Open Procedures and public legitimacy.

An (incomplete) inventory of conditions and mechanisms.

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1. Open procedures and public legitimacy

A common motive for choosing an institutional design that includes decision-making procedures that are to some extent open to the public view is the assumption that openness will increase the perceived legitimacy of the decision-makers, the decision-making institutions and the decisions among the public.

For example, the European Union (or rather its predecessors the European Coal and Steel Community, the European Economic Community and the European Community) operated under many years under a reign of 'permissive consensus' on behalf of the European citizens (Lindberg and Scheingold 1970). The delegation of powers to the supranational level grew from the early 1950s onwards, without raising too much public controversy. However, with the Maastricht Treaty in 1991, which introduced the Economic and Monetary Union and several other important steps towards increased supranationalism many Europeans started to question the extent of delegation of national powers to the EU institutions. Denmark failed to ratify the treaty, as a majority of the Danes voted no in a referendum. The same thing almost happened in France, and opinion polls in many European countries showed declining levels of trust in the EU institutions. As a response 'transparency' entered the EU vocabulary, promoted as a possible cure against the legitimacy crisis. Several reforms were subsequently

implemented during the years that followed, aiming at providing more information about how EU laws were made. These included publishing the votes in the Council of Ministers - the primary legislative institution of the EU - providing more access to documents and broadcasting meetings of ministers on the web. Whether the transparency reforms have had the intended effect is difficult to say, as too many other factors are in play to make it possible to control for a transparency effect on the perceived legitimacy of the EU among Europeans. Continuing problems with treaty ratifications and negative opinion polls suggest at least that the era of permissive consensus has not returned.

Still, transparency continues to be high on the agenda in debates on institutional design in the EU and elsewhere. The quest for more open decision-making in both the political and the economic sphere has been a global trend for several years (Cf. Roberts 2006, Fung, Graham and Weil 2007). Openness is assumed to have positive effects both on the behaviour of those being watched (reducing corruption and other types if agency shirking) and on the attitudes of those watching. But while the effects on those being watched have increasingly become theorised, investigated and subsequently questioned in several respects (see, for example, Elster 1998b, Groseclose and McCarty 2001, Hood and Heald 2006, Lindstedt and Naurin 2010, MacCoun 2006, Naurin 2007, Prat 2005, Stasavage 2004, Vermeule 2009), the effects on those watching have so far been less scrutinized. The causal link between the openness of institutions and public acceptance of these institutions is an important – especially since it seems to be driving much of the transparency rush – but underdeveloped assumption. This paper will discuss some conditions and mechanisms through which openness may - and may not - enhance the public legitimacy of political agents, institutions and decisions. Hopefully, such an inventory (although by necessity incomplete) will be useful not least for the future task of providing a more empirically grounded understanding of this issue. We conclude with highlighting some of our own recent experimental research that offers first steps towards that goal.

2. Some definitions and distinctions.

We will use the terms transparency and openness interchangeably. In our usage these terms refer to a continuous rather than a binary variable, which indicates the degree to which information is made available about how decisions are produced within a certain institution. The continuum is best conceived of as an ordinal rather than an interval scale, as the different steps towards increased openness may be of very different character and with very different effects. For example, the publication of votes in the EU Council of Ministers is likely to have different types of effects, both with respect to the actions of the ministers and the attitudes of the public, compared to the broadcasting of its debates or the publication of its edited minutes.

The objects of transparency include the actions of the decision-makers – those being watched – the decision-making institutions and the decisions. We will limit our discussion mainly to political decision-making, although most of what is said will probably apply generally to agency relations. The subjects – those watching – are the general public.[1] As many others writing on openness and transparency we will sometimes employ the language of agency theory, referring to those being watched as agents, and those watching as principals, and assuming a hierarchical relationship between the two where the principal (in theory) contracts the agent to accomplish certain tasks.

There are different types of openness and transparency. One distinction is that between transparency in process and transparency in rationale (Mansbridge 2009, p.386). The latter refers to publicity of the content of the decisions and of the facts and reasons on which these were based, but secrecy of the deliberations and negotiations that took place during the decision-making process.[2] An illustration may be the division of labour

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[1] Most of what we say in this paper could be complicated by introducing specific publics, such as interest groups, constituents and third parties.

[2] A different distinction is drawn by Prat, who analyses the effect of publishing information on the actions of an agent, on the one hand, and information on the consequences of the actions on the other hand. Actions in Prat's model includes information on both the content of the actual decisions taken, the process and the rationale, while consequences refer to the outcome in terms of societal effects (which may not be visible before long after the actions were implemented). Prat argues that while transparency of consequences will generally be beneficial to the principal transparency of actions may induce conformist pressures on the decision-makers and therefore have detrimental effects. However, we believe that when it comes to political

between committees and plenary sessions in many parliaments. For example, in the Swedish Riksdag the open plenary debates and the final votes recorded are usually pre-determined behind closed doors. The votes are in practise set in negotiations between the majority coalition parties in government or, in the case of minority governments, in the parliamentary committees, and implemented by the party whips. Openness only enters when the decision-making process in reality is over. The open plenary debates then serve to persuade those watching of the merits of the stands taken and the reasons behind. Transparency in process, on the other hand, refers to information on actions that may affect the final decision. Such information may be released in real time ("fishbowl transparency" (Coglianese 2009)) or in retrospect after the decision has been taken. We will discuss circumstances under which transparency in rationale and transparency in process may have different effects on public legitimacy.

