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Secrecy and oversight in the European Union: The law and practice of classified information

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CHAPTER 1

INTRODUCTION

*You want to protect power or protect something that is close to power.
You do not want to be too much in the light.
You do not want transparency that can actually undermine your power.¹*

For the first time in its 20-year history, the European Ombudsman was denied its right under Statute to inspect an EU institution document, even under the guarantee of full confidentiality, as part of an inquiry.

This power to inspect documents is fundamental to the democratic scrutiny role of the Ombudsman and acts as a guarantor of certain fundamental rights to the EU citizen.²

Secrets pose a challenge to democratic processes or even completely obstruct them. Keeping secrets implies having the power to intentionally conceal information and exclusive discretion to selectively decide upon disclosure. It thus leads to a divide between ‘insiders’, those in possession of secrets and ‘outsiders’, those seeking to know them. The European Ombudsman, as an outsider, was refused access to a crucial report classified as ‘EU Secret’ on the implementation of the EU-US Terrorist Finance Tracking Programme in September 2014.³ This secrecy classification derives from the European Union Classified Information system, which administers official secrets in the European Union. Although it was Europol, an EU agency for law enforcement cooperation that officially denied the access request and was later supported by the European Commission for doing so,⁴ the actual decision was made by the US Treasury Department. In line with the agreements regarding the exchange of official secrets between Europol and the US authorities,⁵ the former had to obtain the permission

1 Respondent No. 25.

2 Presentation by the European Ombudsman Emily O’Reilly, Decision of the European Ombudsman closing the inquiry into complaint 1148/2013/TN as regards Europol, available at <http://www.ombudsman.europa.eu/activities/speech.faces/en/58671/html.bookmark>.

3 Decision of the European Ombudsman closing the inquiry into complaint 1148/2013/TN against the European Police Office (Europol).

4 Nikolaj Nielsen, ‘US gag order on EU police agency stirs controversy’ *EUobserver* (Brussels, 8 January 2015) <<https://euobserver.com/justice/127142>> (Accessed 4 June 2015).

5 Agreement between the European Union and the United States of America on the processing and Transfer of Financial Messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program [2010] OJ L195/5, art 4(9). See Marise Cremona, ‘Justice and Home Affairs in a Globalised World: Ambitions and Reality in the tale of the EU-US SWIFT Agreement’ (2011) Institute for European Integration Research Working Paper 4/2011 <<https://eif.univie.ac.at/downloads/workingpapers/wp2011-04.pdf>> accessed 24 August 2015.

of the US authorities before allowing any access to the report. Hence, the European Ombudsman ‘had no alternative but to close’ her inquiry. Even more remarkable than this situation, which effectively amounted to a US veto of the oversight of an EU institution are the *rules of official secrets* that actually empower a third-country executive body to decide how secrets may be shared in the EU.

This thesis examines the law and practice of official secrets in order to appraise whether and how they restrict democratic oversight and fundamental rights in the European Union. It provides a systematic and in-depth analysis of what the rules of official secrets are, who establishes them and how they work in practice. It critically evaluates whether the EU primary law commitment to openness is safeguarded and examines the constitutional changes and democratic implications arising from secrecy.

Secrecy leads to a continuous conflict between democratic oversight and executive discretion. This thesis aims to expand our understanding of how power is exercised in the EU in light of this conflict between the executive prerogative to keep official secrets and the necessity of systematic and timely access to information for oversight processes and public deliberation. Democratic processes do not require unconditional openness but demand the strictly conditioned use of justified and necessary secrecy.

As the case with the European Ombudsman shows, the inaccessibility of oversight actors to official secrets and executive discretion when making final decisions does indeed allow executive actors not to be ‘too much in the light’ and allows them to maintain power to alter or avoid external scrutiny. Other than for the protection of power, why do official secrets matter in the European Union?

1. THE RELEVANCE OF SECRECY IN THE EUROPEAN UNION

The European Union Classified Information (hereinafter: EUCI) is a set of rules dealing with official secrets in the European Union. These rules establish extremely rigid limitations on access to sensitive information. The EUCI system applies to all EU policies and to all executive institutions, agencies and bodies as well as oversight institutions. More importantly, these rules have never been subject to public debate, but instead originated on the basis of internal administrative decisions.

