

*Paper prepared for the Euroacademia International  
Conference  
The European Union and the Politicization of Europe*

*Vienna, 8 – 10 December 2011*

*This paper is a draft  
Please do not cite*

# Transparency and Censorship in the Legislative Process of the European Union

James Cross

22 November 2011

**Abstract:** The Council of Ministers as a legislative body advocates transparency in the legislative process yet continues to censor certain documents pertaining to the negotiation process, even after these negotiations have been completed. This is despite the commitments made by the Council of Ministers to increasing transparency and accountability in the policy-making process (Council decisions 2000/23/EC; 2001/320/EC; Regulation (EC) No. 1049/2001). While transparency in the legislative process has greatly improved in recent years, much important information concerning the positions member states take on important policy issues in legislative negotiations is still censored before many documents are released to the public. This is a significant worry for those concerned with the accountability of decision makers, as constituents' ability to monitor and to evaluate how negotiators are representing their interests in negotiations is heavily reliant upon the public provision of negotiation records. In spite of the importance of this topic, little empirical research has investigated how censorship policy is applied and whether it is in line with the commitments towards legislative transparency. This paper presents a new dataset that identifies which legislative documents are being censored, and identifies patterns in censorship activity in order to assess whether such activity is in line with the Council of Ministers' commitment to legislative transparency. It furthermore examines whether transparent debate encourages negotiators to posture during negotiations thus leading to the polarization of debate. The research thus sheds light upon the manner in which the Council of Ministers releases legislative records to the public, whether it is doing so in line with the transparency commitments enshrined in EU law, and what effects current policy has upon actor behaviour during negotiations.

**Key words:** Transparency, Council of Ministers, Decision making

**Corresponding author:** James Cross, Center for Comparative and International Studies, ETH Zürich, Haldeneggsteig 4, 8092, Zürich, Switzerland. Email: james.cross@eup.gess.ethz.ch

## Introduction

The European Union has long been criticised for the lack of transparency in the manner in which it conducts its day-to-day politics. This manifests itself in the general public's lack of knowledge as to how their interests are being represented at the EU level, and a democratic deficit in terms of the accountability of representatives in a legislative process that is thought by many to be at best semi-transparent, and at worst quite opaque. As a result, the EU is also been criticised for failing to live up to the ideal of democratic politics, in which decisions are made in the open, and are subject to public scrutiny (Follesdal and Hix 2005, Majone 1998). This paper shall examine the manner in which EU transparency policy is applied in the legislative process, and the effects that the level of transparency has upon the positions that actors take during the negotiation process, in order to assess whether these criticisms are warranted.

The EU itself has not remained deaf to the demands for more transparency in the legislative process. The process of opening EU decision-making to public scrutiny began with the Maastricht treaty, which contained a non-binding declaration on the rights of citizens to access information relating to the decision made by EU institutions. This commitment was further formalised in the Treaty of Amsterdam, which introduced the principle of openness in the decision-making process into the treaty. This principle was enshrined in law in 2001 when agreement was reached on Regulation (EC) No 1049/2001<sup>1</sup> regarding public access to European Parliament, Council and Commission documents. This piece of legislation formalised the treaty commitment to openness by dictating the principles that each of the legislative institutions must apply when providing public access to legislative records. The preamble of this piece of legislation states:

*(4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty.*

This regulation set the tone for what was hoped to be a much more open and transparent decision-making process, in which national representatives could be held accountable for the positions they take during negotiations, thus increasing the democratic legitimacy of the decision-making process as a whole.

In spite of the lofty aims enshrined in the preamble, the EU gave itself the ability to refuse requests for documents drawn up by the institutions which relate to matters that have yet to be decided, if disclosure of the document could undermine that institution's decision-making process (art 4.3). This stipulation has the potential to undermine the ability of constituents to monitor their representatives during negotiations, and limit their ability to sanction legislators until after legislation has

been agreed upon. Whether or not this delay in accountability allows legislators to shirk their responsibilities to constituents is the subject of this paper.

The oft-cited argument that transparency is always a good thing in legislative negotiations has been criticised by some authors, who argue that a certain amount of secrecy surrounding legislative negotiations is required, because the EU is an international organisation with a diverse set of member states, constituents and interests that have a divergent set of policy demands. This diversity of interests can make it challenging for decision makers with reputational concerns to reach consensus when those they are representing have a different set of policy demands and can observe their negotiation behaviour (Stasavage 2004, Stasavage 2007, Meade and Stasavage 2008). The argument here is that a certain amount of secrecy allows negotiators to reach compromise solutions, as they do not need to posture in negotiations to keep certain interests happy (Heisenberg 2005, Lewis 2005, Naurin 2005, Wallace 2002). Essentially there is a trade off inherent in increasing transparency, between increasing the accountability of negotiators and decreasing their ability to reach compromise solutions due to their reputational concerns when such an agreement does not reflect their constituents' policy demands. This concern for reputation can lead negotiators to take more extreme positions than they might otherwise have done were bargaining to take place behind closed doors. This paper shall therefore empirically test this assertion by examining the policy positions taken by member state negotiators during negotiations under different levels of legislative transparency.

