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Secrecy Inside and Outside

EU External Relations in Focus

Deirdre Curtin
Christina Eckes

THE EU'S EXTERNAL RELATIONS

Deirdre Curtin and Christina Eckes

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Preface

Foreign affairs have always involved a degree of secrecy. The EU external action is no exception. Out of security concerns and to protect the confidentiality of international negotiations, EU foreign policy actors such as the Council and the European External Action Service manage access to information by classifying EU documents as 'secret'.

How can such classification be reconciled with the EU principles that "decisions are taken as openly as possible and as closely as possible to the citizen"? In this timely report, Professors Deirdre Curtin and Christina Eckes critically examine how this balance is determined, and the role other EU institutions, including the Courts, play on this terrain.

This study is the seventh report SIEPS publishes in the context of its research project *The EU external action and the Treaty of Lisbon*.

Eva Sjögren
Director

About the authors

Deirdre Curtin is Joint Chair of European Law and Politics at the European University Institute, Florence.

Christina Eckes is Professor in European law at the University of Amsterdam and Director of the Amsterdam Centre for European Law and Governance (ACELG).

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List of abbreviations

ACTA	Anti-Counterfeiting Trade Agreement
CSDP	Common Security and Defense Policy
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
COREPER	Committee of Permanent Representatives
CUI	Controlled Unclassified Information
EEAS	European External Action Service
EU	European Union
EUCI	European Union Classified Information
EP	European Parliament
NATO	North Atlantic Treaty Organisation
ORCON	Originator Control
PMOI	People's Mojahedin Organization of Iran
PSC	Political and Security Committee
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations

Executive summary

Foreign affairs have always, to some extent, been conducted in secret. This has occurred both in the national and in the European Union contexts. Apart from the fact that secrecy is justified with reference to a specific subject-matter, such as security, there is an additional rationale for secrecy in foreign affairs: the involvement of external actors pursuing their own agendas. Such consideration highlights the importance of maintaining confidentiality in relation to negotiation strategies, internal agreements and potential secondary motives.

In particular, in the context of national as well as EU foreign affairs, the executive enjoys a wide discretion in the way it manages preservation of secrecy and the level of openness. Such management becomes visible not only from the perspective of external actors, but also the general public. The secrecy in foreign affairs thereby is in strong contrast with the EU's fundamental principle of openness. Not only must 'every citizen' have 'the right to participate in the democratic life of the Union' but also 'decisions' require to be 'taken as openly as possible and as closely as possible to the citizen' (Article 10(3) TEU). More importantly, Regulation (EC) No 1049/2001 established a standard for right of access to all EU documents, including such documents that relate to common foreign and security policy.

In order to manage the need for secrecy in foreign affairs within the framework of the EU Access Regulation, the EU and its agencies in the realm of foreign and security policies such as the European External Action Service (EEAS), Frontex, and Europol are required to balance the overarching demands of transparency with the needs of executive secrecy in certain contexts, especially with regard to national security and international relations. Hence, in the EU's external relations, executive autonomy has manifested itself in the development of several instruments that serve to classify information as confidential thereby limiting public access.

This report focuses on managing access to information declared confidential by the institutions, organs or bodies of the EU. It zooms in on three topical and illustrative examples of how the EU's approach to classified information creates pockets of official secrets in EU foreign affairs. The three illustrative examples that have been chosen for the purpose of this exploratory report are secrecy as manifested in the rules governing the constitution of the EEAS, the adoption of EU autonomous sanctions against 'blacklisted' individuals based on information classified by the Member States, and the secrecy surrounding the negotiation of international agreements on a variety of substantive (security-related) issues.

The EEAS strives to enable the exchange of valuable and sensitive information between its diverse staff while protecting its diplomatic and intelligence services.

Nevertheless, it developed security rules in 2013, which are almost identical to those of the Council and the Commission in terms of classification of and access to documents. In contrast with the EEAS, the EU and its member states are not constrained by external actors but rather choose to keep secret the information upon which EU sanctions are based. The composite procedure requires the mutual sharing of 'relevant information' between competent domestic authorities in member states and the Council as well as the permanent CP 931 Working Party, which is responsible for preparing the list of terror suspects. Unfortunately, many details of the adoption procedures for autonomous EU sanctions remain ambiguous. This is due to several elements: the broad level of discretion enjoyed by the Council in monitoring the procedure; the use of classified and confidential information as the basis of listing; and, the difficulties related to the use of confidential information in judicial proceedings before the EU courts.[1]

International agreements pose another challenge as their adoption increasingly depends on the approval, or at least the absence, of a veto by the European Parliament. This arises by virtue of Article 281(10) TFEU which states that the European Parliament is to be 'immediately and fully informed at all stages of the (negotiating) procedure'. This entitlement includes the Parliament's right to access sensitive, or even, confidential documents. Finally, the privileged access of the Parliament has been repeatedly challenged before EU courts, for instance, by MEP Sophie In't Veld, who based her case also upon rights derived from the EU Access Regulation.

Judicial review remains the most effective mechanism for restricting unlimited secrecy in the conduct of EU foreign affairs. However, such a mechanism can be effective only where a case is actually brought before the courts. Only in these circumstances will the question of the balance between secrecy provisions and constitutional articles on openness and democracy be brought into play. It remains to be seen how the courts (and in particular the CJEU on appeal) will attempt to balance the originating provisions of the Treaty as amended by the Lisbon Treaty and the ongoing practices (and perhaps diplomatic habits) of EU institutions across a range of policy areas. It is clear that the courts, in reviewing secondary legislation for compatibility with the Treaty, do more than simply interpret the law; they fill gaps, clarify ambiguities, and decide which of the warring parties should win[2]. The rulings of the courts have important implications, not only for the individual litigants, but also for the structure and organisation of the EU institutions themselves. In conclusion, it is clear that the EU executive is not entirely 'unbound' in the area of external relations; however, clarity is required in relation to the nature of the existing controls and on how effective they are in constraining unconstitutional conduct.

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[1] EU courts refers to the CJEU and the General Court.

[2] J. Heliskoski and P. Leino (2006) 'Darkness at the Break of Noon: the Case Law on Regulation 1049/2001 on Access to Documents' 43 *Common Market Law Review* 735-781.

1 Introduction

The concept of state secrecy connotes the idea of an object, a process, or a person rendered invisible to outsiders. Outside parties are often unaware that secrets exist; 'they are in the dark about the fact that they are being kept in the dark'.[3] Secret keeping is important. It endows secrets with value. This value is based, not on the content of the secrets, but rather on the fact that others are excluded from knowing about such secrets. The act of secrecy 'gives the person enshrouded by it an exceptional position'.[4] Control over secrecy and openness thus gives power; it influences what others know and thus what they choose to do. Yet secrets are not merely invisible to outsiders, but may also be invisible to insiders or categories of insiders.[5] Secrets may be deep but they can also be shallow (or become shallow). Shallow secrets are knowable by outsiders, in particular by oversight institutions that may be in a privileged position to pursue information. The media may also be privy to such secrets.[6]

National security is widely accepted as the prime justification for employing criminal sanctions to protect official government information. It is a vague concept that goes to the fundamentals of government and concerns the security of a state and the safety of its people. Intelligence gathering and the role of intelligence agencies are also seen as a crucial part of national security. In national democracies, the executive enjoys a considerable monopoly over 'national security' secrets and the checks and balances that exist in this area are not as robust as in other areas.[7] This weakness in controls also exists in foreign or external relations, including the negotiation of international treaties. The argument is periodically made that in security and foreign policy matters, the executive is 'unbound' in the sense that it is not (and should not be) subject to democratic checks and balances, in particular, when it acts in the interests of (national) security.[8] However, it can also be shown that checks and balances of various types have in fact emerged in response to this unrestrained executive

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3 D. Pozen (2010) 'Deep Secrecy' 62 *Stanford Law Review* 257–339, at 260.

4 G. Simmel (1906) 'The Sociology of Secrecy and of Secret Societies' 11 *American Journal of Sociology* 441–98, at 464; L. Van Boven *et al.* (2013) 'Do You Wanna Know a Secret?' *New York Times*, 28 June.

5 Pozen, note 2 *supra*, 269-70.

6 K. L. Scheppele, *Legal Secrets: Equality and Efficiency in the Common Law* (University of Chicago Press, 1988).

7 See, for example, S. Schulhofer (2010) 'Secrecy and Democracy: Who Controls Information in the National Security State?' available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1661964> (last visited 7 February 2016).

8 This executive supremacy claim is prominent in much of the 'national security' literature in the United States. For one of the most forceful recent expressions of the view, see E. A. Posner and A. Vermeule, *Terror in the Balance: Security, Liberty and the Courts*, (Oxford University Press, 2007). See too, E. A. Posner and A. Vermeule, *Executive Unbound. After the Madisonian Republic,* 1st ed. (Oxford University Press, 2011).

autonomy.[9] These countervailing checks and balances over executive power include most prominently the 'right to information' of certain actors, both privileged (parliaments and courts as oversight forums) and non-privileged (the public and affected individuals, albeit within certain limits).

The Treaty of Lisbon explicitly embraces the vision of the role of the citizen as part of an overall system of representative democracy applied in the multi-level context of the European Union. One of the foundational values of the Union is the principle of openness.[10] Openness strengthens representative democracy by enabling citizens to uncover the considerations underpinning legislative and administrative action in a legal and political context where there is no full political accountability whether at the European or at the national level. Openness can also have a further catalysing function of sparking public debate outside of the administration, leading to opinion formation with substantive outcomes that cannot be foreseen/controlled by executive institutions or actors. Article 11 TEU in addition embraces, in a novel fashion, a more participatory understanding of democracy 'beyond representation'.[11] Not only must 'every citizen' have 'the right to participate in the democratic life of the Union' but also 'decisions' must 'be taken as openly as possible and as closely as possible to the citizen' (Article 10(3) TEU). In addition, certain obligations regarding openness, transparency and participation are placed on 'the institutions' (Article 11(1) to (3) TEU), exemplifying their 'democratic inspiration'.[12]

One of the most significant ways of building secrecy for governments and executive actors more generally is by internal systems of classification of documents.[13] This approach involves officially classifying information and sharing such classified information with other states and institutions at various governance levels. The rules on the classification of sensitive information at EU level – developed incrementally over time – constitute an understudied subject both in terms of the legal framework and the empirical practice. Despite the Commission's initial leading role with regard to security management of information following the Maastricht Treaty, it is the Council that has played a leading role in this regard in recent years due initially to its new competences (and those of the Member States) in the areas of the Common Foreign and Security Policy (CFSP) and Defence. In 2011, and later, the Council autonomously expanded what is now

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[9] See, J. Goldsmith, *Power and Constraint. The Accountable Presidency after 9/11,* 1st ed. (Norton, 2012).

[10] Art. 1 TEU. See further, D. Curtin and J. Mendes (2011) 'Transparence et participation: des principes démocratiques pour l'administration de l'Union Européenne' 137-138 *Revue Francaise d'Administration Publique* 101-121.

[11] A. von Bogdandy (2012) 'The European Lesson for International Democracy: The Significance of Articles 9 to 12 EU Treaty for International Organizations' 23 *European Journal of International Law* 315-334.

[12] See, Curtin and Mendes, note 8 *supra*.

[13] See further D. Curtin (2013) 'Official Secrets and the Negotiation of International Agreements: Is the EU Executive Unbound?' 50 *Common Market Law Review* 423-458.

known as the European Union Classified Information (EUCI) to cover *any* of the interests of the EU or of the Member States. The legal basis for the Council's security rules is primarily its own Rules of Procedure. These security rules also involve the application of rules – equivalent to those adopted by the Council – to a wide variety of other EU institutions and agencies. In this regard, the Council's explicit aim of introducing a comprehensive system of EUCI for the EU as a whole has largely been achieved.