The EU's development as a security actor is one of the significant reasons for the increase in secrecy and its regulation. Security policies and cooperation rely on the exchange of sensitive information in order to attain their intended objectives. The EU does not have direct surveillance powers and EU intelligence agencies mostly have coordinating roles. However, there are growing EU competences in internal and external security, which include various measures directly affecting fundamental rights. For example, concerns arise regarding effective judicial protection and personal data protection since EU databases are used for criminal prosecutions across member states, such as the European Criminal Records Information System,⁶ which allows easy access to comprehensive information about an individual's criminal history. The EU's bilateral agreements regarding Passenger Name Records with the United States, Canada and Australia are another example of the exchange of extensive information, including details of who flew where, when, the means of payment used and even the seat number and baggage information.

Security developments at national level that have a direct impact on EU policies and institutional workings are also pertinent to secrecy growth in the EU. Although these developments might not lead to a formal increase of competences, they affect the type of issues the EU is involved in and how they are carried out. In many Member States, the jurisdiction of security and intelligence agencies is increasing in terms of legal prerogatives and technological innovations. For example, recent legislation in France authorises the collection of all types of electronic records in a particular area and grants surveillance agencies powers for warrantless wiretaps because, instead of obtaining a court order, officials must now receive permission from an administrative body.⁷ This has a direct impact on information sharing and the type of intelligence produced at EU level, particularly considering that EU agencies such as Europol or the EU Intelligence Analysis Centre (INTCEN) function on the basis of documents produced at national level. These channels for exchanging official secrets reinforce a rigid secrecy culture because the regime functions on the basis of the rationality of stringent access controls. The transmission of information from national level to the EU takes place on the basis of national rules, which remain applicable at the EU level.

6 Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA [2009] OJ L93/33.

7 See the ruling by the French Constitutional Court approving the bill, *Décision n° 2015-478 QPC*, 24 July 2015. See Sam Schechner and Matthew Dalton, 'French Constitutional Court Approves New Powers for Intelligence Services' *Wall Street Journal* (Paris, 24 July 2015).

Hence, the transferred classified information carries with it national constraints on whether it may be public.

The EUCI rules have a domino effect. This is another aspect of the EUCI that has made it a fully-fledged institutionalized practice in the EU relating to every aspect of managing secrets. Namely, once an institution establishes a system of classified information, in order for any other body to receive the documents, similar rules and agreements are adopted to ensure the protection of the documents and to assure the originator in turn that the information will not be transmitted any further and will not become public without authorization.

Secrecy leads to oversight limitations in the EU. In the fragmented and multi-layered structure of the EU, the typical tensions that arise due to secrecy between security policies and oversight procedures are becoming more pronounced as a result of increased use of EUCI in practice. Administrative oversight, as illustrated in the case of the European Ombudsman above, is not the only process affected. Similarly, the Court of Justice of the European Union and the European Parliament face serious challenges in accessing EUCI. Based on the Court's prerogative for measures of inquiry,⁸ the Court may request information and the provision of documents. However, in numerous cases access to confidential information was denied to the Court despite its prerogatives in these measures.⁹ The European Parliament also faces challenges and limitations in accessing classified information. Moreover, if access to EUCI is granted, only a very few limited number of Members of the European Parliament may see the documents, without any opportunity for a public debate or report on the information contained therein. These consequences of secrecy raise questions regarding the extent to which EU oversight institutions are still able to act as a counter-power to executive action and what arrangements are necessary towards that end.

In a growing number of cases, fundamental rights in the EU are challenged by secrecy, especially the rights of defence and effective judicial protection as well as public access to information. For example, in counter-terrorist sanctions cases, individuals' assets have been frozen or EU citizens have been subject to expulsion while few or no documents were ever disclosed to them. Documents were not disclosed to the sanctioned individual neither at the time when the measures were adopted nor when these measures were in place, some of which lasted for more than a decade.

⁸ Rules of Procedure of the General Court [2015] OJ L105/1, art 65.

⁹ For example, Case C-27/09 P *France v People's Mojahedin Organization of Iran*, EU:C:2011:853.

