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Hillebrandt, M.

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Two conceptions of democracy in the Council of the EU: narrow and broad

Maarten Hillebrandt

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Maarten Hillebrandt is PhD researcher at the Amsterdam Centre for European Law and Governance.

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Address for correspondence

M. Hillebrandt

University of Amsterdam

Amsterdam Centre for European Law and Governance

P.O. Box 1030

NL - 1000 BA Amsterdam

The Netherlands

Tel.: +31-20-525-2957

Email: M.Z.Hillebrandt@uva.nl

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ABSTRACT

Since the entry into force of the Lisbon Treaty, the Council is explicitly understood as a democratic actor in a decision-making system that is legitimated on the basis of a democratic rationale. While this formalisation in the Lisbon Treaty of the Council as a democratic actor is to be welcomed as an important step in a longer-standing process, it remains unclear which normative requirements result from it. This point is illustrated in this paper with reference to the principle of transparency. It discerns the role of transparency in two competing conceptions at the Council level, representing a narrow, and a broad perspective on democracy. It is argued that below a minimal threshold of transparency, Council democracy cannot function. Above this threshold, in turn, transparency is likely to make Council democracy function better.

Keywords: democracy, transparency, Council of the EU

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1. EU DEMOCRACY AT LAST?

Since the entry into force, in December 2009, of the Lisbon Treaty, the Council must be explicitly understood as a democratic actor in a decision-making system that is legitimated on the basis of a democratic rationale.¹ ² The formalisation in the Lisbon Treaty of the principle of democracy is an important step in a longer-standing development that was set in motion in 1992, when the Maastricht Treaty was signed. A gradual process was initiated in response to the development of a supranational decision-making system that increasingly and permanently curbs the sovereignty of EU Member States and exercises a growing power over their nationals.³ Various measures were introduced to address concerns about the legitimacy of this development in the EU, among them European citizenship,⁴ a transparency policy,⁵ and more recently, measures that facilitate structural public participation.⁶

The provisions on democracy laid down in the Treaty on European Union establish the principle of democratic representation as the foundation for EU decision-making.⁷ At the same time, they also envisage a more participatory approach to

¹ This working paper is partially based on work presented at the Third Global Conference on Transparency Research, HEC Paris, 24-26 October 2013. Useful feedback on earlier versions was provided by Vigilencia Abazi, Nik de Boer, Deirdre Curtin, Chris Koedooder, Albert Meijer and Maria Weimer. The usual disclaimer applies.

² J. Mendes, 'The democratic foundations of the Union: representative democracy and the legal challenge of Article 11 TEU', in S. Blockmans and A. Lasowski (eds), *Research Handbook EU Institutional Law* (Oxford University Press, Oxford, forthcoming), p. 1. Throughout this paper, this idea will be referred to as 'Council democracy'.

³ *Supra* note 1, p. 1; J.H.H. Weiler, *The Constitution of Europe. "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (Cambridge University Press, Cambridge 1999), p. 349. Throughout this paper, the term 'decision-making' is used to refer to both the legislative and executive functions of the Council.

⁴ Weiler, *supra* note 3, p. 324 and further.

⁵ S. van Bijsterveld. 'Transparency in the European Union: A Crucial Link in Shaping the New Social Contract between the Citizen and the EU' (Transparency in Europe II, proceedings of conference hosted by the Netherlands during its Chairmanship of the EU Council, 25 and 26 November 2004 2004) 17; A. Héritier. 'Composite Democracy in Europe: The Role of Transparency and Access to Information' (2003) 10(5) *Journal of European Public Policy* 814

⁶ A. Alemanno, "Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy" 2014, *European Law Review* (1), forthcoming

⁷ What has become known as the Lisbon Treaty usually refers to two co-referential treaties: the Treaty on European Union (TEU), and the Treaty on the Functioning of the European Union (TFEU). Hereinafter, reference to the Lisbon Treaty will be specified as the Treaty on

democracy.⁸ However, as representative and participatory models of democracy are underpinned by divergent forms of legitimation, it remains unclear which precise normative requirements result from these democratic principles. This absence of a rigorous conceptual grounding is problematic: when a precise understanding of EU democracy is lacking, it is difficult to establish whether the amalgam of provisions actually leads to more democracy, or are rather a rhetorical exercise.⁹

In order to structure a deeper investigation into the democratic nature of EU, and particularly Council decision-making, this paper identifies a distinction between two conceptions of democracy: one narrow, and one broad. This distinction underpins much existing democratic-theoretical work in the context of the EU. Each of these two conceptions is characterised by its own theory of legitimacy, which is upheld by specific requirements particularly with regard to the degree and forms of citizen involvement. At the same time, narrow and broad democracy are not necessarily antagonistic: while the former contains the minimal requirements for democratic legitimacy, the latter may complement and enrich these requirements. At the same time, as will be detailed below, convincing arguments exist for the proposition that narrow democracy as it exists in the Council falls short in its ability to legitimate decision-making, and must be complemented by broader opportunities for citizens to be involved.

This point will be illustrated with specific reference to the principle of transparency, which is habitually cast in the light of European democracy. The logic underlying this linkage is apparent enough: in a democracy, citizens, united in a community, decide their own fate, and this process of collective decision-making is not possible if ideas on both community ideals, and the way to realise them, cannot be exchanged in an open manner.¹⁰ However, while academics and practitioners regularly sing transparency's praises, the normative argumentation of its fit with democracy in the

European Union (TEU) or Treaty on the Functioning of the European Union (TFEU). TEU Title II (articles 9-12), unless where this may lead to confusion (in a historical context).

⁸ R. Bellamy and D. Castiglione. 'Three models of democracy, political community and representation in the EU' (2013) 20(2) *Journal of European Public Policy* 206

⁹ T. Hüller. 'Assessing EU Strategies for Publicity' (2007) 14(4) *Journal of European Public Policy* 563, p. 565

¹⁰ A. Buijze, 'The Principle of Transparency in EU Law' (doctoral dissertation Utrecht University 2013), p. 83

context of Council decision-making is fragmented at best – a situation that is exacerbated by a confounded understanding of this institution’s democratic legitimacy. It is argued that while a minimal threshold of transparency is required to secure the democratic legitimacy of Council decision-making, above this threshold, transparency is likely to accommodate a welcome further strengthening of the Council’s democratic functioning.

The paper sets out as follows. Section 2 identifies and discusses the democratic models present in Title II of the Treaty on European Union (provisions on democratic principles). Section 3 develops a theory of democratic legitimacy that can be used in the context of Council decision-making. In doing so, it broadly builds on the work of Scharpf. It then problematizes an understanding of democratic legitimacy by casting it in the light of narrow and broad conceptions of European democracy. In section 4, the principle of transparency is introduced to highlight the different practical effects that these democratic conceptions give rise to. Section 5 ends the paper with a number of concluding observations.

2. DEMOCRACY AS UNDERSTOOD BY THE EU: TITLE II ON DEMOCRATIC PRINCIPLES

The Treaty on European Union, which entered into force in December 2009, has been heralded by many observers for both strengthening and, to an important extent, formalising the nature of democratic principles in the EU.¹¹ To begin with the latter: the TEU has *formalised* the principle of democracy, as the relevant articles are now systematised and brought together under a single title, “Title II: Provisions on democratic principles”. This title enumerates the provisions in a clear and structured manner, allowing for the reconstruction of an underlying democratic theory. As for the *strengthening* potential of Title II, the provisions address the concept of democracy with a hitherto unseen degree of ambition and detail, which is already apparent in the title which speaks of “principles” in the plural, rather than a principle of democracy in the singular. Beyond this observation on the title, a number of new provisions provide room for the argument that the TEU contains

¹¹ A. von Bogdandy, “The European Lesson for International Democracy: The Significance of Articles 9–12 EU Treaty for International Organizations”, 2012 *European Journal of International Law*, 23(2), 315-334

some truly innovative thinking about democratic legitimacy, as will be detailed below. But first, in order to grasp the significance of the treaty provisions, we must turn to their historical context.