The paper is structured as follows. The next section explores different aspects of transparency and identifies the form of transparency that is considered in the analyses that follow. The section following that examines different theoretical aspects of the role of transparency and censorship in the legislative process, and elucidates why increasing transparency might not always be a positive thing. It does so by considering the link between transparency and the positions that actors take during negotiations. Once the role of transparency in the legislative process has been examined, other factors that are expected to influence member state bargaining positions are discussed in order to control for alternate explanations of negotiator position taking. The research design section then introduces a new dataset that looks at the application of transparency policy, and how this affects negotiator behaviour during legislative negotiations. Once the research design has been established, the analyses section shall examine whether certain policy areas are subject to more censorship than others, and examine how member state negotiators react to different levels of transparency and censorship. The final section concludes with a discussion of the implications of the findings presented in the paper.

## **Defining Transparency**

Up to this point, the concept of transparency has been discussed, but transparency itself is a broad term, and can have several different meanings, depending on which aspect of the decision-making process one is referring to. Settembri (2005) argues that there are five distinct aspects of transparency that one should consider when assessing constituents' ability to monitor legislative negotiations. These include 1) physical access to the decision-making process; 2) access to records of said process; 3) the transparency of the debates that are under consideration; 4) the intelligibility of the debates for non-experts in the field; and 5) the clarity of interests that have a stake in the decision-making process. Each of these aspects of transparency plays a role in determining how accountable a decision-making body is, and each is important in its own right, yet some of these aspects are necessary as a pre-requisite for others to be assessed, and therefore this paper only considers one aspect of legislative transparency as it applies to Council negotiations: constituents' ability to access the records of legislative negotiations.

There are a number of reasons for focusing solely on this aspect of legislative transparency. The first is that the most direct way in which to monitor negotiator behaviour, which is having physical access to the decision-making process, is for the most part impossible when it comes to legislative negotiations in the EU. Most meetings at the working group, COREPER and ministerial level of negotiation in the Council take place in-camera, with little or no public access granted. This rules out physically accessing meetings in order to monitor negotiators. This leaves analysing constituents' ability to access the legislative records provided by the Council (which corresponds to Settembri's second aspect of transparency) as the most direct way in which constituents can monitor negotiator behaviour. Furthermore, constituents' ability to assess the other aspects of transparency alluded to by Settembri is contingent upon access to these documents, given that one needs to know what was said in the negotiations in order to judge whether transparency policy is applied to the legislative process in the EU in a manner that fulfils Settembri's remaining aspects of transparency.

## **How does the Council apply transparency policy to legislative records?**

The Council provides two distinct forms of legislative records pertaining to the decision-making process. The first type of record published are voting results, in which one can see which member states voted for a piece of legislation, which abstained and which voted against. Theoretically, these records should be very informative to constituents, as the voting behaviour of negotiators should reflect the positions they take during negotiations. In practice however, when votes are taken in the Council, very little negative voting behaviour or abstentions are observed (Mattila and Lane 2001, Mattila 2004). This consensus style voting behaviour tends to mask the true amount of conflict observed in the Council and the heterogeneity of positions taken by member states during negotiations (Cross 2012).

The second type of records published by the Council is the minutes of Council meetings. These minutes detail which member states were intervening at each meeting and what the content of the intervention was (Cross 2012). Van Schendelen(1996) argues that having access to the minutes of Council meetings and those of its auxiliary bodies is very important in making the legislative process transparent, as it is in these documents that one can find the positions taken by member state negotiators during negotiations. The Council records of negotiations are released in the form of annotated versions of the draft proposals under negotiation. These annotated draft proposal documents record member state interventions on an article-by-article basis, and when made available to constituents, supply a detailed picture of the negotiations process. Despite the wealth of information contained within these documents, their public release is subject to the principles outlined in the transparency regulation discussed in the introduction. Examining the availability of these documents thus represents a natural way in which to judge how transparency policy is being applied to Council negotiations.

When one examines the manner in which transparency policy is applied to these documents, one finds a three-tiered system of transparency and censorship in action. In the first tier, legislative records are available without censorship and in their entirety. When documents are made available in this form, the legislative process can be said to have a relatively high level of transparency, as both the content of the interventions being made by negotiators, and the identity of the negotiators making the interventions are available. In the second tier, the documents are made available, with the interventions of negotiators included, but the identity of those expressing the opinion redacted. The fact that the negotiator identities are redacted implies that while the issues that were controversial during negotiations can be identified, those involved in the controversy cannot. This severely limits constituents' ability to hold negotiators accountable for their negotiation positions, as it becomes difficult to identify who is taking what position. When this form of censorship is applied to Council records, a medium level of transparency can be said to exist. In the third tier, the documents are unavailable in any form. This represents the least transparent situation, as no records of the negotiations are made available. Indeed the only information that constituents have access to are the final policy outcome observed and the negotiators account of how they behaved during negotiations. It becomes almost impossible for constituents to assess whether negotiators are truthfully representing their interests in negotiations when this form of censorship is being applied. This tier of censorship is associated with the lowest levels of transparency. Table 1 summarises the information available to constituents under each tier of transparency and censorship.

**Table 1:** Costs and benefits of legislative transparency and censorship

<b>Availability of records</b>	<b>Content of interventions</b>	<b>Identity of intervener</b>	<b>Level of transparency</b>
1) Records available	Yes	Yes	High
2) Records partially available	Yes	No	Medium
3) Records not available	No	No	Low

This paper shall utilise this three-tiered system of transparency and censorship in order to empirically assess how transparency policy is implemented in the Council, and how different levels of transparency affect the positions taken by negotiators during negotiations. The next section outlines the manner in which the level of transparency is expected to affect negotiator behaviour and position taking from a theoretical perspective.