Another relevant distinction concerns who controls the publication of information. We will distinguish between agent-controlled and non-agent controlled transparency (Cf. Lindstedt and Naurin 2010). Agent controlled transparency refers to information released by the agent proactively or in response to freedom of information laws and other requirements that the agent release information about its activities. Such requirements may have been externally imposed on the agent by the principal in order to reduce uncertainty about agency behaviour, or they may have been self-imposed by the agent with the purpose of increasing its legitimacy in the eyes of the principal. With agent controlled transparency the agent is required to make certain types of information available but still controls the implementation of this requirement. Non-agent controlled transparency, on the other hand, refers to information about agency behaviour which is released to the principal by a third party. Examples include fact-digging reporters operating under freedom of the press laws and whistle-blower institutions, such as the freedom for public officials to impart information without being prosecuted.

Most information that is released about governments is likely to be agent controlled (Cf. Ferejohn 1999). One important aspect of agent controlled transparency is that it gives the agent a chance to engage in window dressing rather than expose sincere backstage behaviour, and to counter the opening up of formal arenas by withdrawing the real

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decision-making (especially with respect to law-making) secrecy of the content of the decisions is seldom perceived as an option.

action to a new informal arena. This is especially likely if openness has been externally imposed on the agent, although it is perfectly possible also if the initiative came from the agent itself. For example, former European Commissioner Margot Wallström pointed out an unexpected consequence of the introduction of TV-cameras during the Council of Ministers' meetings (where representatives from the European Commission also participate), namely that "we are gaining weight". The reason, Wallström explained, was the much longer (informal and non-public) lunches that now preceded the meetings. In Sweden, the 'Publicity Principle' has been part of the Swedish constitution since the 18th century, and has prompted far-reaching freedom of information rules. It has traditionally been honoured by Swedes as a landmark of democratic civilization. However, it has also been noted that the fact that so much of what is written on paper within the public administration will eventually become public has led to a tradition of oral communication. Ahlenius, for example, has argued that the Publicity Principle gives the Swedes "the right to examine empty cabinets" (Ahlenius 2004). The Neutralitycommission, which in 1994 investigated the extent to which Swedish defence authorities had cooperated with NATO during the cold war despite the Swedish policy of neutrality, found that they had to go to London to find some of the most important documents, as these did not exist in the Stockholm archives (Wallberg 2005).

Agent controlled and non-agent controlled transparency affects agency behaviour through different mechanisms. While agent controlled transparency makes it more complicated for the agent to engage in shirking (by having to engage in window dressing and the creation of new informal arenas) the possibility of non-agent controlled transparency makes it more risky. With agent controlled transparency the agent must balance the benefits from shirking against the costs involved in window dressing. It may fine-tune the risk level by refraining from shirking if no credible window-dress is found. Engaging in shirking in the presence of non-agent controlled transparency institutions is a more unpredictable gamble. If the information is released there will be no time to reach for the window-dress. Non-agent controlled transparency (operationalised as freedom of the press) has been shown to be a more effective medicine against corruption compared to freedom of information laws and other transparency requirements implemented by the agent itself (Lindstedt and Naurin 2010). We will discuss conditions under which this distinction is relevant also with respect to effects on public legitimacy.

Finally, a short note on the dependent variable. We use the concept of perceived legitimacy in the Weberian sense of indicating the level of social acceptance for the objects of transparency (Weber 1968. Cf. Tyler 2006). Public legitimacy thus refers to a belief among the public that the appointed decision-makers have the right to make the decisions, and that these decisions should be accepted. Such legitimacy is valuable from a government's point of view as it will increase the chances that its decisions will be followed voluntarily (Levi, Sachs and Tyler 2009, Rothstein 2005).[3] Perceived legitimacy is related to, but distinct from, the concept of trust (Kim 2005). Feelings of trust vis-à-vis an agent will make it more likely that its decision-making and decisions will be perceived as legitimate. Openness may also affect the normative status of political institutions. In our analysis this status is relevant only when there is a causal link to the perceptions of the relevant public. It should be noted that in some circumstances – in particular when corruption and other types of misbehaviour is revealed - decreasing levels of perceived legitimacy as a consequence of openness may be regarded as highly valuable from normative point of view.

3. Mechanisms driving a positive causal link between open procedures and public legitimacy.

Why would openness in political institutions increase the level of perceived legitimacy of those institutions among the public? In this section we discuss three theoretical perspectives on decision-making, from which different types of mechanisms that may possibly drive a positive link can be derived.

3.1. According to agency theory transparency may reduce uncertainty about the agent's behaviour in situations characterised by moral hazard, thereby making the principal more confident in delegating powers to the agent (Holmström 1979). A principal-agent relationship contains information asymmetry to the agent's advantage, both about the state of the world and the agent's preferences, competences and actions. Letting the

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[3] That does not mean, of course, that compliance should be interpreted as evidence of legitimacy, as it could also be derived from a fear of getting caught.

principal 'see for itself' how well the agent completes its tasks may reduce suspicion and therefore increase the perceived legitimacy of the agent, according to this perspective. Ferejohn, for example, has argued that agents who are taking this effect into account are likely to offer a higher degree of openness of its actions to its principal in exchange for further investments of power (Ferejohn 1999). The transparency reforms in the European Union implemented as a response to the perceived legitimacy crisis of the early 1990s can be interpreted as a hope on behalf of the EU institutions that this mechanism would work ex post.

