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# PUBLIC ACCESS TO DOCUMENTS IN EU EXTERNAL RELATIONS

Laurens Ankersmit

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Amsterdam Law School Legal Studies Research Paper No. 2022-08

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# Public access to documents in EU external relations

***Laurens Ankersmit and Jesse Peters****

Forthcoming in Daniel Sarmiento and Pablo Biscari (eds), The Law of Access to Documents of the European Union: Theory and Practice

## 1. Introduction

The EU, as an actor in international relations, has undergone a formidable transformation since it received in 1958 legal personhood and the competence to negotiate and conclude international agreements in a few selected areas, such as trade. The Union is now tasked with an ambitious international agenda set out in Articles 3(5) and 21 TEU that includes contributing to

> 'peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.'

The EU even aspires global leadership in areas such as the fight against climate change and environmental protection more generally,[1] protecting human rights,[2] and non-proliferation of nuclear weapons.[3] To that end, the EU Treaties have seen an extensive enlargement of EU competences in the area of international relations (or 'external relations' as it is commonly referred to in the EU). Most notably, the EU now conducts a Common Foreign and Security Policy (CFSP) and has obtained the (often implied) competence to negotiate, conclude, and execute international agreements in areas such as environment and climate change, data retention and protection, development cooperation, immigration, civil law and criminal matters, and is even tasked with the obligation to accede to the European Convention on Human Rights.[4] What is more, EU competences in areas such as trade and investment have expanded over time, and more and more competences are becoming exclusive in nature, excluding the possibility of Member State external action.[5]

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[1] The EU has to this end announced that it seeks to become the first climate-neutral continent in the world: European Commission, 'A European Green Deal' <https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en> accessed 14 March 2022.

[2] The EU has committed to strengthen its global leadership on human rights issues in its EU Action Plan on Human Rights and Democracy: European Commission, 'Joint Communication to the European Parliament and the Council: EU Action Plan on Human Rights and Democracy 2020-2024' JOIN(2020) 5 final.

[3] The Union's High Representative was actively involved in the Iran nuclear deal (the Joint Comprehensive Plan of Action).

[4] Article 6(2) TEU.

[5] Article 216 TFEU and Article 6(2) TEU.



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It is fair to say therefore that the days that EU external action was limited to negotiating tariff concessions with third states is long behind us. The EU is increasingly active on the international stage and its actions are increasingly impacting not only on the EU's partners, but also its citizens.[6] Take for instance the powers of the Commission to take 'adequacy decisions' under the General Data Protection Regulation (GDPR) that enables the transfer of personal data to third countries, the EU's international commitments to fight climate change, or the EU's far-reaching trade and investment agreements that include provisions on regulatory policy and investor-state dispute settlement (ISDS).[7]

Yet, the Union 'is, under international law, precluded by its very nature from being considered a State.'[8] Its conduct on the international plane is therefore distinct from states in several ways. First of all, its ability to conduct external relations is heavily legalised. The principle of attribution of powers constrains when and how the EU can act on the international plane. As a result, in some areas where states can act freely and are ominously present, the EU is not. This is particularly so in the CFSP area, where decision-making is still largely intergovernmental and the Council has a much more prominent role to play. In other areas, such as trade, the EU is more visible. Second, the Unions representatives on the international plane are different from states. Although the EU now has a diplomatic service comparable to that of states (the European External Action Service (EEAS)), the EU is represented by the Commission in key areas such as trade or climate negotiations. This combination of limited and legalised powers and multitude of distinct actors representing the EU makes 'international relations' different for the EU than states.

The more the Union is active internationally, the more documents are held by its institutions that pertain to EU external action. Under the EU's Access to Documents Regulation 1049/2001, two exceptions to the general right of Union citizens to obtain documents are strongly worded: documents whose disclosure would 'undermine' the public interest as regards 'international relations' (hereinafter: the international relations exception) as well as those that would undermine the public interest as regards 'defence and military matters'. In fact, the Regulation imposes an obligation on the EU institutions[9] (rather than give it a right) not to disclose such documents. In addition, the exception does not include an explicit balancing test weighing an overriding public interest in disclosure that is part of other exceptions listed in Articles 4(2) and (3) of the Regulation. As a result, the EU cannot reap the benefits of transparency in relation to such documents. The EU legislator itself recognises that increased openness leads to greater democratic legitimacy of decision-making.[10] It allows citizens to participate in the decision-making and allows the general public to better hold the EU institutions to account.

[6] Païvi Leino-Sandberg, 'Secrecy, Efficiency, Transparency in EU Negotiations: Conflicting Paradigms?' (2017) 5(3) Politics and Governance 6, 9.
[7] Dani Rodrik, 'What Do Trade Agreements Really Do?' (2018) 32(2) Journal of Economic Perspectives 73; Ferdi De Ville and Gabriel Siles-Brugge, *TTIP: The Truth about the Transatlantic Trade and Investment Partnership* (Wiley 2009).
[8] Opinion 2/13 [2014] ECLI:EU:C:2014:2454, para 156.
[9] The institutions referred to are the European Parliament, Council and Commission: Article 1(a) Regulation 1049/2001. The EEAS equally applies the rules laid down in the Access Regulation: Article 11(1) Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service.
[10] Recital 2 Regulation 1049/2001



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Especially when EU institutions act in their legislative capacity, transparency is needed to enable citizen participation and foster accountability.[11]

This article will argue that the fundamental right of EU citizens to access documents held by EU institutions, bodies, and agencies and the corresponding right to participate in the democratic life of the Union is coming under increasing pressure as a result of the increased scope of the EU's international activities.[12] More and more documents that concern citizens' daily lives potentially fall within the scope of the international relations exception. Of particular concern, in this respect, is the interpretation by the CJEU courts of this *exception* pertaining to the public interest as regards international relations to this fundamental right. The CJEU courts offer EU institutions, bodies and agencies a wide margin of discretion in applying the international relations exception, while neither the scope nor the rationale(s) for relying on the exception is hardly scrutinized. This means that not the CJEU courts, but the EU institutions become the guardians of what EU citizens may and may not know about documents held by EU institutions that those institutions consider to fall under the scope of the international relations exception. With little protection offered by the CJEU courts, citizens and public interest organisations need to rely on continuous public pressure on EU institutions for transparency. This does not only have negative repercussions for the participation of EU citizens in EU decision-making, but also for the legitimacy of the Union as a whole. The saga around the secrecy of negotiations for the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US is a noteworthy example of the negative effects of secrecy for the reputation of EU institutions and, paradoxically, their ability to be an effective player on the international scene.

This contribution will proceed as follows. In the first section, it discusses the rationales that underly the international relations exception, as well as its application in case law of the CJEU courts and the Ombudsman. This section will discuss these rationales by outlining the main types of documents that are relevant for the international relations exception: negotiating directives, textual proposals for international agreements and decisions by international bodies and organisations, preparatory documents for negotiations, legal advice, and confidential intelligence. Then, it moves to the defence and military matters exception, and outlines the rationale for secrecy apparent in this exception, as well as the (few) cases before the Ombudsman in which this exception was applied. In section four, the argument is developed that secrecy in external affairs can itself undermine the public interest in international relations, when it concerns policy areas that necessarily touch upon legislative matters that concern citizens directly, but do not constitute key strategic interests. Section 5 concludes.

## 2. The 'international relations' exception (Article 4(1)(a) third indent of Regulation 1049/2001)

The choice of the Union legislator to withhold access to information for the general public more in the realm of international relations than in other areas, is not immediately obvious. Part of the explanation could perhaps be found in the traditional attitude of states to conduct their

[11] Recital 6 Regulation 1049/2001.
[12] Article 42 Charter of Fundamental Rights; Article 10(3) TEU; Article 15(3) TFEU.



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foreign relations and diplomacy secretly.[13] This is particularly true for clandestine activities such as spying and intelligence work. Also, how states obtain information about strategic matters, like the military capabilities of other (rival) states, and the information itself, is generally of such a nature that states do not want other states to know what they know, and how they came to know it. This classic paradigm is, however, insufficient to fully explain the need for a strict transparency regime concerning international relations of the Union: the EU is not a state, and it has limited competences in the field of security and defence. Moreover, there is a separate exception for 'defence and military matters', which will be discussed later in this chapter. The relatively succinct preamble of Regulation 1049/2001 also does not shed light on why international relations would be particularly endangered by transparency.

To properly understand and critically assess the rationales for secrecy in the realm of the EU's international relations, recourse must be taken to the actual reasons presented by EU institutions for withholding access to documents in this field. This section aims to spell out and reflect on these rationales given by EU institutions, and where possible assessed by the CJEU courts or Ombudsman. First, we present the general considerations in light of which the legal review of refusals to disclose information takes place. Then, the two most employed rationales for secrecy are discussed. EU institutions have reasoned primarily that the Union's international relations could be undermined in case disclosure of a document would either (i) reveal strategic objectives or tactical considerations of the EU; or (ii) damage a climate of confidence or the mutual trust between the Union and an external party. Although these reasons sometimes merge in the formulation of the CJEU courts or the institution concerned, we discuss them separately to develop a proper analysis of their logic and application. Subsections within the discussion of these reasons are structured on the basis a selection of the most relevant types of documents that have been withheld or disclosed in the context of the international relations exception. This structure reflects the fact that the legal acceptability of any rationale is dependent on the specific nature of the document in any given case. For instance, a document held by the Commission that it has received from a negotiating partner cannot reveal 'tactical considerations' of the Commission itself. However, an internal document outlining key objectives as to how to obtain energy security in relation to a third country may do so.[14] Similarly, disclosure of documents pertaining to the implementation of an international agreement that has already been negotiated cannot negatively affect the 'climate of confidence' between negotiators to those agreements, since negotiations have already been concluded.