The broad rationale for classification is that secrecy – at a certain level – is *necessary* to carry out a specific substantive executive policy and covers both 'deep' and 'shallow' secrets.[14] Unnecessary secrecy is part of a broader phenomenon of formally unclassified information – controlled but unclassified information (hereafter CUI) – that is nonetheless deemed secret by the government or the institution that guards it and is thus not released to the public but shared instead with other executive actors at various governance levels.[15] The underlying rationale for secrecy is generally process-based whereby the decision-making process as such is prioritised – for example, the need to keep strategic information secret while negotiating.

This report focuses on managing access to information declared confidential by the institutions, organs or bodies of the EU. It zooms in on three topical and illustrative examples of how the EU's approach to classified information creates pockets of official secrets in EU foreign affairs. It makes no claim to be an exhaustive treatment of secrecy in the external relations of the EU more generally but selects three, arguably salient, examples within this broader field that throw up difficult questions of achieving balance between the general requirements of transparency and the specific needs or wishes of executives to maintain discretion and manage information in a non-public way. The three illustrative examples that have been chosen for the purposes of this exploratory report are secrecy as manifested in the rules governing the constitution of the EEAS, the adoption of EU autonomous sanctions against 'blacklisted' individuals based on information classified by Member States, and the secrecy surrounding the negotiation of international agreements on a variety of substantive (security-related) issues. Each of the examples selected exposes different aspects of secrecy in foreign policy matters; at the same time, they exemplify the challenges posed by the EU constitutional order which requires a balancing of the overarching demand for transparency with the needs of executive secrecy in certain contexts, especially with regard to national security and international relations.

Our report is sub-divided into five parts. Section one introduces the rationale for secrecy in foreign relations and expounds the principles that govern classification

[14] See, Pozen, note 2 *supra*.

[15] See further on the different rationales for secrecy and their relationship with the exceptions to the principle of access to documents as interpreted in recent years by the Luxembourg courts: D. Curtin (2012) 'Judging EU Secrecy' 2 *Cahiers de Droit Européen* 459-490.

of information within the EU, such as the principle of originator control. It further addresses the particularity of the EU's CFSP. Section two examines secrecy within the EEAS – a highly relevant subject in the context of a European diplomatic corps. Section three focuses on a highly salient example of secrecy within CFSP, namely, restrictive measures adopted by the EU. It considers, in particular, the situation where the EU and its Member States have full control over the information on the basis of which restrictive measures are adopted. This is exemplified by the adoption of EU autonomous sanctions in reliance on information that is classified by the Member States. Section four widens the focus beyond the CFSP; it turns to secrecy with respect to the conclusion of international agreements both in the area of CFSP and other policy areas. Section five looks at certain checks and balances in the context of the adoption of international agreements, particularly in the European Parliament, and further examines decisions of the Court of Justice which have bolstered these safeguards.

2 Secrecy as managing access to information in public hands[16]

The discussion of secrecy in this paper focuses on managing access to information possessed by a public authority, i.e. institutions, organs or bodies of the EU. An important exercise of official power is deciding the rules on access to sensitive information and on the length of time for which such information can be retained. In the context of the EU and of democratic systems more generally, there is an inevitable tension between the requirement of transparency or openness and the 'need' to keep certain public matters secret.

Transparency has been a crucial aspect of the efforts of the EU to address concerns regarding its democratic legitimacy or lack thereof. Article 1 of the Treaty on the European Union refers to a vision of the Union in which 'decisions are taken as openly as possible'. The European Commission in its 2001 White Paper on European Governance also highlighted that transparency is a key principle of good governance.[17] More importantly, the year of 2001 marked an important stepping-stone for transparency by the adoption of the legal binding instrument, Regulation 1049/2001, known as the EU Access Regulation.[18] This Regulation provided for direct access by EU citizens and residents to Community documents enabling them to gain insight into and contribute to EU decision-making.[19] However, the EU's efforts to pursue openness through public access to information have been accompanied by vigorous efforts by executive institutions, especially the Council, to establish a fully-fledged practice of secrecy, specifically through rules of classified information. In the view of the Council, the establishment of EU rules on official secrets is necessary for the purpose of EU security policies and cooperation.

Traditionally, national security, the conduct of international relation, and the preservation of law and order, were considered as belonging to those areas necessitating high levels of secrecy. Gradually other less cogent reasons were given for maintaining high levels of secrecy. For example, the need for

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[16] This part draws on Curtin, note 11 *supra*, and D. Curtin (2014) 'Overseeing Secrets in the EU: A Democratic Perspective' 52 *Journal of Common Market Studies* 684-700.

[17] European Commission, *European Governance: A White Paper,* COM (2001) 428 final, OJ (2001) C 287/1, 25 July 2001, Section II.

[18] Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to documents, OJ (2001) L 145/43.

[19] A.J. Meijer, D. Curtin and M. Hillebrandt (2012) 'Open Government: Connecting Vision and Voice' 78 *International Review of Administrative Sciences* 10.

discretion in conducting certain internal processes of government in the interests of effective policies was cited as such a reason. There is no European Union equivalent of a 'national security' interest or power. Article 4(2) TEU is quite categorical that 'national security' is a competence reserved to Member States. The EU does not have its own intelligence agencies or security agencies with their own formal powers of interception and surveillance, yet some of its existing agencies (EEAS, Frontex, Europol) clearly perform security and intelligence-related tasks. Additionally, as a 'crisis' manager, in a manner that is now part of its mainstream business, the EU clearly exercises a range of classic tasks of international relations and external affairs. In addition, it has acquired new tasks in sensitive policy fields such as external security, internal security, economic and monetary governance, and banking supervision. Moreover, the diffuse and fragmented EU executive power interacts with other actors at different governance levels, for example, with regard to internal and external EU security, foreign policy and external relations, diverse EU institutions and agencies, third States, international organisations (such as NATO and the UN) and Member States (through their intelligence agencies and otherwise).

Security measures and negotiations do not automatically grant a *carte blanche* justification to EU executive institutions for nondisclosure of documents. A mere invocation of security concerns by executive institutions is not sufficient for the Court of Justice to accept restrictions on public access to documents. The Access Regulation explicitly foresees that the right of public access should apply to documents relating to the Common Foreign and Security Policy and to police and judicial cooperation in criminal matters.[20] Nevertheless, Article 4(1)(a) of the Regulation provides exceptions to public access to documents in the context of international relations and security of a 'mandatory' nature. On the basis of the wording of Article 4, distinctions are drawn between 'mandatory' and 'non-mandatory' exceptions.[21] The mandatory exception provision under Article 4(1a) implies that once the relevant circumstances to invoke the exception are established, the institution in question is not required to balance the protected

[20] Regulation (EC) 1049/2001, note 17 *supra*, preamble, para 7.

[21] Art. 4 of Regulation (EC) 1049/2001 reads:
(1) The institutions shall refuse access to a document where disclosure would undermine the protection of:
(a) The public interest as regards: Public security; Defence and military matters; International relations; The financial, monetary or economic policy of the Community of the Member States.
(b) Privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.
(2) The institutions shall refuse access to documents where disclosure would undermine the protection of: Commercial interests of natural or legal person, including intellectual property; Courts proceedings and legal advice; The purpose of inspections, investigations, and audit; unless there is an overriding public interest in disclosure.

interest against the general public interest in disclosure.[22] This is in contrast to the exceptions under Article 4(2) regarding protection of commercial interests or inspections, which require that even if it is established that a protected interest falls under the exception, the institution is nevertheless still required to balance whether the general interest in disclosure outweighs the necessity for protection.

On issues of security, Article 9 of the Access Regulation is also relevant as it specifically refers to sensitive information that protects the 'essential interests of the European Union or of one or more of its Member States in the areas… [of] public security, defence and military matters'. Article 9(3) of the Regulation provides that the originator of sensitive information may decide not to disclose the document or, alternatively, to give authorisation to include the document in the register. In the CJEU's interpretation of Article 9(3), the originator of the document is justified in refusing not only the disclosure of the document's content but also of its *very existence*.[23] The identity of the originator of the document can in fact also remain undisclosed.[24] Articles 4(1)(a) and 9(3) of the Regulation, according to their interpretation by the CJEU, provide space for the Council to exercise quite a measure of discretion as to whether a document, classified or unclassified, should be disclosed.

In many of the cases which have come before the European Court over the past decade, the Council, relying specifically on the exceptions in Article 4 of the Access Regulation, has argued that the efficiency of its decision-making procedure requires the non-disclosure of its documents.[25] It defends an instrumental understanding of transparency for democratic purposes that requires that it be 'balanced' against the interests of efficiency and security. In addition, the Council defends the preservation of what it terms a 'reasonable'

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[22] Case T-105/95 *WWF UK* v *Commission* [1997] ECR II-313, para. 58; Case T-20/99 *Denkavit Nederland* v *Commission* [2000] ECR II-3011, para. 39; Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paras 46-48, 108; Joined Cases T-110/03, T-150/03 and T-405/03 *Sison* v *Council*, [2005] ECR II–1429, paras. 51-55, 107; Case T-264/04 *WWF European Policy Programme* v *Council* [2007] ECR II-911, para. 44; Case T-300/10 *Internationaler Hilfsfonds* v *Commission* [2012] ECR II-0000, para. 124; Case T-465/09 *Jurašinović* v *Conseil* [2012] ECR II-000, paras. 47-49.

[23] Case C-266/05 P *Sison v Council*, note 21 *supra*, para. 101.

[24] Ibid., para. 102.

[25] See, for example, CaseT-376/03, *Hendrickx* v. *Council*, EU:T:2005:116; Joined Cases T-110, 150 & 405/03, *Sison I*, Case T-371/03; *Le Voci* v. *Council*, EU:T:2005:290; Case C-266/05 P *Sison v Council*, note 21 *supra*; Case T-264/04, *WWF-EPP*, ECLI:EU:T:2007:114; Joined Cases T3/00 & 337/04, *Pitsiorlas* v. *Council and ECB*, EU:T:2007:357; Joined Cases C-39 & 52/05 P, *Sweden and Turco,* ECLI:EU:C:2008:374; Case T-233/09, *Access Info Europe* v. *Council*, EU:T:2011:105; Case T-529/09, *In 't Veld* v. *Council*, EU:T:2012:215; Case T-465/09, *Jurašinovic´* v. *Council*, note 21 *supra*; Case T-63/10, *Jurašinovic´* v. *Council*, EU:T:2012:516; Case C-280/11 P, *AIE*; Case T-331/11, *Besselink*; Case C-576/12 P, *Jurašinovic´* v. *Council*, EU:C:2013:777; Case C-350/12 P, *Council v. In 't Veld*, ECLI:EU:C:2014:2039.

degree of confidentiality and autonomy to decide on the limits to secrecy.[26] Yet, the Council often invokes broad and vague reasons by which it aims to justify non-disclosure of documents (see further, the *In 't Veld* case discussed below).

[26] See Vigjilenca Abazi and Maarten Hillebrandt (2015) 'The Legal Limits to Confidential Negotiations: Recent Case Law Developments in Council Transparency: *Access Info Europe* and *in 't Veld*' 52 *Common Market Law Review* 825, 825-846, at 838-840.

3 Secrecy in foreign affairs

3.1 Rationale

Foreign affairs have always to some extent been conducted in secret. This is the case both in the national and in the European Union contexts. Apart from the fact that secrecy is justified with reference to specific subject-matter such as security, there is an additional rationale for secrecy in foreign affairs: the involvement of external actors pursuing their own interests. Such consideration highlights the importance of maintaining confidentiality in relation to negotiation strategies, internal agreements and potential secondary motives. In the EU context, this is confirmed by the Regulation on public access to documents (Access Regulation), which sets out international relations as a reason to refuse access.[27] The necessity for secrecy in the context of international relations is also acknowledged by the EU Courts.[28] At the same time, the EU does not have a general political question doctrine. Judicial review and the transparency that comes with it are not excluded simply *because* a subject matter falls within the EU's external relations.

