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Transparency and Financial Regulation in the European Union: Crisis and Complexity

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INTRODUCTION

Since 2010, the European Union has watched a global financial crisis develop into a European sovereign debt crisis.[1] Governmental support of financial institutions imposed strains on public finances,[2] which led the International Monetary Fund ("IMF") to warn of the need for structural reforms.[3] Austerity measures have been imposed as a condition of financial support from the European Union and the IMF.[4] But despite a number

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1. *See* EUROPEAN CENTRAL BANK, FINANCIAL STABILITY REVIEW 9 (2010), *available at* http://www.ecb.int/pub/pdf/other/financialstabilityreview201012en.pdf ("The main source of concern stems from the interplay between sovereign debt problems and vulnerabilities in segments of the euro area banking sector.").

2. *See* INT'L MONETARY FUND, GLOBAL FINANCIAL STABILITY REPORT: MEETING NEW CHALLENGES TO STABILITY AND BUILDING A SAFER SYSTEM, at xi (2010) ("A key concern is that room for policy maneuvers in many advanced economies has either been exhausted or become much more limited. Moreover, sovereign risks in advanced economies could undermine financial stability gains and extend the crisis. The rapid increase in public debt and deterioration of fiscal balance sheets could be transmitted back to banking systems or across borders.").

3. *See id.* at xiv.

4. *See* Press Release, Int'l Monetary Fund, Joint Statement on Greece by EU Commissioner Olli Rehn and IMF Managing Director Dominique Strauss-Kahn (May 2, 2010), *available at* http://www.imf.org/external/np/sec/pr/2010/pr10177.htm; *see*

of official interventions designed to promote confidence and maintain financial stability, the European Union's sovereign debt crisis has persisted into 2012.[5] As a result, European politicians can claim that European citizens are bearing the cost of failures in the financial system,[6] and that one of the problems with the way in which governments have sought to address the interlinked financial crises is that they have ignored EU requirements of transparency and accountability.[7]

In national and transnational governance, the language of transparency is unavoidable,[8] although the meaning of

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also Manos Matsaganis, *The Welfare State and the Crisis: The Case of Greece*, 21 J. EUR. SOC. POL'Y 501, 505–06 (2011) (describing Greek pension reform).

5. *See* Econ. & Fin. Affairs, European Comm'n, Statement by Vice-President Olli Rehn on the Decision by S&P Concerning the Rating of Several Euro Area Member States (Jan. 13, 2012), *available at* http://ec.europa.eu/economy_finance/articles/governance/2012-01-13-rehn_en.htm. Failure to solve Europe's crisis has implications for the rest of the world. *See* Christine Lagarde, Managing Dir., Int'l Monetary Fund, Speech: Global Challenges in 2012 (Jan. 23, 2012), *available at* http://www.imf.org/external/np/speeches/2012/012312.htm ("But what we must *all* understand is that this is a defining moment. It is not about saving any one country or region. It is about saving the world from a downward economic spiral. It is about avoiding a 1930s moment, in which inaction, insularity, and rigid ideology combine to cause a collapse in global demand. The longer we wait, the worse it will get. The only solution is to move forward together. Our collective economic future depends on it.").

6. *See* Martin Schulz, Inaugural Speech by Martin Schulz Following His Election as President of the European Parliament (Jan. 17, 2012), *available at* http://www.europarl.europa.eu/the-president/en/press/press_release_speeches/speeches/sp-2012/sp-2012-january/speeches-2012-january-1.html ("As a result of the economic crisis, in many countries poverty is on the increase and unemployment has reached disastrous levels among young people in particular. They are now taking to Europe's streets to protest against an economic system which allows a small minority to rake in the profits when times are good, and forces society as a whole to bear the losses when times are bad; a system whose workings might lead a dispassionate observer to conclude that anonymous ratings agencies in New York are more powerful than democratically elected governments and parliaments. This crisis of confidence in politics and its institutions is also undermining faith in the European integration process.").

7. *See id.* ("For months now the Union has been stumbling from one crisis summit to another. Decisions which affect us all are being taken by heads of government behind closed doors. To my mind, this is a reversion to a form of European politics which I thought had been consigned to the history books: it is reminiscent of the era of the Congress of Vienna in the 19th century, when Europe's leaders were ruthless in their defence of national interests and democratic scrutiny was simply unheard of.").

8. *See, e.g.*, Christopher Hood, *Accountability and Transparency: Siamese Twins, Matching Parts or Awkward Couple?*, 33 W. EUR. POL. 989, 990 (2010) ("[T]he word transparency started to become a central doctrine of good governance for both firms and states from the 1990s, and indeed seemed to be reaching saturation coverage by the 2000s."); *Transparency Is Key to Accountability*, INT'L MONETARY FUND (Jan. 11, 2010),

transparency varies in different contexts,[9] and policies that are said to be designed to achieve transparency may not in fact succeed in achieving communication,[10] let alone accountability.[11] Within the European Union, transparency is seen as a component of accountability,[12] and as one way of addressing the European Union's democratic deficit.[13] EU discussions about the need for increased transparency have moved from a focus on the European Commission ("Commission") at the time of the Maastricht Treaty[14] to a

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http://www.imf.org/external/np/exr/cs/news/2010/cso110.htm ("Greater transparency in the [International Monetary Fund's] policies and decisions makes it more accountable to the people and governments at the center of its work, the organization concluded after a policy review."); *see also* Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 26, 2009). *See generally* Memorandum for the Heads of Executive Departments and Agencies on the Open Government Directive (Dec. 8, 2009), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf.

9. *See* Mark Bevir, *Public Administration as Storytelling*, 89 PUB. ADMIN. 183, 188 (2011) ("Our beliefs, concepts, actions, and practices are products of particular traditions or discourses. Social concepts (and social objects), such as 'bureaucracy' or 'democracy', do not have intrinsic properties and objective boundaries. They are artificial inventions of particular languages and societies. Their content varies with the wider webs of belief in which they are situated.").

10. *See* Onora O'Neill, *Ethics for Communication?*, 17 EUR. J. PHIL. 167, 170 (2009) ("Transparency counters secrecy, but it does not ensure communication.").

11. *See* Hood, *supra* note 8, at 989 ("Accountability broadly denotes the duty of an individual or organisation to answer in some way about how they have conducted their affairs. Transparency broadly means the conduct of business in a fashion that makes decisions, rules and other information visible from outside.").

12. *See* Juliet Lodge, *Transparency and Democratic Legitimacy*, 32 J. COMMON MKT. STUD. 343, 353 (1994) ("Transparency, democracy and subsidiarity are seen as hand-maidens."). The duty to give reasons is a longstanding transparency-enhancing component of EU law that is not addressed in this Essay. *See* Bo Vesterdorf, *Transparency—Not Just a Vogue Word*, 22 FORDHAM INT'L L.J. 902, 903–06 (1998) (discussing the duty to give reasons).

13. *See* Giandomenico Majone, *The Regulatory State and Its Legitimacy Problems*, 22 W. EUR. POL. 1, 8–9 (1999) (writing that "the supranational institutions of the Union cannot be legitimated by proxy, but must establish their own autonomous legitimacy, either through electoral channels (the case of the European Parliaments), or by other procedural and substantive means"). For Majone, transparency is an aspect of such legitimation. *See id.* at 13.

14. *See, e.g.*, Lodge, *supra* note 12, at 346 ("The transparency of decision-making was put onto the political agenda officially by those who had spent decades denying the need for it: the member governments. The [European Commission ("Commission")] became the usual scapegoat for government wanton disregard of the fact that together, acting as [the Council of the European Union ("Council"), they acted as the [European Community's] legislature but not in a manner of the presumed openness characteristic of liberal democratic parliamentary regimes but of a closed, secretive,

greater and more generalized emphasis on transparency as an aspect of European governance under the Treaty of Lisbon.[15] But although the Treaty of Lisbon established a commitment to transparency, the contours of that commitment are controversial.[16] The European Union continues to develop its system for making lobbying more transparent.[17] Progress on a proposed amendment to the EU regulation on access to documents to implement the Treaty of Lisbon has been slow,[18]

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unaccountable system."); *cf.* John Peterson, *Playing the Transparency Game: Consultation and Policy-Making in the European Commission*, 73 PUB. ADMIN. 473, 480 (1995) ("The Commission's broader information policy objectives were pursued in negotiations with the [European Parliament] and Council on the October 1993 inter-institutional declaration on 'Democracy, Transparency and Subsidiarity.' The blandness of the agreed text masked intense institutional recriminations. Commission and [European Parliament] officials accused the Council of paying lip service to transparency while refusing to take meaningful steps to open up its own activities.").

15. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 15, 2010 O.J. C 83/47, at 54–55 [hereinafter TFEU]; *see also* Consolidated Version of the Treaty on European Union arts. 10, 11, 2010 O.J. C 83/13, at 20–21 [hereinafter TEU post-Lisbon]. Some argue that developments in EU law promote transparency in the Member States. *See* R. Daniel Kelemen, *Eurolegalism and Democracy*, 50 J. COMMON MKT. STUD. 55, 56 (2012) ("Across a wide range of policy areas, the process of European integration is undermining traditionally co-operative, informal and opaque approaches to regulation at the national level and replacing them with EU-level regulatory regimes that rely more on formal, transparent legal norms backed by more aggressive public enforcement and expanded opportunities for private enforcement litigation.").

16. *See, e.g.*, Tinne Heremans, *'Optimal' Versus 'Maximal' Public Access to Documents: A Brief Note on EU Case Law*, EUR. POL'Y BRIEF, Sept. 2011, *available at* http://www.egmontinstitute.be/papers/11/eur/EPB4.pdf; *cf.* Susana Borrás & Anders Ejrnæs, *The Legitimacy of New Modes of Governance in the EU: Studying National Stakeholders' Support*, 12 EUR. UNION POL. 107, 108–09 (2011) ("Normative scholars have shown that the new modes of governance in the EU tend not to comply with the standards set up by normative theories of representative democracy, and that they also fall short of the normative democratic ideals of participation and deliberation.").

17. *See* Press Release, European Comm'n, Have a Bigger Say in European Policy-Making: Commission Extends Public Consultations to 12 Weeks and Creates New 'Alert Service' (Jan. 3, 2012) ("The Commission has also introduced an alert service for upcoming initiatives: Organisations that sign up for the Transparency Register, can subscribe to this alert service to get early information on the roadmaps for new initiatives in their fields of interest about one year before there [sic] adoption.").

18. *See* European Commission, Regulation of the European Parliament and of the Council Amending Regulation (EC) No 1049/2001 Regarding Public Access to European Parliament, Council and Commission Documents: Proposal, COM (2011) 137 Final, ¶ 5 (Mar. 2011) [hereinafter Proposed Public Access Regulation] ("More than one year after the entry into force of the Treaty of Lisbon, there is still no perspective for the adoption of a new Regulation regarding public access to documents that will replace Regulation (EC) No 1049/2001. The discussions in the European

and attempts to discover the negotiating positions that the different Member States have adopted regarding the proposed new access-to-documents rules encountered opposition in the Council of the European Union ("Council").[19]

Progress towards transparency may be slow, but the European Union's post-Lisbon commitment to transparency means that claims that the European Union's response to the financial and sovereign debt crises has been opaque cannot be ignored. At the same time, it is clear that it is particularly difficult to achieve transparency with respect to urgent matters such as the financial and sovereign debt crises, not to mention complex, or at least intricate, issues such as financial regulation. Urgency and complexity make transparency harder to achieve,[20] but managing crises of sovereign debt and financial regulation are not the only areas of EU policymaking that are affected by urgency and complexity. Evidence from these policy areas of weaknesses in the European Union's transparency regime has implications for transparency more generally.