### **The Effects of Transparency and Censorship on position taking in the Council**

A number of authors have explored the potential effects of legislative transparency on position taking in various decision-making contexts. Stasavage (2004, 2007) has developed a series of game theoretic models that capture the trade-offs inherent in increasing the transparency of a decision-making process for actors who face competing incentives regarding how to behave during negotiations. These models revolve around the idea that negotiators are concerned with both the policy outcome agreed upon and the reputation they attain by representing the policy demands of their constituents accurately<sup>ii</sup>. Constituents' ability to assess whether or not a negotiator is representing their interests in negotiations is predicated upon the information they have about the positions taken by negotiators during negotiations, and the policy outcome observed once a decision has been reached. The amount of information they have about negotiator behaviour *during* negotiations is determined by how transparent the decision-making process is and how much information is available about the positions negotiators take during negotiations. The models distinguish between two different bargaining contexts, one that occurs in an open-door setting and one that occurs in a closed-door setting. It is argued that the type of setting in which bargaining takes place can strongly influence the positions taken by negotiators during negotiations.

The first negotiation setting to consider is that which takes place in the open. Open-door bargaining tends to increase the accountability of decision makers as constituents can monitor how their interests are being represented in negotiations.

Stasavage (2007) points out that this very capability to monitor negotiations can lead to negotiators posturing and taking extreme positions in order to impress upon their constituents that they are indeed representing their interests. This can lead to negative outcomes as debates become polarized, with negotiators more concerned with their reputation with constituents than with reaching policy agreements. This is especially problematic when negotiators are privy to private information unavailable to constituents about the true value of reaching an agreement, but do not utilise this information due to reputational concerns. Private information could include access to reports unavailable to constituents, or policy expertise gained by having experience in a particular policy area. If negotiators do not utilise private information when bargaining due to reputational concerns, this can lead to suboptimal outcomes for both negotiators and the constituents they represent. This is due to the fact that negotiators are incentivised to take extreme positions in order to demonstrate that they are faithfully representing constituent interests, rather than to utilise their private information that suggests that taking a more moderate position would lead to a better policy outcome.

In contrast, when bargaining takes place behind closed doors, the amount of information that constituents have about the positions taken by their representatives significantly decreases. This in turn decreases the ability of constituents to assess negotiator behaviour and attribute a positive or negative reputation, as they cannot verify how negotiators behaved during negotiations. This allows negotiators more flexibility in the positions they take during negotiations, and as a result, they can better utilise their private information about the value of a particular policy decision, and have less incentive to grandstand and adopt extreme positions due to reputational concerns. This should lead to a decrease in the polarization of policy positions observed in negotiations, and allow for more compromise in the decision-making process.

When one considers the structure of legislative bargaining in the Council of Ministers, and the incentives faced by negotiators under varying levels of transparency, it is clear that the predictions made by the Stasavage models are relevant to Council decision making. Negotiators who are involved in Council negotiations include ministers, who are directly accountable to their constituents at election time, and civil servants who are in turn accountable to their ministers. Each type of actor is in a principle-agent relationship with their constituents/superiors respectively, and can thus be expected to have reputational concerns with regard to their behaviour during negotiations. Given the theoretical arguments presented in this section, and their applicability to Council decision making, the following hypothesis relating to the effect of transparency on position taking in the Council is expected to hold:

*H1: As transparency increases, the extremity of actor positions is expected to increase.*



## **Alternative factors affecting the extremity of negotiator bargaining positions**

While the effects of transparency on negotiator position taking are the focus of this paper, it is equally important to consider the influence of other factors that might affect the policy positions taken by negotiators during negotiations. The existing literature in this area identifies a number of potentially influential variables that shall now be explored. The first of these relates to the saliency that a negotiator attaches to the issue under negotiation. The concept of saliency is found in many accounts of bargaining, and captures the value that negotiators place on achieving their most preferred outcome, or more specifically, the intensity of negotiator preferences over outcomes (Achen 2006, Hinich and Munger 1997). When an actor attaches a high degree of saliency to an issue, they are more likely to take an extreme position in an attempt to extract concessions from other actors in the negotiations process (Bailer 2011). This leads to the following hypothesis:

*H2: As the saliency an actor attaches to an issue increases, the extremity of actor positions is expected to increase.*

Government ideology is also thought to impact upon the policy positions of negotiators in EU politics. The idea here is that because a government's ideological position is used to distinguish itself from non-government parties at the domestic level, the positions they take in EU negotiations can be utilised to emphasise these ideological distinctions (Bailer 2011). Two distinct ideological dimensions are thought to be relevant to EU politics, the left-right dimension, and the pro- /anti- EU integration dimension (Hix 1999, Hix and Lord 1997, Marks and Wilson 2000, Mattila 2004).

The first ideological dimension that has been found to be influential in Council decision making is the left-right dimension. The logic behind a government's left-right position affecting the extremity of their bargaining position relates to the idea that left-wing governments are thought to prefer over-implemented legislative solutions, while right-wing governments prefer less regulation and more minimalist legislative solutions (Falkner, Treib and Hartlapp, et al. 2005, Falkner and Treib 2008). The expectation is that right-wing governments will thus tend to take more extreme positions in order to block the progress of negotiations and prevent further regulations being agreed upon, while left-wing governments will tend to take more moderate positions so that negotiations progress and more legislation is agreed upon.

The empirical evidence with regard to the influence of the left-right dimension on EU politics is rather mixed. Some authors, when looking at member state voting behaviour and the official statements they lodge into Council records find evidence supporting the idea that the left-right dimension influences Council decision making (Hagemann 2008, Hagemann and Hoyland 2008). In contrast, other authors find no support for this hypothesis (Cross 2012, Veen 2011, Zimmer, Schneider and Dobbins

2005). In light of these mixed findings, the following hypothesis will be tested in order to assess whether a governments position on the left-right scale affect the extremity of the policy positions taken by their negotiators.