2.1 Historical context

The provisions in the Lisbon Treaty build upon steps that had been previously taken by the Intergovernmental Conference (IGC), in an attempt to address democratic concerns about EU decision-making. Both the diagnosis of, and remedies against a perceived democratic deficit are of relatively recent origin.¹² Starting in 1992 when the 'permissive consensus' of European integration became widely questioned by the Danish no-vote and French near no-vote in referendums on the Maastricht Treaty, the European treaties slowly began to reflect a democracy-oriented discourse. First, in the Maastricht Treaty the Member States confirmed their adherence to the principle of democracy. This took shape in several ways: a commitment was made to take decisions as closely as possible to the citizen, a European citizenship was established, and finally, the first step was taken towards an access to documents policy.¹³

Throughout the 1990s however, direct references to the principle of democracy were solely made in relation to the Member States and *their* democratic legitimacy.¹⁴ This understanding of the principle of democracy soon came under fire, and it was noted that the EU applied more stringent criteria of democracy to its members than to itself. The turn to the search for a democratic benchmark for the was accompanied by an ever-wider rejection of the *sui generis* theorem, which holds that the EU, being neither a traditional international organisation nor a fully-fledged state, is a governing form that defies all conventional categorisation. Hix argued in 1994 that "politics in the EC

¹² Cf. Weiler *supra* note 3, pp. 238-9. Mendes points out that reference to the principle of democracy is somewhat counter-intuitive in the context of European integration, which was initially premised on a diplomatic, intergovernmental decision-making paradigm. *Supra* note 1, p. 1.

¹³ Respectively Maastricht Treaty, fifth recital, articles A and B/8, and Declaration 17 attached to the Treaty. An additional step that may be mentioned here is the granting of co-decision powers to European Parliament (EP) in a limited number of policy areas, which expanded in the Amsterdam Treaty.

¹⁴ *Supra* note 11, p. 318

is not inherently different to the practice of government in any democratic system".¹⁵ Andersen and Burns, in turn, drew a connection between the complex and dense structures of governance developed at the European level and waning popular and parliamentary control. They observed in 1996 that in the EU, "the direct 'influence of the people' through formal representative democracy has a marginal place".¹⁶

The conspicuous absence of a reference to democracy as one of the EU's (rather than its Member States') constitutional principles was partially repaired in the Amsterdam Treaty. Its amended treaty article F.1 now read: "The Union is founded on the principles of liberty, *democracy*, respect for human rights and fundamental freedoms, and the rule of law, *principles which are common to the Member States*".¹⁷ The principle of democracy thus became a founding principle of the EU but, confusingly, remained linked to the democratic traditions of its Member States. At any rate, as one observer pointed out, "what democracy means in fact has not been defined [by the Amsterdam Treaty]".¹⁸

The lack of substantiation allowed the 'indirect reading' of the EU's democratic legitimation to linger, resulting in periodical plays for the reinforcement of democracy along national parliamentary lines.¹⁹ While national parliamentary representation clearly play an important role in democratic processes of decision-making and accountability, their role is exactly that: national. Arguably, the indirect perspective therefore results in an idiosyncratic reading of the idea of European democratic legitimacy. After all, not just the EU Member States, but also the Union itself constitutionally underwrites the principle of democracy. The Lisbon Treaty

¹⁵ Cited in T.D. Zweifel, "...Who is without sin cast the first stone: the EU's democratic deficit in comparison", *Journal of European Public Policy*, 9(5), 812-840, p. 813

¹⁶ S.S. Andersen, and T.R. Burns, "The European Union and the Erosion of Parliamentary Democracy: A Study of Post-parliamentary Politics", in S.S. Andersen and K.A. Eliassen (eds), *The European Union: How Democratic Is It?* (London: Sage, 1996) p. 227, 244

¹⁷ Amsterdam Treaty art. 1(5), italics added

¹⁸ I. Pernice (1999), "Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?" *Common Market Law Review*, 36(4), pp. 703-750, at p. 739

¹⁹ In fact, this argument has continued to be used after the Lisbon Treaty was adopted. Only recently, British Minister for European Affairs David Lidington argued in favour of stepping up European cooperation through stronger intergovernmental cooperation in the European Council, and overseen by national parliaments. See D. Curtin, "Secrecy at EU level is a challenge to democracy", *Irish Times*, 10 June 2013 <http://www.irishtimes.com/news/world/europe/secrecy-at-eu-level-is-a-challenge-to-democracy-1.1422316>

sought to bring substance to the largely rhetorical qualities of the EU's principle of democracy.²⁰

2.2 Title II in the Treaty on European Union

The "Provisions on democratic principles" contained in Title II of the TEU may be taken as the EU's formal democratic blueprint.²¹ Specifically, the four articles that Title II embodies allude to two common models of democracy, one representative and the other participatory.²² Both models approach the question of democratic legitimacy in a distinct manner. This is here briefly illustrated with reference to articles 9-12 TEU, in order to facilitate a subsequent theoretical discussion of democratic legitimacy in section 3.²³

The first democratic foundation of the EU: representative democracy

Article 10(1) TEU states that "[t]he functioning of the Union shall be founded on representative democracy". Following Schumpeter, representative democracy can be defined as "that institutional arrangement for arriving at political decisions by means of a competitive struggle for the people's vote".²⁴ A representative model such as provided by the TEU requires limited interfaces between citizens and decision-makers.²⁵ In representative democracy, the people express their opinion through the vote. However, after they have elected their representatives, the people lose a right to participate in a fully-fledged manner, until the next elections.

A number of provisions in the TEU underpin the representative ideal of democracy. To begin with, the democratic polity is carried by a European citizenship that complements national citizenship, and which guarantees equality before the law and

²⁰ Before the Lisbon Treaty came into force, the principle of democracy was also invoked before the Courts in relation to access to documents, notably in *Sweden and Turco v Council* (joined cases C-39/05P and C-52/05P), albeit on the basis of a limited theory of democracy.

²¹ *Supra* note 1, pp. 2-4

²² See D. Held, *Models of Democracy* (third edition Stanford University Press, Stanford 2006), ch. 5, 7 and 9. Also B. Manin, *The Principles of Representative Government* (Cambridge University Press, Cambridge 1997); J. Mansbridge. 'A "Selection Model" of Political Representation' (2009) 17(4) *Journal of Political Philosophy* 369

²³ The present discussion sketches the outlines of Title II TEU in a manner that is limited but sufficient for the subsequent theoretical analysis. For a detailed discussion of Title II TEU, see Mendes, *supra* note 1.

²⁴ J.A. Schumpeter, *Capitalism, Socialism and Democracy* (Allen & Unwin, London, [1942] 1976), p. 269

²⁵ Held, *supra* note 22, p. 125

the administration (article 9). Furthermore, the TEU foresees in the direct representation of European citizens through the EP, and of Member States through the Council (article 10(2)). In most cases, these two bodies act as a bi-cameral legislature akin to a federal system. Beyond the representation through these two bodies, the TEU also contains provisions on the role of national parliaments (article 12), in order to strengthen their oversight in both national and European democratic processes.²⁶

The people are able to hold their representatives to account in election, indirectly in their capacity of Member State citizen (elections for the national parliament which produce the national ministers that legislate in the Council) and directly as European citizen (European elections which produce a European Parliament (EP)). While elections for the EP are organised within (and by) Member States, TEU article 10(4) conceptualises the role of European political parties as drivers of “European political awareness”. The ‘Europeanisation’ of EP elections is further enhanced by the possibility of citizens to present themselves as candidates in any Member State in which they have residence (article 20(2) sub b TFEU).

Public debate plays a pivotal role in representative democracy, albeit in a more limited form than is conceived by deliberative theorists. The role of European political parties is understood as a channel through which “the will of citizens of the Union” is expressed. Political position-taking on different issues provides cues on the direction of policy desired by European parties (article 10(4)).²⁷ The other side of the representative model of will formation is formed by European/national citizens. Citizens are expected to form their opinion on the basis of the cues provided by representatives, and are free to publicly express this opinion. Furthermore, they are able to hold their representatives to account in elections (article 10(3)). Besides having the right to vote in elections, each member of the public may also stand as a candidate for European political office, again directly in the EP, or indirectly in a national parliament/government (article 20(2) sub b TFEU).

