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## Overseeing Secrets in the EU: A Democratic Perspective\*

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### Abstract

Formulating policy and overseeing implementation require access to information. Yet in (national) security matters executive officials have considerable discretion to conceal from the public and from parliaments information they consider sensitive. If 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. Secrecy becomes a danger when it undermines the very values invoked to protect it: democratic self-government and security. Technical European Union (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 by parliaments, can supply some countervailing pressure, but remain a recurrent challenge. Is more public discussion needed on when and for how long secrets can be kept and how oversight mechanisms are constructed in new EU horizontal legislation?

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### Introduction

Secrecy matters. Control over secrecy and openness gives power: it influences what others know and thus what they choose to do (Simmel, 1906, p. 482). Moreover, secret-keeping actually endows secrets with value as it gives the person enshrouded by the secret ‘an exceptional position’ (Simmel, 1906, p. 464; Van Boven *et al.*, 2013). Outside parties are often unaware that secrets exist; they are in the dark about the fact that they are being kept in the dark (Pozen, 2010). But secrets may also be shallow (or become shallow) and thus knowable by outsiders such as oversight institutions (and the media) that may be in a privileged position to pursue information (Scheppelle, 1988).

Managing secrecy and access to official information is an important exercise of executive power that is no less vital than other more visible executive powers (Schulhofer, 2010). One of the most significant ways of building secrecy for governments and executive actors more generally is through systems of classification of documents. Classification presupposes separation, a setting apart of the secret from the non-secret and of the keepers of a secret from the objects of a secret. It means that a *selected* (and not necessarily small) group of actors takes part in the secret decision-making process and has access to secret information (Pozen, 2010). The purpose of the classification system is traditionally to prevent disclosure of information that could damage (national) security. The common interest of security experts is often to preserve the integrity of the classification framework. Secrecy in security policies means that control over very salient

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decisions is put into the hands of (security) officials that do not necessarily act with democratic oversight – as indeed has been illustrated with the United States National Security Agency’s global surveillance practices. The rationale for allowing unilateral executive control over ‘sensitive’ official information presumes a unique and highly specialized executive expertise that trumps any other type of expertise that might provide input into executive rule-making on the subject (Schulhofer, 2010). Yet this article will argue that information access judgments demand both an appreciation of the needs for secrecy as well as the value of transparency or openness in the *public* interest.

The European Union (EU) classification system has, according to some authors, been influenced by that of the North Atlantic Treaty Organization (NATO) (Roberts, 2003). In 2000, Javier Solana as Secretary General/High Representative for Common Foreign and Security Policy (CFSP) introduced classification rules for EU information in the areas of foreign policy, security, defence and military or non-military crisis management. These comprised five levels of EU classified information (Council, 2000; Rosén, 2011, p. 9) and were adopted by an internal decision of the then Secretary-General/High Representative on 14 August 2000, while everybody, including the European Parliament (EP), was on holiday.<sup>1</sup> The first four were the NATO levels (‘Top Secret’, ‘Secret’, ‘Confidential’ and ‘Restricted’) that were subsequently taken over in the later security rules by the Council. It is here that an additional level of ‘limite and SN documents’ was first made explicit. These are ‘documents internal to the institution which are not intended for disclosure to the public’ (Council, 2000, Article 2(2)).

The regulation of EU official secrets has developed in a piecemeal fashion over the years, and it has intensified recently (Curtin, 2013; Galloway, 2014). The transformation of the EU internal and external security objectives led to the perceived need by EU institutions and their officials to ensure that the EU emerges ‘as a credible and capable security actor in the eyes of the member states and its international partners’ (Galloway, 2014). Sensitive EU policy domains, including defence and internal security, clearly require (some) secret documents, vetted personnel and well-regulated information-sharing between institutions, agencies, Member States, third countries and other international organizations. The regulation of EU classification rules constitutes an understudied subject both in terms of the legal framework and in terms of empirical practice. EU security rules in fact receive very little attention from ‘outsiders’. The few – descriptive or pragmatic – analyses that exist are by EU officials with an inside view of the necessity and effectiveness as to why the rules were drafted in a certain way and later applied (Stärkle, 2011; Driessen, 2012; and most comprehensively: Galloway, 2014). There is, however, more to the issue of classifying secrets than rational insider explanations and pragmatic approaches to imperfect legal tools.