This rational choice theory mechanism applies primarily to transparency in process, and less to transparency in rationale. The latter, which refers to the agent's efforts to motivate its decisions to the principal in retrospect by means of giving persuasive reasons, may always be dismissed as cheap talk by a rational actor. Furthermore, in the (most common) case of agent controlled transparency the agent must successfully convince the principal that the information released corresponds to real action and not just window dressing. Assuming rationality on behalf of all actors this too will be a challenge for the agent. Non-agent controlled transparency, where the information comes from a more reliable third party, is therefore likely to be more effective in producing a legitimacy effect of this type (i.e. reducing uncertainty about agency behaviour in a rational choice model). On the other hand, the content of the information made public via non-agent controlled transparency is less likely to be to the agent's advantage, and therefore also less likely to produce the positive causal effect.

3.2. According to deliberative democratic theory openness may contribute to a better understanding of the reasons behind a decision, and therefore to higher levels of public legitimacy for both decisions and decision-makers (see, for example, Gutmann and Thompson 1996, Bohman and Rehg 1997, Elster 1998a). Being convinced of the merits of the decision through the force of the better argument, on the one hand, and gaining increased respect for alternative views, on the other hand, are two different deliberative mechanisms with the potential of driving a positive effect on public legitimacy. Public deliberation on behalf of the decision-makers may both inform the citizens of the facts in the case and clarify – and possibly increase the tolerance for - different normative values and worldviews defended by representatives of different groups and perspectives that

feed into the decision. According to deliberative democratic theory such increased understanding will raise peoples' willingness to accept decisions in the face of any remaining disagreements after the deliberations.

The force of the better argument mechanism may be triggered both by transparency in process and by transparency in rationale. Actors in a deliberative mode treat given reasons as sincere, and therefore evaluate the quality rather than the credibility of the information. Information released by the agent about its actions and reasons is therefore equally relevant as non-agent controlled transparency. The second mechanism by which increased legitimacy may come about - as a result of a better understanding of and respect for alternative perspectives - is even more likely to be activated if the reasons are stated by these representatives themselves (agent controlled transparency), so that there is a direct link to 'the others'.

3.3. According to procedural justice theory, the procedure by which a decision comes about may contribute to public legitimacy. The procedure is assigned a value in itself, which spills over to the evaluation of the decision, the decision-makers and the decision-making institutions. Social psychology research has indicated that people are more likely to accept decisions which are arrived at by a just procedure, and are more satisfied with authorities and institutions using just procedures, also when controlling for the content of the decisions (Thibaut and Walker 1975, Tyler et. al. 1997, Napier and Tyler 2008, Tyler 2000, 2006, Ambrose 2002). Aspects of the procedure that have been found relevant in the literature include impartiality, respectful treatment and opportunity for voice. Transparency of the procedure is a prerequisite for the procedural justice effect. Only if people are aware of the procedure can they judge its fairness. Furthermore, openness is commonly considered a procedural value in itself (Birkenshaw 2006). Intuition says that political institutions should be open and transparent rather than closed and secretive. Openness may thus increase public legitimacy in two ways, according to a procedural justice perspective; by clarifying just procedures, and by making the procedures more just.

The clarification part of the procedural justice effect relates to how decisions are taken, and therefore primarily concerns transparency in (and of) process. Obviously, a

prerequisite for the effect to be positive is that the procedures made clear through transparency are perceived as just. The making-procedures-more-just part, however, also applies to transparency in rationale. Motivating carefully the decisions ex post may create a sense among those watching of being treated with respect, which in turn may increase the sympathy for the decision-makers and the acceptance of the decision. The two procedural justice mechanisms may be activated by both agent controlled and non-agent controlled transparency, but with respect to different objects. The existence of non-agent controlled transparency institutions, such as whistle blower regulations, would possibly increase the perceived legitimacy of the institutions and decisions, but probably to a less degree of the decision-makers whose actions are made public by a third party. Agent controlled transparency, on the other hand, especially if introduced by the agent itself, will let the agent capitalize on the positive value of openness. It is important to note that regardless of the actual degree of openness, and the sources of information, if decision-makers can only create the *impression* of being transparent that will be enough to be able to gain from the positive effect of making-procedures-more-just.

4. Mechanisms driving a negative causal link between open procedures and public legitimacy.

The default assumption in most writings on openness and transparency is that the causal link to public legitimacy is positive. Mechanisms through which this link may function have been discussed above. At the same time, somewhat paradoxically, it is also usually assumed that openness has a potential to improve the decisions by revealing (and subsequently holding to account) lazy, incompetent and corrupt agents. However, openness that sheds light on unflattering backstage behaviour on behalf of the decision-makers is unlikely to increase their status in the eyes of those watching. The quote often prescribed to Bismarck comes to mind here:

> "Laws, like sausages, cease to inspire respect in proportion as we know how they are made." [4]

The problem, from the agent's point of view, may be solved by window dressing. Agents who anticipate openness have the possibility to adjust their behaviour to whatever norms of appropriateness they believe that their principal expects them to follow before their actions are revealed. Window dressing is only possible with respect to agent controlled transparency, however. Nevertheless, assuming that most information published about its actions is likely to be controlled by the agent, there should not be too much room for negative effects of open procedures on public legitimacy. It seems from the perspective of governments that (agent controlled) transparency is a fairly cheap way to buy legitimacy, without much risk for a backlash. Below we discuss several conditions under which openness may to the contrary decrease rather than increase public legitimacy.

