to push for further transparency (respondent #2). By the end of December 2002, the Council was ready to issue a bilateral declaration with NATO on classified information exchange, in which it reaffirmed its commitment to interconnecting security arrangements (EU 2002b). The NATO-EU SI agreement of March 2003 paved the way for subsequent third party classified-information agreements. With the growth of such agreements, the role of the orcon principle also increased, which likely accounts in part for the growing reliance on the international relations exception in confirmatory applications. Opinions vary about the relative impact of the orcon principle on access to documents. Some argued that the Americans exercised a de facto veto over disclosures concerning documents to which it was a party. “Actually, the Americans to a large extent determine the degree of openness in Europe. Because if the Americans say: ‘Guys, we will keep this secret’, it will not be disclosed. End of story” (respondent #2, also #5). Others have argued that the implementation of the orcon principle is more nuanced, and subject to the “constitutional requirements, national laws and regulations” of the member states (EU 2011, art. 4(2), cf. Galloway 2014, p. 673).

With the new access-secrecy consensus in place, certain bodies like the PSC (2003) and the Art. 133 trade committee (2004) also began to register small numbers of documents. Large amounts of documents still continue not to be registered up until today. A sample of evidence to this end is provided by the Art. 133 committee, which continues to offer proactive access to an unlikely high percentage of its registered documents, consistently above 97% (annex 2). Indeed, this area of Council foreign policy has come under increasing scrutiny (see below). Nonetheless, when considering a cross-section of FAC documents, the trend of a controlled increase in registered documents accounts for the ‘transparency ceiling’ identified above.

A second development accounting for change was of a wholly different order. On 9 September 2001, two airplanes hijacked by the terrorist group al-Qaeda pierced the World Trade Centre in New York, killing 2,996 people. This terrorist attack had its reverberations on the EU’s counterterrorist policy. Certain counterterrorism measures that were already underway were fast-tracked, while in the years after the attacks, the PSC, on behalf of the FAC, increasingly began to impose sanctions against individuals associated with terrorism (Eckes 2009, p. 12; Zimmerman 2006). At a level of access and security rule-making, the events had a limited impact, as a strict regime was already largely in place (respondents #6, #10). The impact was therefore more discernible in the access to documents practice. It meant, for example, that Coreu document traffic saw a temporary but notable increase from 2001 to 2002, as did the number of documents produced and register by the relex group charged with preparing the legal side of the sanctions decisions (Bicchi and Carta 2012, p. 470; figure 1; annex 2). Another, indirect, effect came through the courts. One sanctions target, Mr Sison, brought three actions against the Council’s refusal to grant him access to documents which addressed by the CFI in a single judgment. Sison was one of a number of cases in which targeted individuals were offered very limited access to the justification of their listing, although he was the only one to bring an action on grounds of his right of public access to the documents (Eckes 2009, p. 4). The CFI duly pointed out that Regulation 1049/01, being an act regulating public access to documents, meant that it could not take the
specific circumstances of an applicant into consideration. The fight against terrorism of which the contested sanction formed a part likely also mattered for the considerable leeway that both the CFI and ECJ granted the Council in limiting its justification for its reliance on the international relations exception (Regulation 1049/01 art. 4(1)(a), third indent) (Leino 2014).

The third major development is formed by changing member state behaviour due to the raised political stakes in the CFSP. This development has multiple origins. First of all, contrary to what might be expected, the eastern enlargement of 2004 increased the number of Council members from 15 to 25 did not translate into an increase of document circulated. Instead, by 2004 the growth curve of FAC documents on the public register was past its peak, while annual numbers of Coreu documents, too, began to decline after that year. While some respondent did not think the enlargement led to a decline in mutual trust, they pointed out that member states were aware that a larger group of decision-makers increases the chance of leaks to the press (respondents #7, #14). Others were more forward, arguing that the larger group, combined with the divisiveness of certain CFSP policy issues indeed did lead to a decline in trust (respondent #6). Strategic leaking to the press, facilitated by the proliferation of electronic devices in meetings, was felt to undermine the effectiveness of policy decisions such as targeted sanctions listings. On certain occasions, even “before the Coreper meetings you could read already in the Financial Times or whatever, which names were [being] put forward” (respondent #10). In some instances, such as in sanctions procedures, this may have been due to active pressure from third states, such as Russia (respondents #10, #13, #15). In others, such as in trade policy, member state delegations may have leaked to exercise political influence (respondent #12, also #7). Either way, the extent of leaking has led to increasing reluctance among member states to share their intelligence via the ordinary Council channels of communication. Resorting to restrictive document sharing, such as through numbered hard copies for the duration of a meeting, is believed to have decreased leaking (respondents #5, #10, #16). In parallel, member states with sensitive intelligence have reverted to informal sharing among smaller groups of member states (respondents #5, #6 #10). As one respondent held