The category of ‘Limite and SN’ documents is the most pervasive of all the secret (unclassified but controlled) categories of documents. In 2012, it appears from the official figures that there were a little under 80,000 Limite and SN documents, which constitute approximately 29 per cent of the total number of documents recorded in the Council

<sup>1</sup> The ‘Solana decision’ was controversial both for its substance and for the manner of its adoption, and was eventually withdrawn subsequent to the adoption of the Access to Documents Regulation in 2001 (which in Article 9 includes specific reference to the special position of the top three categories of classified documents) and the Council’s own Security rules in 2001.

register (Council, 2013, p. 10) – in numerical terms, by far the largest category of secret information held by the Council. In the view of the Council, information covered by the obligation of professional secrecy imposed on members of the institutions, members of committees and EU officials is conceptually distinct from classified information and not within the scope of its security rules. Yet, professional secrets bearing ‘Limite’ and ‘SN’ (*sans numero*) stamps include a type of ‘deliberative privilege’ or ‘space to think’ for EU officials for ongoing policy work as well as early stage legislative and other negotiations.

This article seeks to deepen and focus the existing literature on the democratic challenges facing the EU by looking specifically at the issue of unilateral executive control over sensitive information (both classified and unclassified but controlled) from the wider democratic perspective. The normative relationship between secrecy and democracy is re-examined. The democratic concerns underlying the current executive secrecy apparatus are highlighted. Evolving practices of parliamentary oversight by the EP and the regulatory context within which this takes place are nascent and subject to executive domination. This article exclusively focuses on the EP as an accountability forum since it is the only democratically elected parliament at the supranational level capable of performing functions of democratic oversight over a secretive EU executive. This does not mean that there is no role for national parliaments with regard to national executives; there clearly is, but it is still fragmentary and scattered and has been the focus of some other preliminary studies (Wessels *et al.*, 2013; Curtin, 2014). Finally, the subject of overseeing secrets in the EU is put in a broader context. Given the subject matter – secrecy – there are inevitably empirical challenges, and this study is based on a study of available documents as well as on a selection of qualitative interviews with EU officials to increase ‘outside’ understanding.

## I. Democratic Secrecy and the EU: A Normative Relationship

### *Representative Democracy and Openness*

The democratic deficit of the EU has been discussed for decades (Pescatore, 1974; Weiler *et al.*, 1995; Majone, 1998), but has intensified in practice. For example, when it comes to (new) powers exercised within the Council (and the European Council), there is rarely an issue of formal delegation of powers, but still significant decisions are taken by these EU institutions – without substantive parliamentary oversight at any level (Curtin, 2014). The issue of the EU executive’s legitimacy is particularly relevant because of the considerable reinforcement of both political and administrative executive power of the EU in recent years (Curtin, 2009). This includes not only new executive actors such as the President of the European Council, the High Representative of the Union for Foreign Affairs and Security Policy and the European External Action Service but also the expansion and intensification of the remit of existing actors such as the General Secretariat of the Council, agencies and committees (see, in general, Curtin, 2014). This reveals a (semi-)autonomous administrative executive power which is not embedded in a democratically elected government at the same level. There is only a very weak link between its administration and electorally accountable *government* in its political sense. Even where specific issues are framed within a delegation of powers perspective, this may develop as a more autonomous power, with fairly minimal legislative oversight.

The Treaty on European Union (TEU, Lisbon version) explicitly identifies, for the first time, representative democracy as the founding principle of the Union's functioning (Article 10(1) TEU). It establishes a dual basis of democratic legitimacy: the representation of citizens in the EP (Article 10(2), first paragraph TEU) and the representation of Member States in the Council and in the European Council, which are democratically accountable to their national parliaments or to their citizens (Article 10(2), second paragraph TEU). In order for citizens and national parliamentarians to hold the politicians in the Council and European Council accountable, they must be able to attribute responsibility for decisions to their particular government. Openness can have a further catalyzing function of sparking off public debate (outside of the administration), leading to opinion formation with (substantive) outcomes that cannot be foreseen/controlled by government institutions.

What is the role of executive secrecy in a system of representative democracy? The basic dilemma is that representative democracy requires openness but that some democratic policies (such as counter-terrorism) require secrecy (Thompson, 1999; Chinen, 2009). Secrecy obstructs the standard mechanisms for oversight utilized by representative democracies – elections, public opinion and deliberation (Sagar, 2007, p. 405). This does not mean that democratic governments may not legitimately claim secrecy, but it will need to be balanced against the citizens' right to information in a democracy. The best way of ensuring that secrecy is democratic is to make certain that there is proper *public* discussion of the rules that determine *when* secrets shall be kept and how they will be subject to oversight processes.