*H3: As a government's position on the left-right dimension moves towards the right, a negotiator's policy position is expected to get more extreme.*

The second ideological dimension thought to be relevant to EU politics is the pro-/anti- EU integration dimension. This dimension is distinct from the left-right dimension as it captures member state government's attitudes towards the appropriate level of EU integration and transfer of competencies to the EU level. A member state government's position on this dimension is expected to affect negotiator position taking in the Council, as anti-EU integration member states will attempt to block the progress of legislative negotiations, and generally be disruptive in an attempt to slow the integration process. It is assumed that disruptive behaviour blocks further integration, as the Commission has generally been found to introduce proposals that seek to increase EU integration, as it anticipates having a role in implementing and enforcing such legislation (Mattila 2004, Thomson, et al. 2006). Disruptive behaviour in the form of extreme position taking thus reduces the chance that legislative proposals introduced by the Commission will be agreed upon. This leads to the following hypothesis:

*H4:As a government's position on the pro-/anti- EU integration dimension moves towards the anti-integration end of the policy scale, a negotiator's policy position is expected to get more extreme.*

A number of control variables are also included in the analysis. The first of these relates to the legislative procedure associated with a proposal under consideration. The dataset analysed here includes proposals decided under codecision and consultation. It is important to control for the legislative procedure, as the decision-making rules that determine the formal roles of different actors in the legislative game vary across these procedures(Crombez 1996, 2000, 2001).

The number of controversies in each proposal is also controlled for, as this can be expected to influence the extremity of negotiator positions. This is due to the fact that negotiators can be disruptive across a series of different issues, if such behaviour would improve either the policy outcome agreed upon or the reputation they acquire from their constituents for such behaviour. Essentially, more controversial issues provide more opportunities to be disruptive and should therefore be controlled for.

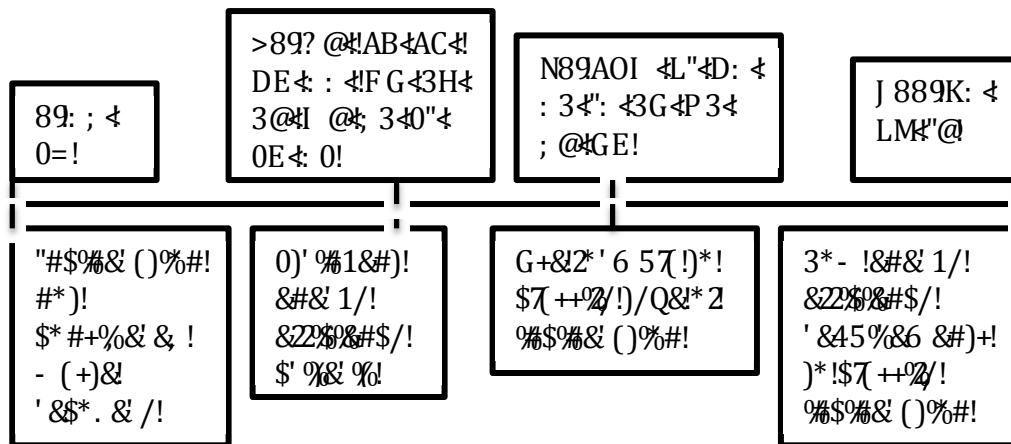
### **Research design:**

In order to test the theoretical hypotheses put forward in the previous section, it was necessary to collect a large amount of information about legislative proposals

that have been negotiated in the Council. A number of selection criteria were utilised to select the proposals that are analysed. The first selection criteria held that the proposals under consideration had to have been in some way controversial when they were negotiated with differences of opinion between negotiators as to how the final policy outcome should look. Some degree of controversy is required, as the paper seeks to explore the determinants of differences in negotiator positions, and if all negotiators agree upon the ideal outcome, there are no differences to explain. In order to ensure a minimal level of political importance, the proposals chosen must have been the subject of some substantive discussion in *Agence Europe*, the main independent news reporting service covering EU affairs. Choosing proposals that were mentioned by *Agence Europe* ensures that the proposals under consideration were of some interest to the readership of this news service, which mostly consists of experts in EU affairs and policy makers with a stake in the legislative agenda (Thomson and Stokman 2006). This avoids the inclusion of proposals that raised little controversy during negotiation.

Proposals were limited to those falling under the codecision and consultation procedures, as these are the most common legislative procedures utilised in EU decision making. A second criterion was that the proposal had to have been by the Commission between the introduction of the Amsterdam treaty on May 1, 1999, and the introduction of the Lisbon Treaty on December 1, 2009. The reasoning behind this selection criterion is that one must hold the legislative procedures under consideration constant across the proposals, and both the Amsterdam and Lisbon treaties include important changes to these legislative procedures.

The dataset upon which much of the following analysis is based upon has been constructed through an extended series of semi-structured interviews with stakeholders involved in the negotiation of the proposals under consideration<sup>iii</sup>. In these interviews, stakeholders were first asked to identify the most important controversies that arose during negotiations. They were then asked to identify and place the different positions that were taken on these controversies on 100-point policy scales, and then place the actors involved on these policy scales based upon the position they supported. This approach to analysing the legislative process in the EU is well established, and has provided significant insight into the manner in which negotiations proceed and controversies are resolved<sup>iv</sup>. It is useful at this stage to provide an example of this research design at work in order to illustrate the data collection process.