“You know, France and Germany, UK also, Spain… [they are] important players in NATO and other international organizations. […] Big member states are also very much solo players. Even today we have this problem […]: what is this common security and defence policy? Even now with a look at the Russian situation and the Ukrainian crisis… So there's this division.” (respondent #17, cf. Zimmerman 2006, p. 130)

New institutional arrangements introduced by the Lisbon TEU may have further facilitated the trend of informal and differential information exchanges. Lisbon separated the function of Council Secretary-General and High Representative. The latter role was turned into a Vice-Commissioner post, and placed at the head of a newly established European External Action Service (EEAS). Soon, the HR or her EEAS representatives took over the chair of the rotating presidency for a majority of FAC bodies, including FAC ministerial meetings, the PSC, and CFSP preparatory bodies (Council 2009). The new step meant in practice that most central coordinating and agenda-setting powers were carried over to the EEAS, at the expense of the presidency and the Council Secretariat. The latter maintained only its organizational function of facilitating meetings and circulating documents received from the EEAS and the member states (respondents #4, #13). The EEAS quickly turned into the ‘hub’ of political decision-making in the CFSP, as is also evidenced by the HR’s seat in the European Council, which allows her to bypass both the ambassadors in Coreper and the foreign ministers in crisis situations (respondents #13, #12, #15). Thus, larger member states with valuable intelligence have now found a new balance of interaction with the EEAS, which has shown sensitivity towards their reserve about sharing intelligence. Equally, the EEAS consults selected larger states early on in the decision-making process (respondent #10). The implicit hierarchy in CFSP decision-making has had as a consequence that many documents that served as the basis for Council policy are not circulated through conventional channels of distribution
This has put member states with smaller diplomatic and intelligence networks at a disadvantage. At the same time, there is an implicit understanding that the CFSP, being an ‘incipient’ field of decision-making that works on a unanimity basis, relies on the willingness and support of all, and particularly the larger member states (respondent #3, #7). FAC decision-making in this area was likened to that in the UN Security Council (respondent #11). The ‘realpolitical’ approach of several member states in a context of increasing policy convergence helps explain the dual trends of a consolidating security culture and an acceptance of the informalisation of document exchanges.

This dynamic however changed where the Council sought to enter into international agreements under the CFSP and in other areas of foreign policy. Here, the basic paradigm of confidentiality has become challenged by a number of NGOs, member states, the EP, and the court. This is not in the last place due to the growing treaty powers of the EP in this area (respondents #5, #8, #11). A new provision under TFEU art. 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, a revised provision from the Amsterdam TEC now entails that the EP “shall be immediately and fully informed at all stages of the procedure” (TFEU art. 218(10), addition relative to Amsterdam TEC art. 300(2) italicized). The latter right applies to all international agreements, non-CFSP or CFSP. Both the EP’s new right to be immediately, fully and completely informed about all international negotiations, and its power to vote any agreement down altered the dynamic of information exchange, and the EP has not hesitate to use its powers when it was dissatisfied with an outcome (respondents #8, #11). It was also in this context that Sophie In ’t Veld MEP, dissatisfied with the information that the EP received about the SWIFT negotiations with the United States, sought access to a Council document through the legal route. Both the court’s review of the international relations exception, and its review of the Council’s somewhat careless invocation of the legal advice exception (respectively Regulation 1049/01, art. 4(1)(a) third indent, and 4(2), second indent), revealed its much more sympathetic attitude than in earlier FAC access cases. The controversiality of certain international agreements also seems to have had an impact on the court’s interpretation of the international relations exception (Abazi and Hillebrandt 2015). In parallel to the court’s more liberal position on public access to documents in the In ’t Veld appeal case, only days earlier, it also rendered a rather progressive judgment on the EP’s right of privileged access in CFSP-related international agreement.9