Secrecy is justifiable, only if it is actually justified in a process that itself is not secret. First-order secrecy (in a process or about a policy) requires second-order publicity (about the decision to make the process or policy secret). (Thompson, 1999, p. 185)

Openness can be contrasted with 'blacked out' secret decision-making spaces that persist in the interest of good or efficient decision-making in the context of a 'representative' understanding of democracy. This can be the case both internally (even as part of the legislative process) and externally (international relations with third countries and other international legal subjects). Secret meetings and discussions without prior public debate make effective parliamentary input difficult at any level. At the same time, it seems that parliaments – in particular the EP – risk being sucked into the executive mode of diplomatic and secret negotiations even when the subject matter is not technical but rather of vital democratic concern (for example, trilogue meetings prior to the first reading on legislation by the EP). The problem of democratic legitimacy does not lie at the formal Treaty level, but rather in the daily practices of the institutions and their various administrative components (both supranational and national). In a system of representative democracy, the principle of openness in the EU mandates open decision-making in both the legislative and the administrative processes (controlled by the legislature). Secrecy impedes this process because it gives the executive the possibility to evade democratic accountability for decisions for which it is responsible.

In a representative democracy worthy of its name one of the truly distinctive qualities of parliaments is their publicness, the fact that they constitute a public forum as opposed to an accountability relationship among peers. Public actors performing public activities require publicity for legitimacy (but see, Chambers, 2004). The value of publicity is under

challenge also at the European level (see, for example, Heremans, 2011). Even if we have more widespread involvement of the EP post-Lisbon on legislation, debates have moved more behind closed doors – not less. As a result of the very widespread use of, for example, inter-institutional agreements (Driessen, 2007; Beukers, 2011) as well as so-called ‘trilogue meetings’, *secret* bargaining and negotiations take place among the legislative partners (Stie, 2012; Lord, 2013). Another virtue of parliaments as accountability forums is that they are essentially institutions for deliberation as opposed to private negotiations. But if the executive power denies parliaments crucial information by relying on its own internal rules on document security, arguably to protect the effectiveness of its own decision-making, then the role of parliaments is eviscerated. The same may happen if parliaments are given access to categories of information (for example, at the ‘restricted’ level or ‘limited’ documents), but the executive actors insist that these documents are not made public and are not discussed in public.

### *Overseeing Democratic Secrecy through Parliamentary Mediation*

The general mechanism of mediation resolves, in theory, the conflict between democratic oversight and executive secrecy by having citizens delegate the task of oversight to the judiciary and to the legislature (Sagar, 2007). Mediation promises the benefits of oversight without the potentially adverse consequences of revealing secrets in *public*. One of the main avenues of mediation or privileged access is oversight mechanisms by parliaments or specialized oversight bodies. Parliamentary oversight of security and intelligence agencies is well developed both in the United States and in Europe. A recent study shows just how varied that can be among the Member States of the EU and a select number of other democracies (European Parliament, 2011, p. 409). It ranges from the worst case (Ireland) where no classified information is revealed to parliament and no other mechanism exists to get access to classified information, to the bulk of other countries where a range of parliamentary and specialized oversight bodies exist (including the Netherlands, Spain, Germany and Italy), which, in one way or another, oversee the action and information of the executive behind closed doors.

The very role and frequency of closed negotiations must themselves be topics of open debate. Despite a lexical ordering that puts arguing before negotiating, the political process should, as Chambers puts it, be fluid between closed negotiations in certain circumstances and open public debate (Chambers, 2004, p. 409). Negotiation can be kept in check by frequently exposing the process to the light of publicity. Publicity, and especially public accountability, encourages participants to examine their own beliefs and arguments – that is, they are ‘called to account’ for their claims and demands, to use Mill’s phrase. Bok describes this Socratic element aptly by saying that having to argue in public often creates ‘the necessity to articulate one’s position carefully, to defend it against unexpected counter arguments, to take opposing points of view into consideration, to reveal the steps of reasoning one has used, and to state openly the principles to which one appeals’ (Bok, 1986, p. 114).

At the EU level the EP is the only parliamentary forum empowered in some way to provide oversight over classified information produced and shared under the auspices of the EU. From a practical point of view, however, the fact that the executive (European and national) controls, in one form or another, the security apparatus allows it to limit very

concretely the information available to potential mediators. In addition, basic principles of the classification system such as the principles of originator control and of derivative classification tend to reinforce a culture of executive secrecy and secret information that may well be difficult for oversight forums to break through. What are the rules and culture of secret-keeping in the EU executive apparatus?