I. *TRANSPARENCY IN THE EUROPEAN UNION*

The Treaty on the Functioning of the European Union ("TFEU") provides that "[i]n order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct

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Parliament and the Council have shown strongly diverging views about amending the Regulation.").

19. *See, e.g.*, Access Info Eur. v. Council of the European Union, Case T-233/09, [2011] E.C.R. II____ (delivered on Mar. 22, 2011) (not yet reported) (annulling the Council's refusal to provide access to documents relating to a proposal for a regulation relating to public access to documents of the European Parliament, Council, and Commission).

20. For a suggestion that transparency may be problematic in the contest of attempts to resolve potential military crises, see Bernard I. Finel & Kristin M. Lord, *The Surprising Logic of Transparency*, 43 INT'L STUD. Q. 315 (1999). The authors argue that transparency may increase noise. *See id.* at 336 ("[T]he sheer availability of information is far less important than its correct interpretation. Since transparency, by itself, may confuse observers by illuminating so many mixed messages, it is important to identify, through diplomacy and intelligence, which voices speak the government's position authoritatively and which do not. The policy implications of this conclusion are that human assessments of intelligence remain valuable, and may become even more so in the future as the revolution in communications technology makes even more information available.").

their work as openly as possible."[21] The idea that institutions should operate as openly as possible involves holding meetings that are publicly accessible,[22] and making documents available to the public.[23] The right of access to documents should now extend to all EU institutions, bodies, offices, and agencies, although its application to the Court of Justice of the European Union ("Court of Justice" or "Court"), the European Central Bank, and the European Investment Bank is limited.[24] The TFEU thus identifies two specific mechanisms of transparency (open meetings and public access to documents), as well as two objectives openness should help to achieve (good governance and citizen participation). The Treaty on European Union ("TEU") guarantees citizens the right to participate in the democratic life of the Union,[25] and to be involved in consultations about the development of policy in the European Union.[26] Although some commentators have argued that the

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21. TFEU, *supra* note 15, art. 15(1), 2010 O.J. C 83, at 54.

22. *See id.* art. 15(2), at 54 ("The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.").

23. *See id.* art. 15(3), at 54–55 ("Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure."); *see also* Charter of Fundamental Rights of the European Union art. 42, 2010 O.J. C 83/389, at 400 [hereinafter Charter of Rights].

24. *See* Proposed Public Access Regulation, *supra* note 18, ¶ 3 ("The legal base for public access to documents is now Article 15(3) of the consolidated version of the Treaty on the Functioning of the European Union. This new provision extends the public right of access to documents of all the Union institutions, bodies, offices and agencies. The Court of Justice, the European Central Bank and the European Investment Bank are subject to this provision only when exercising their administrative tasks.").

25. *See* TEU post-Lisbon, *supra* note 15, art. 10(3), 2010 O.J. C 83, at 20 ("Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.").

26. *See id.* art. 11(1)–(4), at 21 (stating:

> 1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
>
> 2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

European Union's legitimacy should be assessed in terms of its outputs rather than inputs,[27] the TFEU and TEU focus here on inputs.[28] What matters is that citizens know what the institutions are doing and that they have an opportunity to participate in policymaking.

These requirements of transparency are addressed by allowing citizens to watch meetings by video, which is streamed to the Internet and available for download. The Council[29] and the European Parliament[30] have established web pages where their public activities can be watched contemporaneously or after the event. The European Union provides access to a range of other video and photographic material, and has its own YouTube channel.[31] There is even a kids' corner on the Europa

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> 3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent

and providing in subsection 4 for citizens' initiatives); *see also* Council Regulation No. 211/2011/EC on the Citizens' Initiative, 2011 O.J. L 65/1, at 3.

27. *See, e.g.*, Anand Menon & Stephen Weatherill, *Transnationalising Legitimacy in a Globalising World: How the European Union Rescues Its States*, 31 W. EUR. POL. 397, 402 (2008) ("The single market offers itself as the obvious source of output legitimation that can be taken as a justification for an apparent absence of orthodox input legitimacy enjoyed by the key supranational decision-makers . . . ."); *see also* Deirdre Curtin & Albert Jacob Meijer, *Does Transparency Strengthen Legitimacy?*, 11 INFO. POLITY 109, 112 (2006) ("On the whole the legitimacy of the EU and its decisions has tended to be focussed [sic] on the output side of the equation . . . rather than on the input side."); *cf.* Robert O. Keohane et al., *Democracy-Enhancing Multilateralism*, 63 INT'L ORG. 1, 14 (2009) ("When policies are adopted deliberately—after sufficient discussion, debate, and the sifting of reasons and evidence, including from experts—they are more likely to be policies that people are prepared to live with.").

28. *See* Olivier De Schutter, *Europe in Search of Its Civil Society*, 8 EUR. L.J. 198, 199 (2002) ("[T]here exists a rather vague but widely diffused impression that the legitimacy of the European process of integration, which for forty years has been mainly result-based, must now be more process-based. Output-legitimacy must be complemented by input-legitimacy.").

29. COUNCIL EUR. UNION WEBCAST, http://video.consilium.europa.eu/?siteLanguage=en (last visited May 25, 2012). For agendas and other documents relating to Council meetings, together with links to webcasts, see COUNCIL EUR. UNION—CONSILIUM, http://www.consilium.europa.eu/press/council-meetings?lang=en&cmsid=1119 (last visited May 25, 2012).

30. For the European Parliament's main web page with videos, see EUR. PARLIAMENT, http://www.europarl.europa.eu/portal/en (last visited May 25, 2012).

31. For links to EU video and photographic material, see EUR. PARLIAMENT MOBILE, http://europa.eu/media-centre/videos-photos/index_en.htm (last visited May 25, 2012).

website with a number of games.[32] The Europa website thus provides access to material that ranges from contemporaneous coverage of legislative activities to educational games to public relations materials.

Similarly, the EU institutions also publish a range of different types of documents ranging from those that are published in the Official Journal to background documents for the legislative process to documents aimed at citizens.[33] And, the institutions link some of their publication activities to transparency, accountability, and evidence-based policymaking.[34] The Commission publishes numerous Green Papers, White Papers, Communications, and other prelegislative consultative documents that provide information about proposed policy initiatives and solicit comments on those initiatives. Impact assessments of proposals likely to have significant impacts are designed to ensure that policymaking is evidence-based,[35] and an Impact Assessment Board monitors the Commission's impact assessments.[36] Improving the transparency of impact assessments is one of the Board's concerns.[37] An

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32. KIDS' CORNER: EU GAMES AND QUIZZES, http://europa.eu/kids-corner/index_en.htm (last visited May 25, 2012).

33. *See, e.g.*, EUR. COMMISSION, GUIDE TO THE EUROPEAN CITIZENS' INITIATIVE (2011), *available at* http://ec.europa.eu/citizens-initiative/files/guide-eci-en.pdf.

34. *See* European Commission, Smart Regulation in the European Union: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2010) 543 Final (Oct. 2010) [hereinafter Smart Regulation in the EU] ("Stakeholder consultations and impact assessments are now essential parts of the policy making process. They have increased transparency and accountability, and promoted evidence-based policy making.").

35. *See id.* at 6 ("It is essential that the planning of impact assessment work is transparent so that stakeholders can engage in the process as early as possible. As of 2010, the Commission publishes roadmaps for all proposals that are likely to have significant impacts, including delegated and implementing acts, explaining whether an impact assessment is planned or not and why.").

36. *See, e.g.*, European Commission, Impact Assessment Board Report for 2010: Commission Staff Working Paper, SEC (2011) 126 Final (Jan. 2011).

37. *See* Impact Assessment Bd., European Comm'n, *Opinion, DG MARKT—Impact Assessment on the: Proposal for a Legislative Initiative on Short Selling and Credit Default Swaps*, 2010/MARKT/023 ("To facilitate reading by non-experts the report would benefit from simplifying the presentation and analysis of some options . . . . To avoid misunderstanding, the term 'administrative burdens' should be replaced by 'compliance costs' or 'administrative costs' wherever appropriate in the text, headings and tables . . . . Finally, a table providing an overview of the scope of the various measures could be usefully annexed for transparency.").

enormous amount of detailed information is available to citizens who choose to look for it.[38] And much of the information is translated into all of the European Union's official languages; multilingualism is a key commitment of the European Union.[39] Even information the institutions would like to keep secret may leak out.[40]

When the EU institutions make documents available, even in multiple languages, availability does not guarantee that citizens read them. The volume of published material on EU policymaking is enormous,[41] and citizens need to rely on intermediaries to help them sort what matters to them from what does not.[42] Some policy issues are more visible than others.[43] From the perspective of transparency as a mechanism of accountability, variations in the visibility of policy issues would

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38. *See* Curtin & Meijer, *supra* note 27, at 109 ("Less than a decade ago citizens had no easy means of obtaining information about the EU, now European citizens can obtain a great deal of information and download a huge variety of documents irrespective of where they are based or the time of day.").

39. *See, e.g.*, COMM'N OF THE EUROPEAN COMMUNITIES, FINAL REPORT: HIGH LEVEL GROUP ON MULTILINGUALISM 5 (2007), *available at* http://ec.europa.eu/languages/documents/doc1664_en.pdf ("Multilingualism has been part of [European] Community policy, legislation and practices from the time of the Treaties of Rome."). In some respects, the commitment to multilingualism is more theoretical than real. *See, e.g.*, Juliane House, *English as a Lingua Franca: A Threat to Multilingualism?*, 7 J. SOCIOLINGUISTICS 556, 561 (2003) ("It is also an open secret that the EU's supposedly humane multilingualism is but an illusion."). Citizens have the right to communicate with the institutions in their own (official EU) language under Regulation No. 1, although in practice there is evidence that they do not necessarily do so. *See* Charter of Rights, *supra* note 23, art. 41(4), 2010 O.J. C 83, at 399–400 ("Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language."). *See generally* Gilberte Lenaerts, *A Failure to Comply with the EU Language Policy: A Study of the Council Archives*, 20 MULTILINGUA 221 (2001).

40. *See* Peterson, *supra* note 14, at 484 ("Yet, the Commission is a multinational and multicultural bureaucracy with close links to governments, lobbyists and a very inquisitive press corps. Few of its internal secrets stay secret for very long.").

41. *See* Curtin & Meijer, *supra* note 27, at 116 (noting this "information overload" and that "[e]ven experts have a hard time in dealing with the incredible amount of information").

42. *Cf.* Soon Ae Chun & Janice Warner, *Finding Information in an Era of Abundance: Towards a Collaborative Tagging Environment in Government*, 15 INFO. POLITY 89, 91 (2010) (proposing a "collaborative tagging system architecture" to help users discover and share online documents).