Most recently, the issue of public access again resurfaced during the Transatlantic Trade and Investment Partnership (TTIP) negotiations. In June 2013, a year after the GC’s judgment in In ’t Veld, the FAC debated the possibility of publishing the TTIP negotiating mandate, in response to public concern. The decision was eventually delegated to the Coreper, which maintained its classification level of restreint (respondent #20). According to common practice, a decision to declassify and publish a Council document would be taken on the basis of consensus, implying a lowest common denominator (respondents #3, #15). However, public pressure continued to mount and in May 2014, a group of over 250 NGOs, submitted a petition calling on the EU to increase transparency of the TTIP process (AIE 2014). After the outgoing trade commissioner De Gucht joined the chorus of critics, in October 2014 the Council gave in. By then, the mandate had already been long leaked to the press (Euractiv 2014).

At the end of 2014, the year which closes this analysis, the focus in the transparency debate had thus very much shifted to international agreements. However, which generalizable FAC transparency dynamics can be discerned from the analysis? And particularly, does the analysis lend greater support to the ‘logic of transparency’, or rather to the ‘logic of encapsulation’?

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9 Case C-658/11, Parliament v. Council ("Mauritius"), was delivered on 24 June 2014, 9 days before C-350/12 P, In ’t Veld.
Theorising access to FAC documents: transparency or encapsulation?

Over a period of twenty years, transparency made an evident advance in the EU Foreign Affairs Council, albeit with certain notable patterns of variation. In this sense, the analysis of transparency developments provided evidence of the presence of both a ‘transparency logic’ and a ‘logic of encapsulation’. However, the reliance on ‘decision-making logics’ in an explanatory theory not only requires divergence in terms of policy outcomes, but is also expected to offer credible evidence that these outcomes originate in specific policy inputs that lead to a process of ‘path dependency’ where one would normally have expected similar outcomes. ‘Logics of transparency’ and ‘encapsulation’ should therefore be present both in the developing FAC transparency and in its institutional factors (Hall and Taylor 1996, p. 9).

Over time and influenced by institutional changes, elements of two competing logics can be present in varying interactions and intensity (ibid, p. 10). On the basis of the preceding analysis, it may indeed be concluded that the development of access to FAC documents was marked by both dynamics of transparency and encapsulation. While the latter was clearly dominant, judging by the systematic and often default efforts that were made to organise FAC decision-making in a way that shielded it from the public gaze, the former nonetheless was able to make small advances.

During the first years after the adoption of the access decision, policy activity was limited. Consequently, the formal rules and practices governing access to documents remained minimal. An ‘informal’ – from an access documents point of view – arrangement that affected the right of public access to FAC documents from the beginning was the use of the Coreu network. This secured capital-based network distributed numbers of documents that surpassed figures mentioned on the public register when it was set up in 1999. From 1999 to 2001, there was flurry of rule-making activity in the area of access to FAC documents, which was followed by a status quo that remained largely intact until 2011. At the same time, FAC transparency practices appeared to reach a ceiling around 2007, when the growth rate of documents mentioned on the register slowed, and the percentage of directly accessible documents declined proportionally. Moreover, there are indications that the ‘informal rules’ of unofficial and parallel document circulation as well as leaking increased, while the number of Coreu documents began a steady decline after 2004. The final years saw a court judgment and appeal (In ‘t Veld) that marked the most important doctrinal innovation since the 2001 Hautala case, brought a degree of convergence between the interpretation of access to documents rules in the FAC and that in other areas of Council decision-making.