## II. EU Executive Secrecy: EUCI Rules and Practice

### *EU Classified Information: Who, Why and How?*

Secrecy regulation has developed in a largely non-public fashion in the EU context, following several tracks, initiated by several different actors, seemingly independently from one another. Despite the Commission's early leading role with regard to security management of information (since 1958), it has been the Council that has dominated in recent years due initially to its new competence (and those of the Member States) after the Treaty of Maastricht in the areas of CFSP and defence. It later (in 2011, revised in 2013) continued on the same institutional trajectory and autonomously expanded what is known as 'European Union Classified Information' (EUCI) to cover any of the interests of the EU or of the Member States. The 2011 Council security rules amended the 'rules on the rules' to be applied by effectively all the actors under the auspices of the EU (Council, 2011a). They include legal arrangements for protecting EUCI and have been supplemented by a separate international agreement on the protection of EUCI as well as national classified information, shared in the interests of the EU. Moreover, the basic principles and standards laid down in the Council security rules have been extended to a wide variety of other EU institutions and agencies, which have adopted rules equivalent to those of the Council. The legal basis for the Council's security rules is its own rules of procedure (Galloway, 2014). In this way, the Council's explicit aim of consolidating a comprehensive system of EUCI for the EU as a whole has been largely achieved on the basis of an 'internal' discussion as to what the substance of these second-level rules should be (for alternative possible approaches, see Curtin, 2013).

The necessity rationale results in secrecy being claimed for 'concealing plans and vulnerabilities from adversaries, acting quickly and decisively against threats, protecting sources and methods of intelligence gathering, and investigating and enforcing the law against violators' (Pozen, 2010, p. 277). National security is the key justification traditionally given for classifying documents as 'confidential', 'secret' and 'top secret', although it is by no means the only one. Publicizing information about national security policies runs a special risk of ruining the underlying objective. It is an important concern that may justify firm limits on governmental openness. Yet security nowadays is a much broader concept than the classical understanding of the ability to use military force to protect one's state against external invaders and ensure its survival (De Goede, 2012). The SWIFT and PRISM cases show that the distinction between internal and external security becomes increasingly difficult to draw (Burgess, 2009). Moreover, threats to security have become increasingly transnational in nature as well as increasingly networked and thus dispersed (Born *et al.*, 2011).

The contemporary EU is clearly to be considered a security actor of some importance in its own right (Davis Cross, 2011). As a security actor, the EU gathers and processes

information autonomously. It also shares information both internally and externally. Formally speaking, national security remains a matter for the Member States and by implication not for the EU (see Article 4 TEU). However, since the EU is largely internally borderless, Member States tackle the protection of the European 'homeland' collectively. The power of the security experts in EU institutions and Member States is to lay down the meta-rules on secrecy and to adjust them along the way, enabling security and other judgments to be made on the basis of secret information. It undermines not only democratic legitimacy, but may induce poor decision-making by facilitating groupthink and other decisional biases (Cole, 2012, p. 1625; Eriksen, 2011).

What emerges from the figures available is that the Council itself only acts as original classifier in a small fraction of the documents in the classified categories held by it. For example, it has never itself classified any document to date as 'Top Secret' and only very few of its documents have been classified as 'Secret' (33 in 2012). A somewhat larger category is the 'Confidential' documents category (353 such documents were classified or held by the Council in 2012) (Council, 2013, p. 10). It is clear that these numbers are very small in relative terms. By far the largest category of classified documents is at the very lowest level of Restricted (Council, 2013). 'Restricted' is defined in the Council's security rules in very open terms as where the disclosure of a document would be 'disadvantageous' to the interests of the EU or a Member State. Elastic substantive classification criteria are a source of largely unfettered executive discretion, and this is not taken away by the Council's own internal classification guidance (Council, 2011b). In the EU context, there is little control in practice over the substance of unnecessary classification, and there are virtually no internal controls. Until very recently there was no formal procedure for declassification of EUCI documents – only an ad hoc one (Council, 2011c). The fact that there now is an overall declassification framework is designed to facilitate declassification in the future.

Other originators will have originally classified a significant number of the documents in the four classification levels held by the Council, but no precise figures are available on the breakdown. Documents classified by other originators, including internal EU agencies and offices such as Europol and the European External Action Service (EEAS), need to give specific permission for documents before declassification can take place by the Council. These other 'originators' may be a web of Member States, third countries, other international organizations, or other EU institutions and agencies. How is this web formed and underpinned?

