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## 'Integration without transparency'? Reliance on the space to think in the European Council and Council

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### ABSTRACT

To justify the limited publicity of their sessions, members of the European Council and Council regularly argue that they require a 'space to think'. This article analyses the relative success of the plea for this 'space to think' in both legislative (Council) and non-legislative (European Council and Council) modes of decision-making. We consider the concept of the 'space to think' as well as the manner in which it is integrated into the theories of new intergovernmentalism and intergovernmental union. We then analyse how the European Council and Council have developed the 'space to think' in their daily practices. We find that, while the limited progress of transparency lends partial support to the new intergovernmentalism and intergovernmental union, the drivers underpinning the 'space to think' are not limited to non-legislative decision-making but are also increasingly found in the legislative procedure.

### KEYWORDS

Transparency; consensus; European Council; Council of the European Union; intergovernmental theory

### Introduction

In April 2011, at the height of the euro crisis, Jean-Claude Juncker, then still Eurogroup president, addressed the press on progress made. With characteristic love of controversy, he told his audience: 'Monetary policy is a serious issue. We should discuss this in secret, in the Eurogroup', adding flippantly that he favoured 'secret, dark debates' (EUObserver 2011).

While made in apparent jest, Juncker's words touched upon a central tenet of Eurogroup, and more widely, Union decision-making: the idea that inevitably a 'space to think', away from the public eye, is required in order to ensure decisional productivity and safeguard the integration process. Reliance on this argument is particularly salient in the context of the EU's 'rule by summit' of recent years, which is characterised by a regime of regular confidential meetings between Heads of State or Government in the European Council and ministers or their senior officials in the Council.

Over the past decades, the case for a 'space to think' has been made repeatedly by elected officials in various decision-making settings. In the EU, reliance on the 'space to think' is most strongly associated with decision-making in the European Council and the Council. These EU institutions, both largely intergovernmental in set-up, have traditionally followed a mode of diplomatic negotiation in which a 'space to think' takes a central place. Both institutions,

moreover, have tended to stake their legitimacy upon the ability to resolve common policy issues in an efficient manner at some distance from the public and the electoral political process (Puetter 2014, 32).

At the same time, an expanding body of transparency provisions places an increasing presumption of openness on EU decision-making. While this development has led to greater transparency in the Council's conduct of business, it has left the European Council, where the entire decisional process takes place behind closed doors, virtually unaffected. Various commentators have expressed their strong concern about what they perceive as an increasing 'executive dominance', 'executive managerialism' or the pre-cooking of legislative debates, marked by important accountability gaps (Bocquillon and Dobbels 2013; Curtin 2014; Joerges and Weimer 2013). In spite of increasing pressure, legal or otherwise, to open decision-making up, both the European Council and Council continue to defend the indispensability of a wide 'space to think'. From a democratic perspective, this may be problematic, as it leads to European-level decisions for which citizens are not informed of the positions taken by the representatives of the different member states behind closed doors.

In this article, we explore to what extent the European Council and Council's tendency towards opaque decision-making, and the relative success of the plea for a 'space to think' in spite of external pressures for more transparency, adhere to some of the central postulates of what we refer to as the new intergovernmental theories – the new intergovernmentalism and the intergovernmental union, respectively (see the introductory article of this special issue; Bickerton, Hodson, and Puetter 2014, 2015; Fabbrini 2015; Puetter 2014). In this context, it is important to note that this article specifically analyses the question of transparency in light of the conceptual frameworks of the new intergovernmental theories and is not aimed at providing a full assessment of all of their core assumptions. Furthermore, it is not our objective to point out the proper place of transparency in the EU's institutional system as a whole. Instead, we aim to explore the reliance on the 'space to think' in the EU's intergovernmental institutions, and comment on the way in which this practice manifests a particular attitude towards the other European institutions.

The article proceeds as follows. Section one explores the concept of the 'space to think' and its relation to the new intergovernmental theories which frame this special issue. Section two analyses how the 'space to think' has developed as an explicit or implicit practice in European Council and Council decision-making. Section three discusses to what extent these empirically observed developments align with perspectives on the European Council and Council of these intergovernmental theories. Section four concludes.