What institutional factors were found to provide the strongest explanation for these developments? A first, constant, factor was formed by the dominance of member states in the policy process. This dominance was first of all determined by the marginalisation, to a greater or lesser degree, of the EP and the court of justice, but was also largely caused by the need to keep all member states ‘on board’, either because of a requirement of unanimity in decision-making, the Council’s strong reliance on pooled intelligence, or the simple fact that no consensus means no foreign policy. At the same time, the specific concerns of particularly the larger member states were mitigated by concerted transparency advocacy of the transparency proponents in the Council: Denmark, Finland, Sweden, the Netherlands and, to a lesser extent, the United Kingdom. These member states particularly resisted a complete and permanent divergent transparency policy in the area of FAC, namely the a priori exclusion of certain types of documents, particularly classified documents. At the turn of the century, the presidency turned out to be an effective resource for influencing the policy direction. However, the role of the presidency decreased after the basic security-access legal framework was in place, as the policy initiative increasingly came to lie with the HR and, after 2009, the EEAS. In two rounds, the FAC, and particular the CFSP, saw a number of institutional innovations that strengthened the emerging status quo. The first established the position of the HR, the PSC, and the military decision-making bodies. This development accelerated CFSP policy making in general and enabled closer cooperation with third parties. The second placed the HR outside of the Council Secretariat and at the head of the newly established
EEAS, while simultaneously strengthening her agenda-setting power in Council CFSP bodies through the handover of the chair from the presidency to the EEAS. Although member states still remain pivotal in the decision-making process, these processes clearly changed their institutional role and effectiveness. While a ‘community institution’ such as the rotating Council presidency lost in importance over time, others, such as the EP and the Court of Justice were slow or reluctant to catch up. The former was able to secure privileged access to classified CFSP information through a ‘grand bargain’, yet this came relatively late (March 2002), and in a rather restrictive format (access for five MEPs under the Council’s conditions). The latter, while unprepared to yield jurisdiction over access to documents in CFSP cases altogether, remained extremely reluctant to apply strong judicial review in access to FAC documents cases. This reluctance appeared to be only strengthened by the exogenous impact of the 9/11 attacks and subsequent counter-terrorism measures.

All of the aforementioned developments attest to the high degree of policy-specificity underlying document flows and, consequently, access to documents in the area of foreign policy. However, specific ‘horizontal trends’ in the Council were not without effect. First of all, the constant presence of a legal framework for access to documents meant that individuals, even in the face of the various institutional odds against them, were largely able to rely on legal grounds and access to the courts to argue their right of access. Even when the court generally applied a ‘hands off’ approach, such legal access was not always without results. Second, and related, the introduction of an online public register increased the presumption of transparency on the FAC’s side, even when this disclosure eventually reached a ceiling. It also improved the possibilities for knowledgeable outsiders to monitor, albeit in a very incomplete fashion, ongoing decision-making in this area and to adjust their transparency strategy accordingly. Third, while the logic of encapsulation presumes a degree of agreement among Council members, such agreement was not always present. Although the resultant frequent document leaks did not attest to the presence of a transparency logic, they nonetheless undermined the FAC’s ability to ‘encapsulate’ the public’s access to documents or information.

Finally, the analysis confirmed the notable impact of treaty change as an exogenous factor influencing public access to FAC documents. The initial framework laid down in the Maastricht Treaty and the institutional innovation of the Amsterdam Treaty introduced rules and actors that clearly influenced the course of development with regard to FAC access. The Lisbon TFEU did, too, by expanding the rights of the EP in the area of international negotiations which provided the institution with a considerably stronger negotiating position. Apart from strengthening parliamentary oversight, the new paradigm also seems to have spilled over to the public right of access. This became particularly apparent in the In ’t Veld case and appeal, in which the court arguably applied the most stringent review of any FAC access refusal up to date. Nevertheless, it remains to be seen to what extent the new paradigm will affect the right of access to CFSP documents. Furthermore, the court has done little to address irregular informal rules that, even while not contradicting the rules directly, considerably undercut the possibilities for the public the exercise their right of access under Regulation 1049/01. In this regard, the dual dynamics of intergovernmentalism and executive governance that characterise much of FAC decision-making, and that bring with them an inevitable degree of permissiveness in the functioning of access to documents, are likely here to stay for the foreseeable future.
Conclusion

It has frequently been claimed that the EU, over the past quarter-century, was overtaken by a transparency wave. Indeed, the current regulation governing public access to documents, as well as the decision that preceded it, have been indiscriminate about the policy area or document type that forms the basis of an access request. This casts the presumption in favour of the existence of a ‘transparency logic’. While it must be granted that the Council has not always been open out of intrinsic enthusiasm (and has, on various occasions, been subject of criticism over its attitude towards transparency), the presence of several institutional factors conspired most of the time in favour of an expanding transparency policy. Consequently, over the course of two decades, there has been a clearly identifiable development path that led to wider access (Hillebrandt et al. 2014).