### *EUCI: A Web of Secrecy*

There is an intricate web of arrangements by a wide variety of actors at different governance levels (global, supranational and national) concerning the sharing of, *inter alia*, classified information. For example, in the new EU internal security strategy, more inter-agency co-operation across the broad spectrum of internal security takes place than hitherto was the case both at the supranational and national levels. This means more joint operations, including joint investigation teams, involving police, customs, border guards and judicial authorities from different Member States working alongside Eurojust, Europol and the European Anti-Fraud Office (OLAF). EU agency co-operation takes place on both internal and external security. Individual agencies have clearly developed

this dimension of their work, in particular Europol<sup>2</sup> and Eurojust.<sup>3</sup> More co-operation among agencies and other actors leads almost inevitably to more sharing of classified and sensitive information, and indeed this is explicitly envisaged.<sup>4</sup> That flow of information is across Council committees such as the Standing Committee on Operational Security (known by its French acronym 'COSI') and the Political and Security Committee as well as entities such as the EEAS. The Intelligence Centre (IntCen) is now located within the EEAS and does not have access to 'raw' intelligence material or operational information, but rather to information coming from the Member States and open sources (European Commission, 2010, p. 3). All these actors share classified information both within and outside the EU.

Underpinning the web of rules and arrangements is something approaching a culture of secrecy. A culture of secrecy has two main tools that cause secrecy to multiply quasi-automatically: the principle of derivative classification and the principle of originator control. Most information is in fact classified by a process known as '*derivative classification*' (Nesson, 1974, p. 402; Moynihan, 1997, pp. 31–2). This process effectively limits the right of access to any persons who are cleared to see documents in the respective classification categories. Classification targets the document in which sensitive information appears; it is common to classify the entirety of the document that contains a small sensitive 'secret' and this principle applies to all levels of classification. The original classifiers (that is, the first ones to classify information) 'are the only officials empowered to determine what information merits classification' (Goitein and Shapiro, 2011, p. 12). It is understood that Council officials attempt to put (highly) classified parts in annexes or addenda to avoid the complication of entire documents being classified when it is not warranted. This pragmatic approach makes documents easier to work with.

The other tool that tends to cause secrecy to multiply is the principle of 'originator control'. It was an innovation of national security policy in the United States during the Cold War when it protected American agencies and separated branches of government from disclosing intelligence of other agencies and was a key element of the original NATO information security policy. It provides that information may not be downgraded, released or declassified without the consent of the originating government or executive entity (Roberts, 2003; NATO, 2013). This rule deprives states and international organizations of the ability to make their own judgments (Roberts, 2004). Certain (liberal) EU Member States (for example, Sweden and the United Kingdom), while they apply this principle in practice, are unable to enshrine it in binding agreements in an absolute way, which would be inconsistent with their constitution or freedom of information legislation (Galloway, 2014). This is not the case, however, with regard to EUCI, where the EU institutions will

<sup>2</sup> For an overview see: <<https://www.europol.europa.eu/content/page/external-cooperation-31>>.

<sup>3</sup> For an overview see: <<http://eurojust.europa.eu/about/legal-framework/Pages/eurojust-legal-framework.aspx>>.

<sup>4</sup> The operational agreement signed between Europol and Eurojust in 2004 provides for the exchange of operational, strategic or technical operation and even personal data (<<http://www.eurojust.europa.eu/official-documents/Agreements/Europol-EJAgreement.pdf>>). In 2008, a secure communication link was established to facilitate the exchange of information. The two agencies also agreed on a table of equivalence to exchange classified information above the level of 'restricted'. There are also other strategic agreements including some information exchange between Europol and other actors – for example, the Commission and the European Central Bank (<<https://www.europol.europa.eu/content/page/eu-institutions-133>>), and Frontex and four other EU bodies (<<https://www.europol.europa.eu/content/page/eu-agencies-135>>).

seek the permission of the originator and Member States are not in principle free to deviate from this.

In the context of EU rule-making this principle is not new. It has been around in substance since 1958 (Council of the European Atomic Energy Community, 1958, Article 29(1)), but it has mutated and expanded considerably since then. The requirement to consult the author (the originator) before granting public access or declassifying is deeply embedded within the Council's security rules, but also features in several places in the access to documents legislation from 2001 (European Parliament and Council, 2001, Articles 4(4) and 9(3)). A similar type of originator control is applied, extensively with regard to documents stemming from third parties or Member State governments the originator outside the EU determines whether access within the EU rules is given or not (European Parliament and Council, 2001, Article 4(5)). This is particularly the case in the area of CFSP where shared information is subject to control by third parties or Member State governments (see Eckes, 2013). The originator control principle is also applied widely within the EU. Certain agencies (for example, Europol) use it to retain control over 'their' documents *vis-à-vis* other EU institutions (Curtin, 2013). Similarly, this principle prevents them from revealing information classified by other parties.<sup>5</sup>