### **Understanding the 'space to think' in an intergovernmental context**

The case for a 'space to think' lies at the heart of legitimacy debates concerning EU decision-making. In their 2001 Laeken Declaration, the EU's member governments considered that the Union 'derives its legitimacy from democratic, transparent and efficient institutions', a position they reaffirmed in the Lisbon Treaty (European Council 2001; TEU 2009, articles 3 and 9). Underlying the simultaneous attainment of these objectives rests an assumption of a trade-off: transparency comes at the expense of efficiency. This potentially problematic situation, it is argued, may be resolved by allowing decision-makers a 'space to think'. We understand the 'space to think' as the tendency of a decision-making body to shield its meetings from the public eye, motivated by the idea that this will 'lead to the enhanced

quality of deliberations and decision-making' (Curtin 2012, 478). The 'space to think' thus consists of two elements: (a) systematically diminished transparency of decision-making and (b) an underlying assumption that this diminished transparency enhances decisional efficiency. It is furthermore clear that the underlying assumption (element b) precedes the actual behaviour (element a).

A further distinction to be made is between the underlying *assumed* efficiency gain which precedes 'the space to think', and its *actual impact*, which supposedly follows it. The underlying assumption is guided by the notion that transparency (potentially) exposes the debates of decision-makers to a general public composed of outsiders, and that this may lead to a loss of decisional efficiency measured either in time or the attainment of particular pre-set policy goals. By inverse logic, it is believed that a decrease in transparency leads to gains in terms of decisional efficiency. These two sides of the argument (as embodied by element b) represent an intuitive causal claim that is used by decision-makers to justify – explicitly or implicitly – specific behavioural reactions. But it cannot be a priori presupposed that the argument's premises are necessarily coherent or fully compatible. To our knowledge, no systematic studies have been conducted that logically explore or empirically test the actual impact of transparency on decisional efficiency.<sup>1</sup> What is clear however is that the general argument has had a considerable influence on the evolution of the European Council and Council's institutional designs, and it is with this aspect that we are concerned in this paper.

In a number of ways, the frequent reliance on the 'space to think' by the European Council and Council can be linked to the theoretical assumptions of the new intergovernmental theories.<sup>2</sup> A prominent role of 'space to think'-typed argument in the new intergovernmental theories appears to be particularly reflected in three of its central claims. A first tenet of these theories is that those EU institutions which organise member states' inputs into EU decision-making have developed strategies to direct the other EU institutions, notably the Commission and the European Parliament (EP) (Fabbrini 2015, 135). Puetter highlights that from the mid-2000s onwards European integration scholarship began to notice a shift in the inter-institutional balance of power towards European Council and Council (2014, 68–9). Bickerton and colleagues cite Lindberg and Scheingold who argue that under conditions of political or economic duress, 'national governments could close ranks against supranational institutions' (2015, 38). Under these circumstances, it could be expected that the European Council and the Council create a 'space to think' to come to unified positions in confidentiality, thereby strengthening their hand vis-à-vis other institutions.

A second tenet relates to the role of consensus politics. It is perhaps best exemplified by the first hypothesis of the new intergovernmentalism which states that 'consensus ha[s] become the guiding norms of day-to-day decision-making at all levels [...] especially [...] in the European Council and the Council' (Bickerton, Hodson, and Puetter 2015, 29). For the purposes of this article, we are foremost interested in what Puetter describes as potential manifestations of 'institutional engineering, which are aimed at improving the potential of the European Council and the Council to facilitate consensus over policy by modifying the framework conditions of EU decision-making' (2014, 5). As an extension of this assertion, we expect that in order to reach consensus, the European Council and the Council will favour limited transparency.