This paper analysed parallel developments in the Foreign Affairs Council to test whether the premise of a ‘transparency logic’ applied under all circumstances. A counterhypothesis was postulated which held that, under different circumstances, institutional factors may also conspire in the opposite direction to create a ‘logic of encapsulation’. Naturally, such a counterhypothesis must go beyond the trite observation that the exception grounds in transparency policies lead them to yield different outcomes in different policy areas. In the Council like in other settings, certain policy objectives would be necessarily undermined when exposed to the light of transparency (Curtin 2012, p. 460-1). The present paper provides initial evidence for the idea that transparency differences indeed go deeper than the normal application of rules under different circumstances. It found evidence of differences at the level of both transparency rules and practices that cannot easily be explained by horizontal considerations and are instead driven by policy-specific decision-making logics. This offers initial evidence for the presence of a competing logic of encapsulation.

However, the initial findings of this paper also throw up the question of distinctiveness: how atypical is the case of the FAC, when compared to other policy areas? Is the development of Council transparency over time best characterised as consisting of a strong ‘general trend’ accompanied by a few clear outliers, or should it rather to be seen as the average of a wide range of policy-specific transparency implementation practices? Related to this is the question of which (bundles of) institutional factors are most generalizable, and have the strongest explanatory force. Structured comparative analysis can help to sharpen theoretical distinctions that provide stronger and more generalizable institutional explanations of developing transparency policies. Making a start with this ambition, the current study will be matched by case studies of two additional Council policy areas, in order to further fine-tune an institutional theory of Council transparency policy.
## Annex 1: List of interviewees

<table>
<thead>
<tr>
<th>No.</th>
<th>Function</th>
<th>Date interview</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>General-Secretary, European Ombudsman</td>
<td>28 November 2011</td>
</tr>
<tr>
<td>2.</td>
<td>MEP, ALDE group</td>
<td>17 April 2014</td>
</tr>
<tr>
<td>3.</td>
<td>Council Secretariat, legal service (external relations)</td>
<td>3 June 2014</td>
</tr>
<tr>
<td>4.</td>
<td>Academic expert</td>
<td>4 June 2014</td>
</tr>
<tr>
<td>5.</td>
<td>National foreign ministry, legal service</td>
<td>11 July 2014</td>
</tr>
<tr>
<td>6.</td>
<td>EEAS, legal service</td>
<td>10 September 2014</td>
</tr>
<tr>
<td>7.</td>
<td>Member state delegation, Nicolaidis representative</td>
<td>10 September 2014</td>
</tr>
<tr>
<td>8.</td>
<td>EP, legal service (external relations)</td>
<td>11 September 2014</td>
</tr>
<tr>
<td>9.</td>
<td>EP, legal service (external relations)</td>
<td>11 September 2014</td>
</tr>
<tr>
<td>10.</td>
<td>Council Secretariat, PSC Secretariat</td>
<td>11 September 2014</td>
</tr>
<tr>
<td>11.</td>
<td>Council Secretariat, legal service (external relations)</td>
<td>12 September 2014</td>
</tr>
<tr>
<td>12.</td>
<td>Council Secretariat, DG-C (foreign affairs)</td>
<td>12 September 2014</td>
</tr>
<tr>
<td>13.</td>
<td>Member state delegation, Antici representative</td>
<td>12 September 2014</td>
</tr>
<tr>
<td>14.</td>
<td>Council Secretariat, DG-C (foreign affairs)</td>
<td>12 September 2014</td>
</tr>
<tr>
<td>15.</td>
<td>Former spokesperson HR Solana</td>
<td>11 November 2014</td>
</tr>
<tr>
<td>16.</td>
<td>Member state delegation, Relex representative</td>
<td>11 November 2014</td>
</tr>
<tr>
<td>17.</td>
<td>MEP, Greens group</td>
<td>9 December 2014</td>
</tr>
</tbody>
</table>
Annex 2: Proactive disclosure data

Total number of documents and proactive access rates for a selected number of FAC bodies, 1999-2014 (table and figure)