### III. EP Privileged Access to EUCI: Mediation behind Closed Doors

#### *Rule-making through Inter-Institutional Agreements: A Democratic Cocoon?*

Rule-making on the overseeing of EUCI is taking place through the negotiation of a series of inter-institutional agreements: first the Commission, then the Council, then the European Central Bank (ECB) and finally the Council and the High Representative of the Union for Foreign Affairs and Security Policy.<sup>6</sup> This means that there is a web of inter-institutional agreements in this area that are negotiated behind closed doors by the respective EU institutions and actors. The procedure involved in such negotiations means that secrecy is applied to the process itself even when there can be no issue of necessity to negotiate behind closed doors for reasons of security or otherwise. In this context – as in many others – the CUI (controlled but unclassified information) category of information ('limited' documents) is used. Because this information is not made public and not automatically given to parliaments, no public debate takes place and detailed knowledge of what is being negotiated will not necessarily be known by parliaments until an agreement has been reached among the representatives of the negotiating parties.

The subject matter of secret negotiations in this instance is how oversight over the executive itself and its classified information is to be organized. There is no element of operationally sensitive material involved. The underlying rationale is the instrumental

<sup>5</sup> For example, the United States in the context of the Terrorist Financing Tracking Program. See De Goede and Wesseling (2013).

<sup>6</sup> There are *five* in total that either have been adopted or are still being negotiated: European Parliament and Council (2002); Commission and Parliament (2010); European Parliament and Council (2012); European Parliament and European Central Bank (2013); and Draft Arrangement of . . . between the European Parliament, the Council and the European External Action Service concerning the access by the European parliament to classified information in the area of the Common Foreign and Security Policy, General Secretariat of the Council, Document 15343/12, LIMITED (under negotiation).

claim that secrecy is necessary to candour, that candour is necessary to effective decision-making by the executive, and that enhancing the effectiveness of executive decision-making serves the public interest (Wetlaufer, 1990, p. 849). Yet, as Advocate General Cruz Villalón put it in a recent opinion,<sup>7</sup> ‘democratic political debate involves, above all, accountability; and to have accountability it is essential to know the identity of those participating in the debate and, in particular, the terms on which they are doing so’. It is not clear to what extent all MEPs automatically access all limited documents. Some national parliaments obtain such access by virtue of specific arrangements with their governments. The Council has recently made clear that the obligations of professional secrecy apply in this context as well, meaning that limited documents cannot be discussed in public or put in the public domain by actors other than the originators of those documents (Council, 2013; see further Council, 2011d).

The most disputed inter-institutional agreement is arguably the one that is currently being negotiated between the EP, the Council and the High Representative of the Union for Foreign Affairs and Security Policy concerning access by the EP to classified information held by the Council and the EEAS in the area of foreign and security policy. An initial CFSP ‘arrangement’ was drafted by the High Representative, who, on 23 October 2012, presented a proposal to the Council.<sup>8</sup> A draft tripartite inter-institutional agreement was discussed at working party level within the Council on 14 December 2012, where an agreement was reached on the draft text that would form the basis for negotiations with the EP.<sup>9</sup> Negotiations opened with the EP early in 2013. A small delegation from the EP (including the chairs of both the Legal Committee and the Foreign Policy Committee) are negotiating on an ongoing basis with a delegation from the Council and the EEAS. All relevant documents are ‘limited’ and thus not in the public domain. It is not clear if the relevant committees of the EP discussed the matter before negotiations started or how internally the subject matter of ongoing negotiations are discussed within the EP itself. It is also not clear if any national parliaments discussed the issue prior to the start of formal negotiations by a delegation on behalf of the Council. It is doubtful that they did.

The secrecy that is customary in the negotiation of inter-institutional agreements constitutes a classic example of a failure to distinguish between what Thompson called ‘second order’ secrecy and ‘first order’ secrecy (Thompson, 1999). The former is key to developing a system of checks and balances in a political system, while the latter is precisely what we do not have in the EU political system. The time is more than ripe, and it is certainly legally feasible (although an explicit legal basis with full co-decision at the next intergovernmental conference would be the preferred way) to have a full-blown EU Secrecy Law (alongside a revised Access to Documents Law). At the very least, this would mean that the rules governing security classification would be debated in public and would apply in a holistic way to the various actors performing tasks and exchanging information at the European level. Part of such publicly debated EU-wide security rules could include

<sup>7</sup> See ECJ Case C-280/11P *Council v. Access Info Europe*, 17 October 2013. Opinion of A-G Cruz Villalón, para. 71.