A third tenet concerns the distinction between legislative and non-legislative decision-making. As Bickerton and colleagues point out, it is difficult to establish a clear-cut 'intergovernmentalism-supranationalism' dichotomy in EU decision-making because 'a

critical intergovernmental component centred on legislative decision-making in the Council' informs even the 'supranational' Community method. However, they highlight the growing importance of non-legislative decision-making, which they hold has become a Council activity in its own right and must be viewed as central to the new intergovernmentalism (2015, 39, 43). The emphasis on the legislative/non-legislative dichotomy is further highlighted by the emergence at the political centre of the European Council which, being explicitly barred from legislative activity, does not form part of the 'community's core institutional triangle – the Council, the Commission, and the EP' (Puetter 2014, 80, 73). This theoretical ordering suggests that non-legislative decision-making in the European Council and Council is associated with a broader, specifically intergovernmental form of the 'space to think'. This concern is shared by Curtin who speaks of a new 'executive dominance' of the member states in EU politics (Fabbrini and Puetter 2016; Curtin 2014).

As becomes clear from the above discussion, the intergovernmental theories lead us to expect that the members of the European Council and Council are particularly likely to invoke the 'space to think' in relation to three factors that are believed to enhance (a specifically 'intergovernmental' kind of) decisional efficiency: inter-institutional leverage, consensus politics and non-legislative decision-making. We point out that neither of these three measures constitutes an efficiency gain as such. Rather, the intergovernmental theories hold that the European Council and Council put them in place to *increase* decisional efficiency. In other words, the reliance on the 'space to think' forms part of a larger package of measures underpinned by an 'intergovernmental' notion of enhancing decisional efficiency. We acknowledge that other considerations than the desire to enhance decisional efficiency may inform the measures identified by the intergovernmentalist theories. However, these considerations are immaterial to our investigation, which is solely concerned with the possible relation between typical 'intergovernmental' attitudes to enhancing efficiency and non-transparency.

As the 'space to think' and the three other measures are theorised to derive from the same 'intergovernmental' intention to enhance efficiency, causality between them may be difficult to establish. Instead, we aim more modestly to establish whether correlations can be found that meet the theoretical expectations. In line with this aim, we apply the congruence method to an analysis of the most important 'space to think' practices in the European Council and Council (George and Bennett 2005, 181 and further). Under this method, a predetermined set of theoretical postulates is assessed on its ability to explain the 'essential features' of an empirically observed phenomenon. Strong evidence of congruence, which is understood as similarity in the strength and duration of changes in two variables, as well as the identification of pivotal counterfactuals increase the likelihood of the theorised postulate. In the next section, we analyse the phenomenon of the 'space to think' in the European Council and the Council.<sup>3</sup>

### **The 'space to think' in the European Council and Council**

In the European Council and Council the 'space to think' is frequently invoked to justify the necessity of confidential decision-making. This is illustrated by Regulation 1049/01 which governs access to documents of the institutions (European Parliament and Council 2001). Under Article 4(3), it offers a specific exception ground to protect the 'space to think':

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

As Curtin has pointed out, by far most instances in which the Council shields its decision-making from transparency 'basically boil down to [the Council] in one form or another struggling to maintain an internal "space", to think, to negotiate, to deliberate [...] without being disturbed by the broader "public"' (Curtin 2012, 462). A similar situation applies to the European Council although, as we show below, this institution's different role and standing have meant that its reliance on the 'space to think' has been less challenged through outside pressure and consequently, shaped more by practice than through formal justification.

### ***European Council: the exception as the rule***

As the EU's most intergovernmental executive institution, the European Council has from the outset operated in a relatively informal and secluded manner (Puetter 2014). At the same time, today it forms the pinnacle of EU decision-making in the perception of media and the public (Cornia, Lönnendonker, and Nitz 2008). From the moment the European Council was incorporated into the EU as a formal institution, it became legally integrated into the transparency regime (TFEU 2009 art. 15(3); cf. Curtin and Hillebrandt *forthcoming*; sections 3A, 4B). The European Council's Rules of Procedure recognise this situation by applying the Council's access to documents rules 'mutatis mutandis to European Council documents' (European Council 2009, Article 10(2)).<sup>4</sup> Taken together, the various institutional arrangements offer an insight into the European Council's 'space to think' practice and, to a limited extent, its justification.

### ***Non-legislative spaces to think***

The general recognition that European Council decision-making has been brought under the fold of the access rules has not prevented the emergence, or rather, continuation of a situation under which the legal exceptions to transparency predominate *de facto* (Curtin 2014, 22). This is largely due to the institution's informal decision-making style and the manner in which it interacts with both public discourse and the access to documents regime.