### *2.1 Preliminary considerations employed by the CJEU courts*

Before discussing the rationales for secrecy in the realm of external relations, we recall the basic test employed by the CJEU courts. The General Court (GC) and Court of Justice (ECJ) both review challenges to a refusal of disclosure in light of the general principles of the Access Regulation: the right of access should be 'as wide as possible', and the exceptions specified in the Regulation ought to be 'applied strictly'.[15] Therefore, 'the mere fact' that a document

[13] Païvi Leino-Sandberg, 'The Principle of Transparency in EU External Relations Law: Does Diplomatic Secrecy Stand a Chance of Surviving the Age of Twitter?' in Marise Cremona (ed.), *Structural Principles in EU External Relations Law* (Hart 2018) 202.
[14] Ombudsman Decision in Case 1611/2019/KR [2020], para 20.
[15] Case C-506/08 P *Sweden v MyTraveland Commission* [2011] ECLI:EU:C:2011:496, para 75.



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‘concerns’ the public interest as regards international relations ‘is not sufficient to justify the application of that provision’.[16] Institutions relying on an exception such as the international relations exception therefore ought to ‘explain’ how disclosure of the requested document could ‘specifically and actually’[17] undermine the public interest as regards international relations, while that risk must be ‘reasonably foreseeable and not purely hypothetical’.[18]

However, the ECJ also notes that the international relations exception is one of the mandatory exceptions listed in Article 4(1) Regulation 1049/2001, which protect interests that are of a ‘particularly sensitive and essential nature’.[19] Institutions should handle these cases with particular care, while a balancing act with an ‘overriding public interest in disclosure’ cannot be made, in contrast to the other exceptions mentioned in the Access Regulation.[20] The CJEU courts often recall that the mandatory exceptions are worded in ‘very general’ terms, leading to a ‘wide discretion’ for institutions to determine whether disclosure of a document would indeed fall within the scope of an exception.[21] Given this wide discretion, the CJEU courts limit their own review of decisions by institutions to procedural elements, the duty to state reasons, the accurate stating of facts, and whether there has been a ‘manifest error of assessment or misuse of powers’.[22] The ECJ has further explained this by referencing the fact that in the preparatory documents of the Access Regulation, numerous proposals to narrow down the wording of the mandatory exceptions, and thereby increase the level of judicial scrutiny, were not accepted.[23]

In short, despite the fact that EU institutions are relying on an *exception* when withholding access to documents based on the public interest as regards international relations, they enjoy ‘wide discretion’ when doing so. In essence, therefore, an EU institution is required to state how *disclosure* of the requested document could ‘specifically and actually’ undermine the public interest as regards international relations, while that risk must be ‘reasonably foreseeable and not purely hypothetical’. Despite the wide discretion EU institutions have in explaining how the public interest as regards international relations would be undermined by making a document public, the EU institutions cannot decide to withhold access to a document simply because it *concerns* the public interest as regards international relations. A case-by-case assessment therefore must be made whereby the EU institution needs to explain why in a concrete manner disclosure of the requested document would undermine the public interest as regards international relations. In other words, an EU institution needs to provide a convincing *rationale* why disclosure of a document undermines the public interest as regards international relations and it needs to do so in a concrete manner for the document in question.

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[16] Case C-350/12 P *Council v In ‘t Veld* [2014] ECLI:EU:C:2014:2039, para 51.

[17] E.g. Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECLI:EU:C:2008:374, para 49. For the first time explicitly applied in the realm of international relations in *Council v In ‘t Veld:* Vigjilenca Abazi and Maarten Hillebrandt, ‘The legal limits to confidential negotiations: Recent case law developments in Council transparency: *Access Info Europe* and *In ‘t Veld*’ (2015) 52 Common Market Law Review 825.

[18] *Council v In ‘t Veld* (n 16) para. 52; *Sweden v MyTraveland Commission* (n 15) para 76.

[19] E.g. Case C-266/05 P *Sison appeal* [2007] ECLI:EU:C:2007:75, para 35.

[20] E.g. Case T-307/16 *CEE Bankwatch Network* [2018] ECLI:EU:T:2018:97 , para 124.

[21] E.g. *Sison appeal* (n 19) para 34; *Council v In ‘t Veld* (n 16) para 63; *CEE Bankwatch Network* (n 20) para 78; Case T-166/19 *Bronckers* [2020] ECLI:EU:T:2020:557, para 37; Case T-644/16 *ClientEarth (ISDS)* [2018] ECLI:EU:T:2018:429, paras 24-25, confirmed by Case C-612/18 P *ClientEarth (ISDS) appeal* [2020] ECLI:EU:C:2020:223.

[22] E.g. *Sison appeal* (n 19) para 34.

[23] *Sison appeal* (n 19) paras 37-38.



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*2.2 Revealing strategic objectives and tactical considerations*

One of the most important rationales EU institutions give as a reason for withholding documents to prevent the Union's interest in international relations from being undermined, is that the document at hand contains strategic objectives and tactical considerations that ought to remain secret. This rationale is peculiar to the realm of external relations, since it is specifically meant to keep information out of the hands of an external actor,[24] normally a third state. This external party does not necessarily share the political goals and values of the Union, or could even be considered a rival or enemy. Since transparency to the public necessarily implies that such adversaries are also able to access and benefit from disclosed information, transparency becomes a more complicated matter than in purely internal situations. This dynamic is apparent in any relation between the Union and an external actor where a 'zero-sum' logic is at play, meaning that the gains of one party can be viewed as the losses of the other.

Arguably, the most obvious context in which a zero-sum logic can be visible in general, is in the realm of diplomatic discussions or negotiations for international agreements pertaining to defence and security matters, such as the Iran nuclear deal. Knowledge of strategic information, such as 'red lines', space for compromises, or tactical considerations, can potentially be used by other actors to the detriment of the 'transparent' negotiating party. If the other party is for example aware of the minimal outcome the Union negotiator is willing to accept, it is unlikely that the EU will get more out of the negotiations, transparency thus resulting in worse outcomes for the Union and by extension, for its population. The EU, of course, has traditionally been an organisation that has concerned itself more with soft power issues rather than the hard power contexts in which this logic is most apparent, but the logic of the rationale is nevertheless frequently invoked by EU institutions.

An important consideration is that the degree to which a zero-sum logic is at play, is partly dependent on the policy area in which negotiations takes place. For example, negotiations on military and geopolitical matters are typically more characterised by zero-sum thinking than international environmental issues, where shared goals and shared gains are more obvious and cooperation is mutually beneficial. International environmental agreements seek to find solutions to shared (transboundary environmental) problems and typically do so by employing instruments of cooperation, exchange of information, reporting and monitoring. When parties seek to agree on collaboration for issues such as transboundary shipments of waste or living modified organisms the relationship of parties is that of positive-sum, rather than zero-sum. The manner in which such conventions are negotiated is often highly transparent, in the form of conventions that are accessible to the public with a high degree of transparency on the respective levels of ambition of all parties concerned. A high profile example is the Paris

[24] The CJEU has expressly stated that the concept of 'international relations' is peculiar to EU law and does not include relations between the EU and its Member States: Case T-59/09 *Germany v Commission* [2012] ECLI:EU:T:2012:75, paras 62-66. Nevertheless, some Member States insist on invoking the international relations exception when it concerns relations between EU institutions and Member States: Peter Teffer and Hans Martin Tillack, 'Brussels conceals records on recovery billions, despite transparency pledge' *Follow the Money* (9 February 2022) <https://www.ftm.eu/articles/recovery-files-eu-transparency?utm_source=twitter&utm_medium=social&utm_campaign=BrusselsRefuses> accessed 14 March 2022.



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agreement and subsequent conventions governing its implementation. The Ombudsman has similarly emphasised in its decision *Nord Stream 2 pipeline* that the requested documents in question (negotiating directives for an agreement with Russia on a gaspipeline) were drafted in the context of 'negotiations [that] relate to a *key strategic interest*, namely energy supply and security. It is of vital importance for the EU, the Member States, and its citizens, that the institutions are not in any way undermined in such negotiations, by the release of sensitive documents at a crucial point in time. The Ombudsman contrasts this situation with negotiations aimed at entering into general trade agreements, where a high degree of transparency is appropriate.'[25]

The CJEU courts have so far not made a similar logical distinction between policy or competence areas that the Ombudsman has suggested on the basis of key strategic interests. Rather, it has accepted the rationale pertaining to strategic interests and tactical considerations in a variety of policy settings, including human rights agreements or international trade. The ECJ has maintained that keeping strategic objectives or tactical considerations secret, in order to avoid that other parties to negotiations can 'exploit that knowledge', is in general a valid reason to withhold a document.[26] Similarly, the ECJ has stressed that certain documents may give 'an insider look into the European Union's strategy and negotiating margin of manoeuvre' and thereby negatively affect the negotiating position of the EU.[27] There are several types of documents which could be withheld by an institution claiming that disclosure would reveal such strategic objectives or tactical considerations, which we turn to now.