<table>
<thead>
<tr>
<th>Year</th>
<th>CFSP</th>
<th>CSDP *</th>
<th>PSC *</th>
<th>Military matters</th>
<th>Relex</th>
<th>Art. 133 / Trade Policy Committee *</th>
<th>Development cooperation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Registered</td>
<td>Public</td>
<td>Registered</td>
<td>Public</td>
<td>Registered</td>
<td>Public</td>
<td>Registered</td>
</tr>
<tr>
<td>1999</td>
<td>459</td>
<td>38.3%</td>
<td>0</td>
<td>n/a</td>
<td>0</td>
<td>n/a</td>
<td>58</td>
</tr>
<tr>
<td>2000</td>
<td>511</td>
<td>46.0%</td>
<td>75</td>
<td>49.3%</td>
<td>0</td>
<td>n/a</td>
<td>51</td>
</tr>
<tr>
<td>2001</td>
<td>511</td>
<td>61.3%</td>
<td>274</td>
<td>36.1%</td>
<td>0</td>
<td>n/a</td>
<td>179</td>
</tr>
<tr>
<td>2002</td>
<td>657</td>
<td>72.0%</td>
<td>467</td>
<td>49.5%</td>
<td>0</td>
<td>n/a</td>
<td>335</td>
</tr>
<tr>
<td>2007</td>
<td>2080</td>
<td>52.7%</td>
<td>1201</td>
<td>35.8%</td>
<td>524</td>
<td>42.6%</td>
<td>1547</td>
</tr>
<tr>
<td>2008</td>
<td>1905</td>
<td>55.1%</td>
<td>1199</td>
<td>41.4%</td>
<td>545</td>
<td>40.0%</td>
<td>1737</td>
</tr>
<tr>
<td>2013</td>
<td>2324</td>
<td>50.8%</td>
<td>1768</td>
<td>22.2%</td>
<td>786</td>
<td>40.8%</td>
<td>1575</td>
</tr>
<tr>
<td>2014</td>
<td>2286</td>
<td>61.3%</td>
<td>1037</td>
<td>33.5%</td>
<td>666</td>
<td>48.2%</td>
<td>1676</td>
</tr>
</tbody>
</table>

Source: Council register (http://www.consilium.europa.eu/register/en/content/int/?lang=en&typ=ADV). Searches were conducted using the following codes: CFSP= PESC; CSDP= COSDP, CSDP/PSC; PSC= COP, PSC DEC; Relex= Relex; Art. 133= OJ 133, TITULAIRES, STIS; development cooperation= DEVGEN. The main bodies in each of the subareas of the FAC were identified by the Council Secretariat (email correspondence 17 and 25 March 2015). In the cases of CSDP, PSC and Art. 133/Trade Policy Committee, documents were either spread out over two or more codes, or were over time replaced by other codes. In these cases, separate searches were conducted for each code, the results of which were added up. This method is likely to result in slightly inflated figures compared to actual figures due to double counting. In the case of development cooperation, this method would have resulted in significant figure inflation. Here, only the code was used that yielded most documents, resulting in lower-than-actual figures of registered documents. For reasons of double counting, the figures here reported cannot be meaningfully added up and are instead solely used for within-case longitudinal comparison.
### Annex 3: List of abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>BIC</td>
<td>Bureau d'informations classifiées</td>
</tr>
<tr>
<td>CFI</td>
<td>Court of First Instance (after 2009: GC)</td>
</tr>
<tr>
<td>CFSP</td>
<td>Common Foreign and Security Policy</td>
</tr>
<tr>
<td>Coreu</td>
<td>Corespondence Européene (digital document network)</td>
</tr>
<tr>
<td>CSDP</td>
<td>Common Security and Defence Policy</td>
</tr>
<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union (before 2010: ECJ)</td>
</tr>
<tr>
<td>MD</td>
<td>Meeting document ((informal document type)</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice (after 2009: CJEU)</td>
</tr>
<tr>
<td>EP</td>
<td>European Parliament</td>
</tr>
<tr>
<td>FAC</td>
<td>Foreign Affairs Council</td>
</tr>
<tr>
<td>GC</td>
<td>General Court (before 2010: CFI)</td>
</tr>
<tr>
<td>HR</td>
<td>High Representative</td>
</tr>
<tr>
<td>IIA</td>
<td>Interinstitutional agreement</td>
</tr>
<tr>
<td>Orcon</td>
<td>Originator consent</td>
</tr>
<tr>
<td>PoCo</td>
<td>Political Committee</td>
</tr>
<tr>
<td>PSC</td>
<td>Political Security Committee</td>
</tr>
<tr>
<td>Relex</td>
<td>Relations Extérieures (Council preparatory body)</td>
</tr>
<tr>
<td>SG</td>
<td>Secretary-General</td>
</tr>
<tr>
<td>SI</td>
<td>Security of information</td>
</tr>
<tr>
<td>Sitcen</td>
<td>Situation centre</td>
</tr>
<tr>
<td>SN</td>
<td>Sans numéro (informal document type)</td>
</tr>
<tr>
<td>TPC</td>
<td>Trade Policy Committee</td>
</tr>
<tr>
<td>WEU</td>
<td>Western European Union</td>
</tr>
<tr>
<td>WPI</td>
<td>Working Party on Information</td>
</tr>
</tbody>
</table>
References