4.1. Continuing the language of agency theory the principal may anticipate negative effects on the agent's behaviour as a result of openness, and therefore become more sceptical towards its decisions. Even though openness is usually considered a positive feature of decision-making, both for intrinsic and instrumental reasons, several reasons for why transparency may also have adverse effects on the efficiency of decision-making processes and the quality of decisions have been suggested. For example, transparency may raise conformist pressures, strengthen the incentives for public posturing and 'plebicitory rhetoric', reduce incentives to work hard to prove one's worth, and increase the risk for negotiation breakdown (see, for example, Chambers 2004, Elster 1998b, Groseclose and McCarty 2001, Holmström 1999, Naurin 2007, Prat 2005, Stasavage 2004 and 2007, Vermeule 2009). To the extent that a rational principal anticipates such detrimental effects open procedures is likely to weaken its support for the decisions.

Stasavage has developed a model in which the public suspects that their representatives desire to please them interferes with their judgement with respect to the decisions they

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[4] Whether the quote is correctly attributed to the Iron Chancellor is another question. According to the Yale Book of Quotations (2009) the source of the statement is rather the lawyer-poet John Godfrey Saxe, who was quoted in The Daily Cleveland Herald, March 29, 1869.

take. According to the model when representatives make decisions in public they face incentives to use their actions as a signal of loyalty to their constituents, potentially ignoring private information about the true desirability of different policies. Stasavage assumes that the public is aware of the charade and therefore does not take publicly stated positions and arguments seriously, "because it knows that representatives are not conditioning their actions on their private information about which policy is optimal" (Stasavage 2007, p. 61). The result is that openness leads to less informed citizens, as they cease to take cues from their representatives positions when they no longer believe that these reflect their true preferences. Stasavage does not explicitly connect his findings to the public legitimacy of the decision-making institutions, but one of the implications of the model seems to be that public decision-making may lead to decreasing confidence in both the decisions and the decision-making institutions.

Importantly, this possible source of a negative effect of openness on public legitimacy only applies to agent controlled transparency in process. Paradoxically, it is the principal's anticipation of a negative effect on the agent's actions, as a result of the agent's anticipation of the principal's expectations, that brings about the negative result. Information released by a third party, however, will not give the agent the chance to engage in window dressing and will therefore be less harmful in this perspective. Similarly, transparency in rational will also not trigger this mechanism, as it refers to information on the content of and the reasons behind a decision that has already been made.

4.2. Openness that is not accompanied by credible mechanisms for accountability or for giving the agent new instructions, may rather arouse frustration than increase the legitimacy of the decisions and decision-makers. Reducing uncertainty about an agent's behaviour in a situation where the principal does not have real possibilities to act on the information it receives will hardly encourage further investments in the agent. Knowing more about what one's representatives do without being able to do anything about it - should one so wish - may instead lead to stronger feelings of powerlessness, compared to a situation of ignorance about how the agent performs its tasks. Agency theory usually assumes that effective accountability mechanisms are in place – if the principal is unhappy with the agent he/she can impose sanctions or rewrite the contract - but in

politics that is not always the case in practice. The ultimate accountability mechanism in representative democracies is elections. This is a crude instrument, however, and voters who observe their representatives' actions, and want to have the possibility to hold them to account somehow (Cf. Hibbing and Theiss-Morse 2002), may find it too abstract and limited.

The procedural justice research contains empirical findings that seems to support the idea of a 'frustration effect'. The general result in this literature, as noted before, is that people who are given voice in relation to the decision (even if only ex post) are more inclined to accept the decision. However, the negative no-voice effect is even stronger if people are explicitly reminded that they have no voice (van den Bos 1999) Furthermore, there is also evidence from both experimental and survey research that "voice with little influence produces more negative reactions than no voice" (Ulbig 2008, p. 525. Cf. Cohen 1985). Transparency may produce a frustration effect if it reminds people that they could or should have more influence than what they actually have due to weak accountability mechanisms.

4.3. Openness is likely to have a negative effect on the attitudes of those watching if they do not like what they see. For example, Tsoukas discusses a proposal in the UK to install cameras in operation rooms as a way to monitor and record surgeons' likely mistakes. According to The Sunday Times the surgeons feared that faith in their work would be undermined if people realized that surgery often takes place in a relaxed atmosphere accompanied by heavy rock music. The practice of listening to music during operations may to an outsider seem like an expression of carelessness, while from the surgeons' perspective it may be way of keeping concentrated for eight ours or more (Tsoukas 1997, p. 835).

Unpleasant revelations are most likely to come about as a result of non-agent controlled transparency. Whistle-blowers are normally activated only if there are bad things to report (even though governments' spin doctors also regularly leak information to the press to improve the governments standing). A free media normally searches for and prefers to report on bad rather than good news. When the agent controls its appearance, and has time to switch from backstage to front stage dressing, it should do its best to live

up to the expectations of the public. So why would an agent release information that will disappoint the principal? There may be several reasons why:

4.3.1. If the public for some reason dislikes the decision-maker *a priori*, i.e. regardless of his/her actions, seeing more of him/her will not increase the legitimacy of the decision. This may be the case, for example, when the public has a low trust generally in politicians, or in a particular politician. In that case there is simply no window-dress that can distract from the fact that the audience does not like the agent who wears it. The human tendency towards confirmation bias, in which pre-determined attitudes are confirmed regardless of the content of the information received, will strengthen this effect. Laying low may therefore sometimes be the best strategy for representatives who are unsure of their popularity, unless they are confident that they will be able to exceed the audience's expectations.