#### *2.2.1 Negotiating directives*

The Council has in the past regularly withheld public access to negotiating directives issued to the Commission for the negotiations of international agreements on grounds that these documents may reveal strategic objectives or tactical considerations of the EU. In *Besselink*, Dutch constitutional law professor Leonard Besselink challenged a Council decision withholding access to a draft Council decision authorising the Commission to open negotiations on the EU's accession to the ECHR.[28] The Council feared that disclosure of the requested document would reveal the EU's strategic objectives and the limits of its willingness to compromise, and refused access on the basis of the international relations exception.

The General Court found that

> 'the positions taken by the Union are, by definition, subject to change depending on the course of those negotiations and on concessions and compromises made in that context by the various stakeholders. The formulation of negotiating positions may involve a number of tactical considerations on the part of the negotiators, including the Union itself. In that context, it cannot be precluded that disclosure by the Union, to the public, of its own negotiating positions, when the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating capacity of the Union.'[29]

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[25] Ombudsman Decision in Case 1611/2019/KR [2020], para 20.
[26] E.g. Case T-331/11 *Besselink* [2013] ECLI:EU:T:2013:419, para 71.
[27] *ClientEarth (ISDS) appeal* (n 21), para 41.
[28] *Besselink* (n 26).
[29] *Besselink* (n 26) para 72.



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However, one of the negotiating directives that were part of the requested document, was already communicated to the negotiating partners. The General Court found that since this element of the Union's position as regards accessing the ECHR was already known to the negotiating partners, it was difficult to see how the EU's public interest could be undermined by disclosure.[30] Clearly, the need for secrecy in order to not make a rival negotiating partner wiser than necessary disappears when the rival already possesses the information.

Negotiating directives are not only of interest to negotiating partners, but often to the EU public as well, in particular where international agreements may have an impact on health, environmental, or consumer standards, such as modern trade and investment agreements.[31] As a result, their disclosure has been subject to considerable debate in the context of the negotiations for the Transatlantic Trade and Investment Partnership. These growing public demands for more openness have led to a shift in policy in relation to trade agreements by the EU institutions. The Commission now more pro-actively informs the public during the negotiation process rather than keeping the negotiation process entirely behind closed doors and merely publishing the end-result of negotiations. The Commission has committed to publish its recommendations for negotiating directives and initial EU textual proposals. This policy shift is further discussed and analysed in section 4.

*Besselink* shows that where EU institutions do not wish to disclose such (drafts of) directives, the Court is willing to accept the rationale that disclosure undermines the public interest as regards international relations, because these documents may reveal strategy and tactical considerations. A closer look at those negotiating documents themselves, however, shows very little information that can reasonably be characterized as 'strategic' or containing any form of tactics, but rather a list of elements that the agreement should cover.[32] Negotiating directives usually contain information on the desired nature (e.g. trade liberalisation) and scope of the agreement (e.g. sectors covered). They also outline in general terms what the content of the agreement should be with directives for the preamble and general principles, objectives, and the several subject matters to be included in the agreement (e.g. trade in goods, services, investment, non-tariff barriers, intellectual property right protection, trade and sustainable development) as well as directives for institutional matters. This information is necessarily revealed to the negotiating partner as soon as the scope and nature of the agreement under negotiation is being discussed.

Moreover, the Court has specified that the Council cannot 'bind the negotiator' through 'detailed negotiating positions'.[33] As a result, these directives are generally worded and give the Commission significant room for manoeuvre. It is therefore difficult to see how disclosure of those directives could negatively affect the EU's negotiating position. Directives generally

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[30] *Besselink* (n 26) para 58.

[31] Marija Bartl, 'Making transnational markets: the institutional politics behind the TTIP' (2017) 1 (1) Europe and the World: A Law Review 4; Ryan Abman, 'Does Free Trade Increase Deforestation? The Effects of Regional Trade Agreements' (2020) 7(1) Journal of the Association of Environmental and Resource Economists; Kyla Tienhaara, 'Beyond accountability: alternative rationales for transparency in global trade politics' (2020) 22(1) Journal of Environmental Policy & Planning 112; Alessandra Arcuri, 'The Great Asymmetry and the Rule of Law in International Investment Arbitration' in Lisa Sachs, Lise Johnson and Jesse Coleman, eds., Yearbook on International Investment Law and Policy 2018 (OUP, 2019).

[32] Cf Deirdre Curtin, 'Official Secrets' (2013) 50(2) Common Market Law Review 453.

[33] Case C-425/13 *Commission v Council* [2015] ECLI:EU:C:2015:483, paras 86-90.



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only indicate the scope and the level of ambition sought (e.g. ‘the Agreement should aim to provide for an effective and state-of-the-art investor-to-state dispute settlement mechanism’).

The fact that the General Court, nonetheless, was willing in *Besselink* to accept that disclosure of negotiating directives could reveal strategic information and negotiating tactics, demonstrates the level of discretion given to the EU institutions when relying on the international relations exception in Regulation 1049/2001. This is unfortunate, given the considerable public interest in accessing negotiating directives in an early stage. They function as the formal launch of negotiations and contain information on the scope of the negotiations. As such, they are particularly relevant for citizens and public interest groups who want to participate in decision-making and hold decision-makers to account in particular where it concerns members of the Council issuing such directives. This is particularly important given the lack of transparency in deliberations and voting for such documents under the Council Rules of Procedure.[34]

*2.2.2 Textual proposals, consolidated texts and documents not produced by EU institutions and strategy and tactical considerations*

As soon as a mandate has been issued, the EU negotiator will seek to find common ground with its negotiating partner(s) by making textual proposals or responding to such proposals. These documents can consist of initial textual proposals of the EU, initial textual proposals of a negotiating partner, or consolidated texts. Textual proposals by the EU for negotiations of international agreements that have been communicated to the negotiating partner cannot be withheld on the grounds that they contain strategic information or tactical considerations given that they have already been communicated to the negotiating partner.[35]

The current policy of the Commission in relation to trade agreements is to disclose only the initial textual proposals of the EU. Textual proposals of the negotiating partner or consolidated texts are not published. The initial proposals for legal text by the EU show a remarkable similarity regardless of the negotiating partner involved, whether it is Australia, Myanmar, Indonesia, Mexico or South Africa. This similarity reveals that the negotiating position is essentially the same regardless of the negotiating partner. While such documents cannot contain strategic information as they originate or are made in conjunction with the negotiating partner, the CJEU courts have accepted that their disclosure may affect the mutual trust between the negotiators,[36] a rationale this contribution returns to below.

*2.2.3 Legal Service documents on external matters, such as international agreements*

The legal services of EU institutions can be involved in all stages of EU external relations policy. This is particularly so where the EU institutions take decisions that have legal effects, such as during the process of signature, provisional application, conclusion and implementation of international agreements. Their involvement is of considerable importance in EU external relations policy, as international agreements and decisions taken by bodies set up by international agreements binding on the EU need to comply with EU primary law. Preventing successful challenges of such decisions is even more important in the context of EU external relations, given that a successful challenge may negatively affect the relations with third

[34] Articles 5(1), 8 and 9 Council Rules of Procedure.
[35] *Besselink* (n 26).
[36] Case T-301/10 *In ‘t Veld v Commission* [2013] ECLI:EU:T:2013:135, para 126.



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countries or organisations. For instance, the EU institutions may be legally required to ask a third state to renegotiate an international agreement or even terminate it, in order to remedy incompatibilities. Moreover, in relation to trade agreements, Article 207(3) TFEU specifically makes the Council and the Commission 'responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.'

Particularly important legal issues for the EU institutions are competence (choice of the correct legal basis) and compatibility of a decision with primary law. In relation to compatibility, international agreements and Council decisions for positions taken in bodies set up by international agreements need to be compatible with the Charter of Fundamental Rights but also with the EU's autonomous legal order. Both competence and compatibility issues have featured prominently during the negotiations of international agreements in recent years. A notable example is the inability of Belgium to sign the Comprehensive Economic and Trade Agreement (CETA) due to concerns by the Walloon and Brussels regions over the compatibility of the investor-state dispute settlement (ISDS) mechanism with EU law. As a result, signature was delayed until the Belgian federal government committed to request an Opinion by the Court under Article 218(11) TFEU on the compatibility of the agreement with EU law.

The legal services of EU institutions therefore often produce documents that outline the choice for a correct legal basis of an international agreement, their compatibility with already existing internal rules, or even their (in)compatibility with the EU Treaties. What is noteworthy of these legal analyses is that they are internally oriented: they assess an international agreement on the basis of existing EU law. Such an analysis may be done on the basis of texts that are already in the public domain, for instance because the Commission has published an initial textual proposal. The EU institutions have conflicting practices as to the disclosure of such legal analysis. A striking example are the documents produced by the Commission and European Parliament legal services on the compatibility of investor-state dispute settlement (ISDS) mechanisms in EU trade agreements. Whereas the European Parliament disclosed its analysis, the Commission did not.[37]

At first glance, the risk of revealing strategic objectives and tactical positions in the disclosure of documents containing such legal analysis appears rather abstract and hypothetical. The legal services do not concern themselves with strategic objectives or tactical considerations for negotiations but with legal analysis of texts of (draft) international agreements or decisions. Those draft texts themselves do not reveal strategic or tactical information as they are already known when they are communicated to or even jointly produced with the negotiating partner. Moreover, there is a separate exception in Article 4(2), second indent, Regulation 1049/2001 to protect legal advice.[38] Yet, two access to documents cases, *In 't Veld v Council* and *ClientEarth (ISDS)* concern the very situation of an EU institution (partly) relying on the international relations exception to withhold access to documents drafted by its Legal Service.