<sup>8</sup> General Secretariat of the Council, Document 15343/12, LIMITED (Listed in the Councils’ register of documents as ‘not accessible’, last checked on 30 November 2013).

<sup>9</sup> Working Party on General Affairs, Document 17773/12, LIMITED (Listed in the Councils’ register of documents as ‘not accessible’, last checked on 30 November 2013).

an independent oversight body and specific horizontal rules on declassification as well as other more technical rules. The standard for withholding information should be rigorous, with executive officials required to substantiate a serious threat to security or other imperative public interest.

### *Limited Oversight by the EP in the Public Interest?*

In terms of existing substantive oversight, the EP has for some years been granted some access to classified information produced and circulated under the auspices of the EU (unless subject to the principle of originator control) on the Council's premises (Rosén, 2011). These early institutional rules involved the EP making arrangements to receive and 'handle' sensitive documents as defined in 'secure reading rooms' on the Council's premises as the *quid pro quo* for being informed on the content of, in particular, the Council's security and defence policy (European Parliament and Council, 2002, p. 1). A – security-cleared – 'Gang of Five' MEPs was also given classified briefings, although little public information is available as to how often these measures were availed of in practice, nor has – surprisingly – an internal evaluation ever taken place as to how it operated. It was described by one of the MEPs concerned as being like a 'bad Le Carré novel' (Rettman, 2012).

Under the terms of the framework agreement with the Commission in 2009 (Commission and Parliament, 2010, Annex 11), the EP agreed to adapt its internal provisions so as to provide for equivalent internal security standards. The EP did so in June 2011 (Bureau of the European Parliament, 2011) after the Council had adopted its new security rules and sought to ensure that its own new security rules would be considered equivalent to those of the Commission and of the Council.<sup>10</sup> In the new inter-institutional agreement with the Council from 2012 (European Parliament and Council, 2012) specific security-cleared MEPs with privileged access are not permitted to share or refer to the information they have seen either in the security-cleared room in the EP premises or – exceptionally – during the (committee) meetings held 'in camera' (see Article 6(5)). Liability for both MEPs and staff are specifically referred to in the event of breach of these rules in accordance with the EP's own rules and the staff regulations.

The problem with a restricted approach to oversight is that the value of the access may be very limited if information cannot be shared with the full EP committee(s), MEP's staff and the public. The reason for restricting disclosure to a very limited group of parliamentarians is the feared likelihood of leaks if disclosure is required to broader groups within the parliament. The Council squarely frames the issue of oversight by the EP as one of trust: can it trust the EP to keep a secret? (Galloway, 2014). Yet is this hesitation realistic or even desirable? In the United States, for example, Congress is considered to have a reliable track record for non-leakage. The EP would clearly have a political incentive to avoid leaks in order to not to be blamed by the Council or other executive body. The members of the EP concerned are required to sign a 'solemn declaration of disclosure' in accordance with the EP's security rules to gain access to 'confidential' information. Leaks

<sup>10</sup> It is not clear at the end of the 2013 if this is yet the case and this may explain why the 2012 IIA has not entered into force.

always occur at all levels and by different categories of 'insiders' – it is not only members of parliaments who may at times fail to keep a secret (Pozen, 2013).

The problem with the confidential information provision procedure as it is being given shape in iterative inter-institutional agreements negotiated behind closed doors in the EU is that it may well provide only the appearance – rather than the reality – of a parliamentary check on matters of substance (Clark, 2012). The EP is a collective body, and there is nothing that a highly restricted group can do to stop or prevent any of the secret policies it is informed about from being executed. Limiting access in an extreme fashion creates different classes of legislators – those with and without security clearances – in a manner that is not necessarily limited in the public interest. Moreover, if the security-cleared MEPs have only limited access to (security-cleared) staff, then the risk is they will be substantively restricted in appreciating what they are being allowed to read.

Successive information funnels is a technique that involves the funnelling of information, first, to a small group that is not permitted to indiscriminately disclose. But that small group has the power through majority vote or some other parliamentary mechanism to determine that the information or parts thereof should be funnelled to a different group (for example, the full committee) (Kitrosser, 2007). In this manner a (shifting) balance can be achieved between secrecy's costs and benefits. Yet the existing inter-institutional agreements in the EU do not make provision for successive information funnels in a manner that is steered by the EP itself. On the contrary, the Council dominates the implementation of oversight from start to finish. The Council is still adopting an attitude of wait and see (also by building in provisional and far-reaching rules even for the category of 'Restricted' documents) (European Parliament and Council, 2012). The 2012 inter-institutional agreement still has not entered into force because the Council is (apparently) not yet satisfied that the EP's security provisions are fully equivalent to its own and the draft CFSP inter-institutional agreement is in a no-man's land, under negotiation in a secret conclave by a very limited number of 'representatives' (from both the EP and the Council/High Representative).