Christiansen, T., and S. Vanhoonacker (2008), “At a critical juncture? Change and continuity in the institutional development of the council secretariat”

Council Secretariat (2015), email correspondence of 25 March 2015


Monde Économie, “From Maastricht to Amsterdam: the Union inches towards transparency”, 14 November 2000


Reichard, Martin (2013), *The EU-NATO Relationship: A Legal and Political Perspective* (Aldershot: Ashgate)


Case law and AG opinions

T-14/98 Hautala v Council

T-188/98 Kuijer v Council

C-369/00 Netherlands v Council (withdrawn)

T-204/99 Mattila v Council and Commission

AG Legér, Opinion of 10 July 2001 (Hautala case)

C-353/99 P Council v Hautala II (appeal)

T-211/00 Kuijer v Council II

C-353/01 Matilla v Council & Commission II (appeal)

Joined cases T-110/03, T-150/03 and T-405/03 Sison v Council

AG Geelhoed, Opinion of 10 July 2003 (Sison case)
C-266/05P Sison v Council II (appeal)
T-264/04 WWF European Policy Programme v Council
Joined cases C-39/05 P and C-52/05 P, Turco and Sweden v Council
T-529/09 In ’t Veld v Council
T-331/11 Besselink v Council
AG Sharpston, Opinion of 13 February 2014 (In ’t Veld case)
C-350/12 P In ’t Veld v Council II (appeal)

Rules and policy documents
Council (1993), Decision 731/93 of 20 December 1993 on public access to Council documents
Council (1995), Decision 24/95 of the Secretary-General of the Council on measures for the protection of classified information applicable to the General Secretariat of the Council
Council (2000a) Decision 23/2000 on the improvement of information on the Council’s legislative activities and the public register of Council documents
Council (2000b), Decision of the Secretary-General of the Council/High Representative for the CFSP of 27 July 2000 on measures for the protection of classified information applicable to the General Secretariat of the Council
Council (2000c), Decision amending Decision 93/731/EC on public access to Council documents and Decision 2000/23/EC on the improvement of information on the Council’s legislative activities and the public register of Council documents
Council (2001a), Decision 2001/78/CFSP of 22 January 2001 setting up the Political and Security Committee
Council (2001b), Decision 264/01 of 19 March 2001 adopting the Council’s security regulations
Council (2002), Decision 682/02 of 22 July 2002, adopting the Council’s Rules of Procedure
Council (2003), Annual report of the Council on the implementation of Regulation (EC) No 1049/2001 regarding public access to documents, May 2003
Council (2007), Information note 7778/07: exchange of EU classified information (EUCI) with third countries and organisations
Council (2008), Staff note 200/08: Reminder of the instructions on the production and distribution of documents – Rules applicable to meeting documents
Council (2009), Decision 2009/908/EU laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council
Council (2013), Decision 488/13 of 23 September 2013 on the security rules for protecting EU classified information
European Parliament Committee on Budgets (2003), Declaration by the three institutions on financing the CFSP, working document 18 February 2003
European Parliament (2010), Annex to legislative resolution of 8 July 2010 on the proposal for a Council decision establishing the organisation and functioning of the European External Action Service, Declaration by the High Representative on accountability
EU (2002a), Interinstitutional Agreement (IIA) concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy, 20 November. OJ 2002/C298/01.
EU (2002b), EU-NATO Declaration on ESDP, 16 December 2002
EU (2006), Interinstitutional Agreement (IIA) on budgetary discipline and sound financial management, 14 June 2006 (2006/C 139/01)
EU (2011), Agreement 2011/c 202/05 between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union, OJ C202/13
EU (2014), Interinstitutional Agreement (IIA) of 12 March 2014 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 (2014/C 95/01)

Treaty on European Union, Maastricht version
Treaty Establishing the European Community, Amsterdam version
Treaty on European Union, Amsterdam version
Treaty on the Functioning of the European Union (Lisbon)
United Kingdom (2000b) Letter to the Parliament Select Committee on EU, 7 November 2000 (on file with the author)