These classified documents were not disclosed even when they challenged the legality of such measures at the Court of Justice of the European Union.¹⁰ The latter has meant that an individual is unable to defend her interest and realise her essential procedural rights, leading the Court to repeatedly annul the sanctions.¹¹ The limitation on public access to information in the EU is another salient consequence of secrecy, which directly affects this fundamental right in the EU.¹² For example, while 48% of public access requests are filed in the area of freedom, security and justice and 37% in area of external relations, half of these documents are not accessible to the public.¹³

Democratic processes and individual rights are the key concerns regarding the implications of EUCI, but another significant consequence of secrecy is that information is compartmentalized within executive actors. Secrecy not only leads to a divide and imbalance of information between executive actors (insiders) and oversight actors (outsiders), but it also creates a group of inside-insiders since only a limited number of officials have access to classified information. As a result, secrecy provides an opportunity for inside-insiders to have more influence as they are better informed,¹⁴ whereas it leaves the inside-outsiders, officials without access to EUCI, with imperfect information and with limited options for different results than might have occurred if they had also known the classified information.¹⁵

A simple policy solution, taking into account these severe implications, would be to eliminate the EUCI system. However, under the rationale of necessity,¹⁶ some level of secrecy is necessary to be able to carry out a specific aim or task in order to attain some legitimate goals in sensitive policy fields, for example security. Some use of secrecy is inevitable. The challenge is rather to maintain a system that safeguards EUCI when this is necessary for attaining legitimate goals without limiting oversight processes and public deliberation.

10 Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and Others v Kadi* (known as *Kadi II*), EU:C:2013:518; Case C-300/11 ZZ *v Secretary of State for the Home Department*, EU:C:2013:363.

11 See Christina Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (OUP 2009).

12 Art 1 TEU; Art 15 TFEU; Art 42 Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

13 Council Annual Report on Access to Documents 2013 (May 2014) 13, 25.

14 Joseph E. Stiglitz, 'On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life', Oxford Amnesty Lecture, Oxford, January 1999.

15 Kim Lane Scheppele, *Legal Secrets* (University of Chicago Press 1988).

16 Deirdre Curtin, 'Official Secrets and the Negotiation of International Agreements. Is the EU Executive Unbound?' (2013) 50 *Common Market Law Review* 423, 427.

2. RESEARCH RATIONALE, QUESTION AND PERSPECTIVE

This research aims to advance our understanding of secrecy arrangements in the European Union and to shed light on the growing practice surrounding these arrangements and their consequences for oversight. Lack of openness is one of the most longstanding concerns about how the EU functions and develops. However, the legal arrangements dealing with EU official secrets have remained in the shadow.¹⁷ This contribution aims to open the ‘black box’ of EUCI rules and practices.

This thesis seeks to highlight the adaptation of constitutional structures to an administrative practice that has legally thrived outside EU primary law. The EUCI rules, applicable across all EU policy fields, have an enormous impact on EU structures of power and oversight yet they are not fully unfolded from an academic perspective and neither are the particularities of their functioning mapped. This aspect has not only motivated this research but it also influences the manner in which it is carried out. Besides a legal analysis, this research examines in an empirical manner how the EUCI system functions as an administrative practice in order to better comprehend its oversight consequences. The EUCI system is a good illustration of the interconnectedness of internal procedural rules and broader democratic oversight mechanisms. For example, a subjective decision by any official anywhere in the 28 Member States has the consequence of creating a shelf full of classified documents at EU level derived from the original national decision. More importantly, neither the derived documents nor the original classified document may be shared with EU oversight actors if the national body has not given authorization.

The ‘reversed hierarchical effect’ of the EUCI rules is another pertinent reason for examining this regime. Internal administrative rules effectively change the outcome of constitutionally set oversight structures in EU primary or secondary law. To recall, the European Ombudsman was not able to fulfil her prerogative to conduct an inquiry under primary law¹⁸ due to the limitations of rules on classified information agreed in a memorandum of understanding between Europol and the US.¹⁹

This research is also motivated by the need for serious debate on how secrets are kept in the EU.²⁰ We lack knowledge and discussion regarding the costs of the EUCI

17 Exceptionally: Curtin, *ibid*; Deirdre Curtin, ‘Overseeing Secrets in the EU: A Democratic Perspective’ (2014) 52 *Journal of Common Market Studies* 684.

18 See Art 228 (1) TFEU.

19 See Chapter 6, however, for an elaborate discussion on precisely what the legal basis for the refusal would be.

20 Curtin, ‘Official Secrets’ (n 16).

system in the EU and the manner and extent to which the overall system is balanced against the values of openness and public deliberation. The information about how the EU keeps secrets is dispersed and besides a few parliamentary questions, issues pertaining to EUCI almost never reach a public forum. Only very recently have some EU news media started to pay attention to what this system means and ask more critical questions regarding its implications for EU oversight institutions. These are all small steps towards what it is hoped will be a growing and more informed debate about the EU's power to withhold information.