[37] Legal opinion of 1 June 2016 of the Legal Service of the European Parliament, "Investment dispute settlement provisions in the EU's trade agreements" SH-0259/16 D (2016) 16759. The opinion is no longer available online but available upon request with the authors.

[38] This exception is not one of the mandatory exceptions, meaning an overriding public interest in disclosure can potentially require the institution to disclose the document. See for a thorough discussion of the rationales for and CJEU case law on the confidentiality of legal advice: Päivi Leino-Sandberg, 'Confidentiality of Legal Advice' in Päivi Leino-Sandberg, *The Politics of Legal Expertise in EU Policy-Making* (CUP, 2021).



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In *In 't Veld v Council*, Dutch Member of the European Parliament Sophie in 't Veld (ALDE) requested access to an opinion of the Council's Legal Service, the secrecy of which was considered detrimental for the EP's ability to effectively wield its powers of consent under Article 218 TFEU.[39] In this opinion, the Council Legal Service analysed the appropriate legal basis for an international agreement between the EU and the United States on sharing financial messaging data to combat terrorism.[40] One of the arguments presented by the Council for withholding this analysis, was that it would reveal 'elements pertaining to the position to be taken by the European Union in the negotiations which could be exploited so as to weaken the EU's negotiating position'.[41] It further substantiated this claim by arguing that disclosing 'controversy' surrounding the choice for the appropriate legal basis could be used against the Union by other negotiating parties.[42] In 't Veld disagreed with this reasoning, arguing that the choice for the appropriate legal basis is an objective matter of EU law, and discussion on this point could not possibly reveal strategic objectives or tactical considerations.[43]

The General Court acknowledged that certain passages indeed revealed the objectives the EU would pursue in these negotiations, namely where the specific content that the EU had envisaged to be in the agreement was concerned, and accepted the Council's refusal to withhold these passages.[44] However, the Council did not make clear why the rest of the document, including the analysis of the appropriate legal basis, would harm the Union's negotiating position. To that effect, the GC stressed that 'the risk of disclosing positions taken within the institutions regarding the legal basis for concluding a future agreement does not *in itself* establish the existence of a threat to the EU's interest in the field of international relations',[45] and that '*the mere fear* of disclosing a disagreement within the institutions regarding the legal basis […] is not a sufficient basis for concluding that the protected public interest in the field of international relations may be undermined'.[46]

The ECJ confirmed this rule in the appeal filed by the Council, while further specifying that it is not impossible that disclosure of an internal debate on the legal basis of an international agreement can undermine the Union's public interest in international relations, but pointing to such a debate does not automatically justify application of this exception.[47] The Council was not able to successfully make the case for secrecy, and was ordered to disclose the document, except for the parts that referenced the envisaged draft agreement. The judgment was received as a victory against 'blanket institutional secrecy in the area of international relations'.[48] Still, the subsequent way in which the Council interpreted the rulings, by again publishing only a small part of the document, raised questions on how meticulously the Court's judgment was followed.[49]

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[39] Leino-Sandberg, ''The Principle of Transparency in EU External Relations Law' (n 13) 211.
[40] Case T-529/09 *In 't Veld v Council* [2012] ECLI:EU:T:2012:215.
[41] *In 't Veld v Council* (n 40) para 6.
[42] *In 't Veld v Council* (n 40) para 44.
[43] *In 't Veld v Council* (n 40) paras 33, 43.
[44] *In 't Veld v Council* (n 40) paras 35-6, 39.
[45] *In 't Veld v Council* (n 40) para 46, italics added.
[46] *In 't Veld v Council* (n 40) para 50, italics added.
[47] Case C-350/12 P *Council v In 't Veld appeal* [2014] ECLI:EU:C:2014:2039, paras 44-45, 51-52, 64.
[48] Elaine Fahey, 'EU Foreign Relations Law: Litigating to Incite Openness of EU Negotiations' (2014) 4 EJRR 4.
[49] Leino-Sandberg, 'The Principle of Transparency in EU External Relations Law' (n 13) 213.



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The second case in which documents containing legal analysis on an international agreement, in this case drafted by the Commission Legal Service, was withheld on the ground that disclosure would reveal strategic information and thereby hurt the Union's international relations, was *ClientEarth (ISDS)*. Environmental NGO ClientEarth had requested several documents that were drafted for internal use, which presented a legal analysis of ISDS and the new Investment Court System (ICS) in light of CJEU case law on the autonomy of EU law.[50] At the time of the decision to refuse access to these documents, the Commission had approved and published its proposal for an Investment Court System in its negotiations over TTIP with the United States and it had completed the negotiations with Canada over CETA (that included ICS) and published the text of that agreement. In other words, disclosure of the textual proposal or the negotiated CETA text could not reveal strategic information. Similarly, information on well-known and publicly available provisions in international investment agreements, such as the International Convention on the Settlement of Investment Disputes (ICSID) could not reveal strategic objectives.

The key to the case, therefore, was whether the legal assessment of this publicly available information by the legal service of the Commission could reveal strategic information. It is important to note here that only one out of several documents withheld by the Commission were disclosed by the legal service to DG Trade, the department responsible for the negotiations.[51] Similar to In 't Veld's claim, ClientEarth argued that disclosing this information could not weaken the Commission's negotiating position, as the Commission claimed, but simply offered an objective legal analysis.[52] Indeed, the role of the legal service is limited to 'ensure that the law is respected, thereby contributing to upholding the rule of law'.[53] It is for this purpose that the Commission's Rules of Procedure require departments of the Commission to consult the European Commission 'all drafts or proposals for legal instruments and on all documents which may have legal implications'.[54] Its role is therefore not to give policy or strategic advice.

The GC disagreed with ClientEarth. It found that the documents did not contain 'unbiased views on the law to be observed, but [the legal assessment] necessarily implies a thorough analysis of numerous legal, economic, political and strategic issues related to the choices that the European Union is required to make.'[55] The documents were drafted in the context of internal discussions, which would inform the Commission on the appropriate position to take in several ongoing negotiations,[56] including negotiations with the US on TTIP. Apparently for that reason, the GC concluded, without further explanation, that the documents indeed 'relate[d] to the specific content of [ISDS or ICS] mechanisms in the envisaged agreements

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[50] For this particular legal debate, see: Laurens Ankersmit, 'The compatibility of investment arbitration in EU trade agreements with the EU judicial system' (2016) 13(1) Journal for European Environmental & Planning Law 46; Opinion 1/17 [2019] ECLI:EU:2019:341.
[51] Confirmatory Decision C (2016) 4286 final pursuant to Article 4 of Regulation 1049/2001 [2016], p.7
[52] *ClientEarth (ISDS)* (n 21) para 34.
[53] European Commission, 'Mission statement Legal Service of the European Commission' <https://ec.europa.eu/info/sites/default/files/mission-statement-legal-service_en.pdf > accessed 15 March 2022.
[54] Article 23(4) Commission Rules of Procedure.
[55] *ClientEarth (ISDS)* (n 21) para 43.
[56] *ClientEarth (ISDS)* (n 21) paras 45-46.



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and [that] their disclosure may reveal the strategic objectives pursued by the European Union in the negotiations'.[57]

In appeal, the ECJ criticised the GC for its lack of specificity in concluding that strategic objectives would be revealed by disclosing the document.[58] The review the GC had conducted of the Commission's argument that a reasonably foreseeable risk existed, was thereby considered insufficient. Still, the GC's judgment was not annulled, because the ECJ agreed as well with the Commission's reasoning that disclosure 'would [have] weakened the Commission's negotiating position by giving to the Commission's negotiating partners an insider look into the European Union's strategy and negotiating margin of manoeuvre'.[59] It is remarkable that in the four paragraphs the ECJ spends on 'rectifying' the GC's lack of specificity, the Commission's reasoning is simply repeated, again without a more detailed explanation why this reasoning is sufficient to establish a 'reasonably foreseeable risk'.

In short, *In 't Veld v Council* and the appeal in *ClientEarth (ISDS)* both confirmed that the CJEU courts accept that legal advice produced in the context of negotiations of an international agreement does not solely fall under the legal advice exception (Article 4 (2) second indent). EU institutions can rely on the international relations exception as well. The EU institutions have to present a compelling *reason* of why disclosure of a specific element of the Legal Service analysis would 'specifically and actually' create a 'reasonably foreseeable risk' that the EU's negotiating position would be damaged, before a document can be withheld. This reason cannot consist of the mere fact that the document concerns an international agreement under negotiation, or shows an internal disagreement on the legal basis question. However, if the legal analysis concerns the specific content of an envisaged agreement, a valid reason for secrecy is deemed to exist, even where the text has already been disclosed to the negotiating partner. This is so because the Court accepts that such legal assessment is of a strategic nature. As such, the reasoning of the CJEU courts is an example of deference to the rationale used by the EU institutions: not only the legal advice exception can be invoked but also the international relations exception. Moreover, not only policy or strategic considerations can be classified as strategic information, but also legal advice from legal services of the EU institutions.