3.2 EUCI, CUI, ORCON, and derivative classification[29]

To understand secrecy in EU external relations, one needs to understand the underlying system of classifying information. The EU protects confidential information through a classification system and accompanying rules on how to handle both EU classified information (EUCI) and information classified by Member States. With regard to both internal and external EU security, foreign policy and external relations, a multiplicity of entities officially classify information and share such classified information with one another: EU institutions and agencies, third States, international organisations (NATO and the UN) and the Member States (through their intelligence agencies and otherwise). Such entities also in one way or another restrict the circulation of what is sometimes referred to as 'CUI'. This category includes professional secrets or personal information subject to data protection rules. The entanglement of rules relating to 'official secrecy' – with rules on openness and public access to documents is further complicated by the widespread application at all levels and by virtually all actors of the principle of originator control (hereafter: ORCON). Such principle refers to the practice by which the originator of official documents, both classified and unclassified, determines who gets access after it has been shared with other actors.

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[27] Exceptions in Article 4(1) of Regulation (EC) No 1049/2001, note 17 *supra*.

[28] See e.g. Case C-350/12 P, *Council v In 't Veld*, note 23 *supra*. EU courts refers to the CJEU and the General Court.

[29] This part draws on Curtin, note 11 *supra*, and C. Eckes 'Decision-Making in the Dark? – Autonomous EU Sanctions and National Classification', in I. Cameron (ed.), *Legal Aspects of EU Sanctions* (Intersentia, 2013).

ORCON allows originating governments, agencies, or institutions to control the declassification of information (where it is classified) or the release of such information to non-governmental parties (where it is not classified). In March 2011, the Council adopted its first decision on the security rules for protecting EU classified information,[30] applying the ORCON rule to all EUCI.[31] The current security rules on EUCI, which repealed and replaced the 2011 rules, were adopted in September 2013.[32] They provide for the continued application of the ORCON principle to all EUCI.[33] The Member States meeting within the Council (but not acting as the Council) further adopted, in 2011, an agreement on 'the protection of classified information exchanged in the interests of the European Union', in which the Member States agreed to apply the ORCON principle.[34] The application of this principle precludes the ability of actors who process information belonging to others to make their own judgments on the wisdom of releasing such information. The requirement to consult the author (the originator) before granting public access to or declassifying the information is deeply embedded within the Council's rules and has, furthermore, since 2001, also featured in several places in the access to documents legislation.[35]

Similarly ingrained in the EU's classification rules is the principle of derivative classification. This principle stipulates that a person who, in classifying a new document, incorporates into it parts of an old classified document must generally classify the new document at the highest level revealed by the combined documents, irrespective of whether the information re-used actually justifies that. Both these practices can lead to over-classification, which results essentially in unnecessary classification or unnecessarily high classification, adding to an accumulated culture of secrecy within a bureaucracy.[36]

The main pitfalls of the system of information sharing of classified information in the EU context can be summarised in a number of points. First of all, information sharing and exchange can go as far only as Member States allow

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[30] Council Decision of 31 March 2011 on the security rules for protecting EU classified information, OJ (2001) L 141/17.

[31] See Article 3(2) on downgrading or declassifying of EUCI; see Article 12(4) on exchange of EUCI with third states or international organisations. Compare also Article 3(2) of Annex A, Principles and Standards for Protecting EUCI, attached to the High Representative's Decision of 19 April 2013 on the security rules for the European External Action Service, OJ (2013) C 190/1.

[32] Council Decision of 23 September 2013 on the security rules for protecting EU classified information, OJ (2013) L 274/1.

[33] E.g. ibid., Art 3(2).

[34] Agreement between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union, OJ (2011) C 202/5. See in particular Article 4.

[35] See, Article 4(4) and Article 9(3) of Regulation No 1049/2001, note 17 *supra*.

[36] The statistics made available at the EU level tend to be limited to those produced by the Council in its annual reports on access to its information. See most recently, Annual Report 2014 available at <http://www.consilium.europa.eu/en/documents-publications/publications/2015/council-annual-report-access-documents-2014/> (last visited 7 February 2016).

it to go. Institutions and agencies, as well as the EEAS, have limited powers to make Member States, as well as other actors, share either their information or their experience of difficulties in obtaining information.[37] Secondly, in many cases, sensitive information cannot be shared among institutions or agencies. Member States or other actors, both national and international, remain 'owners' of the information and it is only with the permission of the originator that this information can be shared. Classification and declassification are the monopoly of the respective institutions and bodies. Until very recently, there was no procedure – or practice – of declassification. In 2011, the Council issued guidelines[38] on the issue and the first declassification decisions are now emerging. Information is shared among many sources (national and supranational; internal and external; private and public) and the information thus shared tends to be a commingling of both internal and external security aspects. Pertinent questions arising, such as the nature of the information being used and the manner in which it is being utilised, are not at all straightforward and may serve a variety of purposes, ranging from priority-setting and policy-making to actual operational implementation. There is a certain level of impairment in the operational function of information, caused by the fragmentary nature of the information being sourced. Ultimately, this makes it impossible to independently verify the reliability of such information. The problem is compounded at EU level, arising from the combination of the issue of security and the classification rules which are regulated purely at the level of the internal organisation of individual institutions.

The absence of independent checks or oversight of a growing body of 'secret' information is highly problematic at EU level, given the growing scope for secrecy and the likelihood of over-classification that necessarily flows from the use of secrecy and the principles of originator control and derivative classification.[39] The fact that a specific inter-institutional agreement has now been negotiated between the European Parliament (EP) and the EEAS enables the EEAS to give the EP access to classified information and presumably to provide a measure of oversight in this regard. In effect, this is part of a wider strategy engaging the European Parliament as a security actor alongside other

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[37] See also, House of Lords, European Union Committee, 'Europol: Coordinating the Fight Against Serious and Organised Crime', 29th Report of Session 2007-08, Report with Evidence, published 12 November 2008; M. Busuioc, D. Curtin and M. Groenleer (2011) 'Agency Growth Between Autonomy and Accountability: the European Police Office as a 'Living Institution" 18 *Journal of European Public Policy* 848-867; and M. Busuioc, M. Groenleer and J. Trondal (eds.), *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-making* (Manchester University Press, 2012).

[38] Guidelines on downgrading and declassifying Council documents, as approved by the Council Security Committee on 22 September 2011, available at: http://data.consilium.europa.eu/doc/document/ST-14845-2011-INIT/en/pdf (last visited 7 February 2016).

[39] See also D. Curtin, 'Top Secret Europe,' inaugural lecture, University of Amsterdam, 2011, that attempts to launch a broader debate. available at <http://oratiereeks.nl/upload/pdf/PDF-5066weboratie_Curtin.pdf> (last visited 7 February 2016).

EU security actors,[40] but it does reduce the ability of the EP to perform its public accountability function fully and publicly. It can however also be viewed as the first stage in a process of engagement by a wide variety of EU actors (including the European Central Bank and the EEAS and others) in sharing information with a supranational parliamentary organ (the European Parliament) thereby reinforcing the apparatus of checks and balances at supranational level.

3.3 How special is CFSP?[41]

The EU's CFSP has developed over the past twenty-odd years since it was formally introduced by the Treaty of Maastricht in 1993. The creation of CFSP was motivated by a realisation that the existing institutions and procedures for political and military cooperation were inadequate for reaching a common European position on international issues. The goal was to set up a framework for allowing the Union 'assert its identity on the international scene'[42] without 'prejudice [to] the specific character of the security and defence policy of certain Member States'.[43] It is hence aimed at ensuring a 'position of the EU' that can combine the political clout of the Member States. Referring to CFSP as *a policy* may be misleading; it covers a wide array of policies, ranging from civil and military missions aimed at preserving peace and strengthening security to diplomatic efforts to ensure international cooperation on issues such as nuclear proliferation and climate change. CFSP instruments (or policies) with the greatest legal bite are the EU's sanctions policies (see below).

CFSP is part of EU external relations but remains in many ways special. It is subject to special procedures, which limit the role of the Commission and the Parliament, and exclude, with limited exceptions, the Court's jurisdiction. The Parliament is kept informed of its activities but does not have a formal decision-making role. Formally, the Commission has only a limited role, e.g. it lacks a function as a watchdog of Member States' compliance. Yet in its limited role, it is involved at all levels of decision-making. At the highest level, this involvement manifests itself by its engagement with the High Representative[44] and, at another level, it extends to participation in the working groups and committees, including the EPC. The Council is consequently the main decision-making institution under the CFSP. This gives the Member States and their representatives a more dominant position than in other policy areas. Member States are also the main providers and processors of information.

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[40] See the view of D. Galloway (2014) 'Classifying Secrets in the EU' 52 *Journal of Common Market Studies* 668–683, at 679-81. See, however, Curtin, note 14 *supra*.

[41] This part draws on C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford University Press, 2009) and C. Eckes (2015) 'The Common Foreign and Security Policy and other EU policies: A Difference in Nature?' 20 *European Foreign Affairs Review* 535-552.

[42] Ex-Article 2 TEU [Nice version].

[43] Ex-Article 17(1) TEU [Nice version].

[44] E.g. Article 30 TEU.

A game changer in this regard is the establishment of the EEAS, one of whose main tasks is to serve as a hub for policy coordination and information evaluation and sharing. The EEAS is – despite the fact that one-third of its staff is seconded from the Member States' diplomatic service – a true EU body, receiving and processing information related to CFSP. The remaining two-thirds of the staff are EU officials from the Commission and from the Council's General Secretariat.

The EU applies its described classification system across the broad spectrum of all its activities with no special mention or position given to the CFSP. Yet CFSP is an area where considerations pertaining to the security of the Union and its Member States are particularly cogent. These considerations may justify the concealment of certain information or even of its very existence from the public. Indeed, the largest share of classified information relates to the EU's CFSP. It concerns for example EU positions on and approaches to the political situations in third countries[45] or specific aspects of the EU's counter-terrorist strategies, such as necessary changes to the listing procedure.[46]

[45] E.g. concerning the Russo-Georgian war in 2008: a joint EU Special Representative/Secretariat/Commission non-paper containing concrete proposals for an enhanced EU role in the conflict resolution efforts (coreu message CFSP/SEC/1433/08 – EU RESTRICTED); Georgia Monthly Bulletin of 7 July 2008 (EU CONFIDENTIAL), issued by the Situation Centre (SitCen); EU Watchlist of 16 July 2008 (EU CONFIDENTIAL), issued by the Intelligence Directorate (IntDir); Georgia Monthly Bulletin of 4 August 2008 (EU CONFIDENTIAL), issued by SitCen; demarche by the local Presidency in Moscow on 15 July 2008 at the Russian Ministry of Foreign Affairs (coreu message CFSP/PRES/PAR/0325/08 of 17 July 2008 – EU RESTRICTED); demarche by the local Presidency in Tbilissi on 17 July 2008 at the Georgian Ministry of Foreign Affairs (coreu message CFSP/PRES/PAR/0329/08 of 17 July 2008 – EU RESTRICTED).

[46] Fight against the Financing of Terrorism of 21 June 2007 (Council document 10826/07 – EU RESTRICTED).