²⁶ Although the dividing line between these two processes is not always clear, see S. Kröger and D. Friedrich, ‘Democratic representation in the EU: two kinds of subjectivity’, 2013 *Journal of European Public Policy* 20(2), 171-189, pp. 179-81

²⁷ Mansbridge, *supra* note 22, pp. 381-6, S. Binzer Hobolt, ‘Taking Cues on Europe? Voter competence and party endorsements in referendums on European integration’, 2007 *European Journal of Political Research*, 46, 151-82

The second democratic foundation of the EU: participatory democracy

The second model put forward by the TEU is that of participatory democracy. Although it is not directly referred to as such, the self-standing nature of the participatory provisions in article 11, as well as their legislative and institutional history indicate its pre-eminence and complementarity to representative democracy. While the Commission already has been experimenting with participation for a number of years, the fact that it is now cited in Title II as a democratic provision strengthens the argument that participation has been elevated to constitutional status.²⁸

An exploration of article 11 TEU sheds light on the centrality of participation (underlined by its mandatory wording – “the institutions *shall*...”), but also on its lack of clarity. In article 11(1) TEU, the EU institutions are instructed to provide possibilities for “citizens” and “representatives associations” to participate in the institutions “by appropriate means”. The purpose of such participation is further specified in articles 11(2) and 11(3) TEU, namely to maintain “an open, transparent and regular dialogue with representative associations and civil society”, and “to ensure that the Union’s actions are coherent and transparent”. The normative content of this purpose has been criticised for providing too much leeway to an instrumental reading of participation, projecting expectations of “process efficiency and policy outputs”.²⁹ Yet a broader reading of participation is hard to avoid.³⁰ It must, for example, be noted that participation is conceptualized inclusively, encompassing citizens, associations, and civil society. Moreover, article 11 TEU highlights its dialogical character, which, given its placement under Title II, must be given a democratic reading.

From a democratic perspective, participation is connected to the idea that citizens must have meaningful opportunities to contribute to the direction of decision-making. It is generally conceived as a complement to representative democracy, presenting a means to counter public alienation and a sense of disenfranchisement. Particularly in the EU, ongoing public dialogue serves the purpose of strengthening

²⁸ Supra note 6; supra note 1, p. 2

²⁹ J. Mendes. 'Participation and the Role of Law After Lisbon: A Legal View on Article 11 TEU' (2011) 48(6) Common Market Law Review 1849, p. 1850

³⁰ Supra note 11, pp. 329-331

the capacity of citizens to be involved – a capacity that is only marginally addressed by respective (European) elections.³¹

In particular, participation provides the public with formal opportunities to voice their opinion on important issues, and to convince decision-makers of these opinions in order to influence the decision-making process.³² It must be noted in this respect that a model of participatory democracy presupposed both a more deliberative perspective on decision-making, and greater engagement of citizens in its process.

The contours of democratic participation are not directly clear, and are necessarily experimental.³³ However, the TEU expounds two measures in more detail. Article 11(4) establishes the “European citizen’s initiative”, which allows a large and diversely composed group of citizens to invite the Commission to propose broadly supported policies.³⁴ The citizen’s initiative has been criticised for being too restrictive and putting the threshold too high. However, it may at present be too early to discern the impact of the citizen’s initiative on Commission policy-making.³⁵ Another participatory measure, set out in article 11(3) TEU, arranges participation rights through “broad consultations with parties concerned”, organised by the Commission in the preparation of legislative proposals or other policy development. The idea of participation through consultations builds on existing Commission practice yet requires, as has been argued, further constitutional development in order to fulfil a truly democratic function.³⁶ As it stands, participatory democracy serves mainly as a potential source of legitimacy, “to change the nature of the relationship between citizens and government and to develop new forms of decision-making addressing the mounting call for accountability”.³⁷

³¹ Héritier, supra note 5, p. 819

³² Supra note 6, p. 18

³³ Held, supra note 22, pp. 211-3

³⁴ TEU, art. 11(4) speaks of “Not less than 1 million citizens who are nationals of a significant number of Member States”. A “significant number” currently means minimally 7 (a quarter) of the Member States.

³⁵ Supra note 11, p. 330; supra note 6, p. 21; Chalmers, D., G. Davies and G. Monti (2010), *European Union Law* (Cambridge: CUP), pp. 135-6

³⁶ Supra note 29, p. 1858-63.

³⁷ Supra note 6, p. 21; Chalmers et al., supra note 34, pp. 135-6

Relation between the two models

Participatory measures do not necessarily take on democratic forms. They can result in uneven access to decision-making processes, exclusion, or 'rubber-stamping exercises'. Put more strongly, participation may undermine representation when the former 'captures' the decision-making process at the expense of the latter. This is the case, for example, when civil society organisations with dubious 'representative' foundations set the agenda and influence policy, or when certain sections of society are structurally marginalised or conversely, overrepresented in participatory procedures.³⁸

This criticism leaves participatory theorists vulnerable to the claim that participatory democracy is inherently incompatible with (representative) democracy.³⁹ From the above discussion, it indeed becomes clear that both models of democracy perceive the question of legitimacy differently.⁴⁰ At the same time, "the idea that ultimately power is vested in the people is a powerful one", and one that is shared by both models.⁴¹ Particularly in situations where representative structures are incomplete, or enjoy only feeble social legitimacy, additional participatory measures can have added value from a democratic perspective.⁴²

To be sure, representative democracy and participatory democracy each provide their own answers to the question of legitimacy. However, in spite of their differences, these answers are not necessarily incompatible at all times, and in all respects. Indeed, the common understanding of participation under Title II is that it adds to the legitimacy of representative government.⁴³ Many theoretical models of participatory democracy presuppose such complementarity, taking a form of representation by election for granted. Furthermore, both models foresee a democratic infrastructure in which the legitimacy of government is, in some way,

³⁸ Supra note 26, pp. 181-2; supra note 11, p. 330; B. Kohler-Koch. 'Civil society and EU democracy: 'astroturf' representation?' (2010) 17(1) *Journal of European Public Policy* 100

³⁹ Supra note 1, p. 21, particularly footnote 121

⁴⁰ T. Jensen. 'The Democratic Deficit of the European Union' (2009) *Living Reviews in Democracy* 1

⁴¹ Supra note 10, p. 86

⁴² J. Mendes, 'Administrative Law Beyond the State: Participation at the Intersection of Legal Systems' in E. Chiti and B.G. Mattarella (eds), *Global Administrative Law and EU Administrative Law* (Springer-Verlag, Berlin 2011) 111, p. 116

⁴³ Supra note 1, p. 21

vested in the people's ability to participate in discussing the direction of government, and holding those who govern to account.⁴⁴ In the following section, we will take a closer look at the underpinnings of democratic legitimacy, and the role of citizens therein, at a more theoretical level.

3. DEMOCRACY AS UNDERSTOOD IN DEMOCRATIC THEORY: NARROW AND BROAD FORMS OF LEGITIMACY

By setting out provisions on democratic principles, the TEU has created a democratic foundation for the EU. Title II convincingly propounds the idea that democracy is not inextricably bound to the national institutions with which we today so readily associate them.⁴⁵ At the same time the treaty articles on democracy leave many underlying presuppositions implicit. Furthermore, national constitutional principles of democracy can provide only limited guidance in a 'composite' polity that addresses both states and citizens, and which knows multiple citizenships.⁴⁶ Envisaging democracy in the context of the EU, particularly the Council, therefore requires a certain amount of inventiveness.