43. *See* Jan Beyers, *Policy Issues, Organisational Format and the Political Strategies of Interest Organisations*, 31 W. EUR. POL. 1188, 1190 (2008) ("Issues can feature high on the political agenda and gain much public attention or they can be of concern to a handful of actors.").

not really matter if they were attributable to the inherent characteristics of those issues. But, the visibility of policy issues is affected by many different factors; crises and scandals can enhance the visibility of policy issues. Since the financial crisis, some issues of financial regulation are more visible than others.[44] The choices the EU institutions, Member States, and private sector groups make about framing policy issues affects the visibility of the issues.[45] The EU institutions characterize some issues of financial regulation as being relevant to consumer stakeholders.[46] However, consultations about issues that relate to consumer protection do not necessarily identify consumers as key stakeholders.[47] For example, in 2011 the Commission consulted about interest rate restrictions in the European Union.[48] The consultation document invited

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44. The question of whether and how bankers' remuneration should be regulated is a visible issue in financial regulation, covered by the press, and addressed by international organizations. *See, e.g.*, Heather Stewart & Katie Allen, *Even the Bankers Are Saying It: This Might Be the End for Big Bonuses*, OBSERVER (U.K.) (Feb. 4, 2012), http://www.guardian.co.uk/business/2012/feb/05/bankers-end-big-bonuses; FIN. STABILITY BD., 2011 THEMATIC REVIEW ON COMPENSATION: PEER REVIEW REPORT (2011), *available at* http://www.financialstabilityboard.org/publications/r_11101a.pdf.

45. *Cf.* Anne Schneider & Mara Sidney, *What Is Next for Policy Design and Social Construction Theory?*, 37 POL'Y STUD. J. 103, 106 (2009) ("The policy design approach directs scholars to examine who constructs policy issues, and how they do so, such that policy actors and the public accept particular understandings as "real," and how constructions of groups, problems and knowledge then manifest themselves and become institutionalized into policy designs, which subsequently reinforce and disseminate these constructions.").

46. For example, in consulting on responsible lending and borrowing in the EU, the Commission defined the target groups as follows: "All citizens and organisations were welcome to contribute to this consultation. Contributions were particularly sought from consumer organisations, the financial services industry and public authorities." *See Consultation on Responsible Lending and Borrowing in the EU*, EUR. COMMISSION—EU SINGLE MARKET, http://ec.europa.eu/internal_market/consultations/2009/responsible_lending_en.htm (last visited May 25, 2012); *see also* EUROPEAN COMM'N, PUBLIC CONSULTATION ON RESPONSIBLE LENDING AND BORROWING IN THE EU (2009).

47. For an example of a consultation that did seek public input see, e.g., EUROPEAN COMM'N, CONSULTATION DOCUMENT: REVIEW OF DIRECTIVE 94/19/EC ON DEPOSIT-GUARANTEE SCHEMES (DGS) 2 (2009), *available at* http://ec.europa.eu/internal_market/consultations/docs/2009/deposit_guarantee_schemes/consultation_dgs_2009_en.pdf ("This consultation intends to gather contributions from the public for the review of the Directive on Deposit Guarantee Schemes.").

48. *See* EUROPEAN COMM'N, CONSULTATION DOCUMENT ON THE STUDY ON INTEREST RATE RESTRICTIONS IN THE EU (2011), *available at* http://ec.europa.eu/internal_market/consultations/docs/2011/interest_rate_restrictions/consultation_en.pdf.

comments from "stakeholders."[49] The summary of responses to the consultation notes that some responses were received from stakeholders described as "consumer/user representatives/advocates."[50] Whereas stakeholders representing the financial sector expressed concerns that "interest rate restrictions have a detrimental impact on the consumer's ability to access credit which can exacerbate financial exclusion,"[51] consumer groups saw regulation of interest rates as "an important tool for consumer protection."[52] The consultation on the Green Paper, *Towards an Integrated European Market for Card, Internet and Mobile Payments*,[53] welcomes comments from consumers, although the comments of market participants, national governments, and national competent authorities seem to have been more desired.[54] It is not surprising that the Commission emphasizes its interest in receiving input to consultations from bodies that can claim to have expertise relevant to the development of policy, as the Commission regularly states that it is committed to evidence-based policymaking.[55] But if policy in a particular field, such as financial regulation, is developed in processes that tend to involve market participants rather than consumers, the Commission leaves itself open to criticisms that its processes and

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49. *See id.* at 4 ("Stakeholders are invited to send their responses to the questions raised in this document . . . .").

50. EUROPEAN COMM'N, SUMMARY OF RESPONSES TO THE PUBLIC CONSULTATION ON THE STUDY ON INTEREST RATE RESTRICTIONS IN THE EU 3 (2011), *available at* http://ec.europa.eu/internal_market/finservices-retail/docs/policy/irr_summary_en.pdf ("The category 'consumer/user representatives/advocates' comprises individual consumers (citizens), bodies that act for their members in their capacity as consumers and certain consumer-focused think tanks."). This group represented fifteen percent of the total responses. *Id.* at 4.

51. *Id.* at 5.

52. *Id.*

53. European Commission, Towards an Integrated European Market for Card, Internet and Mobile Payments: Green Paper, COM (2011) 941 Final (Jan. 2012) [hereinafter Green Paper].

54. The Commission's consultation page on the Green Paper states: "All citizens and organisations are welcome to contribute to this consultation. Contributions are particularly sought from market participants, national governments and national competent authorities." *See Consultation on Green Paper—Towards an Integrated European Market for Card, Internet and Mobile Payments*, EUR. COMMISSION—EU SINGLE MARKET, http://ec.europa.eu/internal_market/consultations/2012/card_internet_mobile_payments_en.htm (last visited May 25, 2012).

55. *See, e.g.*, Smart Regulation in the EU, *supra* note 34, at 2.

the policies they produce are flawed.[56] The financial crisis showed that failures of financial regulation can impose significant costs on nonmarket participants.[57] And a number of commentators have suggested that policymakers' unwillingness to challenge the prevailing orthodoxies contributed to the failures of regulation.[58] Consumers' lack of participation in policymaking with respect to financial regulation is problematic from a broad, open-government perspective, which emphasizes participation rather than expertise-based policymaking. It also is problematic because narrow participation in policymaking involves the risk of producing worse policies than broader discussions might produce.

There are a number of ways in which consumers' interests and views are incorporated into EU policymaking. As a component of the European Union's formal rulemaking procedures, the European Economic and Social Committee ("EESC") represents the interests and views of the social partners in the European Union's legislative processes.[59] The EESC's opinions on proposed EU legislation often focus on the

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56. *Cf.* Cris Shore, *'European Governance' or Governmentality? The European Commission and the Future of Democratic Government*, 17 EUR. L.J. 287, 302 (2011) ("Despite its rhetoric of wider participation and democratic inclusiveness, the Commission's discourse on European governance promotes a technocratic model of steering and managing that does subvert parliamentary democracy and advance a new form of elitism.").

57. *See* FINANCIAL SERVS. AUTH., THE FAILURE OF THE ROYAL BANK OF SCOTLAND: FINANCIAL SERVICES AUTHORITY BOARD REPORT 9 (2011), *available at* http://www.fsa.gov.uk/pubs/other/rbs.pdf ("Banks are different because excessive risk-taking by banks (for instance through an aggressive acquisition) can result in bank failure, taxpayer losses, and wider economic harm. Their failure is of public concern, not just a concern for shareholders.").

58. *See id.* at 259 (referring to "the widespread intellectual delusion that the global economy and financial system had become more stable as a result of financial innovation"); *see also id.* at 260 ("[The] decisions were made in a context which included . . . [a] consensus among practitioners and policy-makers across the world, which confidently assumed that the financial system had been made more stable as a result of the very financial innovation and complexity which we now understand played a significant role in the failure both of the overall system and of RBS within it. In this climate, very few people in positions of responsibility in major regulatory authorities or central banks appreciated the growing risks, and several argued authoritatively that the risks to the financial system and to the banking system in particular had reduced.").

59. *See* Stijn Smismans, *European Civil Society: Shaped by Discourses and Institutional Interests*, 9 EUR. L.J. 473, 481–84 (2003) (analyzing the European Economic and Social Committee's role).

interests of consumers.[60] Consumer groups participate in consultations as stakeholders, either individually or together with other consumer groups. For example, a number of different groups that represent users of financial services coordinate their activities in a European Federation of Financial Services Users.[61] The Bureau Européen des Unions de Consommateurs ("BEUC") is an umbrella group based in Brussels for a number of consumer organizations. BEUC focuses on a number of different consumer issues, including issues of financial services policy.[62] The EU institutions have decided to fund "an expertise centre to provide non-industry stakeholders with technical expertise on financial services issues."[63] The Commission has encouraged consumer input into the policy process by establishing groups of expert users of financial services.[64] In 2010, the Commission decided "to set up a group of financial services users and to define its tasks, composition and structure in a formal legal act."[65] This is one example of the Commission's work to increase stakeholder participation in

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60. Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on Credit Agreements Relating to Residential Property,' 2011 O.J. C 318/133, ¶ 1.10 ("The [European Economic and Social Committee] suggests that certain provisions be clarified or enlarged upon in order to enhance consumer information on variable rates. Consumers have little awareness of reference indices and of the impact variations in rates can have on repayment amounts. It believes that usurious interest rates should be banned, that lending rates for the main residence should be capped, and that changes in interest rates should be based only on objective, reliable and public indices that are external to the lender.").

61. The European Federation of Financial Services Users was previously known as EuroInvestors (the European Federation of Investors or EFI). It was established in 2009, "following the financial crisis which demonstrated the limits of the almost exclusive dialogue between regulators and the financial industry, largely ignoring the user side." *See* EUROINVESTORS, CESR TECHNICAL ADVICE TO THE EUROPEAN COMMISSION IN THE CONTEXT OF THE MIFID REVIEW—EQUITY MARKETS 1 (2010).

62. *See* BEUC, CREDIT AGREEMENTS RELATING TO RESIDENTIAL PROPERTY: PROPOSAL FOR A DIRECTIVE, BEUC POSITION 3–5 (2011).

63. EUROPEAN COMM'N, RESTORING THE HEALTH AND STABILITY OF THE EU FINANCIAL SECTOR 19 (2012), *available at* http://ec.europa.eu/internal_market/smact/docs/20120206_restoring_health_en.pdf.

64. *See, e.g.*, Caroline Bradley, *Consumers of Financial Services and Multi-Level Regulation in the European Union*, 31 FORDHAM INT'L L.J. 1212, 1229 (2008) (noting the establishment of Fin-Use, the Forum of User Experts in the Area of Financial Services in 2004).