The European Council follows a broader trend of 'presidentialisation' by which every-day decision-making powers are increasingly vested in the member states' top political leadership (Papadopoulos 2013, 39–43). To a considerable extent, The Heads in the European Council succeed in formulating national positions in relative seclusion, away from the gaze of external stakeholders or even responsible national ministries (Curtin and Hillebrandt *forthcoming*; section 3B). The 'space to think' is formally enhanced by a duty of professional secrecy (European Council 2009, Article 10(2)) and the reliance on consensus as the central decision-making rule in all but a small and well-delineated number of areas (TEU 2009, Article 15(4)).

The extent of non-transparent decisional input to which this leads is exemplified by the recent European Council standoff around Greek public finances. In a clear policy reversal austerity, advocates such as German Chancellor Merkel and Dutch Prime Minister Rutte eventually approved the release of a new tranche of emergency funds, the latter thereby breaking an electoral pledge (Washington Post 2015). The largely document-free setting of the European Council made it difficult to establish to what extent the Heads actually brought their publicly professed positions with them into the meeting room. The ability to attribute responsibility to individual Heads was further hindered by the European Council's consensual decision on the matter.

In the face of the European Council's informal decision-making style, the fettering effect of public discourse on Heads, though present, has been limited. First, once a deal has been made, it is up to each Head to 'sell' it to their national public and parliament. The extent of ex ante and ex post political positioning has remained scattered, depending on member states' political culture and parliamentary arrangements. Similarly, media attention has at best elicited various competing narratives to different national audiences, and has tended to focus on the limited set of exceptional controversies to be decided on by qualified majority (Schmidt 2014, 204–5). In instances where controversies ended up in the press, this is often likely the result of spinning on the side of the Heads who are able to strategically control the timing and content of information leaks (Cornia, Lönnendonker, and Nitz 2008, 508; Schmidt 2014, 203).

The formal access to documents regime has had an even more limited impact on the European Council's 'space to think'. Proactive disclosure is limited to statements by the European Council President as well as the publication of draft agendas and meeting conclusions, which are however intentionally produced for public consumption and offer no insight into internal debates (European Council 2015). Regulation 1049/01 grants members of the public a right to request access to documents. The effect of such passive disclosure however is weak due to the rather low number of requests for access. During the 44-month period between 1 December 2009 and 1 July 2013, 23 access requests were made, while from 1 December 2009 until the present three administrative appeals were filed. By comparison, these figures represent roughly 1 and 10% of their Council equivalents in 2010 alone (Council 2015a, 2015b).

In spite of the limited number of applications for access, the responses they received from the European Council are instructive of the way in which its reliance on the 'space to think' is justified. In one instance, an applicant was informed upon appeal that the documents 'contain opinions voiced for internal use'. More generally, the European Council argued that

... [i]t is important [...] that the different views and approaches can be debated freely. [...] If the preliminary views contained in the document were to be disclosed, [...] members would be more reluctant to express their views and make suggestions. (European Council 2014a, paras 9, 13, 16)

The decision to refuse access was protested by six member states which claimed that the refusal was not sufficiently justified. Their opposition however was far from sufficient to block the European Council's negative response (European Council 2014b). The episode illustrates how, in spite of the fact that the broad 'space to think' may not always have unanimous support, it is unlikely that a legally required simple majority may be found to delimit the confidentiality of European Council proceedings. However, given the limited number of examples, the arguments propounded can hardly be taken as representative. In the context of the Council, pleas for a 'space to think' have been developed more extensively.

### ***Council: pockets of confidentiality***

While the European Council has been argued to encroach on the Union's legislative activity, the Council has been described as amplifying its executive activity. Today the Council 'spends [...] more time on non-legislative decision-making and policy debate than ever before' (Bocquillon and Dobbels 2013; Puetter 2014, 11). This trend has occurred just at a time that successive legislative and judicial developments began to strengthen the presumption of openness in the legislative sphere. This section compares the Council's reliance on a 'space



to think' in legislative and non-legislative decision-making activity. The distinction between these two decision-making modes, and the inter-institutional and judicial dynamics that accompany them, have had clear implications for the Council's room for reliance on the 'space to think'.