**Figure 1:** Whether or not incinerating waste can be considered as a form of waste recovery

Figure one represents an issue that was identified by stakeholders as having arisen during the negotiations for a waste disposal proposal introduced in 2005 (COD/0281/2005). The specific issue that arose was whether or not the incineration of waste would be allowed as a method of waste recovery. A number of distinct positions were identified as having arisen during negotiations that revolved around the energy efficiency of the incineration process as a classification mechanism for existing incinerators. The most conservative position in negotiations was not to classify waste incineration as a type of waste recovery (position 0). This position represented the status quo, the case that would accrue should no agreement be reached in the Council. At the other extreme of the policy scale (position 100), the Italians, Belgians and French argued that incineration should be allowed, and relatively lower energy efficiency standards should be attached to the incineration process. The Commission and a number of member states were placed between these extreme positions at position 60, and advocated utilising a formula to determine which types of incinerators could be classified as waste recovery. This was the agreement settled upon following negotiations. The final position of note on this particular issue was taken by the remaining member states (position 40), who argued for more stringent energy efficiency criteria to apply to the incinerators in order to be considered as waste recovery.

Each issue in the dataset is specified in this manner, which allows one to recreate a detailed spatial model of the negotiations and the issues that arose therein. In total there are 272 distinct controversial issues across 111 different legislative proposals. These data are then used to calculate the extremity of actor positions for on each of the issues under consideration. The extremity of actor's positions is simply the distance between that actor's position and the mean of all actor positions for each issue in the dataset. This measure has been used extensively in the literature to capture the heterogeneity of actor positions (Bailer 2004, 2011, Arregui and Thomson 2009).

In order to capture the level of censorship and transparency for each proposal in the dataset, the Council records published online were consulted. These records contain references to documents that record member state policy positions in each meeting that took place for each of the proposals under consideration. As discussed above, a document can be either fully available in unedited form, partially available, in which the positions of negotiators are recorded, but the identity of the negotiator taking the position has been redacted, or unavailable, where the document has been withheld from publication. The transparency measure is constructed as simply the number of documents in each category as a percentage of the total number of documents for each proposal in the dataset. A total of 1873 distinct documents are included in the analysis.

A series of other predictors of the extremity of member states positions are also included in the model. The saliency measure was collected during the aforementioned interviews, and is defined as the level of importance each actor attached to their position for the issue under negotiation. The saliency measure is constructed as a 100-point scale, with a score of 0 representing issues of no importance, a score of 50 representing issues of average importance, and a score of 100 representing issues of the utmost importance to the negotiators involved.

A government's position on the left-right scale and the pro-/anti-EU integration scale were taken from the Benoit and Laver (2006) study, which estimates party positions using expert interviews. The measure utilised here weights the position of each government party on these scales by the number of cabinet seats they hold in government. Constituents' attitude towards the EU was taken from a question in the Euro-barometersurvey, which assesses survey respondents' support for the EU. A member state's population is taken from Eurostat data. The legislative procedure associated with a particular proposal was collected during the interview process, and is coded 1 for codecision proposals and 0 for consultation proposals. The number of issues per proposal is simply the number of distinct controversies that interviewees identified for each proposal in the dataset. Table 1 provides summary statistics for the proposals in the dataset.

**Table 1:** Summary statistics of dependent and independent variables

<b>Variable</b>	<b>N</b>	<b>Mean</b>	<b>Std. Dev.</b>	<b>Min</b>	<b>Max</b>
<i><b>Dependent variable</b></i>					
Extremity of position	4664	27.94	20.35	0	94.12
<i><b>Independent variable</b></i>					
% Documents available	4664	83.87	26.76	0	100
% Documents partially available	4664	2.89	8.02	0	50
% Documents not available	4664	13.25	26.30	0	100
Left-right	4664	10.99	3.119	5.78	16.99
Pro-/anti-Integration	4664	7.75	2.89	1.92	17.6
Attitude towards EU	4664	54.35	13.44	25	85
Population	4664	22.56	25.05	0.4	82.54
Saliency	4664	55.62	24.24	0	100
Legislative procedure	4664	0.81	0.39	0	1
No. Issues	4664	3.31	1.30	1	6

## Analysis

The first set of analyses presented in table 2 below details how censorship is applied to the different policy areas dealt with in the Council. It displays the total amount of documents examined for each Council grouping, and breaks these documents down into groups according to whether they were fully available, partially available, or not available. The numbers in the table represent the percentage of each category of document. Figure two illustrates the same information graphically for added clarity.

**Table 2:** % of documents available by Council grouping

<b>Variable</b>	<b>N</b>	<b>% Available</b>	<b>% P/A</b>	<b>% N/A</b>
Internal market	367	78.75	0	21.25
Environment	307	98.04	1.95	0
Agriculture	292	80.82	2.74	16.44
JHA	202	85.64	9.41	4.95
Transport	164	84.76	3.05	12.20
General	121	88.43	6.61	4.96
Employment	112	70.53	29.46	0
Fisheries	82	59.76	0	40.24
Culture	67	100	0	0
Ecofin	61	50.82	0	49.18
Health	31	100	0	0
Telecommunications	28	100	0	0
Energy	18	27.78	0	72.22
Education	12	100	0	0
Development	6	83.33	0	16.67
Industry	3	100	0	0