4 European External Action Service

The EEAS may be seen as the European Union's diplomatic service. It helps the EU's foreign affairs chief – the High Representative for Foreign Affairs and Security Policy – carry out the Union's Common Foreign and Security Policy. On 15 June 2011, the EEAS formally adopted its own security rules[47], as explicitly envisaged by Article 10(1) of the EEAS Decision.[48] The decision of the High Representative lays down rules for the safety and security of the EEAS and establishes the general regulatory framework for effectively managing the risks to staff, physical assets and information, and for fulfilling its duty of care. The EEAS security rules exemplify the nature of the EEAS as a central policy hub that offers a point of contact and channel for coordination and cooperation between national and EU actors, rather than as a purely autonomous EU agency or body. As mentioned above, the EEAS comprises Commission and Council officials as well as a meaningful presence of nationals from all member states. It aims to offer an environment in which national diplomatic and intelligence services are willing to share and exchange valuable and sensitive information. The 2011 rules did not, however, cover 'the protection of classified information'. It took two years before the High Representative, in 2013, adopted new security rules[49] repealing the 2011 rules and specifically aiming to protect classified information. The 2013 EEAS security rules on the protection of classified information are *equivalent* to the rules adopted by the Council and the Commission as is evident from Recital 5 of the 2013 decision. None of these rules makes a distinction between CFSP and other policy areas.

The 2013 security rules of the Council[50] also reflect the emphasis on the equivalence between its standards and those of the EEAS: Recital 4 states that the Council, the Commission *and the EEAS* are committed to applying equivalent security standards for protecting EUCI. In addition, a new provision was inserted into the Council's rules – Article 12 and the corresponding Recital 6 – establishing a framework for the Council and stipulating the conditions for sharing EUCI with other Union institutions, bodies, offices and agencies (the EEAS being one such body). Article 12(2) provides that '[a]ny

[47] Decision of the High Representative of the Union for Foreign Affairs and Security Policy of 15 June 2011 on the security rules for the European External Action Service, OJ (2011) C 304/7 (hereinafter: EEAS security rules).

[48] Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service, OJ (2010) L 201/30.

[49] Decision of the High Representative of the Union for Foreign Affairs and Security Policy of 19 April 2013 on the security rules for the European External Action Service, OJ (2013) C 190/1.

[50] Council Decision of 23 September 2013, note 31 *supra*.

such framework shall ensure that EUCI is given protection appropriate to its classification level and according to basic principles and minimum standards which shall be equivalent to those laid down in this Decision'.

Indeed, the 2013 EEAS security rules seem to be modelled after those of the Council – with exactly the same sequence and subject-matter of annexes, detailing the various aspects of EUCI protection. However, one notable difference between the Council and EEAS rules is the statement in Recital 6 of the latter that 'this Decision is taken without prejudice to Articles 15 and 16 of the Treaty on the Functioning of the European Union (TFEU) and to instruments implementing them'. Thus, there seems to be a more pronounced concern for balancing secrecy with openness and the protection of personal data in the EEAS than in the Council rules which do not make any reference to those provisions of the Treaties.

The Council's new rules make a single reference to CFSP in the context of releasing EUCI and a single reference to the specific context of 'security of information agreements' with third countries.[51] The first provision invests the Political and Security Committee (PSC) with responsibility for formulating a recommendation to the Committee of Permanent Representatives (Coreper) on the release of CFSP/CSDP information where such a release is not recommended by the Security Committee. For non-CFSP information ('all other matters') the Coreper makes a decision without a recommendation by the PSC. The second provision allows the Council to authorise the High Representative, in compliance with the ORCON principle, to release to a third state or international organisation with whom such an agreement has been concluded, EUCI originating in the Council in relation to CFSP. It also states specifically that the High Representative may delegate such authorisation to senior EEAS officials or to EU Special Representatives.

The Commission, the Council and the EEAS hence apply equivalent rules to EUCI, with few procedural differences in the area of CFSP and in other matters. The 2013 EEAS security rules make an explicit reference to the Treaty provisions on openness and the protection of personal data, which do not find a parallel in the equivalent 2013 security rules of the Council.

[51] Ibid., Annex VI - exchange of classified information with third states and international organisations, para. 34 and para. 38.

5 EU autonomous sanctions based on secret national information[52]

Restrictive measures, i.e. sanctions, targeting natural and legal persons, are the strong suit of the EU's CFSP. At present, the EU presides over 38 sanctions regimes, about half of which are autonomous sanctions regimes for which the EU itself designates the targets.[53] All but one of the EU's autonomous sanctions regimes are geographically defined. One such regime targets terrorist suspects irrespective of their origin.[54] Sanctions are central to the question of secrecy in the area of CFSP. On 25 February 2016, 278 cases concerning restrictive measures (both autonomous and UN based regimes) were closed by the EU Courts. Of these cases, 51 concerned a particularly controversial terrorist regime. Another 89 cases are pending before the EU Courts. All these cases raise issues of access to information, both by applicants and the judiciary.[55] The present discussion will focus on EU autonomous sanctions regimes as, in this matter, the EU institutions and the Member States, in principle, possess all the relevant information. Secrecy is hence *a choice* of the EU and its Member States in the context of autonomous sanctions and does not depend on the decision of external actors such as third countries or the UN sanctions committees.

5.1 Autonomous EU sanctions procedure

The targeted individuals under autonomous EU sanctions regimes are listed pursuant to a composite procedure.[56] The composite listing procedure takes place in three phases. First, a 'competent national authority' takes a 'decision'.[57] Second, the Council adopts a CFSP decision (referred to as a common position pre-Lisbon) listing an individual or organisation as a terrorist suspect based on the 'precise information or material in the relevant file', indicating that a

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[52] This section draws on Eckes, note 28 *supra*, 177-198.

[53] http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf (visited on 25 February 2016).

[54] See for more detail on the procedural differences and similarities: C. Eckes (2014) 'EU Restrictive Measures Against Natural and Legal Persons: From Counterterrorist to Third Country Sanctions' 51 *Common Market Law Review* 869-906.

[55] Ibid.

[56] For counter-terrorist measures, this procedure is e.g. set out in Article 1(4) of Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, OJ (2001) L 344/93. The most recent list was adopted in: Council Decision 2011/872/CFSP, OJ (2011) L 343/54.

[57] See for counter-terrorist sanctions: Article 1(4) of Common Position 2001/931/CFSP, ibid.

decision has been taken in the national context.[58] Third, the assets of those listed are actually frozen in a directly applicable regulation implementing the CFSP decision.

Lists of terrorist suspects are prepared and maintained in a permanent CP 931 Working Party.[59] After a specific name is proposed, the representatives of the Member States have two weeks to consult other governmental officials. Pursuant to its mandate, the permanent CP 931 Working Party has charge of (i) examining and evaluating information with a view to listing; (ii) assessing whether the information meets 'the criteria in Common Position 2001/931/CFSP and in the Council's statement agreed when the Common Position was adopted'; (iii) preparing the regular review; and (iv) making recommendations for listings and de-listings.[60] Any listing is finally agreed in a unanimous decision of the Council, usually – where there are no objections – in a written procedure (A-point).

The procedure, as it is set out in Common Position 2001/931 and in the working methods of the CP 931 Working Party, appears to require that Member States share the relevant information with the Council and the permanent CP 931 Working Party. 'Relevant information' refers to the facts and the national law that, in the view of the competent national authority, justifies a listing in the EU context. However, the specific level of scrutiny that the Council and its CP 931 Working Party exercise over the listing proposed by a Member State remains ambiguous. Many details of the adoption procedures governing autonomous EU sanctions, including the precise listing requirements, remain blurry. This is due to several factors. First, the formulation of Common Position 2001/931 is vague and requires further specification. Second, national judicial systems differ considerably and deal very differently with terrorist suspects. Third, the CJEU has not had the opportunity to specify the sanctioning criteria.[61]

Certain clarification can be found in the EU Sanctions Guidelines, which have been amended several times since their adoption in 2003.[62] A recent change relates to the involvement of the EEAS. With regard to autonomous sanctions, the 2012 Guidelines stipulate that the EEAS 'should have a key role in the preparation and review of sanctions regimes as well as in the communication and outreach activities accompanying the sanctions, in close cooperation with Member States, relevant EU delegations and the Commission.'[63] The 2012

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[58] See Case T-49/07 *Sofiane Fahas v Council of the European Union* [2010] ECR II-05555, para. 81.

[59] Council Document 10826/07, note 45 *supra*, Annex II. Until the establishment of the permanent working party in 2007, the listings were prepared in an ad hoc forum.

[60] See the Working Party's mandate in ibid., Annex I, 4.

[61] Eckes, note 53 *supra.*

[62] The first version of the EU Sanctions Guidelines was adopted by the Council on 8 December 2003 (doc. 15579/03); updated versions were agreed on 1 December 2005 (doc. 15114/05) and on 22 December 2009 (doc. 17464/09).

[63] Ibid., Annex I Recommendations for working methods for EU autonomous sanctions.

Guidelines further underline the importance of 'regular review [of all sanctions] in order to assess the efficiency of the adopted restrictive measures with regard to the *objectives stated*'.[64] The review is conducted by the relevant Council working parties and committees, on the basis of – where relevant – EU Heads of Mission reports.[65] Heads of Missions are particularly relevant in the context of third country sanctions. They may, for instance, help to ensure unambiguous identification of the targeted persons[66] and are often invited to 'provide, where appropriate, their advice on proposals for restrictive measures or additional designations'.[67] The strong involvement of the EEAS underlines the CFSP nature of sanctions.

5.2 Level of scrutiny

The role of the Council in freezing funds requires to be considered. According to the CJEU, '[t]he Council enjoys broad discretion with regard to the matters to be taken into consideration for the purpose of adopting or of maintaining in force a measure freezing funds.'[68] This extends in particular to the question of assessing 'the considerations of appropriateness on which such decisions are based'.[69] The 'competent national authority' that takes the decision to impose sanctions, is in principle functioning as an authority *equivalent to a judicial authority*.[70] In practice, however, the competent national authorities appear to be mostly part of the executive branch.[71] While display of a certain level of deference could be justified with regard to the former, this would seem less justified with regard to the latter.

The Council must first verify that a decision has been taken by a national authority for the adoption of the initial decision to freeze funds. After the initial sanctioning decision, the Council must ensure, at least every six months, that there are sufficient grounds for keeping the blacklisted organisation on the list.[72] Both the General Court[73] and the Court of Justice[74] have further ruled that there

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64 Ibid., II.A.6 (emphasis added).

65 Ibid.

66 Ibid., II.D.22.

67 Ibid., Annex I Recommendations for working methods for EU autonomous sanctions, para. 3.

68 Case T-49/141 *Fahas*, note 57 *supra*, para. 57, referring also to Case T-228/02 *People's Mojahedin Organization of Iran v Council* (OMPI/PMOI I) [2006] ECR II-4665, para. 159, and Case T-341/07 *Jose Maria Sison v Council* [2009] ECR II-3625, paras. 65 and 66.

69 See Case T-49/07 *Sofiane Fahas*, note 57 *supra*, para. 83.

70 Ibid.

71 E.g. for Somalia: Annex II to Council Regulation 356/2010, OJ (2010) L 105/1. See also, C. Eckes and J. Mendes (2011) 'The Right to Be Heard in Composite Administrative Procedures: Lost in Between Protection?' 36 *European Law Review* 651-670.

72 See Case T-49/07 *Sofiane Fahas*, note 57 *supra*, para. 81. See also Art. 1 (4) and (5) of Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, [2001] OJ L 344/70.