4.3.2. Perceived legitimacy is likely to decline if the audience is disappointed by what it sees with respect to the actions of the agent. There may be many sources of such disappointment, of course, such as corruption, laziness and incompetence. Furthermore, disappointment is related to expectations, and higher expectations imply a higher possible fall from grace. The mechanism discussed under 4.3.1, therefore, is likely to lead to a less dramatic fall in popularity compared to situations with initially high hopes. Nevertheless, even in countries where corruption is well known to be widespread the detection of it seems to cause disappointment. Bauhr, Grimes and Harring have studied the link between (agent controlled) transparency and institutional trust on cross-country data. They found that in countries with comparatively higher levels of corruption greater transparency was correlated with reduced institutional trust (Bauhr, Grimes and Harring 2010). Below we discuss some of the conditions under which agent controlled transparency can lead to disappointments about the agent's behaviour:

4.3.2.1. If the agent misjudges the expectations of the principal it may act in a way that decreases the perceived legitimacy of itself and its decisions. Information asymmetry

may arise in both directions in a principal-agent relationship. If the agent is ignorant of what the principal wants, values and believes he/she will not know which window-dress to wear. Marie-Antoinette's alleged solution to the bread shortages in 18th century Paris ("qu'ils mangent de la brioche") may be an extreme example.[5]

Ignorance is often complemented by wishful thinking (Elster 1989). Agents with aspirations to please - but with only vague perceptions of - their principals wants, values and worldviews, are likely to picture these as fairly close to their own wants, values and worldviews, sometimes erroneously so. Holmberg has summarised some of the results of election research with respect to the tendency of both elected representatives and their voters to find more commonalities than actually exist. Generally, survey research shows that representatives and voters tend to disagree on many issues. In fact, appointing MPs by chance would produce parliaments with opinions more similar to the voters than do elections. However, tendencies towards wishful thinking seem to cushion this potential source of tension. Comparing the attitudes of Swedish MPs and voters on a range of issues - and their respective assessments of each others attitudes - Holmberg found that the representatives estimates of the voters' attitudes is more accurately predicted by the attitudes of the representatives themselves than by the voters actual attitudes. The voters in turn tend to reciprocate by thinking that the party they voted for is much closer to their attitudes than is actually the case. Interestingly, returning again to the European union, comparative research has shown that the members of the European Parliament (MEPs) display an exceptionally low degree of awareness of their voters' attitudes. In particular, the MEPs tend to believe that their constituents have a more positive attitude towards European integration than they actually have (Holmberg 1999).

Agents who fall into the trap of wishful thinking will defend positions and use arguments that they themselves find convincing, while inaccurately believing that this will be true also for the audience.

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[5] We refrain from taking any position on the possible accuracy of this historical event, however (including the question of whether Marie Antoinette was in fact a child and not yet married to Louis XVI when (if) she uttered the famous words).

4.3.2.2. Sometimes the agent is forced to release information, due to freedom of information acts and other requirements which it did not initiate itself, and unable to counter perfectly with window-dressing tactics. Not least during the current global transparency rush political demands for transparency reforms have been difficult to reject also for reluctant agents. In Latin America, for example, civil society organisations have been successful in pressuring governments to open up their archives (Grimes 2010). Similarly, advocacy campaigns targeting reputational concerns of oil corporations have contributed to the development of a transparency norm within the oil sector, with respect to its operations in developing countries (Gillies 2010). Elections may also give rise to a time-inconsistency problem for governments with respect to transparency. Parties campaigning on anti-corruption reforms may have a lot to win in the short run by promising to open up and air out the bad smell of the old regime. In the new democracies in Eastern Europe, for example, populist parties often campaign on anti-corruption reforms, including increased transparency (Bågenholm 2009). In the long run, the transparency reforms initiated in a revolutionary spirit after a shift in government may come back to haunt the new power holders.

Normally, however, with agent controlled transparency the agent should be able to window-dress to avoid disappointments. The challenge lies in performing the required front stage show in a credible manner, while at the same time reserving a backstage arena where it can make use of the advantages of secrecy and stick to its preferred actions. Longer lunches before the TV-broadcasted ministerial meetings, and telephone calls rather than letters that must be archived, are two examples already mentioned. However, some actions that the agent wants to perform are more difficult and/or precarious to dress up than others:

4.3.2.2.1. Debates may include closed and open door sessions, where arguments are selected depending on the audience. However, talk is not always as cheap as it may seem. Hypocrisy may have a "civilising effect" (Elster 1998b) if the agent subsequently becomes induced to act, and maybe even to think[6], along the lines of those public norms

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[6] The civilising effect may not only be strategic but also cognitive if, in order to reduce cognitive dissonance, the hypocrite eventually starts to believe in it's own rhetoric.

it first only pretended to acknowledge. Schimmelfennig for example has demonstrated how some of the older EU member states (including France), with respect to the question of membership in the EU for the post-communist Central and Eastern European states, in the early 2000s found themselves trapped by the rhetoric they had used soon after the fall of the Berlin wall. The legacy of the grand statements made earlier, emphasising the close affinity between Eastern and Western Europe, ten years later forced them to accept the enlargement, despite their genuine hesitance, as they would have been portrayed as hypocrites otherwise (Schimmelfennig 2003). If the agent foresees a real risk of becoming tied to its window-dress, and thereby restricted in its action possibilities in the long run, it may prefer to upset the audience in the short run.