### *Legislative spaces to think*

Since the Amsterdam Treaty, legislative transparency has gradually become legally entrenched (TEC 1999). Article 207(3), TEC (Amsterdam) (the substance of which found its way into the more expansive article 15(3) TFEU) first highlighted transparency in the legislative sphere, after which the presumption of openness in legislative matters was operationalised in Regulation 1049/01 (preamble 6, art. 12(2)). The access right now squarely included inputs from member states (cf. CJEU 2013; GC 2011), which has led them, together with the Council Secretariat, to distinguish more clearly between formally and informally submitted documents. For example, next to legislative inputs at the presidency's request that are bundled into a formal Council document, member states frequently circulate informal meeting documents or so-called 'non-papers' without a formal registration number (SN – *sans numéro*). Furthermore, the adoption in 2006 of internal guidelines concerning the *limite* label further proceduralised the already wide reliance on so-called sensitive unclassified information (Bunyan 2014; Council 2006; Galloway 2014).

In terms of voting transparency, Council provisions have developed considerably beyond those of the European Council. Since 1993, the Council systematically publishes legislative voting outcomes (Council 1993, art. 7(5); TEU 2009, art. 16(8)). In 1995, the Council also began to allow the automatic publication of statements alongside the vote, an instrument that became frequently used by member states to publicly communicate dissenting positions (Council 1995, point 13A). However, the norm of joining the majority when one cannot block the adoption of a legislative act anymore means that, in practice, the most successful legislative acts are adopted with no public countervotes (Novak 2013).

Shortly after the entry into force of Regulation 1049/01, in order to still retain some of its former 'space to think' in the legislative procedure, the Council introduced a 'reasonable solution' by which it granted partial access to most legislative documents but redacted the names of the member states that suggested amendments or counterproposals (Council 2002, point 22). This practice was challenged before the Court of Justice in *Access Info Europe* (CJEU 2013; GC 2011). The Court thereupon banned the 'reasonable solution', finding that public access to documents in a 'normal legislative procedure' may not be considered sensitive by reference to 'any criterion whatsoever' (Abazi and Hillebrandt 2015, 831–832; CJEU 2013, para 63). Ominously, shortly after the judgement, the Council agreed to continue to record names of member states only where this would be 'deemed appropriate' (Council 2014a, 2014b).

A final locus where a legislative 'space to think' has emerged is in the so-called 'trilogues'. In trilogues, the acting Council presidency at the Coreper level negotiates legislative dossiers with the EP's rapporteur in a secluded setting. According to recent figures (2009–2014), some 85% of all ordinary legislative procedure acts were adopted at first reading, generally on the basis of trilogues (European Parliament 2014, 8). Trilogue meetings provide a nearly total 'space to think'. In fact, their transparency does not go further than their announcement, and then only in those cases where this is considered organisationally 'practicable'



(European Parliament, Council and Commission 2007). The trilogues thus risk to ‘short-circuit’ the formal legislative process, as relevant debates are not held in public (Huber and Shackleton 2013).

### ***Non-legislative spaces to think***

As highlighted by the new intergovernmentalist theories which constitute the conceptual reference point of this special issue (Fabbrini and Puetter 2016), the Council also fulfils non-legislative functions. These functions are however rather dispersed and therefore lead to variegated spaces of opacity. Frequently, ‘spaces to think’ are created through the unofficial circulation of documents, the circulation of documents in informal decision-making forums or a combination of both. Moreover, the Council has generally claimed a wide discretion to claim a ‘space to think’ in access requests for non-legislative documents.