65. Commission Decision No. 2010/C 199/02 (*Setting up a Financial Services User Group*), 2010 O.J. C 199/12, ¶ 9.

policymaking.[66] The new group, Financial Services User Group ("FSUG"), was to be

> [C]omposed of financial services experts such as individuals appointed to represent the interests of consumers, retail investors or micro-enterprises, but also individual experts having particular expertise in users' needs and priorities in the field of financial services, for example lawyers representing consumers, employee or worker representatives or academics. The group should represent an adequate geographical coverage within the Union.[67]

The FSUG has commented on a number of EU and non-EU initiatives,[68] including the Commission's 2011 consultation on interest rate restrictions.[69] The FSUG is effective as a means of feeding sophisticated consumer-focused analysis into the European Union's policymaking process, which should promote better or smart regulation objectives. It is not so clear that the FSUG promotes the transparency of policymaking. Thus, it likely does more to enhance output legitimacy than input legitimacy. Moreover, the establishment of groups such as FSUG coupled with the Commission's tendency to work with organized groups raises some questions about who is, in effect, being excluded from participation in policymaking.[70]

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66. *Cf.* De Schutter, *supra* note 28, at 206 (asking whether the Commission should actively structure existing civil society networks and create new ones or take civil society as it is); Smismans, *supra* note 59, at 481 (noting that "the Commission does not always resist the temptation to use civil society as a legitimating discourse for all its existing interactions, including those with all sorts of private lobby actors").

67. *Setting up a Financial Services User Group*, 2010 O.J. C 199, ¶ 10.

68. For an example of a comment on a non-EU initiative, see the Financial Services User Group's (FSUG) response to the Financial Stability Board ("FSB") on consumer finance protection. FIN. SERVS. USER GRP., FINANCIAL SERVICES USER GROUP'S (FSUG) RESPONSE TO THE FINANCIAL STABILITY BOARD (FSB) ON CONSUMER FINANCE PROTECTION WITH PARTICULAR FOCUS ON CREDIT—REPORT TO THE G20 LEADERS 3 (2011), *available at* http://ec.europa.eu/internal_market/finservices-retail/docs/fsug/opinions/fsb_consumer_finance_protection-2011_09_27.pdf. It argues that the FSB's "approach to and definition of consumer protection needs to be redefined." *See id.*

69. *See* FIN. SERVS. USER GRP., FINANCIAL SERVICES USER GROUP'S (FSUG) OPINION ON INTEREST RATE RESTRICTIONS IN THE EU (2011), *available at* http://ec.europa.eu/internal_market/finservices-retail/docs/fsug/opinions/irr-2011_03_22_en.pdf.

70. *See, e.g.*, Smismans, *supra* note 59, at 491 ("To what extent does the European integration process become more inclusive through a civil dialogue which privileges contacts with Brussels-based confederations of associations?").

Even where issues are defined and described as affecting consumers directly, consultation documents and proposed rules are sometimes not drafted clearly.[71] In 2001, the Commission focused on openness as a characteristic of good governance, stating:

> The Institutions should work in a more open manner. Together with the Member States, they should actively communicate about what the EU does and the decisions it takes. They should use language that is accessible and understandable for the general public. This is of particular importance in order to improve the confidence in complex institutions.[72]

In order to achieve greater openness, the Commission sometimes publishes citizens' summaries of documents.[73] Citizens' summaries, however, tend to be documents that merely highlight proposed measures in very general terms. The citizens' summary of the proposed directive on credit agreements relating to residential property describes the proposed directive in just over a page, whereas the proposed directive is over fifty pages long. It is possible that citizens may be more willing to read a short document, but it is not clear that such a short summary really enhances the transparency of the proposal in any meaningful sense. The Commission produces other nontechnical publications to explain its activities. For example, in early 2012, the Commission published a booklet with the title, *Restoring the Health and Stability of the EU Financial Sector.*[74] The booklet describes the European Union's ongoing changes to financial regulation for nonspecialists. The booklet and citizens' summaries seem designed as public relations exercises rather

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71. *See, e.g.*, Smart Regulation in the EU, *supra* note 34, at 8 ("Managing the quality of the legislation also means making sure that it is as clear and accessible as possible. The Commission scrutinizes all new legislative proposals to ensure that the rights and obligations they create are set out in simple language to facilitate implementation and enforcement.").

72. Commission of the European Communities, European Governance: White Paper from the Commission, COM (2001) 428 Final (July 2001) [hereinafter European Governance White Paper].

73. *See, e.g., Citizens' Summary: New EU Law on Loans for Buying Homes*, EUR. COMMISSION—EU SINGLE MARKET, http://ec.europa.eu/internal_market/finservices-retail/docs/credit/mortgage/citizens_summary_en.pdf (last visited May 25, 2012).

74. *See* EUROPEAN COMM'N, *supra* note 63.

than as mechanisms for involving citizens in policy development.[75]

Although many citizens either do not choose to study proposals for changes in regulation, or are otherwise unable to navigate the complexities of those proposals, there are individuals and organizations that do study developing policy in a range of different areas. Not only do they read published documents, but they also ask for nonpublished documents under the European Union's access-to-documents rules.[76] These requests are not inevitably initially successful. For example, the Council has been reluctant to disclose documents relating to proposed legislation, leading the Court of Justice to insist that access to legislative documents is important for democracy.[77] Although the Council claimed that disclosing legal advice about a legislative proposal could "lead to doubts as to the lawfulness of the legislative act concerned,"[78] the Court stated that:

> It is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole.[79]

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75. *Cf.* Stephan Grimmelikhuijsen, *Being Transparent or Spinning the Message? An Experiment into the Effects of Varying Message Content on Trust in Government*, 16 INFO. POLITY 35, 36 (2011) (noting that the "pressure to be transparent has also pushed spin control towards the center stage of government"); Shore, *supra* note 56, at 291 (noting that the Commission's approach to governance combines ideas of increasing openness, participation, and accountability with a public relations strategy).

76. *See* Council Regulation No. 1049/2001 Regarding Public Access to European Parliament, Council and Commission Documents, 2001 O.J. L 145/43; *see also* Vesterdorf, *supra* note 12, at 913–24 (discussing the development of the right of access to information).

77. *See, e.g.*, Sweden & Turco v. Council, Joined Cases C-39/05 P & C-52/05 P, [2008] E.C.R. I-4723, ¶ 46 (noting "where the Council is acting in its legislative capacity . . . wider access must be granted to documents . . . . Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights").

78. *Id.* ¶ 59.

79. *Id.* ¶ 2.

The Court suggested that if a specific legal opinion were "of a particularly sensitive nature" or had "a particularly wide scope that goes beyond the context of the legislative process in question," the Council could deny access to the legal opinion provided that the Council gave detailed reasons for its refusal.[80] The Court of Justice subsequently cited the language quoted above in the context of a request for documents generated during an assessment of the compatibility of a concentration with the common market.[81] The General Court of the European Union has said that citizens should be able to follow the institutions' decisionmaking processes in detail, including being able to know which Member States made particular proposals.[82] In these decisions, the courts demonstrate a commitment to a high level of transparency.[83] But, enforcing compliance with the

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80. *Id.* ¶ 69. *Cf.* Toland v. Parliament, Case T-471/08, [2011] E.C.R. II____, ¶ 80 (delivered June 7, 2011) (not yet reported) (considering Article 4(3) of Regulation 1049/2001, which provides an exception for disclosure of certain documents if "disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure" in the Court's Judgment and stating that "the fact that the use by the Members of Parliament of the financial resources made available to them is a sensitive matter followed with great interest by the media, which the applicant does not deny—quite the contrary—cannot constitute in itself an objective reason sufficient to justify the concern that the decision–making process would be seriously undermined, without calling into question the very principle of transparency intended by the [Treaty Establishing the European Community]").

81. *See* Sweden v. Commission & MyTravel Group plc, Case C-506/08 P, [2011] E.C.R. I____ (delivered Mar. 3, 2011) (not yet reported).

82. *See* Access Info Eur. v. Council of the European Union, Case T-233/09, [2011] E.C.R. II____, ¶ 69 (delivered on Mar. 22, 2011) (not yet reported) ("If citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information. The identification of the Member State delegations which submit proposals at the stage of the initial discussions does not appear liable to prevent those delegations from being able to take those discussions into consideration so as to present new proposals if their initial proposals no longer reflect their positions. By its nature, a proposal is designed to be discussed, whether it be anonymous or not, not to remain unchanged following that discussion if the identity of its author is known. Public opinion is perfectly capable of understanding that the author of a proposal is likely to amend its content subsequently.").

83. *Cf.* European Commission, On the Application in 2010 of Regulation (EC) No. 1049/2001 Regarding Public Access to European Parliament, Council and Commission Documents: Report from the Commission, COM (2011) 492 Final, ¶ 8.2 (Aug. 2011) ("Ten years after the Regulation was adopted, its implementation has led to a consolidated administrative practice with regard to the citizen's right of access to Commission documents. Through the case law, the Court of Justice and the General Court have significantly contributed to this consolidation. Therefore, the Commission

courts' requirements with respect to the access to documents rules is slow and costly.[84]

The idea that EU bodies should conduct their work as openly as possible involves disclosure about those who influence the development of policy as much as it involves the publication of policy proposals. Transparent consultations require communication about the responses the consulting organization receives, and transparent governance requires that policymakers give reasons for their policy decisions. In a White Paper on Governance in 2001, the Commission linked the need to improve governance in the European Union with the objective of encouraging European citizens to trust the EU institutions.[85] Increasing openness was an important aspect of improving governance.[86] In addition to providing more information about the development of policy, the Commission would develop consultation standards[87] and guidelines on the collection and

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remains convinced that the revision of the Regulation should build on what has been achieved in the past ten years.").

84. *See, e.g.*, Decision of the European Ombudsman Closing His Inquiry into Complaint 297/2010/(ELB)GG Against the European Commission, Case 0297/2010/(ELB)GG (delivered Sept. 26, 2011), *available at* http://www.ombudsman.europa.eu/en/cases/decision.faces/en/10879/html.bookmark (noting that a Brussels lawyer sought access to the Commission Competition Directorate-General's internal manual of procedure in 2009, and that after the Ombudsman's intervention, the Commission agreed to make a version of the manual publicly available in October 2011 or soon afterwards); Curtin & Meijer, *supra* note 27, at 113 ("The provisions on public access to documents clearly have caused changes by giving citizens a tool to obtain the documents they wish to obtain, albeit with a considerable and significant time lag.").

85. *See* European Governance White Paper, *supra* note 72, at 3 ("Many people are losing confidence in a poorly understood and complex system to deliver the policies that they want. The Union is often seen as remote and at the same time too intrusive."). Deirdre Curtin and Albert Jacob Meijer describe this period as involving a shift from a legal understanding of transparency to a political one—transparency as a "tool for a more democratic way of working." *See* Curtin & Meijer, *supra* note 27, at 113–14.

86. *See* European Governance White Paper, *supra* note 72, at 3 ("The White Paper proposes opening up the policy-making process to get more people and organisations involved in shaping and delivering EU policy. It promotes greater openness, accountability and responsibility for all those involved. This should help people to see how Member States, by acting together within the Union, are able to tackle their concerns more effectively.").