4.3.2.2.2. Some actions may not be possible to window-dress at all. Public instead of secret voting, for example, may affect both the participation in, and the content of, the vote.

Ferejohn reports that when roll call votes in committees began to be published in the US Congress attendance approximately doubled (Ferejohn 1999, p.139). Monitoring the attendance rates at the votes in the European Parliament is standard operating procedure for the media, and the MEPs who are most absent have to defend themselves from accusations of not taking the job seriously.

A vote in favour of a certain decision also cannot be reversed into a vote against the same decision after having been recorded. One possible solution may be to use informal voting, and subsequently display the decision as having been taken unanimously. One might suspect that something like this is going on within the EU Council of Ministers. Ever since the votes of the ministers started to be published in 1995 the amount of no-votes recorded has been almost negligible (Mattila 2008). This has led researchers to wonder about the 'culture of consensus' in the Council (Aus 2008, König and Junge 2008). The tradition of integrative bargaining in the Council due to the iterated nature of the negotiations is well documented and certainly part of the explanation. However, it is also plausible that the almost perfect consensus displayed is partly a façade. The minsters have incentives to keep the degree of public politicisation low as domestic

(national) audiences may not be prepared to be outvoted by 'others' (Sharpf 1999). Furthermore, because ministers do not want to come back from Brussels as losers they may prefer to vote yes in the end to a decision that they know will be approved of by a majority in the Council, and then portray it as a compromise. If informal voting is not possible, however, which may be the case if some factions of the voting body foresee that they have more to win than to lose from open voting (see below) or if communication between the voters is not possible, in the event of a conflict between the agent's and the principal's preferences the agent must balance the benefits with voting sincerely, and thereby increasing the chances for the 'right' decision to be taken, against the costs incurred by possibly disappointing the principal.

Regardless of whether it is debates, votes, attendance figures or documents that the agent has been forced to show in the open the strategies set in place to counter the negative consequences for the agent may not be perfect and/or may include risks of having one's future action possibilities reduced. A rational agent calculating on the costs and benefits of acting sincerely or disappointing the principal may from time to time choose the later, thus provoking a negative effect on the perceived legitimacy. Sometimes, such behaviour may best be described as shamelessness. In other cases, it might be better conceived of as democratic leadership. Representation, in Pitkin's words, means "acting in the interests of the represented, in a manner responsive to them" (Pitkin 1967:209). This definition leaves room for actions that are unpopular, but nevertheless in the interests of the represented.

4.3.2.3. If the agent is divided into factions, some of these may view the public as a potential ally, which can be mobilised through openness. Conflict expansion or contraction – increasing or reducing the number of actors involved in a political struggle - are fundamental power strategies. "If a fight starts, watch the crowd", wrote Schattschneider, emphasising the importance of mobilising to ones side those actors who are potentially interested in the issue, but not yet active (Schattschneider 1975 [1960], p. 3). Transparency is a possible instrument for mobilising support in favour of those factions within the agent/organisation who might gain from expanding the conflict. Often the most effective way to mobilise the crowd will be to point at

incongruities that need to be addressed, which is likely to lead to negative effects on public legitimacy.

Leaking information to the press is a common way of putting pressure on a competitive faction within an agent/organisation. However, also the opening up of formal arenas may come about as a result of inter-institutional rivalry. In the European Union the competition between the European Commission, the European Parliament and the Council of Minsters induced these institutions to pressure each other to introduce reforms. When transparency first arrived on the EU agenda in the early 1990s it was the ministers in the Council who urged the Commission to increase its openness. Subsequently the Council itself has been pressured by the Parliament to do the same. The aggregate effect of such competition within an agent may be more (agent controlled) transparency than can be countered by window dressing, as discussed above. Furthermore, the likelihood that new backstage arenas can be established is even lower if some factions prefer to act in the open, and therefore refuse to engage in informal voting or decision-making during lunch.

4.3.2.4. The agent may seek to use transparency to refer responsibility back to the principal, thereby liberating itself from costly burdens. One factor behind the increased number of transparency reforms globally is that governments are using openness as a way of delegating the task of scrutinising and monitoring bureaucracies and markets to civil society (Florini 1998). Transparency in practice becomes a policy instrument, the success of which is dependent on the implementation of the principal itself. Fung, Graham and Weil label this practice "targeted transparency" (Fung, Graham and Weil 2007). Instead of regulating what market actors are allowed to do, which potentially implies costly information gathering and conflicts with pressure groups, governments can regulate the access to information about what market actors do and leave it to the public to react. For example, rather than setting minimum reserve levels for banks, governments may insist on that banks should inform the public of its reserve levels. Rather than regulating safety standards on cars, with respect to the risk that the car rolls over, policy-makers can, as they did in the US, require auto producers to provide customers with figures on rollover risks and introduce rollover ratings on all car models (Fung, Graham and Weil 2007, p. 2).