Following David Held, a parsimonious definition of democracy is sought in its etymological origins, which refer to 'people rule' (*demos* meaning people, and *kratia*, rule). The plethora of democratic theoretical questions concern the meaning of these two terms, and their proper relation.⁴⁷ One possible take is provided by Lincoln's influential definition of democracy as "government of the people, for the people, and by the people".⁴⁸ In this account, the people's 'rule' is vested in government, which acts as its representative. As the people and the government are necessarily two

⁴⁴Supra note 9, pp. 566-7

⁴⁵J. Habermas, *The Crisis of the European Union: A Response* (Polity Press, Cambridge 2012), pp. 14-20; supra note 11, p. 330

⁴⁶ Supra note 26, pp. 172; Héritier, supra note 5, p. 814

⁴⁷ Held, supra note 22, pp. 1-3

⁴⁸ See Daniel Webster (1830), discussing the limitations of state's rights and the supremacy of federal law in his "Second Speech on Foote's Resolution" in the U.S. Senate, on January 26, 1830: "It is, Sir, the people's government, made for the people, made by the people, and answerable to the people. The people of the United States have declared that this Constitution shall be the supreme law". Also Abraham Lincoln (1863), closing words of his Gettysburg Address, delivered on November 19, 1863: "We here highly resolve that these dead shall not have died in vain, that this nation, under God, shall have a new birth of freedom; and that government of the people, by the people, for the people, shall not perish from the earth."

separated entities, democratic legitimacy can only be ensured through the bonds that tie the two together.⁴⁹

Lincoln's observations may serve as useful starting point for our exploration of democracy in the EU. Yet they still operate at a relatively abstract normative level. Of themselves, they do not inform us whether the provisions on democratic principles in the TEU uphold a standard that is sufficient for the EU to qualify as democratic. For that, the idea of democracy inherent in Title II must be supported by a theory of democratic legitimacy.⁵⁰

3.1 Unpacking democratic legitimacy

Whenever a community of citizens is bound by a governing body that purports to act on its behalf, this requires legitimation.⁵¹ As indicated above, in a democratic system, those who govern claim to do so (1) in name of the people, (2) in their common interest, and (3) with their involvement. These claims relate to what Scharpf has called 'polity', 'output' and 'input' legitimacy.⁵² Such forms of legitimation can also be applied to the Council, which functions as a component of the EU's overall democratic regime. Each claim needs to be substantiated before we can consider the Council's decisions democratically compelling.

Polity legitimacy: in whose name?

In EU decision-making, polities can be discerned at two levels. At one level, Member State governments act on behalf of their nationals. At another level, nationals of the Member States together form a community of European citizens, which is directly

⁴⁹ F.W. Scharpf, 'Interdependence and Democratic Legitimation' Max Planck Institute for the Study of Societies (MPIfG Working Paper,) 98/2, p. 2

⁵⁰ R. Bellamy. 'Democracy without democracy? Can the EU's democratic 'outputs' be separated from the democratic 'inputs' provided by competitive parties and majority rule?' (2010) 17(1) *Journal of European Public Policy* 2; A. Follesdal and S. Hix. 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44(3) *Journal of Common Market Studies* 533; *supra* note 49; D. Curtin and A.J. Meijer. 'Does transparency strengthen legitimacy? A critical analysis of European Union policy documents' (2006) 11(2) *Information Polity* 109; D. Curtin, 'Transparency, audiences and the evolving role of the EU Council of Ministers' in J.E. Fossum and P. Schlesinger (eds), *The European Union and the Public Sphere: A Communicative Space in the Making?* (Routledge, London 2007) 246; J. Lodge. 'Transparency and Democratic Legitimacy' (1994) 32(3) *Journal of Common Market Studies* 343

⁵¹ *Supra* note 1, p. 1

⁵² *Supra* note 49

represented by the EP, and indirectly by the Council. This duality of communities of itself has given rise to controversy.⁵³ At the same time, it is a legal reality, since European citizenship saw light when the Maastricht Treaty entered into force in 1993 – a reality which was further strengthened when this citizenship was explicitly coupled to a system of European representative democracy under the Lisbon Treaty.⁵⁴ In the EU, the Council participates, in an ongoing manner, in the creation and execution of European-level laws that bind both its members and their citizens. Legally and politically speaking, the Council's legitimate underpinnings are therefore both national *and* European.⁵⁵

Output legitimacy: in whose interest?

The Council's decision outputs must be beneficial to those on whose behalf it acts. As the Council acts on behalf of polities at two levels, it may be said that its legitimate objective is to realise the shared interests of the citizens of the participating Member States. These could be conceptualised as overlapping national interests or fully-fledged common European interests.⁵⁶ In practice, the dual legitimation of the Council's members makes it hard to decide on European interests by simple majority. Yet a requirement to garner wide support for decisions hinders representatives' ability to come to effective and coherent solutions.⁵⁷ Historically, this problem has been remedied through consensual decision-making in the Council, complemented by majoritarian decision-making in the EP. However, under the dual

⁵³ For reasons of space, this paper's discussion of the so-called 'no demos' argument is limited to this paragraph. Arguments for and against the centrality of a European demos are discussed in detail in other places, e.g., D. Grimm, 'Does Europe Need a Constitution?' (1995) 1(3) *European Law Journal* 282; J. Habermas, 'Remarks on Dieter Grimm's 'Does Europe Need a Constitution?'' (1995) 1(3) *European Law Journal* 303; and more recently, *supra* note 26, p. 172; P. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford University Press, Oxford 2010)

⁵⁴ Articles 9-10 TEU and article 20(1) TFEU. The latter article states that "Citizenship of the Union shall be additional to and not replace national citizenship". Buijze speaks of "the theoretical collective of Europeans who together pursue the common European good". *Supra* note 10, pp. 118-9.

⁵⁵ Curtin, *supra* note 50; Habermas, *supra* note 45. This is not to argue that a weak sense of a shared belonging, and concomitant solidarity are unproblematic, and may not undermine the EU's legitimacy, see also P. Schmitter. 'Democracy in Europe and Europe's Democratisation' (2003) 14(4) *Journal of Democracy* 71, pp. 79, 83. Instead, this section is expressly limited to considering the institutional design side of EU democracy, rather than its popular reception.

⁵⁶ In reality, what constitutes a 'general interest' is of course not predetermined, but rather a matter of perpetual contestation. This fact further contributes to the blurring of national and European interests, both in terms of the decision to be taken, and the right procedure to arrive at this decision.

⁵⁷ Bellamy, *supra* note 50, p. 7

dynamic of widening (from 15 Member States at the turn of the century to 28 Member States today) deepening (ongoing policy integration) in which the EU's widely diverse Member States have come to cooperate ever more closely, it becomes increasingly difficult to honour all national constituencies' (perceived) interests. While EU decision-making has converged substantially, particular national circumstances are more resilient to change. Such circumstances are often contingent on decades of path-dependent institutional choices and are therefore likely to continue to diverge in important respects.⁵⁸ Consequently, representatives in the Council, who are under pressure to support decisions that are unpopular at home, may seek refuge in opaque decision-making at some distance from the national political community, in order to shirk.⁵⁹ It has been suggested that the pressures on output legitimacy may be overcome by straight-talking politicians who are honest about the limits of national autonomy and the benefits of collective policy-making.⁶⁰ Nonetheless, it is easy to see an interest among the Council's members to stretch the limits of opacity in the face of decision-making's diminishing returns.⁶¹

Input legitimacy: what involvement?

Input legitimacy hinges on citizens' ability to be involved in directing the Council's decision-making. This means that the communities of national and European citizens can provide input to those who govern concerning the ends that they to aspire to, as well as the means deemed (in)appropriate to reach those ends.⁶² In a democracy, citizen audiences take in information related to political decision-making, on the basis of which they form their will.⁶³ Theorists diverge on the meaning of the process of will formation. Pluralists hold that the 'public will' represents the aggregation of majorities of individual preferences, while republicans emphasise the communal nature of the public will, which is 'discovered' through an open exchange of views.⁶⁴

⁵⁸ Supra note 8, p. 217; supra note 49, pp. 7-10

⁵⁹ Supra note 8, p. 215; Curtin, supra note 50, p. 424

⁶⁰ Supra note 49, pp. 11-4; supra note 40, pp. 1-2

⁶¹ Curtin and Meijer, supra note 50, pp. 117-8

⁶² Bellamy, supra note 50; Mansbridge, supra note 22

⁶³ Curtin, supra note 50. Eriksen and Fossum also refer to these as "weak publics". E.O. Eriksen and J.E. Fossum. 'Democracy through Strong Publics in the European Union' (2002) 40(3) *Journal of Common Market Studies* 401, p. 405

⁶⁴ The term 'republican' is here not used to refer to the American political party, but rather reflects an ideal of the politically engaged and civically spirited citizen. See also W. Kimlicka, *Contemporary Political Philosophy: An Introduction* (Oxford University Press, Oxford 2002), p. 294.