73 Eckes and Mendes, note 70 *supra*.

74 Case C-27/09 P *France v People's Mojahedin Organization of Iran* (OMPI/PMOI)[2011] ECR I-13427, para. 63.

is a distinction between the *initial* listing decision and *subsequent* listing decisions as concerns the Council's engagement with the underlying information. In the *Sison* case, the General Court also explicitly stated that 'a decision to prosecute may end in the abandoning of the prosecution or in acquittal in the criminal proceedings. It would be unacceptable for the Council not to take account of such matters, which form part of the body of information having to be taken into account in order to assess the situation (...). To decide otherwise would be tantamount to giving the Council and the Member States the excessive power to freeze a person's funds indefinitely, beyond review by any court and whatever the result of any judicial proceedings taken'[75]. This *obiter* illustrates that there is an obligation on the Council to monitor development of the substantive allegations beyond the existence of a mere *prima facie* case. The Council must consequently, following the initial decision, be in possession of certain information supporting that decision or of information on follow up developments.

However, irrespective of the level of actual scrutiny that the Council exercises, it needs to possess the relevant information simply because, in the event of a legal challenge, both the General Court[76] and the Court of Justice[77] will require the Council to submit the relevant information to them. Neither court accepts the legality of listing decisions based on information that cannot be shared with the judiciary. There are a large number of judicial challenges pending and, in order to avoid annulment of its decisions, the Council must be in the position to submit the relevant information to the Courts.

5.3 Classified information

Classified information regularly plays a role in the decision to impose autonomous sanctions. In the appeal of *France v PMOI*, the PMOI was the subject of a subsequent listing, after a national quasi-judicial body had annulled the reason for the initial listing.[78] Yet, the new information on which the subsequent listing was based was not communicated to the applicant before the listing or even at the time of the legal challenge. The Council informed the Court that 'it was unable to produce, at that stage, certain further documents setting out the proposed new basis for listing PMOI and explaining the reasons for its proposal, since these were *classified as confidential by the French Republic and could not be made available* at the time the response was submitted'.[79]

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[75] Case T-341/07 *Jose Maria Sison*, note 67 *supra*, para. 116. See for similar reasoning: Case T-348/07 *Al Aqsa v Council* [2010] ECR II-04575, para. 168; Case T-49/07 *Sofiane Fahas*, note 57 *supra*, para. 81.

[76] Case T-284/08 *People's Mojahedin Organization of Iran v Council* (OMPI/PMOI III) [2008] ECR II-3487, para. 71-73.

[77] Case C-27/09 P *France v OMPI/PMOI*, note 73 *supra*.

[78] Ibid.

[79] Ibid, para. 42.

The Council hence refused to submit documents to the Court on the grounds simpliciter that they were classified as confidential. It did not make an assessment of the need for confidentiality itself. In this regard, in the first instance, the General Court had made clear that 'the Council's contention that it [was] bound by the French authorities' claim for confidentiality […] [did] not explain why the production of the relevant information or material in the file to the Court would violate the principle of confidentiality, whereas their production to the members of the Council, and thus to the governments of the 26 other Member States, [would] not.'[80] This is in line with the General Court's basic position that 'the Council is not entitled to base its funds-freezing decision on information or material in the file communicated by a Member State, if the said Member State is not willing to authorise its communication to the Community judicature whose task is to review the lawfulness of that decision'.[81]

5.4 Who decides what is confidential?

The core problem with respect to the adoption procedure for imposing autonomous EU sanctions is the use of confidential information. This raises the question as to who should decide what information is to be considered confidential. Does the ORCON principle apply? As was explained above, the concept of originator control is well entrenched in the handling and sharing of sensitive information. This is highly relevant in the case of autonomous EU sanctions, given that, as we have already seen, all relevant information that leads to a listing in the EU context emanates from national authorities. ORCON also means that where the information has been classified in accordance with national procedures, it cannot be reclassified or declassified by the EU, unless the originator consents. Further, information provided by a Member State cannot be passed on to any other institution or body without the consent of that Member State. Ultimately, where it is decided that ORCON should apply, national control over shared information is nearly absolute. Particularly, there is no requirement for the designating Member State to justify on the merits its choice to classify, or refuse to declassify, or to consent to the release, of information, which it has provided to the Council.

Neither the 2013 Council decision on EUCI, nor the 2013 EEAS security rules specifically mentions either the Access Regulation or court proceedings.[82]

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[80] Case T-284/08 *People's Mojahedin Organization of Iran v Council* (OMPI/PMOI III), note 75 *supra*, para. 72. See also AG Sharpston, Opinion in C-27/09 P *France v OMPI/PMOI*, note 73 *supra,* para. 72: 'As regards the Council's contention that it is bound by the French authorities' claim for confidentiality, this does not explain why the production of the relevant information or material in the file to the Court would violate the principle of confidentiality, whereas their production to the members of the Council, and thus to the governments of the 26 other Member States, did not.'

[81] Case T-284/08 *People's Mojahedin Organization of Iran v Council* (OMPI/PMOI III), note 75 *supra*, para. 73.

[82] The 2011 Council decision, note 29 *supra,* on EUCI, used to explicitly state that it complies with existing transparency rules.

Yet, they should be interpreted as being subject to the EU's rules on access to documents, which include ORCON as an established principle. The Access Regulation for example sets out in Article 4(4) that the EU institutions are required to consult the third party from which a document originates 'with a view to assessing whether an exception […] is applicable, unless it is clear that the document shall or shall not be disclosed.' Article 9(3) stipulates that '[s]ensitive documents shall be recorded in the register or released only with the consent of the originator'. Both provisions reflect the ORCON principle without specifically mentioning it.

Furthermore, Article 4(5) of the Access Regulation stipulates that '[a] Member State may request the institution not to disclose a document originating from that Member State without its prior agreement'. National classification may be seen as an automatic 'request'. However, the Court of Justice interpreted Article 4(5) as *not* giving Member States 'a general and unconditional right of veto, so that it can oppose, in an entirely discretionary manner and without having to give reasons for its decision, the disclosure of any document held by a [Union] institution simply because it originates from that Member State'. Such an interpretation, it ventured, 'would not be compatible with the objectives […]' of the Regulation.[83] Hence, pursuant to the case law of the EU Courts, ORCON does not stand in the way of disclosure to the judiciary. The Court made clear that Member States could oppose disclosure only where this would be possible within the framework of the exceptions set out in Article 4(1) to (3) of Regulation 1049/2001.[84] This does not – at least not directly – answer the question of who should be in charge of taking the final decision as to whether or not a document can be released. However, it does place the decision firmly within the EU law context and does not grant a general exception for information classified under national law.

The exceptions under the Access Regulation may require an assessment of the interests of the Member States (as distinguished from the interest of the Union). In particular, Article 4(1)(a) refers to '[…] the protection of the public interest as regards public security, defence and military matters [and] international relations […] *of a Member State*'. Member States have a broad discretion in determining their interest within the meaning of this exception under EU law. Yet, any decision to conceal information based on any of the exceptions in Article 4 necessarily falls within the jurisdiction and control of the Court of Justice. This, of course, necessarily implies disclosure to the Court.

5.5 Information in judicial proceedings

In principle, Member States are under an obligation to cooperate and provide relevant information supporting listing under the autonomous sanctions

[83] Case C-64/05 P *Sweden v Commission* [2007] ECR I-11389, para. 58.
[84] Regulation (EC) No 1049/2001, note 17 *supra*.

regimes.[85] They are equally obliged to keep the Council and each other informed about developments in cases that are already listed by the EU. The Council depends on the willingness of the competent national authorities to submit their decisions and the relevant information. Excluding sensitive information would in many cases make it impossible for the Council to make an informed decision about the listing or to avoid annulment by the EU Courts.

At the same time, in practice, a certain level of secrecy has to be guaranteed in the EU context to ensure cooperation by the Member States.[86] In the context of sanctions, this includes, in particular, guaranteeing confidentiality of information shared with the EU Courts. Indeed, as the final assessment of the legality of both the sanctioning decision and any decision denying access to information lies with the EU judiciary, this necessarily requires that the court have access to the relevant information, including confidential information.

At present, the General Court's rules of procedure provide that relevant information must be disclosed to the other party and that the Court will consider only information available to both sides.[87] The current rules of procedure of the Court of Justice address only the issue of confidential information with regard to interveners to the proceedings, from whom information may be kept in certain circumstances.[88] The General Court has recently revised its rules of procedure,[89] aiming *inter alia* to improve 'the procedural treatment of confidential information or material pertaining to the security of the Union or of its Member States or to the conduct of their international relations'.[90] Triggered in particular by the procedural difficulties of dealing with confidential information in sanctions cases,[91] such revision has introduced into the General Court's rules of procedure an entirely new chapter on the specific treatment of

[85] See Article 4 Common Position 2001/931/CFSP, note 55 *supra*, and Article 8 Council Regulation (EC) No 2580/2001, note 71 *supra*.

[86] The case of Europol demonstrates that the concern that information is *officially* passed on against the will of the providing Member State is not the only obstacle to information sharing but that a general lack of trust lies at the core. See: House of Lords, European Union Committee, note 36 *supra*, foreword (summarising paras. 49 et seq).

[87] See Art. 67 para 3 of the Consolidated version of the Rules of Procedure of the General Court of 2 May 1991, OJ C 177/37.

[88] Art. 131 of the Rules of Procedure of the Court of Justice of 29 September 2012, OJ L 265/1.

[89] The draft rules of procedure of the General Court were submitted to the Council in March 2014, see document 7795/14, COUR 12, INST 157, JUR 164 [for the revision procedure, see Articles 253(6) and 254(5) TFEU].

[90] Ibid, see in particular the fifth objective, Chapter 6, Section 3 and Chapter 7. The draft rules were discussed in the meeting of the Security Committee of the Council on 23 September 2014 (see provisional agenda, pt 7); in the Working party on the Court of Justice on 10 October 2014 (provisional agenda, pt 2).

[91] The introduction to Chapter 7 specifically refers to restrictive measures, even if Article 105 is phrased in general terms and could be applied to other security matters.

highly sensitive information.[92] Under the new rules, it is for the General Court to decide whether the confidentially submitted information is *relevant* to the case and whether it is indeed *confidential* in nature. If both these criteria are fulfilled, the General Court will depart from the adversarial principle and communicate only a non-confidential version to the other party.[93] If the Court considers the information relevant but is not convinced as to its confidential nature, the party that submitted the information may choose to have the information disregarded in the proceedings rather than have it communicated to the other party.[94] Hence, the party that has submitted the information remains in the position to object to its communication to the other party even where the General Court has concluded that there were no overriding reasons justifying secrecy.

The General Court's new rules of procedure do not specifically refer to classified information; similarly, they do not set out special rules for CFSP. Hence, they apply to all TFEU policies and to the CFSP. Moreover, the Court independently assesses whether the information should be treated as confidential, based on overriding considerations pertaining to the security of the Union or its Member States. This means that unclassified information can be considered confidential (and will hence not be communicated to the other party), but, more importantly, it means that neither classification by the Union nor by the national authorities will predetermine the Court's decision.

[92] Chapter 7 (Article 105) on 'Information or materials pertaining to the security of the Union or of its Member States or to the conduct of their international relations'; see also new Art. 103-104 on treatment of confidential information, items and documents produced in the context of measures of inquiry.

[93] See for details Article 105(5) and (6) of the draft rules, note 89 *supra*.

[94] Ibid., Art. 105(4) of the draft rules.

6 Secrecy surrounding the negotiation of international agreements[95]

As explained above, secrecy in foreign affairs may be necessary because of the subject-matter triggering the secrecy, e.g. where counter-terrorist policies are concerned; however, such secrecy may also be justified because the law-making was internationalised and involved third countries, whose interests differed from those of the EU, and with whom the EU required a separate negotiation.