87. *Id.* at 4; *see* Commission of the European Communities, Towards a Reinforced Culture of Consultation and Dialogue—General Principles and Minimum Standards for Consultation of Interested Parties by the Commission: Communication from the Commission, COM (2002) 704 Final (Dec. 2002) [hereinafter Towards a Reinforced Culture of Consultation and Dialogue].

use of expert advice.[88] The White Paper identified five principles of good governance: openness, participation, accountability, effectiveness, and coherence.[89] Participation would include the involvement of civil society,[90] but civil society groups would also be subject to expectations of openness and transparency.[91] The White Paper promised openness in order to increase citizens' trust in the European Union and its institutions, and presented participation as another core component of good governance, but at the same time emphasized that participation was about "more effective policy shaping."[92]

Since the White Paper, the Commission has been developing a European Transparency Initiative,[93] which includes increasing the transparency of interest representation (i.e. lobbying).[94] Interest representatives would be encouraged to register and provide information about themselves in return for receiving notifications about developments in their areas of interest.[95] In a follow-up to the Green Paper, the Commission announced that it planned to treat submissions from

88. *See* European Governance White Paper, *supra* note 72, at 5 (promising publication of "guidelines on collection and use of expert advice, "so that it is clear what advice is given, where it is coming from, how it is used and what alternative views are available").

89. *Id.* at 10.

90. *Id.* at 14 ("Civil society includes the following: trade unions and employers' organisations ('social partners'); nongovernmental organisations; professional associations; charities; grass-roots organisations; organisations that involve citizens in local and municipal life with a particular contribution from churches and religious communities.").

91. *Id.* at 15 ("Civil society must itself follow the principles of good governance, which include accountability and openness. The Commission intends to establish, before the end of this year, a comprehensive on-line database with details of civil society organisations active at European level, which should act as a catalyst to improve their internal organisation.").

92. *Id.* ("[C]onsultation helps the Commission and the other Institutions to arbitrate between competing claims and priorities and assists in developing a longer term policy perspective. Participation is not about institutionalising protest. It is about more effective policy shaping based on early consultation and past experience.").

93. *See* Commission of the European Communities, European Transparency Initiative: Green Paper from the Commission, COM (2006) 194 Final (May 2006).

94. *Id.* at 5 ("When lobby groups seek to contribute to EU policy development, it must be clear to the general public which input they provide to the European institutions. It must also be clear who they represent, what their mission is and how they are funded.").

95. *Id.* at 8 ("Groups and lobbyists which register certain information about themselves would be given an opportunity to indicate their specific interests and, in return, would be alerted to consultations in those specific areas.").

unregistered interest representatives as "individual contributions."[96] At this point in the follow-up document, the Commission cites its 2002 Communication on Consultation,[97] which suggests that input from representative European organizations may weigh more heavily than input from others.[98] Article 11 of the TEU provides some support for a distinction between citizens and interest representatives. Whereas the institutions are to "give citizens and representative associations the opportunity to make known and publicly exchange their views," the institutions are only required to "maintain an open, transparent and regular dialogue with representative associations and civil society."[99] The Code of Conduct for Interest Representatives requires them to "ensure that, to the best of their knowledge, information which they provide is unbiased, complete, up-to-date and not misleading."[100]

This brief description of the European Union's approaches to achieving transparency suggests that the EU institutions are implementing transparency policies to inform and involve citizens and thereby increase their trust in the European

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96. Commission of the European Communities, Follow-up to the Green Paper 'European Transparency Initiative': Communication from the Commission, COM (2007) 127 Final, at 4 (Mar. 2007) ("The Commission therefore intends to combine the voluntary register with a new standard template for internet consultations. If organisations submit their contributions in the context of such a consultation they will be systematically invited to use the register to declare whom they represent, what their mission is and how they are funded.").

97. *See id. See generally* Towards a Reinforced Culture of Consultation and Dialogue, *supra* note 87.

98. *See* Towards a Reinforced Culture of Consultation and Dialogue, *supra* note 87, at 11–12 ("The Commission would like to underline the importance it attaches to input from representative European organisations. . . . However, the issue of representativeness at European level should not be used as the only criterion when assessing the relevance or quality of comments. . . . [M]inority views can also form an essential dimension of open discourse on policies. On the other hand, it is important for the Commission to consider how representative views are when taking a political decision following a consultation process."); *see also id.* at 17 ("Openness and accountability are thus important principles for the conduct of organisations when they are seeking to contribute to EU policy development. It must be apparent . . . which interests they represent . . . [and] how inclusive that representation is.").

99. TEU post-Lisbon, *supra* note 15, art. 11, 2010 O.J. C 83, at 21.

100. Commission of the European Communities, European Transparency Initiative: A Framework for Relations with Interest Representatives (Register and Code of Conduct); Communication from the Commission, COM (2008) 323 Final, at 7 (May 2008).

Union,[101] to improve the performance of the institutions by opening them up to public scrutiny, and to improve the quality of EU policymaking. But whether transparency alone can achieve these goals is doubtful.[102]

The European Union faces special challenges in achieving transparency with respect to policymaking because it is a multilingual union[103] that relies on translation. As the European Union has expanded, EU institutions have tried to control the increasing costs of translation in ways which limit transparency.[104] Not all of the European Union's texts are translated into all of the official languages.[105] Policy documents that are translated into all of the official languages tend to be shorter than they used to be.[106] Other working documents are translated into a smaller number of languages. In the context of financial regulation, the European Union's financial authorities, the European Banking Authority ("EBA"),[107] the European

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101. For a discussion of different views of the relationship between transparency and trust, and contrasting the views of "transparency optimists" and "transparency pessimists," see Grimmelikhuijsen, *supra* note 75, at 36–37.

102. For a powerful critique of the naive assumptions or "myths" of transparency in the European Union, see Curtin & Meijer, *supra* note 27, at 120.

103. *See, e.g.*, Commission of the European Communities, A New Framework Strategy for Multilingualism: Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee, and the Committee of the Regions, COM (2005) 596 Final, at 12 (Nov. 2005) ("It is . . . a prerequisite for the Union's democratic legitimacy and transparency that citizens should be able to communicate with its Institutions and read EU law in their own national language, and take part in the European project without encountering any language barriers.").

104. *See, e.g.*, DIRECTORATE-GEN. FOR TRANSLATION, EUROPEAN COMM'N, STUDIES ON TRANSLATION AND MULTILINGUALISM: LAWMAKING IN THE EU MULTILINGUAL ENVIRONMENT (2010).

105. *See id.* at 153 ("Now everything points towards English: usually this is the source language of legislation and the dominant language for the institutional and external communication of the EU (as is apparent from most EU-produced websites), although French has not lost its former privileged role yet.").

106. *See* EUROPEAN COMM'N, TRANSLATION AT THE EUROPEAN COMMISSION: A HISTORY 40 (2010) ("[T]he Commission adopted several strategic documents, particularly a decision on translation demand management, designed to strike the right balance between the maintenance of multilingualism and the deployment of optimum working methods. . . . [A] limit of twenty pages was introduced for documents to be submitted for adoption or approval.").

107. *See* Council Regulation No. 1093/2010 Establishing a European Supervisory Authority (European Banking Authority), 2010 O.J. L 331/12.

Securities and Markets Authority ("ESMA"),[108] and the European Insurance and Occupational Pensions Authority ("EIOPA"),[109] consult on the development of detailed rules to implement EU measures. Their consultations are carried out in English. This reflects the fact that English tends to be the language of the international financial markets,[110] but it also illustrates a limit to transparency through multilingualism in one area of EU policy. It is not clear whether a failure of translation in consultations by these EU financial services authorities is consistent with the European Union's transparency requirements. The European Ombudsman recently stated, in response to a complaint that a consultation paper on financial sector taxation was published only in English, that a failure to translate documents excluded non-English speaking citizens from the democratic exercise of consultation,[111] and constituted maladministration.[112] Although the consultation involved technical issues it also was relevant to consumers of financial services.[113] The Ombudsman said that the Commission should develop "clear, objective and reasonable guidelines concerning the use of the treaty languages in its public consultations."[114] On

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108. *See* Council Regulation No. 1095/2010 Establishing a European Supervisory Authority (European Securities and Markets Authority), 2010 O.J. L 331/84 [hereinafter European Securities and Markets Authority Regulation].

109. *See* Council Regulation No. 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), 2010 O.J. L 331/48.

110. *See, e.g.*, DIRECTORATE-GEN. FOR TRANSLATION, *supra* note 104, at 91 ("Effects of internationalisation and thus the spreading of English terminology or the impact on the national translations of the latter can be studied in the area of capital markets and finance terminology, which are strongly affected by internationalisation.").

111. *See* Draft Recommendation of the European Ombudsman Concerning His Inquiry into Complaint 640/2011/AN Against the European Commission, Case: 0640/2011/AN, ¶ 32 (delivered Nov. 24, 2011) [hereinafter Draft Recommendation of the European Ombudsman], *available at* http://www.ombudsman.europa.eu/cases/draftrecommendation.faces/en/11043/html.bookmark.

112. *See id.* ¶ 43 ("In the Ombudsman's view, the above scope illustrates that the Commission: (i) unjustifiably; and (ii) disproportionately restricted the right of non-English speaking citizens to be consulted, by not making the Consultation Paper available to them in languages other than English. This is an instance of maladministration.").

113. *See id.* ¶ 30 ("[A]s the complainant pointed out, despite its '*technical*' character, the topic was of direct interest to large sectors of society, since potential taxes on financial transactions will most likely be passed on to consumers by financial entities, in the form of banking costs or other charges.").

114. *Id.* at Conclusions No. 2.

the other hand, translation itself raises issues of transparency. All official language versions of legal texts are equally authentic,[115] but errors of translation mean that it is not always clear what the rules are.[116]

In many ways the complexity of the European Union interferes with the achievement of transparency. The supranational aspects of the European Union are more distant from citizens than their domestic governments. The increasing institutional complexity of the European Union means that sources of information about the European Union's policies have increased in number, adding to problems of information overload. And multilingualism complicates transparency. The following Sections of this Essay illustrate that in the field of financial regulation issues of urgency and complexity create their own additional problems of opacity.

II. *INTERNATIONAL FINANCIAL CRISES AND TRANSPARENCY*

The global financial crisis and the sovereign debt crisis shook confidence in financial institutions in the European Union[117] (and outside) and in the value of debt issued by a

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115. *See* DIRECTORATE-GEN. FOR TRANSLATION, *supra* note 104, at 37 ("Producing high quality translations is all the more important within a system where translated texts will become equally authentic as the original one.").

116. *See* Theodor Schilling, *Beyond Multilingualism: On Different Approaches to the Handling of Diverging Language Versions of a Community Law*, 16 EUR. L.J. 47, 48 (2010) (asking "whether the multilingualism as practiced . . . by the EU is compatible with the rule of law requirements of accessibility of a law and foreseeability of its effects as developed by the Court of Human Rights under the (European) Convention for the Protection of Human Rights and Fundamental Freedoms"); EUROPEAN COMM'N, STUDIES ON TRANSLATION AND MULTILINGUALISM: QUANTIFYING QUALITY COSTS AND THE COST OF POOR QUALITY IN TRANSLATION 1 (2012) ("[P]oor translations—and poor originals for that matter—can lead to damages suffered by citizens or companies, and to legal uncertainty and court cases.").