In several areas of Council policy-making, multiple intergovernmental ‘satellite’ forums have been set up that discuss issues and reach decisions *en marge* of the ‘regular’ Council bodies (Curtin 2014, 5). For example, state secretaries of finance hold policy coordination talks in the Economic and Financial Committee (EFC) alongside the Economic and Financial Affairs (ECOFIN) Council. The EFC is supported by its own secretariat and functions under conditions of strict confidentiality. Similarly, the Eurogroup and its preparatory body, the Eurogroup working group function as largely unregulated and document-free decision-making spheres parallel to the ECOFIN Council (Puetter 2006, cf. Protocol 14 on the Eurogroup attached to the Lisbon Treaty). The status of documents introduced in such forums in relation to Regulation 1049/01 is frequently unclear and their content remains largely beyond the reach of the public and, in the case of the Eurogroup, of non-euro EU member states. Similar confidential bodies exist in other Council decision-making areas. A prominent example in the area of the common foreign and security policy (CFSP) is the Political Security Committee.

Non-legislative Council decision-making also leads to evasive, unofficial document circulation, as is again illustrated by practices in the field of foreign affairs and economic and monetary policy. For example, from an early stage the Eurogroup president developed the practice of presenting his views of a meeting in an unregistered ‘letter of the president’ (EFC secretariat 2002, v–vii). In the areas such as the Common Foreign and Security Policy (CFSP), member states have traditionally relied on the intergovernmental, so-called Coreu network (*correspondance européenne*) for the circulation of policy documents. In recent years, informal document exchanges parallel to the Coreu network appear to have been on the rise (Bicchi and Carta 2012). For example, a member government may decide for strategic reasons to circulate its national intelligence’s report among only a limited number of member states, with the EEAS acting as a go-between.

Finally, in access requests for non-legislative documents, the Council has from the start claimed a wide discretion to invoke the need for a ‘space to think’. Although the EU courts have at times been critical about the consequences of this attitude for the parliamentary and public right to information, they have in a number of cases – sometimes understandably, sometimes controversially – been unwilling to insist on transparency in areas with a clear executive prerogative such as ongoing negotiations, sanction listings or monetary policy debates (Abazi and Hillebrandt 2015; CJEU 2007a; GC 2013, 2007; Leino forthcoming).

## Integration without transparency?

Having highlighted the relative success of the plea for a ‘space to think’ that serves to limit the transparency of the European Council and the Council, we now aim to explore how the empirical evidence is congruent with the three core assumptions derived from intergovernmentalist theories as suggested in section 2. This section discusses how the development of non-legislative decision-making, the leverage of the European Council and the Council in the inter-institutional system and the continued practice of consensus correlate with the relative success of the plea for a ‘space to think’. Our findings are mixed: whereas we find a correlation between the inter-institutional leverage of the European Council and the Council and the ‘space to think’, empirical evidence of congruence is less clear when it comes to the distinctions between QMV or consensus politics and between legislative and non-legislative decision-making.

### *Difference between legislative and non-legislative decision-making*

First, our findings are mixed in relation to the distinction between legislative and non-legislative decision-making. As shown in section 3, when the actors operate in the non-legislative area of the European Council, reliance on the ‘space to think’, while consistently practiced, is rarely justified. In the non-legislative area of the Council, we also find a high degree of non-transparency, which is characterised by the multiplication of unofficial documents, the public access to which is starkly limited in the name of the ‘space to think’. Moreover, more instances of explicit justification of the ‘space to think’ exist for non-legislative Council activity, as is evidenced by the Council’s regular invocation of this argument in the context of court proceedings.

However, this apparent correlation must be interpreted cautiously at least for two reasons. First, the recourse to the ‘space to think’ is not specific to the non-legislative area. Even in the legislative area, and in spite of increased regulations on transparency, actors have persistently relied on the ‘space to think’. The picture of transparency in legislative decision-making is a complex one because the transparency rules are implemented with varying success (Hillebrandt, Curtin, and Meijer 2014; Novak 2014). Indeed, the information publicly released during the plenary sessions of the Council might be partial or misleading because the Coreper deals with the bulk of the decisional process. Furthermore, information on positions taken by the ministers is only partial: as shown by the *Access Info Europe* case, the Council Secretariat can redact the names of the delegations in the minutes; in addition, public votes do not accurately reflect the positions taken by the actors behind closed doors – as pointed to by Hayes-Renshaw, Van Aken, and Wallace, ‘some dogs do not appear to bark’ (2006, 172; see also Vaubel 2008).