#### *2.2.4 Preparatory documents for negotiations and reports of negotiations*

It is not inconceivable that the EU institutions produce internal preparatory documents before rounds of negotiations with a negotiating partner. They may outline, for instance, where the EU is willing to compromise on tariff concessions or market access commitments in trade negotiations and when such compromises must be sought. It is these documents that seem at first glance to particularly fit the rationale to withhold access on the basis that they may reveal strategy and tactical considerations and as a result may compromise the EU's negotiating position.

Interestingly, in accordance with the Commission's greater commitment to transparency for trade negotiations, the Commission has committed to publishing the agendas and reports of each negotiating round. This allows the public to understand the current state of negotiations, what is the subject-matter of the round of negotiations, where compromises have been found and where difficulties in the negotiations exist. The reason for the Commission's openness may

[57] *ClientEarth (ISDS)* (n 21) para 46.
[58] *ClientEarth (ISDS) appeal* (n 21) para 39.
[59] *ClientEarth (ISDS) appeal* (n 21) para 41.



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not only be a greater commitment to transparency, but also that this type of information is not strategic or reveals tactical considerations as the negotiating partner equally knows this information.

The Commission is also committed to publishing a Sustainability Impact Assessment (SIA) before the end of the negotiations, although the European Ombudsman has found maladministration of the part of the Commission as recently as 2020 for failing to finalise, update and publish an SIA on the EU-Mercosur trade deal.[60] It also engages in regular Civil Society Dialogue meetings and the Commission has created an Expert Group on EU trade agreements in order to improve participation of the public in the decision-making during the negotiating phase of the agreements. However, the Expert Group on EU trade agreements has already been disbanded in 2019 after it was set up in 2017. Disclosure of SIA's themselves hardly seem to be capable of revealing strategy or tactical considerations as they are produced by organisations outside the EU institutions, yet the negotiators assessment of how to use the information to address the SIA findings may.

*2.2.5 Positions to be taken before international bodies*

The rationale that documents must be withheld because they reveal strategic objectives and tactical considerations that can undermine the EU's negotiating position is used predominantly where the EU is negotiating an international agreement. However, the EU may also find itself in international negotiations where it is part of discussions before international bodies set up by international agreements that implement an international agreement. A notable example is the Dispute Settlement Body (DSB) of the World Trade Organisation (WTO). Here, the EU might find itself negotiating mutually agreed solutions or mutually acceptable compensations with WTO members alleging non-compliance of WTO agreements by the EU. The CJEU itself has stated that the 'WTO dispute settlement system […] accords considerable importance to negotiation between the parties'.[61]

Accordingly, documents can likely be withheld from the public where they would reveal strategic objectives and tactical considerations before international bodies where negotiations take place, such as in the context of the WTO's DSB. This may also be true for situations in which the EU is producing documents for negotiating a text of a decision to be adopted by an international body outside the WTO context. However, it should be noted that for the implementation of international agreements, documents produced by EU institutions are not necessarily part of 'negotiations' nor is the content necessarily 'strategic' or tactical. Many international environmental agreements contain (scientific) reporting obligations necessary for the proper monitoring of such an agreement. Documents containing such information are not part of 'negotiations' nor is their content 'strategic'.

Where international agreements establish bodies that can be called upon to adopt acts 'having legal effects', the Council must take a decision on a proposal from either the Commission of the High Representative.[62] As a result, Commission proposals for such decisions and the decisions themselves are published, although the more stringent transparency requirements that

[60] Ombudsman Decision in Case 1026/2020/MAS.
[61] Case C-377/02 *Van Parys* [2005] ECLI:EU:C:2005:121, para 42; Case C-149/96 *Portugal v Council* [1999] ECLI:EU:C:1999:574, paras 36-40.
[62] Article 218(9) TFEU.



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are applicable for legislative procedures do not apply in such a situation.[63] A decision has 'legal effects' when it is capable of 'decisively influencing the content of the legislation adopted by the EU legislature' regardless of whether under international law the decision is a mere recommendation.[64]

### *2.3 Protecting a climate of confidence or the mutual trust between the Union and an external party*

The second rationale discussed here that EU institutions present to withhold documents which in their view could undermine the public interest as regards international relations, entails that disclosure of the document would damage a climate of confidence or the mutual trust that exists between the Union and its international partners. The Union is an active player in the international arena, and needs to uphold quality relations with a wide range of third states and other international organisations to effectively carry out its tasks. According to Article 21(1) TEU, for example, the Union 'shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations,' and 'shall promote multilateral solutions to common problems.' The exclusive competence to develop a common commercial policy,[65] is still regarded as the most important element of the Union's external relations.[66] In this, and in other areas, the Union needs to be perceived[67] as a reliable and constructive negotiating partner for external parties in order to fulfil its tasks.

An important aspect of gaining a solid reputation in this regard is to respect the climate of confidence in negotiations of international agreements. Especially when it concerns information that external parties have confidentially shared with the EU, disclosure of that information could potentially harm the relations with that party, and make this actor less willing to conduct negotiations or cooperate in general with the Union, resulting in worse outcomes for the general public. To this effect, the CJEU has specified that the way in which external parties, like third countries, perceive the decisions of the EU, is a component of the international relations of the Union.[68] If a decision to disclose information is likely to hurt the confidence or trust of the authorities of a third country, the international relations exception can potentially be invoked to prevent this from happening, and keep the relations between the Union and this third country intact. The CJEU has also emphasised that negotiations in particular require mutual trust between negotiating parties 'to ensure the effectiveness of the negotiation'.[69]

This rationale thus follows a different logic than the argument that disclosure would reveal strategic objectives or tactical considerations, mainly because the zero-sum logic is less apparent in the argument that mutual trust or a climate of confidence requires withholding certain documents. Sharing confidential materials is deemed to smoothen the talks, whilst an attitude of distrust likely leads to worse outcomes for both parties. Still, the difference in policy

[63] Protocols 1 and 2 to the TFEU; Articles 7, 8 Council Rules of Procedure.
[64] Case C-399/12 *Germany v Council* [2014] ECLI:EU:C:2014:2258, para 63.
[65] Article 3(1)(e) TFEU.
[66] Joris Larik, 'Common Commercial Policy' in Ramses A. Wessel and Joris Larik, *EU External Relations Law* (Hart 2020) 209-210.
[67] *CEE Bankwatch Network* (n 20) para 90.
[68] *CEE Bankwatch Network* (n 20) para 90.
[69] *In 't Veld v Commission* (n 36) para 119.



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areas described above between negotiations on 'key strategic interests' and negotiations around more cooperation-based areas like environmental issues, is relevant in assessing the appropriate degree of transparency. It is more likely that an external party expects secrecy from the Union in realms that are sensitive and potentially dangerous for its national security, than when a general trade agreement or environmental convention is drafted. This is also reflected in the fact that negotiations concerning environmental agreements are characterised by a high degree of transparency, which does not hinder the effectiveness of these discussions. We now turn to a selection of types of documents to assess the relevance of and possible reliance on the rationale that the protection of a climate of confidence or mutual trust requires application of the international relations exception.

#### *2.3.1 Confidential intelligence received by external parties and held by EU institutions*

The CJEU has accepted that information shared confidentially by an external actor can be withheld with reference to the international relations exception. An early example in the case law is *Sison*, in which the GC held that international cooperation to combat terrorism 'presupposes confidence in confidential treatment accorded to information passed on to the Council' and that disclosing this information anyway, could put the EU in jeopardy, because third countries would then be less willing to share their intelligence with the EU.[70] The GC stressed the sensitivity of this policy area, which contributed to the justification of secrecy.[71] This part of the GC's ruling was overturned in appeal, but not because the reasoning of the GC was flawed. In fact, the documents at hand did not come from third countries, but from Member States, which rendered this consideration irrelevant for the case at hand.[72] Nevertheless, the reasoning of the GC shows deference to the argument that confidential intelligence shared in sensitive policy contexts can be withheld by using the international relations exception.

#### *2.3.2 Documents received by external parties in the context of the implementation of international agreements*

Regulation 1049/2001 in principle does not distinguish between documents that EU institutions have received from external actors, such as the authorities from third countries or international organisations, and documents that EU institutions themselves have drafted.[73] However, institutions are asked to consult the third-party that delivered the document, in case some doubt exists on whether one of the exceptions to transparency applies, according to Article 4(4) Regulation 1049/2001. The nature of this consultation was further clarified in the recent *Bronckers* case.[74] The Commission was asked to disclose documents drafted by a Mexican non-profit organisation that was accredited by the Mexican government to oversee the implementation of a 1997 EU-Mexico agreement on the mutual recognition and protection of designations for spirit drinks. The Mexican authorities that were consulted by the Commission disagreed with disclosure, mainly by raising the argument that this could hurt commercial interests.[75] The GC acknowledged first of all that the wishes of the third party which is consulted do not in any way bind the institution which must decide on a request for access.[76]

[70] Joined Cases T-110/03, T-150/03, and T-405/03 *Sison* [2005] ECLI:EU:T:2005:143, para 80.
[71] *Sison* (n 70) para 81.
[72] *Sison appeal* (n 19) para 67.
[73] Article 2(3) Regulation 1049/2001.
[74] *Bronckers* (n 21).
[75] *Bronckers* (n 21) para 44.
[76] *Bronckers* (n 21) para 45.