6.1 Internationalised law-making and the extended involvement of parliament

It has become a commonplace to state that internationalisation of rulemaking is withering the classic distinction between international law – regulating relations between international legal actors – and domestic law – regulating relations between public authority and individuals. International law and organisations regulate government-individual relations, and domestic authorities take part in international law-making. International agreements and the scope of action of international organisations have become ever more comprehensive and ever more determinative of the position of individuals.[96] As a consequence, international standards determine the quality of life[97] and international sector-specific agreements regulate domestic issues right down to specific spending targets on public welfare.[98] The growing direct or indirect impact of international agreements on the legal position of individuals is an important argument in favour of transparency. Only where citizens have access to the relevant information can they become politically involved and participate in shaping the decisions that determine their legal rights.

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[95] This paragraph draws on C. Eckes (2014) 'How the European Parliament's Participation in International Relations Affects the Deep Tissue of the EU's Power Structures' 12 *International Journal of Constitutional Law* and Curtin, note 11 *supra*.

[96] On comprehensiveness consider e.g. the functional widening of the WTO agreements. On the direct impact on individuals, e.g. UNHCR conducts status determination for individual refugees, see e.g. M. Pallis, 'The Operation of UNHCR's Accountability Mechanisms' *IILJ Working Paper* 2005/12; UN sanctions against individuals, see Eckes, note 40 *supra*.

[97] PISA Rankings in educational performance or international quality standards for pharmaceuticals.

[98] J. Hagen-Zanker and A. McCord (2013) 'The Affordability of Social Protection in the Light of International Spending Commitments' 31 *Development Policy Review* 397-418.

Within the EU legal order, the CJEU has, by its decisions, positioned international agreements between primary and secondary law in the legal hierarchy.[99] This makes a change to EU secondary legislation by international rulemaking perfectly possible. As most EU secondary legislation is democratically legitimised, not only indirectly through Member States' representatives in the Council, but also directly through participation by the European Parliament as co-legislator, democratic legitimation would be necessarily undermined if the executive could change secondary legislation by concluding international agreements. Within the EU legal order, the European Parliament's participation in the negotiation process and in the conclusion of international agreements is one fundamental way of democratically legitimising the content of these agreements, which increasingly is of a quality similar to domestic legislation, including potential horizontal effect. It ensures that, in principle, the public remains informed and involved. The Lisbon Treaty extended the involvement of the European Parliament at the conclusion stage of the legislative process, and also, in a more limited fashion, at the negotiation stage (Article 218 TFEU). This can be interpreted as being motivated by two objectives: firstly, to reflect Parliament's increased internal powers, and, secondly, to prevent parliamentary exclusion in the conclusion of increasingly broad and detailed international agreements, which govern and regulate the legal position of individuals in the same way as internal legislation.[100]

In the specific domain of the negotiation and conclusion of international agreements, the Parliament now enjoys the power to veto the conclusion of international agreements negotiated on behalf of the EU (Articles 218(6) and (4) TFEU). This novel right of veto is specifically linked with a right to information: Article 281(10) TFEU states that the EP is to be 'immediately and fully informed at all stages of the (negotiating) procedure'. In the view of the EP, following the entry into force of the Lisbon Treaty, this provision implies the right of access to all information in the negotiations conducted by the Council or the Commission at *all stages* of the procedure: pre-negotiation, on-going negotiations and final outcome (and implementation). The legal framing of this right to information goes beyond the parameter of the merely advisory or consultative role the Parliament had historically exercised with regard to CFSP.[101] In the context of the negotiation of international agreements by the EU, it can be seen that, in light of the legal rights of the EP to effective information and participation at all stages of the negotiations process, it now plays a pivotal role in implementing international agreements in the EU legal order. The claim by the Parliament that it has the right to receive – albeit in a regulated way – both

[99] Case C-181/73, *Haegeman v Belgium* [1974] ECR 449; see also Article 216(2) TFEU.

[100] For the second point see: T. Tiilikainen (2011) 'The Empowered European Parliament: Accommodation to the New Functions Provided by the Lisbon Treaty' 91 *Finish Institute of International Affairs*, Briefing Paper.

[101] See, D. Thym (2006) 'Beyond Parliament's Reach? The Role of the European Parliament in the Common Foreign and Security Policy' 11 *European Foreign Affairs Review* 109-127.

classified and unclassified information, irrespective of the originator of the EUCI or the principle of originator control, is on the whole actively resisted by the executive institutions, in particular the Council and the Commission (pre-negotiations and during the international negotiations) and Europol (in terms of implementation). In the view of the Commission and the Council, international agreements are agreements between two contracting parties (the EU and a third state or international organisation) with no direct effects on citizens and limited parliamentary involvement by most states.[102] Recent practice however reveals some of the highly political issues that the EU has negotiated with third states, which have a type of *legislative* impact on citizens' rights or interests in a substantive sense. In view of these developments, legal and institutional practices are emerging that illustrate the need for a review of the prevailing diplomatic paradigm that limits the input of member states to these types of negotiations.

6.2 Inter-institutional access by the European Parliament to sensitive documents during negotiations

The European Parliament's strengthened position in the negotiation process and in the conclusion of international agreements should not overshadow the reality that, in the EU, as in the Member States,[103] the executive has a privileged position in conducting external relations. This has been explicitly acknowledged by the CJEU.[104] Despite the strengthened role of Parliament, the Council takes central stage and remains a stronghold of national executives working behind closed doors – albeit, in many cases to reach interstate compromise, rather than to identify the common EU interest. The Council's strong position is visible in Article 218 TFEU, pursuant to which the Commission submits recommendations to the Council, which then authorises the opening of negotiations, adopts negotiating directives, authorises the signing of agreements and concludes them. The Council also nominates the Union negotiator or the head of the Union's negotiating team. While the Commission usually acts as negotiator for the Union, in the area of CFSP this role may be entrusted to the High Representative, who is equally mandated by the Council. Even though the Commission is representing the common interest and its independence of the Member States is formally ensured,[105] in the context of the negotiation of international agreements, it is bound by a negotiating mandate and is further exercising powers delegated to it by the Council. The Council's control over

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[102] D. Thym, 'Parliamentary Involvement in European International Relations' in M. Cremona and B. de Witte (eds.), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing, 2008) 201-224.

[103] E.g. Germany: GFCC, BVerfGE 68,1 (87) *Atomwaffenstationierung*. The German Constitutional Court explicated one important rationale for the executive's dominance in foreign affairs. Different from Parliament, it possesses the 'appropriate personnel, material and organizational potential'. See also, G. Biehler, *Auswärtige Gewalt* (Mohr Siebeck, 2005) 3-55.

[104] E.g.: Case T-529/09 *in 't Veld v Council*, note 24 *supra*, para. 88; see also para. 57, and the end of para. 59 of the judgment.

[105] Article 17(3) TEU: Commissioners should be chosen from 'from persons whose independence is beyond doubt' and 'the Commission shall be completely independent'.

the Commission in the negotiation of agreements that fall under the Common Commercial Policy exemplifies this. Article 207(3) TFEU sets out that '[t]he Commission shall conduct [the] negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.'

The European Parliament has in recent years been able to enflesh the Treaty bones in terms of accountability by engaging in a whole host of inter-institutional arrangements with both the Council and the Commission.[106] Many of these informal inter-institutional arrangements concern the provision of information in one form or another to the European Parliament. The European Parliament has successfully negotiated a series of inter-institutional agreements with various actors facilitating the provision by such actors of information – both classified and unclassified – to the European Parliament. Since 2002, it has put arrangements in place to 'receive' and 'handle' *sensitive information* that relate to policy areas such as CFSP, internal security and foreign and security policy.[107] This inter-institutional trajectory, granting 'privileged' and 'closed' access to certain MEPs under precise conditions, has culminated in the recent negotiation of a number of new inter-institutional agreements with various actors (the Council and the EEAS in particular) facilitated by decisions of the Parliament to modify and expand its own internal security rules[108] in order to reflect changes to the Council's security rules. A notable aspect of the new rules is the addition of a lengthy Annex II, which, much like the Annexes of the Council's security rules, provides extensive details on the various aspects of 'secure treatment and management of confidential information by the European Parliament'. The term 'confidential information' *includes* but is not limited to classified information and also covers 'non-classified *other* confidential information' (abbreviated in this paper as CUI).[109]

In September 2012, the Council and the Parliament concluded an inter-institutional agreement that covers all international agreements that do *not*

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[106] See further, D. Curtin, *Executive Power of the European Union: Law, Practice and the Living Constitution* (Oxford University Press, 2009).

[107] This is in line with the fact that Regulation (EC) No 1049/2001 (note 17 *supra*) in Article 9 explicitly foresees the adoption of implementing inter-institutional rules on how 'sensitive documents' will be transmitted to the European Parliament in a manner that will not involve their being made 'public' but will respect the confidential classification status. See G. Rosén, "Can You Keep a Secret?' How the European Parliament Got Access to Sensitive Documents in the Area of Security and Defence', *RECON Online Working Paper* 2011/22.

[108] Decision of the Bureau of the European Parliament of 6 June 2011 concerning the rules governing the treatment of confidential information by the European Parliament, OJ (2011) C 190/2. Decision of the Bureau of the European Parliament of 15 April 2013 concerning the rules governing the treatment of confidential information by the European Parliament, OJ (2014) C 96/1.

[109] Ibid., Article 2(b).

exclusively deal with CFSP matters.[110] Article 1 (purpose and scope) sets out that the agreement governs 'the forwarding to and handling by the EP of classified information held by the Council …which is relevant in order for the EP to exercise its powers and functions.' It covers amongst others international agreements on which the EP is to be consulted or is required to give its consent pursuant to Article 218(6) TFEU, including the negotiating directives for these agreements.

This covers information generated by the EU institutions themselves. An additional problem remains the above-discussed originator control principle (ORCON). Such principle becomes particularly relevant in a negotiation context, where input to international law-making originates outside of the EU.[111] More recently, the inter-institutional agreement still under negotiation between the Parliament, the Council and the High Representative of the Union for Foreign Affairs and Security Policy concerns access by the EP to classified information held by the Council and the EEAS in the area of foreign and security policy. [112]

6.3 Parliamentary access to documents behind closed doors

The greatest continuing concern following the extension of Parliament's powers remains the lack of open debate. While it may be able to exercise some control over the final outcome, the EP's function of informing the public and contributing to shaping the public debate will remain limited by the procedural arrangements governing how information is shared with Parliament. Even where access is granted, it extends only to a few MEPs and in very restrictive circumstances. This is very problematic in the context of the European Parliament's core role as a window to the public. It divides MEPs into 'ins' and 'outs' and gives the former a sense of inclusion and power. The problems are comparable to agreements hammered out behind closed doors that are then passed at first reading within the ordinary legislative procedure.[113] This practice has been severely criticised for

[110] Agreement concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy, of 13 September 2012, P7 TA(2012)0339. The agreement was finalised on 12 March 2014, see OJ (2014) C 95/1, and entered into force on 1 April 2014.

[111] The agreement between Council and Parliament confirms ORCON as the basic principle of handling classified information. Article 3(4): 'the Council may grant the European Parliament access to classified information which originates in other Union institutions, bodies, offices or agencies, or in Member States, third States or international organisations only with the prior written consent of the originator.'

[112] General Secretariat of the Council, Document 15343/12, LIMITED (Listed in the Council's register of documents as 'not accessible', last checked on 7 February 2016). However, the document is available through StateWatch <http://www.statewatch.org/news/2012/oct/eu-council-ep-access-class-info-15343-12.pdf> (last visited 7 February 2016).

[113] See for more details: *Guide to the ordinary legislative procedure*, October 2010, available at: http://consilium.europa.eu/uedocs/cmsUpload/QC3109179ENC.pdf (last visited 4 November 2014).

lack of openness.[114] It certainly prevents an open public debate on issues that are usually subject to such a debate.