The problem with respect to legitimacy arises if the public interprets such transparency reforms as a way for the agent to shirk from its responsibility, and/or that it feels burdened by having to make choices that they thought they had already delegated to the agent. The mechanism can be described as the backside of participatory democracy – with influence comes responsibility. Again, expectations decide what the reaction will be. One might guess that in Europe people will be more inclined to expect governments to make choices on risk levels for them, and therefore claim the right to remain ignorant about reserve levels and rollover rates. In the US, where the government is expected to have a lower profile overall, transparency as a policy instrument is perhaps more acceptable.

4.3.3. Perceived legitimacy is also likely to decline if those watching are disappointed by what they see with respect to the state of the world. If the public has an unrealistically rosy picture of the circumstances under which policy-making is taking place, which may or may not have come about as a result of the agent's own descriptions, transparency reforms may lead to decreased perceived legitimacy of both decision-makers and decisions. Reality – facts of life which the agent may not be able to do much about - may be disappointing both with respect to the decision-making process, to the types of decisions that have to be made and the conditions for these decisions.

4.3.3.1. For people with an ideal image of policy-making as a rational process – comprising a straight chain from policy-makers identifying problems, collecting information on possible solutions, weighing carefully the alternatives and eventually choosing the best option which subsequently is implemented by a Weberian bureaucracy – getting to see how it really works may be an unpleasant surprise (Cf. Grimmelijkhuisen 2010). Lindblom characterised public policy-making as "the science of 'muddling through'", referring to policy-makers acting incrementally and under the constraints of bounded rationality (Lindblom 1959). In the famous garbage can model of public administration solutions are searching for problems rather than the other way around. Decisions happen seemingly ad hoc when windows of opportunities open for policy entrepreneurs to connect their preferred solution to a problem that has appeared

(Cohen, March and Olsen 1972, Kingdon 1984). Furthermore, implementation processes of decisions taken at a central level may seem far from rational from the point of view of an outsider observer (see, for example Pressman and Wildavsky's *"Implementation: How Great Expectations in Washington Are Dashed in Oakland"* (Pressman and Wildavsky 1984)), calling into question the effectiveness of public policy-making. When the myth of rationality is the norm (Brunsson and Olsen 1993), and part of the basic legitimacy ground of a bureaucracy (Weber 1968), the many ways in which public policy-making may run counter to this ideal may cause decreasing levels of perceived legitimacy of the decisions and the decision-makers.

4.3.3.2. Openness may also reveal that the agent is taking certain types of decisions which the principal either would not want it to take, or would prefer not to know that it was taking:

4.3.3.2.1. If the principal has not fully understood the extent to which power has been delegated to the agent, transparency of the real state of the world may cause resentment. This is particularly relevant when delegation occurs in several steps, so that a first agent delegates to a second agent some of the powers invested in it by the principal, to an extent that the principal did not intend. Returning again to the European Union in the early 1990s one interpretation of the sudden end of the era of permissive consensus is that the types of competences delegated to the EU institutions by the member states crossed a visibility threshold at that time. An explanation for that may be found in Scharpf's argument that the EU lacks structures for creating "input-legitimacy" (Scharpf 1999). It means that EU decisions cannot be motivated by its just (democratic) procedures, but must instead derive its legitimacy from the value of the output. Only certain types of Pareto-improving regulations with relatively few distributive effects (like the creation of a common market, according to Scharpf) will be legitimately dealt with at the EU level in the eyes of the public. Public policy that is politicised, because it concerns distribution of wealth or allocation of other values and/or risks, must therefore be dealt with within the member states' democratic institutions, according to this view. Only the member states are capable of dealing with disappointed minorities

on salient issues. If the source of the perceived legitimacy crisis of the EU therefore has to do with EU policy being politicised among a broader public, trying to handle such politicisation by introducing further transparency reforms seems to be similar to putting out fire with gasoline (Cf. Bartolini 2005).

4.3.3.2.2. Transparency may also uncover unpleasant facts about the state of the world with respect to tough choices that have to be made in the face of scarce resources. Priority setting is always painful, when trade-offs have to be made between two valuable ends. Even though most people probably would agree at a general level that policy-making by necessity involves making such trade-offs being enlightened of them may nevertheless cause unease, which in turn may spill-over to the legitimacy of the decision and decision-makers.

This is particularly so with respect to the type of choices that Fiske and Tetlock call "taboo trade-offs" (Fiske and Tetlock 1997. Cf. Tetlock et.al 2000, MacCoun 2006). The theory of taboo trade-offs states that some decisions may be both necessary *and* illegitimate to make. Fiske and Tetlock identifies four basic ways of organizing, interpreting, coordinating and evaluating social life: Communal sharing (all individuals are treated equally), authority ranking (ordinal ranking of social hierarchy that determines one's status and claims on resources), equality matching (approximate tit-for-tat reciprocity) and market pricing (use of an absolute metric to make comparisons). The different categories apply to different social spheres, with different logics of appropriate behaviour and notions of fairness. Within each of these spheres, trade-offs may be painful and even tragic, but they make sense. The real problem arises when trade-offs have to be made between values belonging to different spheres, as there is no common currency for making such trade-offs. Trying to do so explicitly immediately raises moral concerns. For example, the question of how much resources that should be spent on investments in traffic safety measures may in practice involve putting a price on human life. Priority setting in health care is another area in which taboo trade-offs may arise. Importantly, however, Fiske and Tetlock also point out that given scarce resources taboo trade-offs are sometimes necessary to make. In such cases these decisions have to be made implicitly rather than explicitly in order not to provoke moral distress. The definition of taboo trade-offs thus include explicitness:

> "Any explicit mental comparison or social transaction that violates deeply-held normative intuitions about the integrity, even sanctity, of certain forms of relationship and the moral-political values that derive from those relationships (Fiske and Tetlock 1997, p. 256)."