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The Commission in this case thus had to assess the request in light of the rules of Regulation 1049/2001 and could not automatically discard it.[77] Taking into account the content of the document, as well as the Mexican authorities' opposition to disclosure, led the Commission to the stance that disclosure could be viewed by the Mexican authorities as a breach of trust, potentially frustrating the operations of the Committee set up to implement the Agreement,[78] and therefore the international relations exception should be applied. Although the Commission did not base its refusal to disclose on the same ground as the Mexican authorities did (namely the protection of commercial interests), the GC still accepted the reasoning of the Commission, since it did not merely draw on the Mexican opposition, but also considered other factors.[79] Nevertheless, *Bronckers* shows that although opposition to disclosure from a third party cannot automatically lead to a refusal to withdraw, this factor can play an important role in the subsequent assessment made by the institution, and thereby justify reliance on the international relations exception.

This logic equally applies to documents received from an international body overseeing the implementation of an international agreement.[80] The Ombudsman has for example allowed the Commission's refusal to disclose a note laying out the preliminary position of the World Customs Organisation ('WCO') regarding the classification of smartphones. The WCO objected to releasing this document to the public before the final decision, and necessary redactions were made.[81] The Ombudsman agreed with the Commission that breaching the requested confidentiality of the document would violate WCO rules and hurt the EU's diplomatic relations between the EU, the WCO, and its members.[82]

*2.3.3 Documents containing the Union's own stances in ongoing rounds of negotiations*

Not only documents that emanate from external parties themselves can potentially be withheld by EU institutions in order to protect the mutual trust between the Union and a third party, but also documents produced by EU institutions themselves can be kept secret by using this rationale. This was made clear by the GC in *In 't Veld v Commission*. MEP In 't Veld argued in this case that disclosing positions the Union had taken in a round of ongoing negotiations, meaning the other negotiating parties were already aware of these stances, should be made public. While the first rationale of protecting strategic objectives or tactical considerations would not work here,[83] the GC still disagreed with In 't Veld. The main consideration the Court employed, was that the Union's positions 'could reveal, indirectly, those of the other parties to the negotiations'.[84] Even if the positions of other parties appear to be anonymous, disclosure 'may be likely to seriously undermine, for the negotiation party whose position is made public and, moreover, for the other negotiating parties who are witnesses to that disclosure, the mutual trust essential to the effectiveness of those negotiations'.[85] In the subsequent review of the specific documents the Commission withheld, the Court agreed with all documents where the

[77] *Bronckers* (n 21) para 46.
[78] *Bronckers* (n 21) paras 48-49.
[79] *Bronckers* (n 21) paras 51-53.
[80] E.g. Ombudsman Decision in Case 624/2020/MIG [2020], para 9.
[81] Ombudsman Decision in Case 624/2020/MIG [2020], para 9.
[82] Ombudsman Decision in Case 624/2020/MIG [2020], para 22.
[83] Cf *Besselink* (n 26).
[84] *In 't Veld v Commission* (n 36) para 124.
[85] *In 't Veld v Commission* (n 36) para 126.



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positions of other parties were referred to.[86] The difference with *Besselink*, in which the Court disallowed withholding documents that contain stances of the Union which are already communicated to other negotiating parties, is that the document in that case was drafted before any actual negotiation took place, making it impossible that the positions of other negotiating parties could be derived from the document. In *In 't Veld v Commission*, the Court showed a particular sensitivity to the rationale of protecting the climate of confidence in negotiations.[87]

### *2.3.4 Confidential agreements with external parties*

Not all agreements that the EU concludes, are released in full to the general public. A refusal to disclose such an agreement can be based on one of the exceptions laid out in Article 4 Regulation 1049/2001, but then has to satisfy the particular requirements of that exception, even in case the EU has promised the external party confidentiality.[88] The *CEE Bankwatch* case concerns such an agreement that was not fully disclosed, and later became the subject of an access to documents request, namely the Loan Facility Agreement between the European Atomic Energy Community (EAEC), represented by the Commission, and Ukraine of 2013.[89] The Commission had only granted partial access to the Agreement, and relied on the international relations exception in making its redactions. It argued that disclosing the entire Agreement would hurt the relations with Ukraine, a 'strategic partner' of the Union, and thus have a 'negative diplomatic impact'.[90] Hurting these relations would be specifically problematic, because that would undermine the efforts to achieve the safety of nuclear power plants close to the territory of the EU, according to the Commission. The General Court accepted the Commission's reasoning that these relations would be undermined by the release of the document, mainly because the Agreement contained commercially sensitive information on Energoatom, a State-owned enterprise, the disclosure of which may hurt the quality relations with Ukraine.[91] Since nuclear safety can be considered a 'key strategic interest',[92] it is understandable that details of agreements such as this Loan Facility Agreement can be withheld using the international relations exception.

### *2.3.5 Internal records on or internal analysis of events in third countries*

The scope of application of the rationale for withholding documents on the basis of protecting a climate of confidence or mutual trust between the EU and external parties is not limited to confidentially received information or the realm of negotiations. The EU also holds internal records on matters that can be particularly sensitive to a specific third country, the disclosure of which could potentially damage the relations with that country. The most important example in the case law of an internal document that was withheld for this reason, is formed by

[86] *In 't Veld v Commission* (n 36) paras 138, 143, 151, 170-2, 195
[87] Leino-Sandberg, 'Secrecy, Efficiency, Transparency' (n 6) 10.
[88] Cf. *In 't Veld v Commission* (n 36) para 118. See for a broader discussion of the role of the EP in informal readmission arrangements in the field of EU migration law: Davide Gnes and Milka Sormunen, 'Controlling the executive in external migtation policy? A preliminary assessment of the role of the European Parliament in scrutinising and influencing EU informal readmission arrangements' 2022 CLEER Paper 1.
[89] *CEE Bankwatch Network* (n 20).
[90] *CEE Bankwatch Network* (n 20) para 83.
[91] *CEE Bankwatch Network* (n 20) paras 93-96.
[92] The GC referred to the fact that identifying risks to nuclear safety in Ukraine is crucial for the EU's own security: *CEE Bankwatch Network* (n 20) paras 92-93, 95.



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*Jurašinović*.[93] During the Croatian War of Independence in 1995, observers from the (then) European Community drafted reports documenting the events in the area of Knin. When asked to release these reports fourteen years later, the Council was reluctant to do so, in part because this could turn problematic for the relations between the EU and the different parties to the conflicts in former Yugoslavia.[94] Even though the events took place over a decade ago, the GC found that the contents where so sensitive as to be 'capable of giving rise to or increasing resentment and tension among the different communities of the countries which had been parties to the conflicts in former Yugoslavia or between the countries formed from Yugoslava, thus weakening the confidence of the Western Balkan States in the process of integration.'[95] It concluded that for that reason, disclosing 'comments or assessments concerning the political, military and security situation at a decisive stage of the conflict between Croatia and Federal Yugoslav forces' would undermine the Union's international relations and thus could not be disclosed. This reasoning was not challenged in the appeal, while the other points raised were dismissed by the ECJ.[96]

The Ombudsman has dealt with a number of similar cases, where internal EU records on events in third countries were not disclosed by EU institutions on the basis of the rationale that releasing these records would undermine the trust of that external party and by extension hurt the EU's diplomatic activities. One example is the refusal by the European External Action Service to fully disclose a note on the Amulsar Mountain mining project in Armenia, which has been protested due to environmental concerns. The note, meant to inform EU representatives, contained 'politically sensitive information', and would undermine relations with stakeholders in Armenia, according to the EEAS. The Ombudsman reassured the applicant that the redacted parts did not contain environmental information, and agreed that the sensitivity of the redacted elements was of such a nature as to justify keeping its contents secret.[97] Other examples include documents that contain positions voiced by Member States in confidential EU meetings, such as documents on a Council Working Party in which Member States voiced their confidential opinions on sanctions on Iran,[98] and 'briefing notes' held by the Commission containing an assessment of Israel's internal affairs and Member State opinions on this matter[99]. The Ombudsman ruled in both cases that disclosure would undermine the relations between the EU and the external party involved.

The internal records the EU holds on the situation in third countries is specifically sensitive in the context of accession. The Ombudsman has in this context dealt with an access to documents requested related to internal records on Albania, which is officially a candidate for entering the EU since 2014. One of the conditions for entering the Union, is that the legal system of the country involved is in accordance with EU law. In order to foster the Albanian legal system's compliance with Union law, the Commission funds EURALIUS, a project meant to improve and consolidate the Albanian justice system.[100] EURALIUS drafted an internal report on the

[93] Case T-465/09 *Jurašinović* [2012] ECLI:EU:T:2012:515, confirmed in appeal by Case C-576/12 P *Jurašinović appeal* [2013] ECLI:EU:C:2013:777.
[94] *Jurašinović* (n 93) para 3.
[95] *Jurašinović* (n 93) para 39.
[96] *Jurašinović appeal* (n 93).
[97] Ombudsman Decision in Case 785/2020/MIG [2020], paras 15, 17.
[98] Ombudsman Decision in Case 689/2014/JAS [2015].
[99] Ombudsman Decision in Case 1713/2019/FP [2019].
[100] See the website of EURALIUS: <https://euralius.eu/index.php/en/> accessed 15 March 2022.