It is still early days and too soon to know exactly how the EP is applying these rules in practice and clearly the Council is adopting an attitude of 'wait and see' (also by building in provisional and far-reaching rules even for the category of 'RESTRICTED' documents[115]). It is not uncommon in national democracies to limit access to particularly sensitive classified information to a limited – or, indeed, very limited – number of security-cleared parliamentarians. However, it is also not uncommon in national democracies to allow such access to full committees in relevant subject areas (intelligence or security and defence and foreign policy).

One of the problems that has already emerged in practice relates to where access is very restricted; in such circumstances, the value of the consultation may be very limited as the information cannot be shared with the full committee or otherwise. It creates different classes of legislators – those with and those without security clearances – and such classification does not necessarily serve the public interest. Moreover, if the security cleared MEPs have no access to their staff, then they may be substantively limited in appreciating what they are being allowed to read and how it must be understood in a broader context.

6.4 Judging EU secrets[116]

Since the entry into force of the Lisbon Treaty, the secrecy surrounding the negotiation of international agreements has been challenged before the EU Courts in three prominent cases. The first two cases were brought under the Access Regulation. In the third, the Parliament defended its new prerogatives to be informed, granted under Article 218(10) TFEU. The first case concerned the TFTP Agreement, which is a bilateral agreement between the EU and the US allowing the latter to have access to financial messaging data stored by SWIFT, a private company based in the EU, and to be processed by the US Terrorist Financing Tracking program (TFTP). The second case concerned the Anti-Counterfeiting Agreement (ACTA), which, in fact, was not actually concluded by the EU and never, therefore, entered into force. The subject-matter of the

[114] See e.g. recently and with many references: S. Carrera, N. Hernanz and J. Parkin (2013) 'The 'Lisbonisation' of the European Parliament: Assessing Progress, Shortcomings and Challenges for Democratic Accountability in the Area of Freedom, Security, and Justice' *CEPS Paper in Liberty and Security in Europe* No. 58 24-31.

[115] Art. 6(2) of the Inter-institutional agreement between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the Common Foreign and Security Policy OJ (2014) C 95/1.

[116] This sub-paragraph draws on Curtin, note 11, 12 or 14 *supra*; C. Eckes (2016), Common Foreign and Security Policy: the Consequences of the Court's Extended Jurisdiction, *European Law Journal*, *forthcoming*, and Eckes, note 94 *supra*.

third case was an agreement between the EU and Mauritius concerning EU military operations against pirates in the Indian Ocean.

Prior to Council authorisation to open negotiations with the US in relation to the TFTP Agreement, a Council Legal Service opinion on the competence of the EU to negotiate such an agreement and on the legal basis for the agreement was distributed within the Council and to the Member States. The legal service opinion was classified as RESTRICTED, which is the lowest level in the Council's security classifications, and falls outside the scope of Article 9 of the Access Regulation on 'sensitive' (classified) documents. No security clearance is needed to view restricted documents. This categorisation is used for 'information and material the unauthorised disclosure of which could be *disadvantageous* to the interests of the Union or of one or more of the Member States'. Sophie In 't Veld, an MEP and also Vice-Chairperson of the Committee on Civil Liberties, Justice and Home Affairs, did not gain access to this document via the privileged access rules that applied at that time to the relations between the Council and the EP. She used, rather, as a member of the public, the formal procedural route offered by the Access Regulation but was nonetheless also refused access in that context.

The Council refused access to the legal service opinion on the basis of Article 4(1)(a) and the second indent of Article 4(2) of the Access Regulation. Its rationale for maintaining secrecy was overtly process-based. The Council reasoned that 'disclosure of [document 11897/09] would reveal to the public information relating to certain provisions in the envisaged Agreement…and, consequently, would negatively impact on the [European Union]'s negotiating position and would also damage the climate of confidence in the on-going negotiations'. [117] According to the applicant, the exception relating to the protection of the public interest in the field of international relations in Article 4(1)(a) of the Access Regulation was not applicable because the legal basis for the negotiations '[was] an issue of internal EU law which [was] not likely to have an impact on the substance of negotiations and, hence, on the international relations of the European Union.' [118]

The judgment of the General Court in *In 't Veld I* is instructive with regard to the pre-negotiation stage in particular. It considered that the document was specifically drawn up for the opening of negotiations and that the analysis it contained was therefore linked to the envisaged international agreement. It thus fell within the scope of the exception relating to international relations if it could be shown that this public interest would be actually undermined. The Court held that this could be shown insofar that disclosure of some elements of the document would reveal part of the *strategic objectives* pursued by the

[117] Case T-529/09, *Sophie in 't Veld v Council*, note 24 *supra*, para 6.
[118] Ibid., para 27.

EU. The Court accepted that 'disclosure of those elements would damage the climate of confidence in the negotiations which were on-going at the time the contested decision was adopted.'[119] The Court thus drew a very important line regarding what could and could not be revealed in the context of international negotiations. It did not accept that disclosure of the analysis of the negotiations' legal basis would weaken the Council's negotiating position as such. The Council had argued it would do so, because the controversy could give rise to confusion regarding its competence and thus weaken its negotiating position. The Court held that non-disclosure for this reason could not be justified. It seemed to imply that the (hypothetical and not proven) weakening of the Council's negotiating position in advance of negotiations would not justify secrecy whereas proven damage to the negotiating strategy of the Council as a whole during ongoing negotiations would justify secrecy.

More generally, in the view of the Court, the Council had failed to balance the protected interest against the public interest in disclosure. The fact that the envisaged agreement affected the fundamental right of protection of personal data constituted a clear public interest that had to be taken into account by the Council. There was thus an overriding public interest in disclosure, because 'it would contribute to conferring greater legitimacy on the institutions and would increase EU citizens' confidence in those institutions'. The Court held that the Council had failed to adequately take into account the subject-matter affected by the envisaged agreement. For these reasons the General Court ruled that the document should be disclosed, except for those parts that related to the strategic objectives pursued by the EU. This is one of the few cases where the Court actually ruled on the public interest and came out in favour of it, rather than choosing to find procedural faults.[120]

The Court also ruled much more generally that the principle of transparency applies to the international relations of the EU and it took particular account of the subject-matter affected by the agreement and of its effects on individuals. The rulings constituted in any event an important statement of principle that potentially has wider ramifications than with regard only to the negotiation stage of international negotiations.

In the subsequent case involving the ACTA negotiations (*In 't Veld II*), it was the *later stages* of the negotiation process that were at stake. In this context, there was a specific (pre-negotiation) 'confidentiality agreement' between the negotiating parties, providing that documents exchanged between the Parties would not be made public unless the Parties agreed. The underlying rationale of the agreement – embedded in a historical understanding of the diplomatic relationship among

[119] Ibid., paras. 33-36 and paras. 57-59.

[120] See, for example, the approach adopted by the CJEU in Case C-28/08 P, *European Commission v Bavarian Lager* [2010] ECR I-06055.

the negotiating parties – was, again, a process-based one, seeking to prioritise the 'blacking out' of a negotiating environment in which the parties could hold open, frank and candid discussions. Both the Council and the Commission emphasised in this case the need to keep ongoing international 'negotiations' secret for reasons of *effective* decision-making. Instead of being considered as a type of quasi-negotiator present at the 'green table' while negotiations were ongoing, as seemingly envisaged by Article 218(10) TFEU, the EP was actually denied access to a range of key documents. In particular, the *negotiation mandate* of ACTA was not provided to the EP and Court proceedings were again brought by MEP Sophie In 't Veld to challenge the Council's refusal.

The classification level of negotiation – similar to that of the Council Legal Service opinion in the earlier TFTP case *mandates* – is, in principle, 'restricted', at any rate while negotiations are on-going. If one looks at the actual content of the ACTA negotiating mandate in question, there is nothing in it mandating secrecy 'in the interests of the Union' but rather it contains an enumeration of the types of issues that must be taken into account (eg data protection etc.).[121] It seems difficult to argue that such provisions constitute in any real sense negotiating 'strategy' that should be kept tactically hidden from the negotiating partner. It was subsequently – after the case was brought and after the EP had vetoed adoption of the agreement – declassified by the Commission on 12 July 2012 and is now fully in the public domain.[122]

The judgment by the General Court in *In 't Veld II*[123] offers a more generous reading of the international relations exception than the earlier case and accepts that the reason for refusal to disclose information under the international relations exception is the fact that third countries are involved in the law-making process.[124] This establishes a general difference in transparency between internal and external law-making. The level of transparency is hence dictated at least by the fact that law-making is taken to the outside. Where international agreements of a legislative nature are concluded, this is particularly concerning.[125] The Council's appeal in this case to the CJEU largely turned on the question of whether 'negotiation and conclusion of an international agreement' could be compared 'with the institutions' legislative activities for the purposes of applying

[121] While the case was still pending, judgment by the General Court unauthorised public disclosure (leaks) permitted some analysis of the nature of the information being denied: http://register.consilium.europa.eu/pdf/en/08/st07/st07095-re01.en08.pdf (last visited 4 November 2014).

[122] Ibid.

[123] Case T-301/10, *Sophie in 't Veld v Commission*, ECLI:EU:T:2013:135.

[124] See in particular: Ibid., paras. 115-118, 126, 206.

[125] See for ACTA: C. Eckes, E. Fahey and M. Kanetake (2013) 'International, European and US Perspectives on the Negotiation and Adoption of the Anti-Counterfeiting Trade Agreement (ACTA)' *Currents, International Trade Law Journal*.

the overriding public interest test'.[126] The Court considered that the General Court had erred by comparing the two. Advocate-General Sharpston addressed this issue at some length, concluding that 'whether an institution is acting in a legislative, executive or administrative capacity should not be determinative'[127] but that 'the institution concerned should conduct the assessment required by the Regulation carefully and objectively and should provide the necessary detailed and specific reasoning in its decision'.[128] She expressed in particular concerns that 'all institutional activities are not necessarily amenable to such neat and precise classification between the legislative and other realms,' which 'makes it difficult to justify applying a different standard of review to institutional acts based on how the institution's activity should be classified in a particular instance'.[129] She concluded that it was 'over-simplistic to say, for example, that legislative acts generically require a high level of transparency but that other institutional activities generically require less transparency'.[130] Acknowledging the particularity of international negotiations, she concluded that they should not automatically require less transparency, 'even where the subject matter […] is considered to be sensitive.'[131] The CJEU did not further elaborate on the link between the legislative nature of an activity and the required standard of transparency. It pointed out merely that the transparency rules were 'of particular relevance where the Council [was] acting in its legislative capacity', but also that non-legislative activity equally fell under the transparency regulation.[132] In the final analysis, the CJEU upheld the General Court's decision in *In 't Veld I* and ruled that the General Court 'confined itself to verifying the statement of reasons' and 'did not infringe the Council's discretion'.[133]

In the third case concerning the piracy agreement with Mauritius, the Court had the occasion to address the interpretation of Article 218(10) TFEU, which states that the EP 'shall be immediately and fully informed at all stages of the procedure'.[134] The EP firstly challenged the Council's classification of the agreement as relating exclusively to the CFSP and secondly argued that the Council had breached its duty under Article 218(10) TFEU by informing Parliament following a three months delay. The Court considered the Council's classification of the agreement as falling under the CFSP as correct. It refused to make a distinction, based on the wording of Article 218(3) and (6) TFEU, between agreements which relate 'exclusively' to the CFSP and those which relate

[126] Case C-350/12 P, Appeal brought on 24 July 2012 by Council of the European Union against the judgment of the General Court (Fifth Chamber) delivered on 4 May 2012 in Case T-529/09 *Sophie in 't Veld v Council*, note 24 *supra*.
[127] Ibid., para 98.
[128] Ibid.
[129] AG Sharpston, opinion in Case C-350/12 P, *Council v In 't Veld*, note 23 *supra*, para. 73.
[130] Ibid., para 97.
[131] Ibid.
[132] Case C-350/12 P, *Council v In 't Veld,* note 23, paras. 105-7.
[133] Ibid, paras. 66-68.
[134] Case C-658/11, *European Parliament v Council*, ECLI:EU:C:2014:2025.