**Figure 2:** Document availability by Council grouping

As can be seen, there is a large amount of variation in the level of transparency observed and in the type of censorship applied across each Council grouping. The Council groupings with the most censorship in the form of unavailable documents include those dealing with fisheries with 40.24% of documents unavailable, economic and financial affairs (Ecofin) with 49.18% of all documents unavailable, and energy with 72.22% of all documents unavailable. This seems to be in line with the transparency commitments of the EU, as these policy areas are generally regarded as highly sensitive, with the vital interests of member states under negotiation. For instance, one of the proposals considered under the Ecofin Council grouping was whether or not to establish a minimum standard rate of VAT across all member states. Such an undertaking has significant consequences at the domestic level for constituents and governments alike, given the sensitive nature of harmonising tax policy at the EU level, thus one can assume that the vital interests of member states were in play. This would justify the application of censorship to documents based upon article 4 of the transparency regulation (Regulation (EC) No 1049/2001). Similarly, proposals included under the fisheries Council grouping included one laying down the rules for the provision of structural assistance to the fisheries sector, and another on the organisation of the market for fishery and aquaculture products. These proposals deal with very sensitive topics for member states with important fishery sectors in their economy, and thus warrant some form of censorship under the aforementioned transparency regulation.

Partially releasing documents appears to be a much less utilised form of



ensorship in the Council, given the data presented above. It is most often utilised in the employment Council grouping and also sometime in the general affairs Council and the JHA Council. This might be due to the fact that redacting Council records is quite a labour intensive process, with each document having to be read and references to member state identity removed manually. It would also make sense in terms of the Council policy towards appeals of their decision to censor documents. If a member of the public believes the Council's reasoning behind not publishing a document online is not in line with the transparency commitments outlined in Regulation No. 1049/2001, they can appeal the decision. If upon review the document can be released in redacted form, this is done. This process can only take place when the initial decision not to release the document has been reviewed, and this is likely to cause the number of documents partially available to be lower than the number of documents unavailable. This would go some way to explaining why partially available documents are less often observed than unavailable documents.

In contrast to policy areas subject to a large amount of censorship of records, policy areas including culture, health, telecommunications, and education appear to be relatively transparent with each having 100% of documents surveyed available. Interestingly, all of these policy areas except telecommunications are areas where the EU has relatively little formal power to legislate. Indeed, under title 1 article 3 of the new Lisbon treaty, the EU has only a supporting competency in these policy areas. In policy areas where the EU has relatively few formal competencies, it makes sense that transparency is higher, given that member states' vital interests are unlikely to be at stake in the bargaining process.

The Council grouping dealing with the environment has a reassuringly high level of transparency, given the EU's commitments to legislative transparency in this policy area. Of the 307 documents analysed, 98.04% were fully available. This is in line with Council decision 2005/370/EC, commonly referred to as the Aarhus convention, which dictates that the public should have full access to the decision-making process when the issues under negotiation are related to the environment. The agreement was designed to improve public access and participation in environmental policy making, and the data presented in table 2 demonstrates that this commitment is being adhered to.

The analysis presented in table 2 and figure 2 provide descriptive information about the application of transparency policy to the legislative process, but do not consider how this affects negotiator behaviour in the Council. The second set of analyses, presented in table 3, considers negotiator behaviour by examining the determinants of the extremity of member state policy positions. Table 4 clarifies the substantive size of the significant effects as one goes from the minimum to the maximum of each variable found to be significant.

**Table 3: Multi-level Regression Analysis of the Extremity of Actor Positions**

	Model A	Model B	Model C
% docs available	0.0692 <sup>†</sup> (0.0362)	- -	- -
% P/A documents	- -	-0.158 (0.129)	- -
% N/A documents	- -	- -	-0.0582 (0.0369)
Left-right	0.0835 (0.0845)	0.0873 (0.0845)	0.0832 (0.0845)
EU integration attitudes	0.109 (0.0932)	0.105 (0.0932)	0.110 (0.0932)
Public support for EU	0.0118 (0.0169)	0.0119 (0.0169)	0.0117 (0.0169)
Population	0.0309 <sup>**</sup> (0.00956)	0.0309 <sup>**</sup> (0.00956)	0.0308 <sup>**</sup> (0.00956)
Saliency	0.218 <sup>***</sup> (0.0120)	0.218 <sup>***</sup> (0.0120)	0.218 <sup>***</sup> (0.0120)
Voting procedure	5.431 <sup>*</sup> (2.402)	6.233 <sup>*</sup> (2.442)	5.280 <sup>*</sup> (2.424)
No. of issues	-0.365 (0.797)	-0.271 (0.796)	-0.298 (0.798)
Constant	3.877 (4.222)	9.069 <sup>**</sup> (3.360)	10.37 <sup>**</sup> (3.504)
<hr/>			
Proposal level			
Constant	1.926 <sup>***</sup> (0.148)	1.925 <sup>***</sup> (0.152)	1.934 <sup>***</sup> (0.148)
<hr/>			
Issue level			
Constant	2.371 <sup>***</sup> (0.0589)	2.376 <sup>***</sup> (0.0592)	2.372 <sup>***</sup> (0.0589)
<hr/>			
Residual			
Constant	2.714 <sup>***</sup> (0.0107)	2.714 <sup>***</sup> (0.0107)	2.714 <sup>***</sup> (0.0107)
<hr/>			
Observations	4664	4664	4664

Note: Multi-level models with random intercepts. Member state positions are nested within issues which are nested within proposals. Standard errors in parentheses. <sup>†</sup> $p < 0.1$ , <sup>\*</sup> $p < 0.05$ , <sup>\*\*</sup> $p < 0.01$ , <sup>\*\*\*</sup> $p < 0.001$

**Table 4:** Summary statistics of dependent and independent variables for model 1

<b>Variable</b>	<b>Min</b>	<b>Max</b>	<b>Effect</b>
% Documents available	0	100	+6.92
Population	0.4	82.54	+2.53
Saliency	0	100	+21.8
Legislative procedure	0	1	+5.43

The results presented in table 3 lend some support to the idea that the level of transparency associated with negotiations affects the level of polarization of policy positions taken. Model 1 illustrates that as the percentage of documents that are available increases, actors tend to take more extreme positions. When a proposal goes from being completely censored to completely transparent, actor positions tend to be 6.92 policy scale point more extreme. The effect is found to be statistically significant at the  $p < 0.1$  level<sup>y</sup>.