117. *See, e.g.*, Commission Communication to Member States on the Application of State Aid Rules to Measures Taken in Relation to Financial Institutions in the Context of the Current Global Financial Crisis, 2008 O.J. C 270/8, at 8 [hereinafter Application of State Aid Rules] ("Given the scale of the crisis, now also endangering fundamentally sound banks, the high degree of integration and interdependence of European financial markets, and the drastic repercussions of the potential failure of a systemically relevant financial institution further exacerbating the crisis, the Commission recognises that Member States may consider it necessary to adopt appropriate measures to safeguard the stability of the financial system.").

number of the Member States.[118] In both cases, the EU institutions and the Member States were tempted to act quickly to restore confidence.[119] The crises were not merely European crises but required the European Union and its Member States to cooperate with other jurisdictions and international financial institutions.[120] And, in both cases, the Member States faced political pressure to focus on domestic aspects of the crisis at the same time as needing to focus on cooperation with each other.[121] Member States were pulled to act at the international level because the problem of increasing stability of the international financial markets was an international, rather than merely an EU, problem. And they were pulled toact domestically first to protect their financial institutions and then to wrestle with the problems of implementing austerity measure.[122]

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118. *See* Nicholas Dorn, *Regulatory Sloth and Activism in the Effervescence of Financial Crisis*, 33 LAW & POL'Y 428, 428 (2011) ("In 2010, it became clear that sovereign states, which had 'bailed out' the banking sector, were themselves becoming targets of a mixture of speculation and genuine fears and uncertainties over their financial health.").

119. *See, e.g.*, HOUSE OF COMMONS TREASURY COMMITTEE, THE COMMITTEE'S OPINION ON PROPOSALS FOR EUROPEAN FINANCIAL SUPERVISION, 2008–9, H.C. 1088, at 3 (U.K.) ("While the intention of the new regulations is widely welcomed, there is a great deal of unease about the detail. There is still more unease about the speed with which it is hoped to agree them; the Presidency is pressing for their adoption by ECOFIN at the Council on 2 December. We consider that is far too fast: the proposals will set in place a framework which should last for many decades, and there should be proper time for consideration.").

120. *See* FIN. STABILITY FORUM, REPORT OF THE FINANCIAL STABILITY FORUM ON ENHANCING MARKET AND INSTITUTIONAL RESILIENCE 2 (2008) ("While national authorities may continue to consider short-term policy responses should conditions warrant it, to restore confidence in the soundness of markets and institutions, it is essential that we take steps now to enhance the resilience of the global system.").

121. The United Kingdom began to consult on amending UK rules on depositor protection in October 2007 in order to encourage confidence in the safety of deposits in UK banks. *See, e.g.*, HM TREASURY ET AL., BANKING REFORM—PROTECTING DEPOSITORS: A DISCUSSION PAPER (2007); BANK OF ENGLAND ET AL., FINANCIAL STABILITY AND DEPOSITOR PROTECTION: STRENGTHENING THE FRAMEWORK, 2008, Cm. 7308 (U.K.). The Commission published a proposal to revise EU deposit guarantee rules in late 2008. *See* Commission of the European Communities, Amending Directive 94/19/EC on Deposit Guarantee Schemes as Regards the Coverage Level and the Payout Delay: Proposal for a Directive of the European Parliament and of the Council, COM (2008) 661 Final (Oct. 2008) [hereinafter Proposal Amending Directive 94/19/EC].

122. *See, e.g.*, INT'L MONETARY FUND, IMF COUNTRY REPORT NO. 11/351, GREECE: FIFTH REVIEW UNDER THE STAND-BY ARRANGEMENT, REPHASING AND REQUEST FOR WAIVERS OF NONOBSERVANCE OF PERFORMANCE CRITERIA; PRESS RELEASE ON THE EXECUTIVE BOARD DISCUSSION; AND STATEMENT BY THE EXECUTIVE DIRECTOR FOR

Whereas domestic action may be even more transparent (or at least more visible) than action at the EU level,[123] action at the international level typically involves less transparency and less effective consultation than action at the EU level.[124]

At the international level, the G20 countries agreed to implement changes to financial regulation to enhance financial stability.[125] They began by making public commitments to strengthen international cooperation with respect to financial stability and prudential regulation. They also agreed to work together in other areas, including the supervision of hedge funds and credit rating agencies. More than merely agreeing to increased cooperation, however, the G20 committed to "implement international financial standards (including the 12 key International Standards and Codes)."[126] The G20 countries

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GREECE 4 (2011) ("EU Summits in July and October took decisions on a path forward. Meanwhile, the Greek authorities had difficulties implementing the adjustment program over the summer, falling behind across a range of policies. Social resistance to the program continued to intensify as the economy weakened and opposition attacks on the program accelerated.").

123. Even governments that are committed to transparency may at times ignore normal procedures. *See, e.g.*, SELECT COMMITTEE ON THE CONSTITUTION, FAST-TRACK LEGISLATION: CONSTITUTIONAL IMPLICATIONS AND SAFEGUARDS, 2008–9, H.L. 116-I, at 7 (U.K.) (noting that "fast-track legislation has dealt with such serious issues as . . . [t]he response to the economic collapse"); *see also id.* at 8 ("To what extent are the transparency of the policy-making process within government and the parliamentary legislative process compromised when bills are fast-tracked?").

124. *See* Caroline Bradley, *Consultation and Legitimacy in Transnational Standard-Setting*, 20 MINN. J. INT'L L. 480, 486–87 (2011) ("Transnational standard-setters engage in consultation as a concession rather than as a matter of obligation: they are not required by any binding rules to carry out consultations at all or in any particular way. As a corollary of this lack of obligation, stakeholders do not have meaningful rights to be consulted."). In February 2012, the Commission responded to claims that it had not been sufficiently transparent about negotiations for an anti-counterfeiting trade agreement, explaining the steps it had taken to inform the Parliament, civil society, and stakeholders about the negotiations. *See* EUROPEAN COMM'N, MEMO/12/99, TRANSPARENCY OF ACTA NEGOTIATIONS (ANTI-COUNTERFEITING TRADE AGREEMENT) (2012).

125. The G20, rather than the International Monetary Fund ("IMF"), took the lead in responding to the crisis. *Cf.* MICHEL CAMDESSUS ET AL., REFORM OF THE INTERNATIONAL MONETARY SYSTEM: A COOPERATIVE APPROACH FOR THE TWENTY FIRST CENTURY 5 (2011), *available at* http://global-currencies.org/smi/gb/telechar/news/Rapport_Camdessus-integral.pdf ("[A]s long as problems in the international monetary system are not addressed, an increasingly integrated world economy becomes more and more vulnerable. A muddling through approach therefore is an increasingly inadequate response.").

126. GROUP OF TWENTY (G20), DECLARATION ON STRENGTHENING THE FINANCIAL SYSTEM (2009).

began to develop a more focused approach to ensuring that they would implement the agreed standards than had existed previously. The IMF and World Bank had developed a Financial Sector Assessment Program ("FSAP") with reports on standards and codes that assessed the extent to which IMF members were in compliance with agreed international standards and codes.[127] In early 2009, the G20 decided to rename the Financial Stability Forum ("FSF"), which had been established ten years earlier to address issues of financial stability, and thus the FSF became the Financial Stability Board ("FSB").[128] The FSB established a system of peer review to encourage the G20 countries to keep to their commitments to reform financial regulation.[129] The peer review system supplements the FSAP and is designed to be more coercive than the FSAP,[130] but like the FSAP it is a mechanism to encourage states to implement transnational standards of

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127. *See* Kern Alexander, *Global Financial Standard Setting, the G10 Committees, and International Economic Law*, 34 BROOK. J. INT'L L. 861, 875 (2009) ("The IMF and World Bank have also required many countries to demonstrate adherence or a realistic effort to implement the Basel Accord in order to qualify for financial assistance as part of IMF Financial Sector Assessment Programs and World Bank Financial Sector Adjustment Programs."); Duncan E. Alford, *Core Principles for Effective Banking Supervision: An Enforceable International Financial Standard?*, 28 B.C. INT'L & COMP. L. REV. 237, 273–77 (2005) (describing Financial Sector Assessment Program reviews of France and the United Kingdom).

128. *See* CHARLES GOODHART, THE BASEL COMMITTEE ON BANKING SUPERVISION 543 (2011); Enrique R. Carrasco, *The Global Financial Crisis and the Financial Stability Forum: The Awakening and Transformation of an International Body*, 19 TRANSNAT'L L. & CONTEMP. PROBS. 203 (2010); *Overview of Recent International Banking and Financial Market Developments*, BANK INT'L SETTLEMENTS Q. REV., June 1999, at 1, 4 ("The global financial turmoil of last year prompted a number of initiatives. In February, the Group of Seven industrial countries established the Financial Stability Forum to improve coordination and information exchange among the national authorities, international institutions and international regulatory or expert groupings with responsibilities for questions of international financial stability.").

129. *See* FIN. STABILITY BD., THEMATIC REVIEW ON DEPOSIT INSURANCE SYSTEMS: PEER REVIEW REPORT, at i (2012) (noting that "the [Financial Stability Board] agreed to include the *Core Principles* [for Effective Deposit Insurance Systems] in the list of key standards for sound financial systems that deserve priority implementation depending on country circumstances"); *see also* BASEL COMM. ON BANKING SUPERVISION (BCBS) & INT'L ASS'N OF DEPOSIT INSURERS, CORE PRINCIPLES FOR EFFECTIVE DEPOSIT INSURANCE SYSTEMS (2011).

130. *Cf.* Chris Brummer, *How International Financial Law Works (and How It Doesn't)*, 99 GEO. L.J. 257, 262–63 (2011) ("[I]nternational financial regulation, although formally a species of 'soft law,' is a unique species of cross-border cooperation bolstered by a variety of disciplining mechanisms that, under certain circumstances, render it more coercive than traditional theories of international law predict.").

financial regulation that are adopted without the level of disclosure and consultation characteristic of EU policymaking processes. The IMF is considering building financial stability analysis into surveillance.[131]

The European Union tried to control the Member States in their resort to domestic solutions to the financial crisis. For example, the Commission had to adapt the EU state aid rules to allow the Member States to rescue failing, and even fundamentally sound, financial institutions promptly while not undermining the state aid rules.[132] Although the Commission adopted its guidelines to allow the Member States to act to rescue financial institutions quickly, the need for rescues of financial institutions persisted through the end of 2011.[133] EU Member States were tempted to introduce their own new rules relating to financial regulation without coordinating with each other.[134] For example, the United Kingdom has been concerned about protecting its own financial institutions from competition

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131. *See* INT'L MONETARY FUND, MANAGING DIRECTOR'S STATEMENT ON STRENGTHENING SURVEILLANCE: 2011 TRIENNIAL SURVEILLANCE REVIEW (2011), *available at* http://www.imf.org/external/np/pp/eng/2011/102711.pdf. Under Article 4 of the IMF's Articles of Agreement, IMF member countries need only use best efforts to implement financial sector policies. *See* INT'L MONETARY FUND, 2011 TRIENNIAL SURVEILLANCE REVIEW—REVIEW OF THE 2007 SURVEILLANCE DECISION AND THE BROADER LEGAL FRAMEWORK FOR SURVEILLANCE 4 (2011), *available at* http://www.imf.org/external/np/pp/eng/2011/082611.pdf.