'principally' to the CFSP,[135] emphasising the 'symmetry' or parallelism between internal and external procedures.[136] The Court then asserted its own jurisdiction over procedural issues relating to CFSP agreements, explaining that Article 19 TEU gave it 'general jurisdiction' over both European Treaties and that the explicit limitation of its jurisdiction over CFSP matter was a derogation from this rule that 'must […] be interpreted narrowly'.[137] It further emphasised that informing Parliament was an 'essential procedural requirement' and cuts across all different procedures.[138] It further held that the EP's right to be informed '[was] the reflection, at EU level, of the fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly'.[139] The Court consequently emphasised the universal nature of 'the fundamental democratic principle' and explained its interpretation in the EU context.

The Council's insistence that public awareness of internal, i.e. inter-institutional, disputes could negatively influence international negotiations and its emphasis on the discretion of the executive to decide whether access to information could harm international relations was not unreasonable. Yet, the debate illustrates that transparency requirements and judicial safeguards that a democratic society offers with regard to the internal law-making process cannot be taken for granted when such law-making is moved outside of the domestic framework. Furthermore, when access to information is granted it is – as discussed above – very limited and does not allow the European Parliament to exercise its function as a window to the public. What has been established by the Court is that the fact that information relates to international relations in itself cannot justify secrecy (denial of access to information) and that it will exercise jurisdiction over the negotiation and conclusion processes of international agreements, including CFSP agreements. The CJEU further stressed the relevance of transparency for legislative activities but did not explicitly extend this to international agreements of a legislative nature.

[135] Ibid., paras. 46 et seq.
[136] Ibid, para. 56.
[137] Ibid, para. 70.
[138] Ibid, para. 54 and in particular paras. 80-86.
[139] Ibid, para. 81, referring also to: Case 138/79, *Roquette Frères v Council* [1980] ECR 3333, para. 33; and C-130/10, *Parliament v Council,* ECLI:EU:C:2012:472, para. 81.

7 Conclusion

Secrecy impedes processes that are commonly regarded as essential in a democracy, namely the possibility of citizens and their representatives holding politicians and government officials accountable for their actions, and the possibility of having a public debate on government policy. In order to exercise democratic accountability, citizens must be able to attribute responsibility to politicians and officials. This requires openness; it needs at the very least to be clear as to which decisions can be attributed to which politicians, both national and European. At the same time, certain democratic policies require secrecy in order to be effective at all.[140] Where executive officials are given largely unchecked power to conceal from the public and from parliament(s) whatever information they consider sensitive, part of the essential machinery of democracy is disconnected. In the EU political and constitutional system, there is virtually no substantive internal control over overclassification (either by original or derivative classifiers). It can be considered extraordinary that there is virtually no internal system of control or oversight within the executive as a whole. On the one hand, this can be explained by the different competences of the different institutions and the incremental way in which new and existing agencies are tasked and also by crisis scenarios and by the purely internal focus (even when *de facto* general rules are being adopted). On the other hand, it is also a consequence of the failure to engage with the subject in a more overtly holistic fashion (substantive relationship with the Access Regulation and the (new) Treaty provisions).

Secrecy becomes a danger when it undermines the very values invoked to protect it: democratic self-government and security. This becomes particularly apparent in the area of external relations. Convincing reasons may justify a certain level of secrecy in external relations; yet its limits need to be patrolled in order to avoid the erosion of democratic values.

Technical EU security classification rules receive little attention from 'outsiders' and are adopted and amended in iterative processes as low-level internal rule-making. Oversight mechanisms in the EU, in particular those operated by national parliaments, can supply some countervailing pressure but surveilling secrecy remains a recurrent challenge.

The courts appear to be a major safeguard against 'overreach', which, of course, is effective only where a case is actually brought. Only in these circumstances will the balance between secrecy provisions and constitutional provisions on openness and democracy be brought into play. It remains to be seen how the courts (and in particular the CJEU on appeal) will attempt to balance the original

[140] D. F. Thompson (1999) 'Democratic Secrecy' 114 *Political Science Quarterly* 181-193, at 182.

provisions of the Treaty, as amended by Lisbon, with the ongoing practices (and perhaps diplomatic habits) of the institutions across a range of policy areas. It is clear that courts in such circumstances do more than simply interpret the law; they fill gaps, clarify ambiguities and decide which of the parties should win.[141] The rulings of the courts, therefore, have important implications, not only for the individual litigants, but also for the structure and organisation of the EU institutions themselves. In conclusion, it is clear that the EU executive is not entirely 'unbound' in the area of external relations; however, clarity is required in relation to nature of the existing controls and on how effective they are in constraining unconstitutional conduct.

[141] J. Heliskoski and P. Leino (2006) 'Darkness at the Break of Noon: the Case Law on Regulation 1049/2001 on Access to Documents' 43 *Common Market Law Review* 735-781.

Svensk sammanfattning

Utrikespolitik har alltid, i viss utsträckning, förts i det dolda. Detta gäller på såväl nationell som EU-nivå. Utöver den sekretess som motiveras av det specifika ämnesområdet, som exempelvis säkerhet, finns det ytterligare logiska argument för sekretess inom utrikespolitiken. Involverandet av externa aktörer som driver sina egna intressen gör det exempelvis nödvändigt att vidhålla sekretess vad gäller förhandlingsstrategier, interna avtal och potentiella sekundära motiv.

Särskilt inom ramen för den nationella utrikespolitiken och EU:s utrikespolitik har myndigheterna stor handlingsfrihet när det gäller hur de hanterar kraven på sekretess visavi öppenhet, något som är uppenbart inte bara för externa aktörer utan även för allmänheten. Sekretess inom utrikespolitiken står därför i stark kontrast till EU:s grundläggande öppenhetsprincip.

Det är inte bara en fråga om att ”varje medborgare” ska ha ”rätt att delta i unionens demokratiska liv”, dessutom ska ”besluten (…) fattas så öppet och nära medborgarna som möjligt” (Artikel 10(3) EUF). Än viktigare är att förordning (EC) No 1049/2001 fastställer ett juridiskt bindande instrument beträffande tillträdesrätten till alla EU handlingar, inklusive de som handlar om den gemensamma utrikes- och säkerhetspolitiken.

För att hantera behovet av sekretess gällande utrikespolitiken inom ramen för EU:s s.k. tillträdesförordning måste EU och dess myndigheter inom det utrikes- och säkerhetspolitiska området – som exempelvis Europeiska utrikestjänsten (Europeiska avdelningen för yttre åtgärder), Frontex (Europeiska byrån för förvaltningen av det operativa samarbetet vid Europeiska unionens medlemsstaters yttre gränser) och Europol (Europeiska polisbyrån) – väga de övergripande kraven på insyn mot myndigheternas behov av sekretess inom vissa områden, i synnerhet vad gäller den nationella säkerheten och internationella relationer. När det gäller EU:s yttre relationer har det därför utvecklats flera instrument som har till uppgift att sekretessbelägga och därmed begränsa allmänhetens tillgång till information.

Tonvikten i den här rapporten ligger på hur man hanterar tillgång till information som har sekretessbelagts av EU:s institutioner eller organ. Rapporten riktar in sig på tre aktuella och illustrativa exempel som visar hur EU:s inställning till sekretessbelagd information skapar slutna kretsar av officiella hemligheter inom EU:s utrikespolitik. De tre exemplen rör (1) sekretess som den tar sig uttryck i de regler som styr den Europeiska utrikestjänstens sammansättning, (2) godkännande av EU:s beslutade sanktioner riktade mot ”svartlistade” individer grundade på av medlemsstaterna sekretessbelagd information samt (3) sekretess kring internationella avtalsförhandlingar gällande olika (säkerhetsrelaterade) sakfrågor.

Inom Europeiska utrikestjänsten (EEAS) strävar man efter att möjliggöra ett utbyte av värdefull och känslig information mellan dess personal samtidigt som man skyddar dess diplomat- och underrättelsetjänster. Trots detta utvecklade man år 2013 säkerhetsregler som var närmast identiska med rådets och kommissionens regler vad gäller just sekretessbeläggning och tillgång till handlingar.

Till skillnad från Europeiska utrikestjänsten begränsas vare sig EU som sådant eller medlemsstaterna av externa aktörer, men man väljer ändå att hemlighålla den information som EU:s sanktioner grundar sig på. Förfarandet kräver ett ömsesidigt utbyte av ”relevant information” mellan såväl behöriga inhemska myndigheter och rådet som den permanenta arbetsgruppen CP 931 som ansvarar för att utarbeta listan över terrormisstänkta. Dessvärre är många detaljer kring godkännandeförfarandet av EU:s sanktioner av flera skäl fortfarande otydliga. Det handlar bland annat om det betydande handlingsutrymme rådet har när det gäller hur man övervakar förfarandet, användandet av hemligstämplad och konfidentiell information som grund för svartlistning och svårigheterna kring hur man använder sekretessbelagd information i rättsliga förfaranden vid EU:s domstolar.[142]

Internationella avtal skapar ytterligare en utmaning, eftersom deras antagande i ökad utsträckning beror på godkännande – eller åtminstone inte veto – av Europaparlamentet. Det som ett resultat av artikel 281 (10) i Fördraget om Europeiska unionens funktionssätt (TFEU), där man konstaterar att Europaparlamentet ska ”omedelbart och fullständigt informeras i alla skeden av förfarandet”. Denna inkluderar parlamentets rätt att få tillgång till känsliga eller till och med hemliga handlingar. Denna parlamentets exklusiva tillgång till handlingar har vid upprepade tillfällen blivit ett ärende för EU:s domstolar. Bland annat tack vare den nederländska EP-ledamoten Sophie In’t Veld, vars fall även baserades på de rättigheter som följer av EU:s tillträdesförordning.

Domstolsprövning är alltjämt den mest effektiva mekanismen för att begränsa sekretessen inom EU:s utrikespolitik. Det kräver dock att ett ärende verkligen tas till domstol. Bara då kommer frågan om balans mellan sekretessregler och författningsbestämmelser om öppenhet och demokrati att kunna prövas. Det återstår att se hur domstolarna (i synnerhet EU-domstolen, efter överklagande) kommer att försöka balansera de ursprungliga bestämmelserna i fördraget, som de kommer till uttryck i Lissabonfördraget, och EU-institutionernas praxis (eller kanske diplomatiska vanor) inom olika politikområden. Det är uppenbart att domstolarna, när de granskar huruvida sekundärlagstiftningen är förenlig med fördraget, gör mer än bara tolkar lagen: de kompletterar, förtydligar och avgör

[142] Med EU:s domstolar avses här Europeiska unionens domstol och tribunalen.

vem av parterna som har rätt.[143] Domstolarnas utslag får betydande konsekvenser, inte bara för inblandade parter utan också för EU-institutionernas struktur och organisation. Sammanfattningsvis ter det sig uppenbart att den verkställande makten i EU inte är helt ”fri” vad gäller externa relationer. Ökad klarhet krävs dock när det gäller de befintliga kontrollerna och hur effektiva de är i att begränsa författningsstridigt agerande.

[143] J. Heliskoski and P. Leino (2006) ‘Darkness at the Break of Noon: The Case Law on Regulation 1049/2001 on Access to Documents’ 43 *Common Market Law Review* 735-781.

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"Secrecy becomes a danger when it undermines the very values invoked to protect it: democratic self-government and security. This becomes particulary apparent in the area of external relations."

Deirdre Curtin and Christina Eckes

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