Openness about taboo trade-offs is likely to decrease rather than increase the perceived legitimacy of those policy-makers who are involved in the decision-making.

5. Researching the link between open procedures and public legitimacy: some empirical findings

The inventory above is obviously not intended to be complete. Furthermore, it gives a rather shallow sweep over a broad range of conditions and mechanisms of very different character that need to be further specified. Their relevance and explanatory power should also be tested empirically. In this final section we will highlight some preliminary findings from our own research that attempts to study empirically the effects of open procedures on public legitimacy, and which point to the significance of some of the conditions and mechanisms discussed above.

The method used in these studies is vignette experiments, which means that the participants get to read a scenario of a case of decision-making. The procedure by which the decision is taken in the scenario is manipulated and different versions – including different degrees of openness – are randomly distributed among the participants. One study concerned decision-making within a school context (de Fine Licht et. al. 2010). Representatives of students and teachers, along with the principal, according to the scenario, gathered in a school conference to decide on the school's regulations with respect to mobile phones in classrooms and the right to raise formal complaints against teachers. The participants in the experiment were upper secondary students. Another study focussed on priority settings within health care, and included ordinary citizens as participants (de Fine Licht 2010).

The two experiments demonstrate the overall message from the inventory above, namely that openness can have very different effects on public legitimacy depending on the context. In the school experiment, the general tendency pointed towards a positive

link, with more transparency increasing the perceived legitimacy of the procedure, although with some important variations. In the health care case, to the contrary, more information about the decision-making process seemed to make the participants less trustful of health care institutions overall.

The school experiment included five different treatments, relating to the transparency of the school conference. Two of the scenarios included no transparency in process. The deliberations between students' and teachers' representatives were held behind closed doors, and the decisions were announced after the conference. One of these two closed-door scenarios did include a substantial portion of transparency in rationale, where the representatives after the conference explained the reasons behind the decisions taken. The other three scenarios included both transparency in rationale and transparency in process. The students were informed that they had the possibility to watch the conference deliberations over the internet, as a web-camera was installed in the room. In two of the three open door (web-camera) scenarios the participants were also given an extract from the deliberations. In one of these extracts the representatives were acting according to an ideal deliberative model, in which rational arguments referring to common interests were exchanged, and where the representatives explicitly acknowledged the merits of each other's arguments and were prepared to change their minds in the light of these. In the other open door (web-camera) scenario that included an extract the representatives were instead bargaining, stating positions and demands rather than reasons, and using threats and focussing on getting a deal rather than trying to reach consensus on the right thing to do. The dependent variable measured how fair the participants thought the procedure had been.

Two statistically significant results were found. First, the least open decision-making procedure, with no transparency in process or rationale, was perceived as less legitimate than all the other procedures. Secondly, open decision-making with representatives acting according to a deliberative ideal led to higher degrees of procedure acceptance than both the two closed-door scenarios and the scenario which only informed the participants that they had the possibility to watch the conference, but did not include any actual extract of the deliberations. No significant differences were found between three scenarios; closed-door transparency in rationale, transparency in process without extract, and transparency in process with a bargaining scenario. The

findings indicate that transparency in process is considered more legitimate than transparency in rationale only if 1) the public actually receives information from the process (i.e. only knowing that one has the possibility to watch is not enough to trigger an additional making-procedures-more-just effect on top of the one gained by transparency in rationale) and 2) this information demonstrates a type of behaviour on behalf of the representatives that the audience likes (deliberation rather than bargaining in this case).

The school conference study concerned issues which the students considered to be of high importance in their everyday lives, and in which they had clear interests. The issues were nevertheless of a relatively mundane character compared to the health care case. In the later experiment the participants were informed about a decision on priority setting that raised more of moral concerns. The scenario stated that the health care authorities were about to re-allocate resources between two groups with different health care needs. In the face of scarce resources the decision was taken to end public funding of in vitro fertilisation, in favour of increasing adolescent psychiatric services. These types of priority settings occur everyday within publicly funded health care institutions. Nevertheless, the choices that have to be made may provoke both tragic and taboo trade-offs, when matters of life and death are compared against budget limits.

The findings indeed indicated that the participants preferred to remain ignorant of these types of decisions. The experiment included several different scenarios, in the form of newspaper articles about the priority setting decision. It included variations on the decision-making procedure (doctors taking the decision or politicians taking the decision, with or without first consulting a citizens' advisory panel) and the framing of the article (positive versus negative framing of the decision). Strikingly, it was the control group – which only received information about the priority decision, with no description of how and by whom the decision had been made – which afterwards demonstrated the highest level of trust in the health care institutions. The difference was statistically significant even vis-à-vis the scenario including a positively framed case of participatory democracy. This result run contrary to the rhetoric within the health care priority setting literature, where explicit priority setting is often advocated precisely as a means to creating public legitimacy for tough decisions (Daniels and Sabin 2008, Kenny and Joffres 2008). Taking into account the taboo trade-offs mechanism, however, the findings are less paradoxical.

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