132. *See* Application of State Aid Rules, *supra* note 117, at 8. The Commission acknowledged that it would be necessary to act quickly to protect the financial markets. *Id.* at 9 ("In applying these criteria to measures taken by Member States, the Commission will proceed with the swiftness that is necessary to ensure legal certainty and to restore confidence in financial markets."); *see also* Michael Reynolds et al., *EU Competition Policy in the Financial Crisis: Extraordinary Measures*, 33 FORDHAM INT'L L.J. 1670, 1689 (2010) ("The Commission has attempted to find a middle way between states clamoring for the power to rescue their most important financial institutions and legal purists decrying an apparent chasm between the existing state aid rules and the practice of the Commission.").

133. *See* Commission Communication to Member States on the Application of State Aid Rules to Support Measures in Favor of Banks in the Context of the Financial Crisis, 2011 O.J. C 356/7, at 7 ("The exacerbation of tensions in sovereign debt markets that has taken place in 2011 has put the banking sector in the Union under increasing pressure, particularly in terms of access to term funding markets. The 'banking package' agreed by the Heads of State or Government at their meeting of 26 October 2011 aims to restore confidence in the banking sector. . . . Despite those measures, the Commission considers that the requirements for State aid to be approved pursuant to Article 107(3)(b) will continue to be fulfilled beyond the end of 2011.").

134. *See, e.g.*, *supra* note 121 and accompanying text.

from financial institutions based outside the European Union that are subject to lower levels of regulation than those that apply or are proposed in the European Union.[135] The European Union's sovereign debt crisis has increased the tensions between stronger and weaker economies inside and outside the Eurozone.

The Commission proposed significant changes to the structure of the European Union's financial regulatory system to address the financial crisis,[136] and argued that the new measures should be adopted quickly.[137] The European Union's management of financial regulation would shift from a system of advisory committees for the securities, banking and insurance sectors to a system of European authorities for the different sectors.[138] The proposed reforms of the structure envisaged more EU-level, directly applicable rules to avoid the implementation problems that result from harmonization by means of directives.[139] The new structures involve a more intense level of harmonization of financial regulation than existed

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135. *See, e.g.*, HM TREASURY ET AL., *supra* note 121, at 3 ("Supporting and promoting London, and the UK, as a centre for financial and business services remains a priority for the Government."); HM TREASURY, A NEW APPROACH TO FINANCIAL REGULATION: SECURING STABILITY, PROTECTING CONSUMERS, 2012, Cm. 8268, at 45 (U.K.) ("The Government will continue to work to ensure that there is adequate flexibility in European legislation.").

136. *See* Commission of the European Communities, European Financial Supervision: Communication from the Commission, COM (2009) 252 Final, at 3 (May 2009) [hereinafter European Financial Supervision] (proposing the establishment of a European Systemic Risk Council and "a European System of Financial Supervisors (ESFS) consisting of a robust network of national financial supervisors working in tandem with new European Supervisory Authorities to safeguard financial soundness at the level of individual financial firms and protect consumers of financial services").

137. *Id.* ("Given the urgent need for parallel action on supervision, the Commission proposed an accelerated timetable for delivering on the reform of EU financial supervision."); *cf.* HOUSE OF COMMONS TREASURY COMMITTEE, *supra* note 119, at 3.

138. *See* European Financial Supervision, *supra* note 136, at 8 ("[T]he EU cannot remain in a situation where there is no mechanism to ensure that national supervisors arrive at the best possible supervisory decisions for cross-border institutions; where there is insufficient cooperation and information exchange between national supervisory authorities; where joint action by national authorities requires a tour de force to take account of the patchwork of regulatory and supervisory requirements; where national solutions are most often the only feasible option in responding to European problems, where different interpretations of the same legal text abound.").

139. *Id.* at 3–4.

before the financial crisis.[140] Perhaps in order to encourage the Member States to accept this new level of harmonization, the Commission characterized reformed EU financial regulation as an enterprise that was not merely responding to developments at the international level but that could influence international standards.[141] The new authorities, the EBA, ESMA, and EIOPA, have been operating since the beginning of 2011.[142]

More uniform harmonization of the rules of financial regulation should enhance transparency. But a proliferation of new rules and proposed rules tends to counteract this trend: in addition to proposing changes to the structure of financial regulation in the European Union the Commission proposed many changes to the substance of financial regulation.[143] In proposing these new rules the Commission sometimes acted without respecting its normal consultation procedures.[144] New rules were adopted to regulate credit rating agencies ("CRAs") in 2009,[145] but the following summer the Commission was proposing amendments to the regulation to charge ESMA with registration and supervision of CRAs.[146] In 2010, the

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140. The Investment Managers Association told the House of Commons Treasury Committee that it was in favor of increased harmonization. *See* HOUSE OF COMMONS TREASURY COMMITTEE, *supra* note 119, at 13 ("The Investment Managers' Association welcomed the prospect of a harmonised, and possibly less intrusive, rulebook . . . In too many areas of financial markets regulation, and especially supervision, national differences remain strong beneath a veneer of European harmonisation.").

141. *See* European Financial Supervision, *supra* note 136, at 4 ("With this initiative, the EU is not just responding to its calls in the G20 framework for international action to build a stronger, more globally consistent, regulatory and supervisory system for the future financial sector, but also setting out a modern and comprehensive regional framework, whose principles should be taken up at international level.").

142. *See* Michel Barnier, *The Date of 1st January 2011 Marks a Turning Point for the European Financial Sector*, EUR. COMMISSION—MICHEL BARNIER, MEMBER OF THE EUR. COMMISSION (Jan. 1, 2011), http://ec.europa.eu/commission_2010-2014/barnier/headlines/speeches/2011/01/20110101_en.htm.

143. *See generally* EUROPEAN COMM'N, *supra* note 63.

144. *See, e.g.*, Proposal Amending Directive 94/19/EC, *supra* note 121, at 2 ("Due to the urgency of the matter, neither an impact assessment nor a public consultation could be carried out for the current proposal.").

145. *See* Council Regulation No. 1060/2009 on Credit Rating Agencies, 2009 O.J. L 302/1; Corrigendum to Regulation (EC) No 1060/2009 of the European Parliament and of the Council on Credit Rating Agencies, 2009 O.J. L 350/59.

146. *See* European Commission, Regulation of the European Parliament and of the Council on Amending Regulation (EC) No. 1060/2009 on Credit Rating Agencies: Proposal, COM (2010) 289 Final (June 2010); *see also* Council Regulation No. 513/2011

Commission consulted on other issues with respect to CRAs, including how to address over-reliance on ratings, perceived problems of sovereign credit ratings, the need to increase competition in ratings, and civil liability for ratings.[147] In late 2011, the Commission published a new proposed regulation and a new proposed directive on credit ratings.[148] Over a relatively short period the legal environment in which CRAs operated changed significantly,[149] and the European Union's rules have not yet achieved equilibrium.

During a crisis, policymakers may feel they need to suspend normal procedures of consultation and transparency, and the Commission seems to have surrendered to urgency at times in its responses to crisis, for example, in failing to translate consultation documents in the interests of speed.[150] But a commitment to transparency and consultation that withers in the face of serious crisis seems to be a weak commitment.

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amending Regulation (EC) No. 1060/2009 on Credit Rating Agencies, 2011 O.J. L 145/30.

147. *See generally* EUROPEAN COMM'N, PUBLIC CONSULTATION ON CREDIT RATING AGENCIES (2010), *available at* http://ec.europa.eu/internal_market/consultations/docs/2010/cra/cpaper_en.pdf.

148. *See* European Commission, Amending Regulation (EC) No 1060/2009 on Credit Rating Agencies: Proposal for a Regulation of the European Parliament and of the Council, COM (2011) 747 Final (Nov. 2011); European Commission, Amending Directive 2009/65/EC on the Coordination of Laws, Regulations and Administrative Provisions Relating to Undertakings of Collective Investment in Transferable Securities (UCITS) and Directive 2011/61/EU on Alternative Investment Funds Managers in Respect of the Excessive Reliance on Credit Ratings: Proposal for a Directive of the European Parliament and of the Council, COM (2011) 746 Final (Nov. 2011). Standard & Poor's stated that some of the proposed EU rules were "out of step with ratings regulation elsewhere in the world." Press Release, Standard & Poor's Ratings Services, The Role and Regulation of Ratings Agencies in Europe (Feb. 7, 2012), *available at* http://www.standardandpoors.com/about-sp/corporate-announcements/en/us.

149. The European Union has not been alone in experiencing an evolution of thinking how to regulate credit rating agencies.

150. *See, e.g.*, Draft Recommendation of the European Ombudsman, *supra* note 111, ¶ 39 ("To the extent that the Commission invokes reasons of urgency in order to support its position, the Ombudsman takes the view that such considerations cannot suffice to entitle the Commission completely to disregard the objectives of participation and transparency enshrined in TEU Article 10(3), read in conjunction with TEU Article 11(3), unless the difficulties it would have faced by giving full effect to those provisions were insurmountable. In the Ombudsman's view, it was not established that this was the case. In any event, even if this had been so, the Commission's reason for not translating anything into any language at any stage of the Consultation process is clearly disproportionate.").

Moreover, responses to crises arguably require more buy-in from citizens rather than less.[151]

III. *FINANCIAL REGULATION: TRANSPARENCY AND COMPLEXITY*

Financial regulation is particularly problematic from the perspective of transparency because of the complexity of the financial markets, of the firms that participate in those markets, and of the transactions in which they engage. Regulation of the financial markets is as intricate as the markets themselves, and the language of financial regulation is not easily accessible to nonexperts. Rules and standards of financial regulation are developed in multiple different fora (public and private) in different jurisdictions. When the European Union addresses issues of financial regulation it does so in a context where transnational networks of standard-setters interact with stakeholders based in multiple jurisdictions.[152] The European Union's mechanisms of transparency cannot achieve complete transparency with respect to financial regulation because of the multiple complexities in financial regulation and because increasing disclosures about the development of policy in the field of financial regulation tends to increase rather than reduce complexity.

In thinking about maximizing the transparency of financial regulation perhaps we should be considering whether the rules really need to be as complex as they are. For example, Andrew Haldane of the Bank of England has suggested that simple rules might be appropriate for complex activities.[153] Financial firms

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151. *See, e.g.*, B. Guy Peters et al., *Global Financial Crisis, Public Administration and Governance: Do New Problems Require New Solutions?*, 11 PUB. ORG. REV. 13, 18 (2011) ("[M]anaging a crisis also requires gaining consensus or at least acquiescence across the society and decentralization may be a useful strategy for producing that legitimacy for the proposed changes. If governments have to undertake a range of novel and perhaps extreme policy initiatives then they may be well advised to involve stakeholders and the general public to the greatest extent possible.").

152. *Cf.* HOUSE OF COMMONS TREASURY COMMITTEE, *supra* note 119, at 9 ("The European Union is not the only forum for cross-border financial policy making. The financial crisis has prompted a plethora of activity as policy makers recognise the importance of international cooperation to ensure financial stability in an environment where the degree of global financial integration has risen sharply.").