Second, the reliance on trilogues between the Council, the EP and the Commission shows that upholding a limited form of transparency is not specific to the European Council and the Council. When negotiating legislative acts, the Commission and the EP also rely on non-transparent practices. Therefore, even if we find a correlation between non-legislative decision-making in the Council and pleas for limited transparency, the fact that the ‘space to think’ is not absent from legislative decision-making in the Council and not even specific to this institution does not allow us to suggest that the limited progress of transparency is exclusively congruent with non-legislative decision-making.

### **Leverage of the European Council and Council**

To some extent, the relative success of both the European Council and the Council (particularly Coreper and junior-level bodies) at preserving a 'space to think' in spite of increased external pressures for more transparency is correlated with the leverage of these two bodies in the inter-institutional setting.

One could argue that the increased openness of the Council (publicity of votes for all legislative acts, publicity of the legislative debates in the framework of codecision, publicity of documents) (Council 2009, articles 7–10) increases the equality of the Council and the EP. Nevertheless, an asymmetry between the two institutions persists. While most of the committees and sessions of the EP are public, the sessions and the minutes of the Coreper, the Council's central steering body, remain confidential. The fact that the Council applies the transparency rules less stringently than the EP confers an informational advantage on the former, which strengthens the leverage of the Council over the EP.

Moreover, the European Council is not strictly subjected to transparency obligations, which allows it to account for the positions of its members only exceptionally. At the same time, it faces two supranational institutions, the Commission and the EP, for which transparency obligations are far more stringent. The asymmetry of information created by this situation benefits the former institution to the detriment of the latter two. It could further be assumed that the informational disadvantage of the two supranational institutions has grown over time as the European Council's repeated negotiation setting means that it accumulates an ever-larger internal 'institutional memory' which is shielded from outsiders. This informational advantage might be mitigated by the rotation of the individual members due to national elections or by the publicity of certain member states' dissent on important issue. Nonetheless, it is likely that the presence of a wide 'space to think' correlates with the leverage of the European Council in the interinstitutional equilibrium. In this respect, the intergovernmentalist theories with their focus on the centrality of the Council and of the European Council are likely to account for the wide extent of the 'space to think' in both institutions.

### **Consensus practices**

A central tenet of the new intergovernmentalism is that consensus has become the guiding norm of day-to-day decision-making at all levels (Bickerton, Hodson, and Puetter 2015, 711). We argue that the limited progress of transparency correlates with the iterative practice of consensus, but a fuller appreciation of this correlation requires a redefinition of the concept of consensus. New intergovernmentalism tends to conceive consensus as a general intergovernmental agreement. We do not dismiss this dimension of consensus, however recent research reveals a further aspect (Novak 2013). Consensus should not be understood as explicit unanimity but, in accordance with the definition of consensus in international law, as only the absence of explicit dissent. In this sense, consensus does not guarantee accountability because it constrains the actors from taking explicit positions.

In the case of the European Council, the Lisbon Treaty institutionalised consensus as the prime decision rule. In this light, it is significant that the Treaty refers to *consensus*, rather than unanimity. Even if one can justify the rule of consensus by the necessity to avoid the adoption of measures against the will of any given government, this practice prevents us from knowing the Heads' positions.

Turning to cases in which the Council decides by QMV, what is remarkable is that in spite of the introduction of voting transparency, consensus has remained the norm. Naturally, under QMV the position of actors partly depends on their ability to build a blocking minority against a legislative proposal. Furthermore, a measure cannot be adopted if the Council Secretariat has not checked that the qualified majority is actually reached (Novak 2013). However, when it comes to registering one's vote on an adopted measure, the norm is for the opponents to join the majority unless domestic reasons compel them to express public opposition or abstention (Hayes-Renshaw, Van Aken, and Wallace 2006). Interestingly, this norm of consensus has proven remarkably resilient even if a multitude of factors – the pressure for increased transparency, the extension of co-legislation involving the EP, and the enlargements – could have led one to predict the end of consensus.