The saliency that a negotiator attaches to the issue under negotiation is found to have the largest effect upon the extremity of a negotiator's position, with a negotiator that attaches 100 saliency points to an issue taking a position 21.8 policy scale points more extreme than an actor that attaches 0 saliency points to an issue. The effect is highly significant across all models. This finding suggests that indifferent negotiators are happy to go along with compromise policy solutions near the mean, whereas negotiators that attach a great deal of importance to an issue tend to take aggressive negotiation stances that move away from the mean policy position for the issue under consideration.

Model 2 and 3 differentiate between the tier two and tier three types of transparency in order to see if they differ in their effect upon position taking in the Council. This is important to assess as the second tier of censorship still provides some information about the positions being taken during negotiations, even if negotiator identities are unavailable. Neither of these variables turns out to be statistically significant, suggesting that neither type of censorship on its own has an effect upon negotiator behaviour and position taking. It appears that negotiators are less likely to take extreme positions as long as some form of censorship is in play, regardless of whether the censorship is of the tier two or tier three variety.

No significant effects are found for the two government ideology variables and the public support for the EU variable included in the analysis. This suggests that negotiators are not directly influenced by the ideological concerns of both the government being represented, and constituents' attitudes towards the EU when negotiating in the Council.

Finally, and in contrast to the ideological factors already discussed, a member states population, which captures the diversity of interests at the domestic level does have a small but significant effect on position taking in the Council, with Germany, with the largest population taking a position that is 2.53 policy scale points more extreme than Malta which is the country with the smallest population.

### **Conclusion:**

This paper has sought to assess how transparency policy is applied in the EU Council of ministers, and whether different levels of transparency in the legislative process affects the behaviour of negotiators in the form of the extremity of policy positions they take during negotiations. The paper first outlined the EU's commitments to legislative transparency, and the exceptions to this policy that apply when the vital interests of member states are at stake, or when disclosure of information could negatively affect the negotiation process. The first set of analyses presented lent support to the idea that the Council generally applies transparency policy in line with the commitments made in the transparency regulation agreed upon in 2001, as censorship was found to be highest in policy areas where member state's vital interests were at stake.

The second set of analyses presented empirically tested the expectations that emerge from Stasavage's (2004, 2007) models of the effects of transparency on negotiator behaviour. It specifically considered how the level of transparency associated with a particular proposal affected the extremity of positions taken by member state negotiators during negotiations. The findings presented demonstrated that the level of transparency does indeed affect the positions taken by negotiators, with legislative contexts to which a high level of transparency applies generally experiencing more polarized debates. This polarizing effect of increased transparency has implication for those who advocate legislative transparency across the board as an always-desirable characteristic of the decision-making process. The inherent trade-off between increased accountability and increased polarization of decision making in the legislative process needs to be acknowledged, and the appropriate level of transparency should be determined based upon whether the benefits of increased accountability outweigh the costs of having a more polarized decision-making process.

### **Bibliography**

Achen, C H. "Institutional Realism and Bargaining Models." In *The European Union Decides*, by R Thomson, F, N Stokman, C, H Achen and T. König. Cambridge: Cambridge University Press, 2006.

Arregui, J, and R Thomson. "States' Bargaining Success in the European Union." *Journal of European Public Policy* 16, no. 5 (2009): 655-676.

Bailer, S. "Bargaining success in the European Union." *European Union Politics* 5, no. 1 (2004): 99-123.

Bailer, S. "Structural, Domestic, and Strategic Interests in the European Union: Negotiation Positions in the Council of Ministers." *Negotiation Journal* 27, no. 4 (2011): 447-475.

Benoit, K, and M Laver. *Party Policy in Modern Democracies*. London: Routledge, 2006.

Bueno de Mesquita, B, and F N Stokman. *European Community Decision Making: Models, Applications, and Comparisons*. New Haven, CT: Yale University Press, 1994.

Crombez, C. "Institutional Reform and Co-Decision in the European Union." *Constitutional Political Economy* 11 (2000): 41-57.

Crombez, C. "Legislative Procedures in the European Community." *British Journal of Political Science* 26 (1996): 199-228.

Crombez, C. "The Treaty of Amsterdam and the co-decision procedure." In *The Rules of Integration. Institutional Approaches to the Study of Europe*, edited by Gerald Schneider and Mark D. Aspinwall, 101-122. Manchester: Manchester University Press, 2001.

Cross, J P. "Interventions and negotiation in the Council of Ministers of the European Union." *European Union Politics* 13, no. 1 (2012).

Falkner, G, and O Treib. "Three Worlds of Compliance or Four? The EU-15 Compared to New Member States." *Journal of Common Market Studies*. 46, no. 2 (2008): 293-313.

Falkner, G, O Treib, M Hartlapp, and S Lieber. *Complying with Europe. The impact of EU minimum harmonisation and soft law in the Member States*. Cambridge: Cambridge University Press, 2005.