Both sides however share the idea that will formation must precede government in order for the latter to qualify as democratic. Without opportunities for politically consequential will formation through periodical contestation, the notion of self-rule becomes devoid of meaning. Government for, but not by the people constitutes an act of “democracy without democracy”.⁶⁵

3.2 Narrow and broad perspectives on European democracy

In spite of the merits of a minimal conception of popular input (periodical elections with accompanying public debate), critical observers have argued that the EU's current representative democratic foundation is insufficient to address the question of input-legitimacy. Problems are identified in this respect in relation to both the EP and the Council. These give rise to two responses, which can be typified as a narrow, and a broad perspective on European democracy.

Shortcomings of input legitimacy: EP and Council

Current EP elections are generally recognised to fall short of democratic standards in important respects. Due to a division of seats that emerged out of a compromise struck between the Member States, a vote for the EP which is cast in Luxemburg currently has 80 times more weight than a vote cast in Germany. This is clearly in breach with the democratic principle of equality, which states that each citizen has one vote.⁶⁶ The problem of electoral inequality is generally associated with the fact that EP elections are organised along national lines: candidate lists are put together by national political parties, while the elections are organised by national governments. Understandably, this causes EP elections to be treated as “second-order national contests” by many voters and national parties alike. As a result, they provide insufficient cues for will formation that transcends national borders and approximates European interests.⁶⁷

Follesdal and Hix, *supra* note 50, p. 547; D. Naurin, 'Dressed for Politics: Why increasing transparency in the European Union will not make lobbyists behave any better than they already do' (PhD Göteborg University 2004), p.169

⁶⁵ Follesdal and Hix, *supra* note 50, p. 534; Bellamy, *supra* note 50, pp. 4-7; *supra* note 10, p. 88

⁶⁶ *Supra* note 26, p. 178

⁶⁷ Follesdal and Hix, *supra* note 50, p. 536

In respect of the Council, the members of national governments that govern in the Council are equally elected through national political contestation. This dual role gives the national vote (which represents a wider segment of issues that just EU policy making, some of which are experienced as rather more urgent) a fragmented character, which leads to equivocal national electoral outcomes. From a purely national perspective, which treats EU matters as 'foreign affairs', such ambiguity may be tolerable, so long as national parliaments provide sufficient oversight on its government's activity in the Council.⁶⁸ Problems however surface when processes of oversight and accountability are frustrated, a situation that many national parliaments frequently encounter.⁶⁹

When the Council is regarded as a decision-making institution at Union level, in which national and European interests cross-cut, Council democracy falls short in a further respect. Although the sum of decision-making is recognised to be larger than its respective parts, national parliaments are only able to each hold their own Council representative to account, which contributes to fragmentation and hinders democratic dialogue between Member State governments and their citizens. A lack of dialogue may lead both national polities and Member States to entrench their position, highlighting national contradictions rather than shared interests.⁷⁰

The shortcomings of input legitimacy that the EU currently experiences have led to two responses which, implicitly or explicitly, underpin the debate on EU democracy. These two responses relate to the perceived relationship between a democratic EU and the citizens it represents, and can be categorised into narrow and broad perspectives on democracy. Below, these perspectives will be described, with particular reference to their meaning in the Council context.

The narrow perspective

The narrow perspective foresees a limited formal role for citizens in the act of governing. It is associated with representative government, elective aristocracy,

⁶⁸ Supra note 8, p. 210-1

⁶⁹ D. Curtin, 'Challenging Executive Dominance in European Democracy' 2014 *Modern Law Review*, forthcoming

⁷⁰ Supra note 8, p. 219-20; M. van de Steeg, 'Public Accountability in the European Union: Is the European Parliament able to hold the European Council accountable?' (2009) 13(3) *European Integration Online Papers (EiOP)* 1, pp. 2-3; Curtin, supra note 50, p. 425

vertical politics, singularism, egalitarian proceduralism, and entrusted decision-making.⁷¹ While these positions at times contradict each other, they converge in the important respect that they conceptualise a narrow formal relation between government and citizens.

This narrow relation between government and citizens may be grounded in conservative, liberal, or libertarian philosophies of social ordering. Manin points at the model's conservative origins when he shows how representative government was historically designed in *opposition* to democracy. A government's capability to represent its people was foremost thought to be contingent on the personal distinction of its members in public matters. In conservative thought, the idea that government needs to reflect the underlying population in a sociological sense is absent.⁷² Liberal theory, in turn, construes government as a meritocratic activity, albeit explicitly elite-based, and with limited room for broader citizen involvement.⁷³ The emphasis thereby lies on government *for* the people, rather than *by* the people: government makes its own assessment of what is 'in the interest of' the people.⁷⁴ The narrow perspective is supported by a theory of individual rights in the face of government power.⁷⁵ The most powerful of these is the right to periodically elect a new government. Furthermore, the individual is protected from government power through freedom of speech and the rule of law. Radical theories of liberty go further, denying the possibility of any transfer of individual autonomy to a collective, and advocating extreme government restraint in the exercise of its normative monopoly.⁷⁶

⁷¹ Respectively: Manin, *supra* note 22, pp. 173-9; H.M. ten Napel, R. Passchier and W. Voermans, 'Combing Transparency and Efficiency in the Legislative Process', paper presented at the Third Global Conference on Transparency Research, Paris 24-26 October 2013, pp. 2-3; *supra* note 8; *supra* note 9, p. 567; E. Tauschinsky and V. Abazi, "Control is Good, Trust is Better? Management of information in the EU through the lenses of control and trust", paper presented at the Third Global Conference on Transparency Research, Paris 24-26 October 2013

⁷² Manin, *supra* note 22, p. 1, 94-5

⁷³ *Supra* note 8, p. 211

⁷⁴ Mansbridge, *supra* note 22pp. 378-9

⁷⁵ Held, *supra* note 22, pp. 81-8

⁷⁶ *Supra* note 8, p. 211; P.H.A. Frissen, *Gevaar verplicht: Over de noodzaak van aristocratische politiek* (Van Gennep, Amsterdam 2009), pp. 261-8

The narrow perspective thus understands representation as *entrusted* leadership, rather than leadership that closely reflects the underlying population.⁷⁷ This perspective is aptly articulated by the Germany Federal Constitutional Court in its *Lisbon* ruling. Considering the democratic foundations of the EU, it first sets out, in paragraph 268, to describe the basic features of democracy in nation-states:

In modern territorial states, the self-determination of a people is mainly realised in the election of bodies of a union of rule, which exercise public authority. The bodies must be created by the majority decision of the citizens, who can periodically influence the fundamental direction of policy in respect of persons and subjects. A free public opinion and a political opposition must be able to critically observe the major elements of the decision-making process and ascribe it correctly to those responsible, i.e. usually to a government.⁷⁸

As may be observed, the German Federal Constitutional Court's perspective on democracy closely mirrors the representative model elaborated above: government and citizens are bound together through elections, in which the majority decides who will govern. For the purpose of subsequent elections, citizens should be broadly able to observe their government's decision-making, and to attribute responsibility. They are allowed to freely debate and criticise this decision-making, but no direct consequences can be attached to such debate and criticism. The Court then places this model in the context of European decision-making:

...taking into account state responsibility for integration, and as long as an equal balance between the competences of the Union and the competences of the states is retained, the democracy of the European Union cannot, and need not, be shaped in analogy to that of a state. [...] It is true that the merely deliberative participation of the citizens and of their societal organizations in the political rule [...] cannot replace the legitimizing connection based on elections and other votes.⁷⁹

⁷⁷ See, e.g. Tauschinsky and Abazi, who argue that: "...the distance and thus independence of the EU from the citizens is particularly great, in terms of community, culture and geography as well as in terms of organisation structure. This distance creates a large measure of discretion of the EU in relation to its citizens, as it necessarily makes direct influence unfeasible. [...] Because the EU is in many ways distant, it needs to rely on citizen trust", supra note 71, p. 11. Manin further points out that if government aimed to accurately reflect the population, it would be chosen by lot, rather than elected. Supra note 22, pp. 8-9