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protection of property in Albania, which was the subject of an access to documents request. The Commission argued that the report was a part of the accession process of the EU, which requires 'open and frank' dialogue, for which an 'environment of mutual trust' is necessary.[101] The Ombudsman agreed that fully releasing this report would show 'sensitive information on the shortfalls in the Albanian justice system', could hurt the necessary mutual trust in the accession process, and agreed with the refusal to share the entire report.

## 3 The 'defence and military matters' exception (Article 4(1)(a), second indent, Regulation 1049/2001)

Although the EU has limited competences in the field of defence, it conducts a Common Security and Defence Policy that provides the Union with an operational capacity drawing on military assets of the Member States and therefore necessarily entails that the EU institutions hold documents that relate to defence and military matters. Since this area touches upon particularly sensitive matters of national security, it is understandable that a separate exception for documents that undermine the Union's public interest as regards defence and military matters is listed in Article 4(1)(a), second indent, Regulation 1049/2001. The release of information that contains information on, for example, Member State's defence capabilities, military strategies, or specific forms of defence cooperation between Member States, could benefit the Union's adversaries and potentially even put European citizens or soldiers at risk. The rationale for secrecy in this field is therefore quite obvious and fits the classic paradigm of secrecy in international affairs that was sketched at the outline of this section. An example of a policy in which documents circulate that could be covered by this exception is the brand new European Defence Fund ('EDF'), which is operative since 2021 and which is formally a part of the Union's industrial policy. The EDF funds research and development of new defence products and technologies, the details of which are not shared with the public, since sharing those details would give external parties insights into the nature and innovative aspects of the projects, defying their purpose of increasing the Union's strategic autonomy[102] vis-à-vis external actors.

Interestingly enough, no applicant has yet challenged the use of this exception by an EU institution before the CJEU. In contrast to the rich case law under the international relations exception, the Court thus has not had the opportunity to clearly outline the scope of the defence and military matters exception. This means that the only institution that has yet applied the defence and military matters exception in a concrete case, has been the Ombudsman, in a small number of applications. Given that the Ombudsman still has to respect the CJEU's interpretation of Regulation 1049/2001, it reviews requests based on the general comments in CJEU case law on the exceptions listed in Article 4(1)(a) Regulation 1049/2001. This primarily means that the Ombudsman considers the 'wide margin of appreciation', or 'wide discretion' of the institution involved.[103] With no limits that can be derived from CJEU jurisprudence, as

[101] Ombudsman Decision in Case 1392/2019/FP [2019], para 14.
[102] E.g. Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing the European Defence Fund' COM(2018) 476 final, 1-2.
[103] E.g. Ombudsman Decision in Case 786/2021/LM [2021]; Ombudsman Decision in Case 1839/2021/OAM [2021], Ombudsman Decision in Case 2011/2018/MIG [2018].



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with the international relations exception, the resulting review of the Ombudsman in cases where the defence and military matters exception is applied, is extremely limited in nature.

One of the cases in which the marginal review of the Ombudsman is visible, concerns a request for access to a report of the High Representative on the status of Permanent Structured Cooperation (PESCO). PESCO is a recent initiative that provides a framework for Member States willing to cooperate on a more committed basis in the field of defence, and works through several projects that Member States can opt-in to at will.[104] The Ombudsman found that the document in this case contained 'sensitive defence and military information throughout', while it was 'reasonable' for the EEAS to argue that hostile external parties could obtain strategic cues to effectively counteract the EU's defence efforts, if they were able to access this information.[105] The reviews of the Ombudsman are generally quite shared and limited in scope, where a link to military information seems to almost automatically justify the application of the defence and military matters exception. Similarly, the Ombudsman has allowed the refusal to share the troop contributions of individual Member States in CSDP missions abroad by the EEAS,[106] the refusal to disclose evaluations of projects funded by the EDIDP (European Defence and Industrial Development Project) on their compliance with international law,[107] and a note setting out the priorities of the EU's military capability development in the CSDP area.[108]

## 4 How secrecy itself could undermine the Union's public interest in international relations

The international relations exception and its interpretation suggest that the public interest as regards international relations benefits from secrecy. However, as recent events and subsequent practice of EU institutions in the area of trade and investment policy have shown, the opposite can be the case too: secrecy can, in fact, *undermine* the public interest as regards international relations. This is the case, for instance, where secrecy undermines both the effectiveness and legitimacy of EU institutions to such a degree that its capacity to conclude international agreements is weakened. For instance, the negotiations of the Transatlantic Trade and Investment Partnership (TTIP) and the Anti-Counterfeiting Trade Agreement (ACTA) came to a standstill, in part as a result of the secrecy that surrounded the negotiations that damaged the legitimacy of the Commission and the public support of the negotiations in the Member States. As a result, the EU institutions and in particular the Commission, have made a considerable turn on transparency policy during negotiations of trade agreements. The Commission now has a transparency policy that goes beyond what it is required to do by the CJEU courts in order to advance public acceptance of international trade and investment agreements.

The Commission's approach to the negotiations for TTIP had initially been traditional, even in the wake of the European Parliament's decision to decline consent to ACTA in 2012. It refused

[104] Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States; PESCO Website <https://pesco.europa.eu/> accessed 15 March 2022.
[105] Ombudsman Decision in Case 786/2021/LM [2021], para 18.
[106] Ombudsman Decision in Case 1029/2020/DL [2020].
[107] Ombudsman Decision in Case 1839/2021/OAM [2021].
[108] Ombudsman Decision in Case 2011/2018/MIG [2018].



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to grant access to the (draft) negotiating directives, negotiating positions, draft texts of the agreement, reports of negotiating rounds, or meetings with industry to public interest organisations and members of the public.[109] Gradually, this position began to shift towards more openness, at the suggestion of the European Parliament. During the TTIP negotiations, however, the Commission still responded negatively to various recommendations made by the European Ombudsman in its own-initiative inquiry on TTIP.[110] As a result, the Commission became vulnerable to what Tienhaara has labelled 'disruptive transparency', where disclosure of documents is 'intended to interrupt the secret flow of information within and among powerful institutions and ultimately to upset the existing social and political order'.[111] On 2 May 2016, Greenpeace successfully managed to bring the TTIP negotiations to a complete halt by leaking a large amount of secret documents pertaining to the negotiations including draft texts of the agreement.[112] The leaks followed years of campaigning by public interest organisations highlighting the secrecy surrounding the negotiations and the heightened interest of the public in the negotiations. Shortly thereafter several government leaders in Member States called for the end of negotiations, citing concerns over the secrecy of the negotiations.[113]

Currently, the Commission's transparency policy in trade negotiations is moving away from a model that can be labelled as 'conventional transparency' to something that is closer to a 'deliberative transparency' model.[114] Rather than merely focusing on facilitating accountability of decision-makers after decisions have been taken, this model seeks to facilitate deliberation and participation in decision-making during and before the decision-making process. Before the launch of negotiations, the Commission has committed to systematically publish its recommendations for negotiating directives (those directives themselves, if issued, are a Council document). According to the Commission, this practice allows the public 'to have a better informed view and to discuss issues of interest and concern right from the start of preparations for a negotiation'.[115] Yet, despite these public promises, the Commission has not been true to its word for all of the trade agreements under negotiation. The draft negotiating directives of the EU-Mercosur agreement have not been disclosed by the Commission, nor has the Commission released the draft negotiating directives of a new side agreement to the EU-Mercosur agreement that is intended to strengthen its environmental credentials. The environmental impact of this agreement is by far the most controversial aspect of the agreement and of significant concern to the public and environmental organisations. Given that the goals

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[109] Friends of the Earth Europe, 'Civil society call for full transparency about the EU-US trade negotiations' (2014) <http://www.foeeurope.org/sites/default/files/foee_ttip-civil-society-transparency-call190514.pdf> accessed 15 March 2022; Ombudsman, 'Letter to the European Commission requesting an opinion in the European Ombudsman's own-initiative inquiry OI/10/2014/MMN concerning transparency and public participation in relation to the Transatlantic Trade and Investment Partnership (TTIP) negotiations' <https://www.ombudsman.europa.eu/en/doc/correspondence/en/54633> accessed 15 March 2022.

[110] Niels Gheyle and Ferdi De Ville, 'How Much Is Enough? Explaining the Continuous Transparency Conflict in TTIP' (2017) 5 (3) Politics and Governance, 16, 22

[111] Tienhaara (n 31) 114.

[112] Trade-leaks.org, 'TTIP Leaks (2 May 2016) <https://trade-leaks.org/ttip/> accessed 15 March 2022.

[113] Jennifer Rankin, 'Doubts rise over TTIP as France threatens to block Eu-US deal' (*The Guardian*, 3 May 2016) <https://www.theguardian.com/business/2016/may/03/doubts-rise-over-ttip-as-france-threatens-to-block-eu-us-deal> accessed 15 March 2022; Céline Nguyen, 'Francois Hollande buries hope of concluding TTIP this year' (EURACTIV, 31 August 2016) <https://www.euractiv.com/section/all/news/hollande-burries-any-hope-of-ttip-conclusion-this-year/> accessed 15 March 2022.

[114] Tienhaara (n 31) 113-115.

[115] European Commission, 'Transparency Policy in DG Trade' <https://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157486.pdf> accessed 15 March 2022.



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of the Commission on enhanced transparency are to strengthen the legitimacy of its trade policy and to involve all stakeholders more, this is a noteworthy setback.