153. *See* Andrew Haldane, Exec. Dir., Fin. Stability, Bank of Eng., Remarks on Capital Discipline 3 (Jan. 9, 2011), *available at* http://www.bankofengland.co.uk/

tend to want to have rules spelled out in detail,[154] but simpler rules would have the advantage of being more consistent with ideas of better lawmaking.[155]

EU financial regulation has become more complex over time in multiple ways. The addition of a focus on systemic financial stability to the objectives of financial regulation has increased the complexity of the subject matter of EU financial regulation. The European Union has proposed and adopted new and more complex measures to deal with weaknesses in financial regulation suggested by the financial crisis. Structurally, the system of financial regulation in the European Union has seen an expansion in the number and powers of responsible authorities at the EU level. The sovereign debt crisis has revealed a complex interaction between bank regulation and confidence in sovereign debt.[156]

The regulation of CRAs provides an example of complexity in EU financial regulation. In September 2011, ESMA, which by that point was responsible for supervising CRAs, published four consultation documents on technical standards for the

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publications/speeches/2011/speech484.pdf ("As a thought experiment, imagine instead we were designing a regulatory framework from scratch. Finance is a classic complex, adaptive system. What properties would a complex, adaptive system such as finance ideally exhibit to best insure about future crises? Simplicity is one. There is a key lesson, here, from the literature on complex systems. Faced with complexity, the temptation is to seek complex control devices. In fact, complex systems typically call for simple control rules. To do otherwise simply compounds system complexity with control complexity.").

154. *Cf.* Letter from Brian R. Leach, Chief Risk Officer, Citigroup Inc., to Bd. of Governors of the Fed. Reserve Sys. et al. 2 (Feb. 13, 2012), *available at* http://www.sec.gov/comments/s7-41-11/s74111-356.pdf ("[T]he proposed rule is complex, with overlapping and imprecise compliance requirements, and does not provide sufficient clarity as to what type and level of activity is permissible, which itself may impair capital markets.").

155. *See* DIRECTORATE-GEN. FOR TRANSLATION, *supra* note 104, at 38 ("Since the Edinburgh European Council of 1992, the need for better lawmaking—that is, acts with a clearer, and simpler text complying with the principles of good legislation—has been recognised at the highest political level.").

156. *See, e.g.*, Lagarde, *supra* note 5 ("We must also break the vicious cycle of banks hurting sovereigns and sovereigns hurting banks. This works both ways. Making banks stronger, including by restoring adequate capital levels, stops banks from hurting sovereigns through higher debt or contingent liabilities. And restoring confidence in sovereign debt helps banks, which are important holders of such debt and typically benefit from explicit or implicit guarantees from sovereigns.").

regulation of CRAs.[157] The documents were published in English, comprised over 150 pages, and asked for responses just over a month after they were published.[158] The regulation that established ESMA provides:

> Before submitting them to the Commission, the Authority shall conduct open public consultations on draft regulatory technical standards and analyse the potential related costs and benefits, unless such consultations and analyses are disproportionate in relation to the scope and impact of the draft regulatory technical standards concerned or in relation to the particular urgency of the matter.[159]

The technical consultations on CRAs were relatively short, although the documents had been preceded by calls for evidence[160] or earlier consultations. ESMA received eleven responses to its call for evidence on ratings data periodic requirements,[161] and did not disclose how many responses it

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157. *See* EUROPEAN SEC. & MKTS. AUTH. (ESMA), ESMA/2011/302, CONSULTATION PAPER: REGULATORY TECHNICAL STANDARDS ON THE INFORMATION TO BE PROVIDED TO ESMA BY A CREDIT RATING AGENCY IN ITS APPLICATION FOR REGISTRATION AND CERTIFICATION AND FOR THE ASSESSMENT OF ITS SYSTEMIC IMPORTANCE (2011); EUROPEAN SEC. & MKTS. AUTH., ESMA/2011/303, CONSULTATION PAPER: REGULATORY TECHNICAL STANDARDS ON THE ASSESSMENT OF COMPLIANCE OF CREDIT RATING METHODOLOGIES WITH THE REQUIREMENTS SET OUT IN ARTICLE 8(3) OF REGULATION (EC) NO 1060/2009 (2011); EUROPEAN SEC. & MKTS. AUTH., ESMA/2011/304, CONSULTATION PAPER: ESMA'S DRAFT REGULATORY TECHNICAL STANDARDS ON THE PRESENTATION OF THE INFORMATION THAT CREDIT RATING AGENCIES SHALL DISCLOSE IN ACCORDANCE WITH ARTICLE 11(2) AND POINT 1 OF PART II OF SECTION E OF ANNEX I TO REGULATION (EC) NO 1060/2 (2011); EUROPEAN SEC. & MKTS. AUTH., ESMA/2011/305, CONSULTATION PAPER: ESMA'S DRAFT REGULATORY TECHNICAL STANDARDS ON THE CONTENT AND FORMAT OF RATINGS DATA PERIODIC REPORTING TO BE SUBMITTED FROM CREDIT RATING AGENCIES (2011).

158. *See, e.g.*, EUROPEAN SEC. & MKTS. AUTH., ESMA/2011/305, *supra* note 157, at 2 ("[The European Securities and Markets Authority ("ESMA")] will consider all comments received by the 21 October 2011.").

159. European Securities and Markets Authority Regulation, *supra* note 108, art. 10(1), at 96. Article 10(1) of the regulation also provides that "[r]egulatory technical standards shall be technical, shall not imply strategic decisions or policy choices and their content shall be delimited by the legislative acts on which they are based." *Id.*

160. *See, e.g.*, EUROPEAN SEC. & MKTS. AUTH., ESMA/2011/305, *supra* note 157, at 7 ("ESMA published a 'Call for Evidence on ratings data periodic reporting requirements' (Ref. ESMA/2011/156) on 26 May 2011. The aim of the Call for Evidence was to collect data and information for a preliminary assessment of the above-mentioned requirements from CRAs, and possibly other interested parties.").

161. *See id.* ("The Call for Evidence closed on 20 June 2011. ESMA has received 11 responses: 2 from associations of financial institutions (banks) and 9 from credit rating agencies.").

received to the Article 8(3) call for evidence.[162] ESMA's website shows that it received fewer than twenty responses from eleven organizations to all of the technical CRA consultations. The European Association of Credit Rating Agencies ("EACRA") commented:

> [G]iven that the status of registered or certified CRA is a very new one and that many stakeholders are not aware of this important regulatory change, we call on your esteemed institution to spread this information more widely, especially towards users of ratings as defined under the Regulation.[163]

Consultations on complex issues, on the basis of documents published only in English, and with a limited time frame do not really seem to be consistent with the ideas of openness and transparency in the Treaties, even if they are technically in compliance with the terms of Article 10 of the ESMA Regulation, which seems to give ESMA some scope to maneuver. The issues raised by these consultations were undoubtedly technical, and it would be rational for most citizens to ignore them. But, as EACRA noted, many users of ratings, who might be interested in the details of the rules, were likely not aware of the consultations.

On January 24, 2012, ESMA published a consultation on draft technical standards on short selling and credit default swaps.[164] This was a consultation on the development of technical standards under a regulation, which had not only not been published in the Official Journal when the consultation document appeared,[165] it was not published at the end of the consultation period, which was set for February 13, 2012. Law firms and other groups criticized the short consultation

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162. *See* EUROPEAN SEC. & MKTS. AUTH., ESMA/2011/303, *supra* note 157, at 5.

163. Letter from Thomas Missong, President, European Ass'n Credit Rating Agencies (EACRA), and Thomas Morgenstern, Secretary Gen., EACRA, to the European Securities and Market Authority (Oct. 21, 2011), *available at* http://www.esma.europa.eu/system/files/2-EACRA.pdf.

164. *See* EUROPEAN SEC. & MKTS. AUTH., ESMA/2012/30, CONSULTATION PAPER: DRAFT TECHNICAL STANDARDS ON THE REGULATION (EU) XXXX/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON SHORT SELLING AND CERTAIN ASPECTS OF CREDIT DEFAULT SWAPS (2012).

165. *See id.* at 5 (stating that the regulation was about to be published).

period.[166] A group of trade associations recently suggested that ESMA risked not complying with better regulation standards because it was being forced to work too quickly.[167]

The development of EU rules relating to CRAs[168] and other issues in financial regulation raises questions about how the Treaty principles apply and should apply to actions of these EU authorities. And transparency matters here because the details of the rules matter as well as the broad outlines that provide the context for the details.[169] Financial market participants are in a better position than consumer groups to track the development of these detailed rules, but the interests of financial market participants and consumers often diverge. More effort to try to move beyond formal transparency to more effective and visible communication would help citizens to monitor whether regulatory bodies were deferring too much to the views of financial market participants.[170]

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166. *See, e.g.*, HERBERT SMITH, THE NEW PAN-EUROPEAN REGIME FOR SHORT SELLING AND CREDIT DEFAULT SWAPS: ESMA CONSULTATION PAPER ON DRAFT TECHNICAL STANDARDS 2 (2012).

167. Letter from Ass'n for Fin. Markets in Eur. (AFME) et al. to Michel Barnier, Comm'r, European Comm'n et al. (Jan. 17, 2012) ("Legislation such as the European Market Infrastructure Regulation (EMIR) and the Regulation on CDS and Short Selling requires ESMA to adopt implementing and technical measures within very short timeframes. Such demands jeopardise the goal of drafting high quality and credible regulation. . . . In the case of the CDS and Short Selling Regulation, formal consultation by ESMA is expected to begin in January 2012, with allowance for a consultation period of only one month (possibly less), before ESMA reports to the European Commission on its recommendations for technical standards by 31 March 2012. In contrast to this three month drafting period—which we believe falls far short of the Commission's better regulation standards for the ESAs—it appears that there will then be a seven month period before the standards are finalised by the Commission.").

168. *See supra* notes 145–48 and accompanying text.

169. *See* Letter from Frederic Drevon, Managing Dir., Region Head of Eur., Middle East & Afr., Moody's Investors Serv., to Felix Flinterman, Head of Unit, Credit Rating Agencies, ESMA 1 (Oct. 21, 2011), *available at* http://www.esma.europa.eu/system/files/MIS___Response_to_Draft_RTS_Reg_Info__Final.pdf ("MIS is concerned that ESMA is inappropriately expanding the scope of the Regulation by introducing into EU law, via this RTS, a disclosure regime on ownership of CRAs that was not provided for in the Regulation.").

170. After the financial crisis policymakers questioned their earlier deference to arguments that the markets should be allowed to manage themselves. *See, e.g.*, FIN. SERVS. AUTH., THE TURNER REVIEW: A REGULATORY RESPONSE TO THE GLOBAL BANKING CRISIS 49 (2009), *available at* http://www.fsa.gov.uk/pubs/other/turner_review.pdf ("An underlying assumption of financial regulation in the US, the UK and across the world, has been that financial innovation is by definition beneficial, since market

CONCLUSION

Complete transparency is impossible to achieve. As transparency increases it produces information overload. The European Union has committed itself to transparency in the Treaties, however, so the EU institutions must work to increase citizens' ability to navigate the information that is available to them. And the EU institutions should do more to increase access to information about the development of EU policy, by implementing the EU commitment to multilingualism more effectively, and by not allowing crises and technical matters to divert them from the imperatives of transparency.

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discipline will winnow out any unnecessary or value destructive innovations. As a result, regulators have not considered it their role to judge the value of different financial products, and they have in general avoided direct product regulation, certainly in wholesale markets with sophisticated investors.").