#### IV. Beyond Closed Doors?

Oversight over 'security' secrets is a hugely salient topic in many contemporary political systems as the fallout from the leaking by Edward Snowden continues to show. One common thread is the lack of sufficient oversight over the practices of security and intelligence agencies, and parliaments are grappling with their inadequacies in this regard worldwide. The EU may not have its own spy agency or engage in the direct surveillance of its citizens, but it does create classified and unclassified secret information, and it shares classified information created by other originators with very little 'real' parliamentary oversight. Oversight over governmental secrecy in the supranational context of the EU is understudied and regulated under the public radar in iterative, inward looking and inter-institutional processes. Despite the fact that the EU is different to national political systems since it does not (yet<sup>11</sup>) have supranational intelligence agencies of its own, it

<sup>11</sup> See however, the statement by Commissioner Viviane Reding that the EU 'needs' to create its own intelligence agency (*EUObserver.com*, 4 November 2013. Available at: <http://euobserver.com/justice/121979>).

grapples with many of the same challenges that lead to the multiplication of secrets in this context. The workings of the executive power at the supranational level is scattered and fragmented, and no overall figures are available as to the numbers of documents for which EU institutions and actors are the originators. The commingling of EU information with information from other national and international sources makes oversight patchy, as the principle of originator control will let third parties determine whether access must be given. In addition, the extensive use of professional secrecy in the EU context removes whole swathes of ongoing decision-making procedures from public scrutiny and effective and timely parliamentary control at all levels.

The focus on parliamentary oversight and, in particular, the evolving rules in this regard for the role of the EP is a first cut at a more general topic. What this preliminary examination reveals is domination by the executive (the Council in particular) in terms of the rules that apply and how the substantive parameters are determined. These rules (a succession of inter-institutional agreements) have largely not entered into force yet and those that have (for example, the inter-institutional agreement from 2002 on CFSP that is still in force) have never been reviewed or evaluated, and there is very little public information as to how it has operated in practice in terms of types of information consulted, quantities and problems encountered. The rationale for this type of professional or procedural secrecy needs to be explored further both as a matter of principle and – to the extent possible – empirical practice. It is more than a matter of executive ‘trust’ (Galloway, 2014); the procedure for adopting general rules on these issues is also legitimately a matter of broader democratic concern. It is not only an issue of existing legal bases in the Treaties to do otherwise, but rather requires a democratic perspective grounded in the normative provisions of the Treaties. The systematic use of the procedural mechanism of inter-institutional agreements and the introverted manner in which the negotiations are shielded from the public gaze, as well as broader parliamentary discussions, raise serious democratic questions as to the specific rationale for secrecy as a matter of (negotiating) procedure. Inter-institutional agreements can, even where it concerns the general rules governing oversight by the EP, be regarded as structurally cocooned from democracy, at least until the rules have been conclusively negotiated and agreed (Puntscher Riekmann, 2007).

Of course, parliaments worldwide struggle with effective oversight over these kinds of sensitive areas that may at times and within certain limits require a non-public venue. But a distinction must be drawn between second order secrecy (the general rules and principles that govern secrets and their oversight) that should take place in a context of public debate and first order secrecy (operational type decisions that may necessitate secrecy within previously openly agreed limits). What is striking in the EU context is the extent to which rule-making takes place under the radar and by the affected actors themselves as to the general principles, structures and limits. In other words, the failure to have any publicity and public debate on the general parameters prior to their agreement is hugely problematic from an overall democratic perspective of binding secret-making and secret-keeping in the public interest.

Why can there not be an EU Secrets Law that is preceded by a public debate and public consultation as a companion to the (revised) Access for Documents Law? The executive branch is not the exclusive repository of expertise relating to security and other needs for secrecy. Information-access judgments require an appreciation of a balance between the needs for secrecy and the values of publicity and openness in a democratic political system

(Schulhofer, 2010). The challenge is to make parliamentary checks and balances over executive unilateralism a reality. The starting point is a public debate on the limits of secrecy in the EU context and the desirable content of general principles underlying the arrangement of (parliamentary) oversight structures.

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