During the negotiations, the Commission publishes the EU's initial proposals for legal text, explanatory documents, and reports of negotiating rounds. The initial proposals for legal text by the EU show a remarkable similarity regardless of the negotiating partner involved, whether it is Australia, Myanmar, Indonesia, Mexico or South Africa. This similarity highlights the lack of confidentiality of these documents as it demonstrates that the EU's negotiating position is essentially the same regardless of the negotiating partner.

The Commission is also committed to publishing a Sustainability Impact Assessment (SIA) before the end of the negotiations, although the European Ombudsman has found maladministration of the part of the Commission as recently as 2020 for failing to finalise and update an SIA on the EU-Mercosur trade deal.[116] It also engages in regular Civil Society Dialogue meetings and the Commission has created an Expert Group on EU trade agreements in order to improve participation of the public in the decision-making during the negotiating phase of the agreements. However, the Expert Group on EU trade agreements has already been disbanded in 2019 after it was set up in 2017.

The Commission does not publish consolidated and amended texts after initial textual proposals. This is still a considerable restriction in enabling participation of the public. While this can be explained by possible reluctance of negotiating partners to disclose this information, the Commission does not commit to agreeing with the negotiating partner or convincing it of the importance of disclosure of such texts. As the European Ombudsman stated in its TTIP inquiry:

> 'The right of EU citizens to have public access to documents held by EU institutions is a fundamental right aimed at ensuring that they can participate in EU decision-making and hold the EU and its institutions to account. This right deepens the democratic nature of the EU and its institutions. Responses to the Ombudsman's public consultation have made clear the importance that stakeholders attach to documents, such as consolidated texts containing EU and US positions. **Accordingly, it is vital that the Commission inform the US of the importance of making, in particular, common negotiating texts available to the EU public *before* the TTIP agreement is finalised. The Commission should also inform the US of the need to justify any request by them not to disclose a given document. The Commission needs to be convinced by this reasoning**. Early publication of common negotiating texts would allow for timely feedback to negotiators in relation to sections of the agreement that pose particular problems. The Ombudsman assumes that it is preferable to learn of such problems sooner rather than later, so that they can be tackled effectively.'[117]

The Commission also will not pro-actively publish preparatory documents, documents for internal use such as legal advice and legal analysis of trade agreements or documents it has received from the negotiating partner such as proposals for legal texts. At the implementation phase, the Commission's transparency efforts appear to be limited to publishing agendas and

[116] Ombudsman Decision in Case 1026/2020/MAS [2021].

[117] Ombudsman Decision closing her own-initiative inquiry OI/10/2014/RA concerning the European Commission [2015], paras 22-23, italics and bold added.



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reports of meetings of committees set up under the agreement, not preparatory or otherwise more internal documents. Nonetheless, publication of the negotiating mandate and textual proposals do allow much more participation of the public than before.

The deliberative transparency model is in line with the rationale of EU transparency law. Recital (2) of Regulation 1049/2001 states: 'Openness enables citizens to *participate* more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.'[118] The legal basis of the Regulation, current Article 15 TFEU, states that 'in order to promote good governance and *ensure the participation of civil society*, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible' an allusion to Article 1 TEU: 'this Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.' Article 11 TEU, in turn, also emphasises the link between openness and ability of the public and civil society to participate in decision-making requiring EU institutions to maintain 'an open, transparent and regular dialogue' with civil society, carrying out consultations and giving the opportunity to 'make known and publicly exchange their views in all areas of Union action'.

The peculiar procedure for the conclusion of international agreements under Article 218 TFEU further highlights the need for the Commission to be more open towards the public during the negotiation stage of an agreement. After negotiations have been finalised, the Council and (in most cases) the European Parliament are presented with a take-it-or-leave-it choice over the entirety of the agreement. This severely limits the public debate over the merits and pitfalls of the agreement as these institutions cannot amend specific parts of the text. The participation in the decision-making of these institutions the public and civil society is therefore much more limited than under other decision-making procedures if the Commission does not meaningfully engage with the public.

## 5 Conclusion

While the EU's activities on the international stage have expanded considerably over time, EU institutions draft, receive and hold more and more documents that could be of importance to Union citizens' daily lives and their participation in EU decision-making. The exceptions that EU institutions can rely on to withhold that information are however amongst the 'mandatory' exceptions listed in Article 4(1)(a) Regulation 1049/2001, meaning that EU institutions must refuse access to these documents if they consider disclosure to undermine the public interest as regards international relations. Moreover, no overriding public interest in disclosure can be found if the document's release would undermine the public interest as regards either international relations or defence and military matters. This leads to a problematic predicament in which crucial information on a growing range of legal and political issues is withheld from the public, hurting the EU's legitimacy and Union citizens' right to access documents and participate in decision-making.

To that effect, this contribution showed that the CJEU courts generally apply a light-touch review of an EU institution's reliance on the international relations exception, despite the fact

[118] Italics added.



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that the CJEU courts continually stress that the exceptions ought to be 'applied strictly'. The CJEU courts generally give institutions a wide discretion that challenging an institution's reliance on this exception is very difficult. This contribution identified two types of rationales for secrecy that cover the CJEU case law on the international relations exception: (i) a document could reveal strategic objectives or tactical considerations; and (ii) a document could damage the climate of confidence or the mutual trust between the Union and an external partner. While the former rationale hinges on the existence of a zero-sum logic within a particular negotiation, the latter follows the opposite assumption that a climate of confidence can smoothen cooperation and lead to more positive outcomes for all parties involved. Despite their seemingly contradictory logic, the CJEU courts have at times intermingled these rationales. [119] Moreover, the level of scrutiny to review whether a particular document concretely satisfies the logic of one of these rationales has been particularly low. Even apodictic and barely substantiated refusals have been accepted, while the Court's approach appears to be reminiscent of an approach the Ombudsman had warned the Commission for in its TTIP investigation:

> 'this exception does not apply simply because the subject matter of a document concerns international relations. Rather, it is necessary to show, based on the content of a requested document, that its disclosure would undermine the public interest as regards international relations'.[120]

Central to the logic of applying the two identified rationales is a distinction made by the Ombudsman between documents relating to a 'key strategic interest' from documents drafted in the context of 'negotiations aimed at entering into general trade agreements'. [121] If a document contains particularly sensitive secret information, for example in the sphere of military action, it is more likely that disclosing information could be exploited by other parties and a zero-sum logic is at play, then when the document concerns for instance international environmental issues, where shared goals and gains are more obvious. Likewise, disclosing confidential information received from external parties concerning such key strategic interests will generally hurt mutual trust more than when rather inconsequential information is shared. Consequently, the Ombudsman has considered that a 'high degree of transparency is appropriate' in the area of general trade agreements,[122] as opposed to areas that are considered key strategic interests. This nuanced approach which stems from the logic inherent in the rationales for secrecy has so far not been followed by the CJEU courts, which further highlights the low level of judicial review the courts use to scrutinise EU institutions.

On two occasions, the CJEU courts did take an important step towards a more stringent review of the arguments presented by the defendant institution. In *In 't Veld v Council*, the ECJ agreed with the General Court that not all internal debates could reveal strategic objectives or be exploited by negotiating partners, and in *Besselink v Council*, the General Court found that disclosing positions already known by negotiating partners, drafted before any actual negotiation took place, can also not reasonably be said to undermine the EU's international relations. These developments are arguably offset by more restrictive judgments such as

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[119] E.g. *In 't Veld v Council* (n 40) paras 36, 39; *ClientEarth (ISDS)* (n 21) paras 46-47.

[120] Ombudsman Decision closing her own-initiative inquiry OI/10/2014/RA concerning the European Commission [2015], para 19.

[121] Ombudsman Decision in Case 1611/2019/KR [2020], para 20.

[122] Ombudsman Decision in Case 1611/2019/KR [2020], para 20.



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*ClientEarth v Council*, in which an internal legal service opinion on the legality of forms of ISDS was kept secret.

Although EU institutions are left with a wide discretion and are not pressured by the CJEU courts to apply the international relations exception more strictly, there has been a development in the way the Commission deals with documents regarding trade negotiations. The overall shift in the direction of a 'deliberative transparency' model has been spurred on by the TTIP affair, in which the disruptive nature of a leak of previously withheld documents showed how secrecy in international relations can actually *harm* the EU's ability to act as an effective international actor. In fact, a more proactive approach in releasing document does not undermine the EU's public interest, but serves it, since the legitimacy of decision-making in the EU increases with more transparency and early public participation in drafting and negotiating international agreements that impact citizens considerably, as the Ombudsman's TTIP opinion of 2014 exemplifies.

This development shows that the classic paradigm of secrecy in international relations should be considered something of the past. Instead, the EU's increasing competences to act on the international scene should also bring with it a more nuanced approach to applying the international relations exception by both EU institutions and the CJEU courts. Mainly, the logic of the two identified rationales for secrecy should be strictly followed and applied to the concrete contents of any document that is drafted or received in the context of international action. This means in part that the distinction between key strategic interests and less sensitive realms, such as negotiations on general trade agreements or international environmental accords, should inform the specific handling of documents concerning international relations. Not only would such an approach benefit the legitimacy of EU institutions and the participation of Union citizens in decision-making, but, as the TTIP saga show, it would also improve the general effectiveness of the EU to act on the international scene.



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