⁷⁸ BVerfG, 2 BvE 2/08 of 30.6.2009, para 268, www.bverfg.de/entscheidungen/es20090630_2bve000208en.html

⁷⁹ Ibid, para 272

The narrow perspective is epitomised by the Council's claim to a 'space to think', "...shielded from the public, in order to make decisions and reach agreements in an efficient way".⁸⁰ However, as the German Federal Constitutional Court makes clear, it does entail certain requirements of transparency. First, the floor criteria of the accountability mechanism must apply. From the narrow perspective, accountability is generally set apart for election time, although a "fire alarm" may very occasionally be sounded by citizens when a policy is deemed extremely unpopular.⁸¹ While will formation mechanisms cannot be omitted, they impose no transparency requirements on the Council and its members beyond what is minimally required for the exercise of political accountability. Rather, will formation is seen as a 'negative right', highlighted by the government's duty to uphold the freedom of expression.⁸² Finally, the participation mechanism is equally reduced to its minimal understanding of the right to participate in elections.⁸³

The broad perspective

The broad perspective on EU democracy takes the role of citizens further. Here, relations between citizens and government are based on more expansive formal provisions for interaction. The broad perspective is associated with participatory democracy, republicanism, horizontal politics, solidarism, and self-government.⁸⁴ These positions share a common commitment to the idea of inclusive decision-making processes. This perspective can be described as broader, in the sense that it sets a more stringent benchmark for the role of citizens in democratic decision-making. Structural forms of citizen involvement are deemed an indispensable complement to the sort of conventional representation advocated in the narrow perspective.

The broad basis for government-citizen relations is grounded in a republican philosophy of social ordering that is underpinned by an emancipatory dialectical

⁸⁰ Naurin, *supra* note 64, p. 35

⁸¹ A. Meijer, 'Transparency', in M. Bovens, R.E. Goodin and T. Schillemans (eds), *Oxford Handbook of Public Accountability* (Oxford, Oxford University Press, 2014), p. 23

⁸² Manin, *supra* note 22, p. 168

⁸³ *Supra* note 10, p. 89

⁸⁴ Respectively Held *supra* note 22; *supra* note 10, p. 211; Ten Napel et al., *supra* note 71, pp. 2-3; *supra* note 8, p. ; I. de Haan, 'De democratie als werk in uitvoering. Pierre Rosanvallon over democratie, representatie en gelijkheid', in P. Rosanvallon, *Democratie en tegendemocratie* (Boom, Amsterdam, 2012), pp. 15-7

perspective on government-society relations. From the viewpoint of civil emancipation, a broad historical trend can be discerned towards the inclusion of an ever-wider citizen base in government decision-making.⁸⁵ This has led to two concomitant developments. While the role of government as a custodian of the public good has lost much of its (theoretical) natural authority, citizens have become increasingly emancipated through a successful campaign for political rights. This has affected the willingness of citizens to accept the legitimacy of government decisions at face value, and to demand increasing participatory rights in decision-making processes, both of a legislative and executive nature.⁸⁶

A republican perspective capitalises on the proprietary nature of government as form of decision-making *vested in* the citizenry. Government that purports to decide for everybody, must allow for the involvement of everybody. Decisions should emerge in a dialogical manner in which every perspective has an equal right to be heard.⁸⁷ From the broad perspective of democracy, the dialogue emerging out of participation, beyond its potential problem-solving capacity, is first and foremost valuable in itself.⁸⁸ Emphasis is placed on the democratic legitimacy that flows out of government *by* the people, while government *for* the people comes only in the second place. People are “entitled to go their own way, even at the expense of making mistakes”.⁸⁹

Broad democracy thus envisages a model in which representative politics is ‘enriched’ by strong formal arrangements for democratic participation. However, in the context of European integration, commentators have also provided credible arguments for their *indispensability* and *centrality* to EU democracy. As has been

⁸⁵ *Supra* note 64, pp. 287-91. Cf. Weiler who has argued that ‘democracy can be measured by the closeness, responsiveness, representativeness, and accountability of the governors to the governed’, *supra* note 3, p. 81.

⁸⁶ It must be noted here that different rationales exist for increased participation. Here, participatory rights refers to civic engagement that is meant to enhance input legitimacy, and is therefore oriented on a collectivistic perspective of decision-making. Cf. V. Bekkers and A. Meijer, *Cocreatie in de publieke sector. Een verkennend onderzoek naar nieuwe, digitale verbindingen tussen overheid en burger* (Boom, Den Haag, 2010), pp. 18-27; T. Bovaird, ‘Beyond Engagement and Participation: User and Community Coproduction of Public Services’ 67(5), *Public Administration Review*, 846

⁸⁷ *Supra* note 42; Eriksen and Fossum, *supra* note 63, pp. 405-6, 420

⁸⁸ *Supra* note 29, p. 1863

⁸⁹ Bellamy, *supra* note 50

argued, EU decision-making are characterised by certain structural imbalances. For example, the case has been made that they are organised in a manner that favours (de)regulatory politics and a strong primacy of the (cooperating) Member State governments.⁹⁰ These two dynamics lead to an executive-decision-making and economically-oriented-policy bias, at the expense of popular sovereignty. Council decision-making is characterised by low levels of public awareness and involvement, but a high and increasingly politicised impact on that public.⁹¹

Where institutional structures undermine the people's ability to express their will, giving them a larger role in such decision-making can render the system as a whole more democratic.⁹² Citizens are provided with more information on a continuing basis, in order to respond to decisions that are under way, and more generally, to enter into the public debate against –or in favour– of the Council's actions. Directly, or indirectly through civil society organisations, citizens can actively monitor information streams, enter into public debate, and interact with their representatives.⁹³ This constrains the representatives' "backstage" space, including the efficiency and room for manoeuvre this brings.⁹⁴ Yet from a democratic perspective, such constraint is generally desirable, as it brings citizens a greater sense of control over, and involvement in democratic decision-making processes.⁹⁵

As may be expected, the broad perspective imposes larger requirements on Council democracy. Accountability mechanisms, while formally limited to electoral moment, place greater emphasis on *ex durante* decision-making information that allows for more direct and engaged oversight. Parliamentary permissiveness is replaced by strong formal accountability, complemented by a greater emphasis on informal accountability, both to national and European audiences. Such informal accountability is rendered possible through frequent, open parliamentary sessions in which majorities need to be found for current Council decisions. Both Council

⁹⁰ F.W. Scharpf, 'The asymmetry of European integration, or why the EU cannot be a 'social market economy'', 8 *Socio-Economic Review* 211

⁹¹ Follesdal and Hix, *supra* note 50, pp. 534-8

⁹² *Supra* note 9, p. 576

⁹³ J. Fox. 'The uncertain relationship between transparency and accountability' (2007) 17(4) *Development in Practice* 663, p. 667

⁹⁴ Naurin, *supra* note 64, p. 30; *supra* note 10, pp. 94-5

⁹⁵ Curtin, *supra* note 50. T. Bunyan, *Secrecy and Openness in the European Union: The Ongoing Struggle for Freedom of Information* (Statewatch, London, 2002)

members, acting as self-standing legislators, and the Council as a whole, may be expected to reflect on political dilemmas and divergences

Concerning both legislative and executive matters in an open and ongoing manner. In terms of participation, opportunities for consultation in Council deliberations would require relatively detailed *ex ante* and *ex durante* information on legislative dossiers and on procedures for participation at both the national and Council level, and finally provide *ex post* feedback on input utilisation at Council level.

4. WHAT STANDARDS? THE CASE OF COUNCIL TRANSPARENCY

In the previous section, I dissected the idea of democratic legitimacy with relation to the EU, particularly the Council. This exercise built upon the realisation that since the Lisbon Treaty, the EU recognises two complementary forms of legitimation: these are representative and participatory democracy. It was argued that these can be understood within two dominant approaches to democratic decision-making, which were described as the narrow and broad perspective on democracy.