The lack of transparency of the European Council and the Council can therefore be correlated with the continued practice of consensus insofar as consensus avoids the disclosure of positions. However, to explain the relation between consensus and the lack of transparency, we need to complete the definition of consensus suggested by the new intergovernmentalism. Finally, one additional aspect should be noted: because consensus avoids the disclosure of internal divisions, it can operate as a means for the intergovernmental institutions to maintain their unity and reinforce their power when facing the EP and the Commission. Thus a broader correlation emerges between inter-institutional leverage, consensus and the relative success of the 'space to think'.

## Conclusion

The empirical analysis shows that both the European Council and the Council have been so far relatively successful in preserving a 'space to think'. The objective of this article was to assess to what extent intergovernmentalist theories could be successful in explaining this trend. Our empirical findings demonstrate a partial congruence with the theoretical expectations developed in section 2.

First, in line with the postulated expectation, non-legislative decision-making in the Council correlates strongly with a reliance on the 'space to think'. However, we also observe a correlation (albeit with a more limited effect) between legislative decision-making and the same reliance on a 'space to think'. On balance, non-legislative areas are considerably more insulated from formal transparency requirements than legislative decision-making. While the latter is subject to increasingly stringent transparency rules, the non-legislative bodies act under a de facto presumption of non-transparency which is generally confirmed by the European courts. We interpret this situation as partially congruent with the theoretical expectations: while reliance on the 'space to think' clearly plays a larger role in the European Council and Council's (frequently intergovernmental) non-legislative decision-making, it is evidently not unique to either these institutions or this specific decision-making mode.

We also expected that the practice of consensus correlates with limited transparency. Our analysis allows us to establish this correlation but under the condition that 'consensus' is broadly defined as the absence of explicit opposition, rather than a mere general agreement entailed by deliberation. Thus understood, consensus in both institutions is (at least partially) associated with the deliberate creation of a 'space to think' that undermines decisional transparency.

Lastly, the most relevant theoretical expectation is the one dealing with the centrality of the European Council and of the Council in the inter-institutional equilibrium: the leverage of both institutions is accompanied by a lack of openness vis-à-vis the EP and the Commission. However, this correlation does not inform us on the direction of a possible causal link: does the centrality of the European Council and of the Council lead the actors to limit the extent of transparency or does the limited extent of transparency, inversely, contribute to empowering both institutions? It thus remains unclear whether this reliance on the 'space to think' is deliberately or coincidentally associated with the intergovernmentalist theories. From a normative viewpoint, depending on one's analysis, this development may be characterised as intrinsic to the nature of European institutions composed of national executives that form a link between national- and European-level decision-making, or as a form of intergovernmental domination that stands in the way of parliamentary supranational decision-making processes.

Over two decades after the Maastricht Treaty, the European Council and Council continue to rely on the 'space to think' often and with relative success. This absence of transparency is all the more preoccupying given the growing executive dominance of the European Council and of the Council, which increases the incidence of consensus-based non-legislative decision-making (Curtin 2014). Both of these decisional modes further diminish the public contestation over decision-making, as well as the possibility of attributing responsibility to decision-makers. In this context, we believe that further research is needed to unpack the argument underpinning a reliance on the 'space to think', and to clarify the relation between transparency and efficiency. Even if transparency is usually seen as an obstacle to efficient decisions, we currently lack empirical evidence that supports this argument and that would serve as a justification of this so commonly and casually coined claim of EU decision-makers.

## Notes

1. Rafferty and Tomljanovich (2002) and Novak (2011) investigate this issue.
2. In this article, we focus exclusively on the European Council and Council, leaving aside the question of the 'space to think' in institutions such as the Commission or the Court of Justice of the EU. See however Curtin (2014, 4–6) and Alemanno and Stefan (2014) on these areas.
3. The empirical analysis in this article is based on previous research conducted by the authors (Curtin and Hillebrandt *forthcoming*; Hillebrandt et al. 2014; Novak 2011, 2013, 2014), as well as on legal texts, court judgments, administrative decisions and policy documents. Details are provided in the Appendix.
4. On the exceptions regime under Regulation 1049/2001 see paragraph 3.2 below.

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No potential conflict of interest was reported by the authors.

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