Follesdal, A, and S Hix. "Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik." *European Governance Working Papers* 5, no. 2 (2005).

Hagemann, S. "Voting, Statements and Coalition-Building in the Council from 1999 to 2006." In *Unveiling the Council of the European Union: Games Governments Play in Brussels*, edited by D Naurin and H Wallace. London: Palgrave Macmillan, 2008.

- Hagemann, S, and B Hoyland. "Parties in the Council?" *Journal of European Public Policy* 5, no. 8 (2008): 1205-1221.
- Heisenberg, D. "The Institution of 'Consensus' in the European Union: Formal Versus Information Decision-Making in the Council." *European Journal of Political Research* 44 (2005): 65-90.
- Hinich, M J, and M C Munger. *Analytical Politics*. Cambridge: Cambridge University Press, 1997.
- Hix, S. "Dimensions and Alignment in European Union Politics: Cognitive Constraints and Partisan Responses." *European Journal of Political Research* 35, no. 1 (1999): 69-106.
- Hix, S, and C Lord. *Political Parties in the European Union*. London: Palgrave Macmillan, 1997.
- Lewis, J. "Is the 'Hard Bargaining' Image of the Council misleading? The committee of Permanent Representatives and the Local elections Directive." *Journal of Common Market Studies* 36, no. 4 (1998): 479-504.
- Lewis, J. "The Janus Face of Brussels: Socialization and Everyday Decision Making in the European Union." *International Organization*, 2005.
- Majone, G. "Europe's "Democratic Deficit": The Question of Standards." *European Law Journal* 4, no. 1 (1998): 5-28.
- Marks, G, and C J Wilson. "The Past in the Present: A Cleavage Theory of Party Positions on European Integration." *British Journal of Political Science* 30, no. 3 (2000): 433-59.
- Mattila, M. "Contested Decisions: Empirical Analysis of Voting in the European Union Council of Ministers." *European Journal of Political Research* 43 (2004): 29-50.
- Mattila, M, and J-E Lane. "Why Unanimity in the Council? A Roll Call Analysis of Council Voting." *European Union Politics* 2, no. 1 (2001): 31-52.
- Meade, E, and D Stasavage. "Publicity of debate and the incentive to dissent: Evidence from the US federal reserve." *The Economic Journal* 118 (April 2008): 695-717.
- Moravcsik, A. "Is there a "Democratic Deficit" in World Politics? A Framework for Analysis." *Government and Opposition* 39, no. 2 (2004): 336-363.

Naurin, D. "Why Increasing Transparency in the European Union Will Not Make Lobbyists Behave any Better than They Already Do." *Goteborg University*, 2005.

Settembri, P. "Transparency and the EU Legislator: 'Let He Who is Without Sin Cast the First Stone'." *Journal of Common Market Studies* 43, no. 3 (2005): 637-654.

Stasavage, D. "Open-Door or Closed-Door? Transparency in Domestic and International Bargaining." *International Organisation* 58 (2004): 667-703.

Stasavage, D. "Polarization and Publicity: Rethinking the Benefits of Deliberative Democracy." *The Journal of Politics* 69, no. 1 (2007): 59-72.

Thomson, R, F N Stokman, C H Achen, and T König. *The European Union Decides*. Cambridge: Cambridge University Press, 2006.

Van Schendelen, M.P.C.M. "The Council Decides: Does the Council Decide?" *Journal of Common Market Studies* 34, no. 4 (1996): 531-548.

Veen, T. "The dimensionality and nature of conflict in European Union politics: On the characteristics of Intergovernmental decision-making." *European Union Politics* 12, no. 1 (2011): 65-86.

Wallace, H. "The Council: an Institutional Chameleon." *Governance* 15, no. 3 (2002): 325-344.

Zimmer, C, G Schneider, and D Dobbins. "The Contested Council: Conflict Dimensions of an Intergovernmental EU Institution." *Political Studies*. 53 (2005): 403-422.

**Author bio-note:** James Cross is a post-doctoral researcher in the European politics research group at the centre for Comparative and International Studies at the ETH Zurich since September 2011. He completed his PhD at Trinity College Dublin in 2011. His current research considers decision-making processes and negotiator agency in legislative negotiations in the EU. It examines member state interactions within the Council of Ministers during the legislative process, and examines how the Council interacts with other legislative bodies over the course of negotiations to reach decisions at the EU level. The research seeks to account for the influence that the institutional environment has on the decision-making process, by detailing how negotiators respond to different institutional contexts in which legislation is discussed.

---

<sup>i</sup>This regulation was amended in 2008 to take account of a number of developments including the Lisbon treaty and the Aarhus accord. These amendments did not much alter the content of the regulation, but rather clarified a number of issues relating to the application of the regulation in the broader legislative framework.

<sup>ii</sup>The structure of the model thus parallels arguments relating to policy seeking and office seeking in standard accounts of representative motivations.

<sup>iii</sup> Robert Thomson, Rory Costello, Javier Arregui, and the current author completed these interviews.

<sup>iv</sup> Important studies in this vein include Bueno de Mesquita and Stokman(1994), a 2004 special issue of *European Union Politics* (vol 5.1), and Thomson *et al.* (2006).

<sup>v</sup>When the dependent variable is transformed with a square root transformation to more accurately resemble a normal distribution, this increases the level of significance to  $p < 0.05$ . These results are not displayed in the table, as the coefficients of models with transformed dependent variables are more difficult to interpret substantively and are thus less informative.