The present section is dedicated to demonstrating the differential normative implications of a choice for either perspective. This is done with reference to the principle of transparency in the Council, and its expected role within a democratic framework, by way of a case. For the purpose of this paper, transparency is understood as *that Council information which the public requires in order to be able to monitor the processes and performance of this body*.⁹⁶ These requirements may act as a benchmark against which Council transparency is normatively evaluated. It will be argued that below a certain threshold of transparency, Council democracy cannot function even in a narrow understanding. In order to live up to the ideal of broad democracy in turn, transparency provisions would have to go beyond that threshold to meet additional criteria.

The fact that a normative linkage between transparency and democracy has since long been taken for granted in the EU context is aptly exemplified by Declaration 17,

⁹⁶ A. Meijer, 'Understanding the Complex Dynamics of Transparency' 2013, 73(3) Public Administration Review 429, p. 430; M.Z. Hillebrandt, D. Curtin and A. Meijer, 'Transparency in the EU Council of Ministers: An Institutional Analysis' 2014, 20(1) European Law Journal 1, p. 4

attached to the Maastricht Treaty. This declaration, which marked the introduction of an EU transparency policy, states:

The Conference considers that transparency of the decision-making process *strengthens the democratic nature of the institutions* and the public's confidence in the administration. [...].⁹⁷

The linkage has been reaffirmed on various occasions by the circle of Member States, in the Council and elsewhere.⁹⁸ Its underlying logic is easy to see: in a democracy, citizens, united in a community, decide their own fate, and this process of collective decision-making is not possible if ideas on both community ideals, and the way to realise them, cannot be exchanged in an open manner.⁹⁹ However, the precise role of transparency vis-à-vis democracy is not a straight-forward matter, and depends on the perspective one adopts.¹⁰⁰ Moreover, transparency *of itself* cannot be expected to fulfil any supportive role in these mechanisms; it requires publicity to become operative. The Council can make available all the information that it wants, yet without publicity, this act is rendered virtually futile. Only when “almost everybody knows [...], and almost everybody knows that everybody knows”, can we speak of information flows that are truly public.¹⁰¹

While the Council is largely dependent on receptive audiences to generate publicity, its ideal nevertheless sets certain floor conditions for the principle of transparency. Irrespective of whether one assumes a narrow or a broad perspective on democracy, transparency audiences expect to have easy access to relevant information that is clear and meaningful.¹⁰² The latter implies that information should be understandably presented both in content and form.¹⁰³ Once the requirements for

⁹⁷ Declaration 17, annexed to the Maastricht Treaty, 3 February 1992 (italics added).

⁹⁸ Significant examples, in chronological order, are found in the Edinburgh European Council presidency conclusions (12 December 1992); the 1997 Amsterdam Treaty, art. 1; Regulation 1049/2001/ec, recital 2; and the Brussels European Council presidency conclusions, Annex 1: An Overall Policy on Transparency (17 July 2006).

⁹⁹ Supra note 10, p. 83

¹⁰⁰ Supra note 9, pp. 563-4; Curtin and Meijer, supra note 50

¹⁰¹ Supra note 9, p. 567

¹⁰² Supra note 9, p. 565

¹⁰³ Steenbruggen 2004 in E. Scholtes, 'Transparantie: Icoon van een dolende overheid' (PhD Tilburg University 2012), p. 51, also J.P. Cross. 'Striking a Pose: Transparency and Position Taking in the Council of the European Union' (2012) European Journal of Political Research 1

publicity are fulfilled, transparency's role in each of the respective democratic mechanisms can be considered.

4.1 How does transparency support Council democracy?

In relation to democratic processes, transparency can be seen to support the democratic processes of *opinion formation*, *accountability*, and *participation*. In each instance, transparency serves as a prerequisite without which these processes cannot operate.

Transparency is necessary for citizens to form their opinion on politicians and the decisions that they make. The underlying premise is that in democratic societies, citizens need to be able to inform themselves to participate competently. In the context of Council decision-making, this suggests that minimal information is available regarding ideas on the goals that the EU should pursue and how to attain these goals, as well as critical perspectives on the quality of Council representatives.¹⁰⁴ This allows Council representatives to present their political vision, while citizens are able to form their opinion out of the available political information and perspectives on that information.¹⁰⁵ The act of opinion formation assumes that a sufficient degree of Council information is available. Moreover, the available information, and representatives' perspectives on it, must be trusted to present a veracious and relatively accurate representation of the political situation.

Transparency is furthermore required to provide the information on the basis of which citizens can hold their representatives in the Council accountable. Following the definition of accountability coined by Bovens,¹⁰⁶ transparency can be understood as a subcomponent of accountability, which as such provides an indispensable

¹⁰⁴ Supra note 10; Manin, supra note 22; J. Neyer. 'Discourse and Order in the EU: A Deliberative Approach to Multi-Level Governance' (2003) 41(4) *Journal of Common Market Studies* 687

¹⁰⁵ Mansbridge, supra note 22; A. Michailidou and H.-J. Trencz. 'Mediatized representative politics in the European Union: towards audience democracy?' (2013) 20(2) *Journal of European Public Policy* 260, p. 266

¹⁰⁶ "[1] a relationship between an actor and a forum, [2] in which the actor is obliged, [3] to explain and justify [4] his conduct; [5] the forum can pose questions [about this information and its accuracy], [6] and pass judgement, [7] and the actor may face consequences", M. Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13(4) *European Law Journal* 447, p. 452

condition without which the latter cannot function. Transparency serves, as it were, as the 'vehicle' that allows politicians to render account.¹⁰⁷ This entails that clarity exists concerning the purpose of accountability: a clear framework needs to be in place that determines to whom it is that politicians need explain and justify their actions (parliaments or citizens), and what aspects of their actions it is that they need to account for (broad policy considerations or specific decisions).

Finally, transparency is indispensable for citizens to be able participate in the democratic process. The term participation is generally interpreted as "the possibility for non-institutional actors to take part in decision-making".¹⁰⁸ Conceptual work in the field of open government points at the important role of transparency as a precondition for participation.¹⁰⁹ Where transparency provides outsiders with information (or "vision"), participation grants opportunities for interaction ("voice").¹¹⁰ Participation stands in a largely unresolved relation to democracy, in that it means all sorts of things to all sorts of people.¹¹¹ This also has consequences for the expected standard of transparency in its relation to participation. After all, if the form of participation expected of citizens is that they elect representatives every four years, this clearly presupposes a different (and lesser) degree of transparency than if formal procedures envisage participation on a more regular basis. Notwithstanding these differences in conception, all forms of participation can be said to require a transparency base that is sufficiently inclusive, provided in a timely manner, and offering sufficient feedback on the way in which participation was utilised.

From the above exposition on the functioning of Council transparency, a fragmented picture emerges. What becomes clear before all, is that transparency takes many shapes, and fulfils various (potentially overlapping) functions. At the same time, it is equally apparent that transparency cannot be expected to play an unconditionally supportive role for democracy. In order for that to be case, processes of opinion formation, accountability and participation need to be embedded in a clear perspective on democracy. This perspective may take on a narrow, or a broad form.

¹⁰⁷ C. Ball. 'What is transparency?' (2009) 11(4) *Public Integrity* 293, p. 303, supra note 81, p. 22

¹⁰⁸ Supra note 29, p. 1849

¹⁰⁹ Supra note 10, p. 120

¹¹⁰ A. Meijer, D. Curtin and M. Hillebrandt. 'Open Government: Connecting Vision and Voice' (2012) 78(1) *International Review of Administrative Sciences* 10, p. 11

¹¹¹ Held, supra note 22, pp. 209-16

4.2 A question of standards

The role of transparency as a component of Council democracy is thus a question of standards. A narrow conception of democracy focusses on the transparency that is needed for (national) elections and (national) parliamentary oversight. A broad conception of democracy, instead, presupposes further-going, and continuous, transparency streams that empower citizens in their participatory role.

Transparency in the narrow perspective of democracy

A narrow perspective on Council democracy capitalises on the legitimacy that the Council derives from continuous elections at the national level. The role of transparency from this perspective is therefore one that stands directly in support of the electoral role of citizens.

In terms of opinion formation, information streams are predominantly directed towards national audiences, and only a minimal amount of coordination of those national audiences is required for legitimation. Council representatives are expected to provide political narratives that cast European decision-making in the light of national interests. At the same time, no hard and fast threshold exists, since freedom of opinion is broadly understood as a negative right (the right to speak one's mind freely rather than an entitlement to know politicians' honest opinion). Public opinion is foremost thought of as an instrument for (electoral) accountability, and as such it is conceptualised as an aggregate of individual opinions, which leads to the requirement that representatives need the majority support of the national electorate.

As may be expected, the narrow perspective lays a strong emphasis on electoral accountability, which entails that central information must be available at least *ex post*. This includes information on what decisions were taken, whether representatives supported these decisions or not, and for what reasons. *Ex post* accountability may be complemented by limited *ex durante* accountability, in a process of parliamentary oversight. However, the intensity and form of such oversight is a prerogative of parliament, and in principle excludes the direct involvement of citizens.

Finally, participation from the narrow perspective of democracy is limited to the role of citizens at election time. Such elections are generally already relatively inclusive, and address the entire citizenry that is eligible to vote. No particular feedback information is required, in the sense that the participation of citizens in elections is naturally translated into the establishment of a new government that has the support of a (parliamentary) majority.

Transparency in the broad perspective of democracy

A broad perspective on Council democracy capitalises on the legitimacy that the Council decision-making derives from its interaction with citizens. Accordingly, forms of transparency are expected that are structural and comprehensive.

Broad democracy assumes a republican perspective on opinion formation, according to which the public good is 'discovered' through a process of deliberation. The central subjects of will formation in the Council context (pooled objectives, pooled policies, pooled representation) have overt European echoes, which must be addressed.¹¹² National deliberative processes of will formation on European decision-making clearly feed into one another. A degree of integration of audiences is therefore necessary to facilitate the interaction between deliberative audiences, and thereby, to improve the coherence of opinion formation.¹¹³ From the broad perspective, opinion formation is in principle part of a constant process, and information cues on important matters are therefore expected *ex durante*. As has been stressed, particularly in matters where the legitimacy of decision-making is not self-evident, the community requires "mechanisms to encourage leaders to consult the ruled *regularly* and accord them equal concern and respect" [emphasis added].¹¹⁴

In terms of accountability, the broad perspective emphasises the role of informal processes that emerge from interaction. This is achieved through what Rossanvallon has described as the "institutionalisation of distrust".¹¹⁵ Transparency plays an important role in a critical "counterdemocracy": it allows multiple informal actors to

¹¹² Supra note 8, pp. 213-4

¹¹³ Supra note 49; Neyer, supra note 104, pp. 688-90

¹¹⁴ Supra note 8, p. 208

¹¹⁵ P. Rosanvallon, *Democratie en tegendemocratie* (Amsterdam: Boom, 2012), pp. 82-3

act as the “public eyes” that monitor decision-makers by scrutinising information.¹¹⁶ This process is essential to a democracy as it allows the citizens to judge “the propriety and effectiveness of the conduct of the government”,¹¹⁷ and to participate in counterdemocratic pressure when it deems this necessary. Informal measures of accountability therefore engender comprehensive *ex durante* information streams.

The broad perspective looks upon citizen participation in a more holistic manner than mere electoral participation which, it points out, does not constitute ‘interaction’ in the common understanding of the term. Instead, decision legitimacy is sought beyond representation, in the possibility of citizens to be directly involved. In decision-making settings where representative democratic structures “stand on somewhat shaky normative grounds”, such as the Council of the EU, participation can act as a compensatory form of legitimation.¹¹⁸ When processes of citizen input become formalised, such as may be the case with the provisions in article 11 of the TEU, the required level of transparency changes drastically.¹¹⁹ In order for citizens to be able to participate meaningfully, its procedure must be at the centre of democratic decision-making. This entails that transparency of the participatory process and important aspects of the policy at hand are sufficient to guarantee broad inclusiveness, and that the impact of such participation is made visible in a certain amount of detail.

Table 1 details the design criteria for transparency according to both the narrow and the broad perspective of Council democracy.

¹¹⁶ Supra note 81, p. 24

¹¹⁷ M. Bovens. 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism' (2009) 33(5) West European Politics 946, p. 955

¹¹⁸ Supra note 42, pp. 114, 116

¹¹⁹ Supra note 42, p. 114

| Mechanism | Narrow perspective | Broad perspective |
|--------------------------|--|--|
| <i>Opinion formation</i> | (National) election-based, ex post facto information cues | Trans-national, ongoing information cues to facilitate public deliberation |
| <i>Accountability</i> | Focus on information required for formal accountability at election time, supplemented by (privileged) information for parliamentary oversight | Focus on information required for informal accountability processes between elections, counterdemocracy through “public eyes” |
| <i>Participation</i> | Basic information to participate competently in elections, supplemented by freedom to collect and disseminate information | Generous and continuous information provision on substance of policy making and formal procedures for participation, detailed feedback on use of citizen input |

5. CONCLUDING OBSERVATIONS

Since the entry into force, in December 2009, of the Lisbon Treaty, the Council must be explicitly understood as a democratic actor in a decision-making system that is legitimated on the basis of a democratic rationale. A list of explicit “provisions on democratic principles” are now enshrined in four articles of the TEU. These provisions established both representative democracy and participatory democracy as complementary foundations of EU democracy. Might we conclude that we have EU democracy at last?

Four years after the Lisbon Treaty entered into force, the precise implications of the EU’s new democratic grounding are still a matter of debate.¹²⁰ The critique of the democratic provisions in the TEU focusses on two aspects. The TEU’s principle of

¹²⁰ See, for example the ACELG conference held on 22 November 2013, which deals with the nature and implications of article 11 TEU, <http://acelg.uva.nl/news/events/content/conferences/2013/11/3rd-annual-acelg-conference.html>.

representative democracy is criticised for being insufficient; its principle of participatory democracy, for being inconclusive.

This paper has examined the provisions in the TEU, and their grounding in democratic theory, with the purport of exploring how these provisions may be understood from the perspective of legitimacy. From this exploration, two dominant perspectives emerged: a narrow, and a broad conception of Council democracy. These may be conceptualised as ideal types along a spectrum of democratic perspectives, with a number of important differences in the way that they understand democratic legitimacy. While a narrow perspective of democracy focusses on the legitimacy representatives derive from elections, a broad perspective of democracy highlights the legitimacy that is derived from structural interaction between citizens and representatives.

As this paper has attempted to show, the different approaches embodied in narrow and broad perspectives on democracy have a real impact on the way that democracy in the EU is organised. This becomes clear with reference to the case of Council transparency. Conceptualising the function and requirements of information streams that underpin a legitimate relation between citizens and Council representatives, the appropriate form of transparency alters significantly as the perspective shifts from narrow to broad. Incidentally, it may be observed that in the Council context, such differing transparency requirements coincide with (conflicting) perspectives on the Council as respectively an intergovernmental pooled decision-making forum, and a regular federal legislative chamber.

The ambiguous -from a democratic perspective- nature of the Council is frequently noted by observers. It has been described as a decision-making forum occupying a place “between diplomacy, technocracy and democracy” in a regional union that “is less than a state but more than a regime”.¹²¹ At the same time, even when democratic standards used in the nation state do not fit the EU model, that clearly does not justify overlooking democratic standards completely, or replanting them in a half-

¹²¹ A. Verhoeven, ‘Democratic Life in the European Union, According to its Constitution’, in D. Curtin and R.A. Wessel (eds), *Good Governance in the European Union: Reflections on concepts, institutions and substance* (Antwerp: Intersentia, 2005) 153, p. 161; Neyer, *supra* note 104, p. 688

hearted manner. The provisions on democratic principles in the TEU, both representative and participatory, are a step towards remedying the legitimacy gap of EU decision-making. Whether they will be given a narrow or broad reading, with all the concomitant consequences remains, for the moment, an entirely open-ended question.

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