This thesis aims to answer the following research question: *Do the EU rules and practices on official secrets impede parliamentary, judicial and administrative oversight?*

The focus is on the law and practice of EUCI as it represents the most significant form of secrecy in the EU and it imposes strict rules on the accessibility of information both to the public and oversight actors,²¹ as the example of the European Ombudsman illustrates. Closed door meetings are another example of secrecy practices in the EU. The consequences of EUCI, however, are more severe since the range and rigidity of these rules within the EU and their applicability both to Member States and third parties, leads to both more cases and more tension between secrecy and oversight processes. Furthermore, it is crucial to study how the EUCI rules and EU institutional settings interlink since research has shown that institutional settings have an effect on minimizing the possibilities of secrecy abuse.²²

Oversight is essential in ensuring that a legal system adheres to democratic principles. This research aims to uncover whether and how secrecy limits or challenges parliamentary, judicial and administrative oversight in the context of the EU. These three different types of oversight play a complementarity role to safeguard the fundamental rights of citizens as well as to ensure the democratic processes of accountability and public deliberation. Chapter II discusses the understanding of democracy as developed in this research. Oversight is not strictly relevant for accountability, which is defined in principle as one actor giving account to another actor followed by the consequences.²³

21 See Curtin, *ibid.*

22 David E. Pozen, 'Deep Secrecy' (2010) 62 *Stanford Law Review* 257, 337.

23 For the elements of the notion of accountability see Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 *European Law Journal* 447, 449-450. See Deirdre Curtin and Andre Nollkaemper, 'Conceptualizing Accountability in International and European Law' (2005) 36 *Netherlands Yearbook of International Law* 3; Carol Harlow, 'European Governance and Accountability' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing 2003); Joy M. Moncrieffe, 'Accountability: Ideals, Ideas, Constraints' (2001) 8 *Democratization* 26; Ruth W. Grant and Robert O. Keohane, 'Accountability and Abuses of Power in World Politics', (2005) 99 *American Political Science Review* 29.

Oversight is relevant for democratic processes that aim to ensure the formation of public opinion and the formation of public deliberation necessary towards that end. This perspective is based on the conceptualisation of will and opinion as the two bases of what is called the 'diarchic system' of democracy,²⁴ and finds their realisation equally important. In principle, theories of democracy emphasise the reliance and significance of openness for the functionality of democratic processes regardless of the varied specific elements these theories stress, such as deliberation or participation.²⁵ These democratic conceptualisations establish conditions for what could be considered 'democratic secrecy'²⁶ or when secrecy is democratically acceptable and how. It also matters how these theoretical distinctions and perspectives apply in the EU context. It is important to highlight in this respect that EU primary law stipulates various sets of processes that are conducive to public deliberation and specific processes that aim to ensure accountability. The EU has a constitutional commitment to democracy and the principle of openness.²⁷ This thesis evaluates the secrecy arrangements in the EU, taking these commitments and principles as a foundational basis that must be adhered to.

3. METHODOLOGICAL CONSIDERATIONS

Decision-making has a 'backstage' characterized by secrecy and a 'frontstage' demarcated by openness.²⁸ It is the backstage that is explored by this research in a legal

24 Nadia Urbinati, *Democracy Disfigured: Opinion, Truth and the People* (Harvard University Press 2014) 2.

25 The main argument is that democracy relies on the presumption that the flow of relevant information and its proper handling are not obstructed - Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, (William Rehg tr, MIT Press 1996) 269. See furthermore, Diana Mutz, *Hearing the Other Side: Deliberative versus Participatory Democracy* (CUP 2006), Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press 1984) xiv-xv. Thomas Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (Harvard University Press 1989); David Held, *Models of Democracy* (Stanford University Press 2006). See also UN Resolution A/RES/59/201 'Enhancing the role of regional, sub-regional and other organizations and arrangements in promoting and consolidating democracy', 25 March 2005. For reports, see for European Parliament, Michael Meyer-Resende *Democracy Revisited: Which Notion of Democracy for the EU's External Relations?*, September 2009, and *Democracy Reporting International, Discussing International Standards for Democratic Governance: A Preliminary Research Report*, Discussion Paper No. 2, September 2007. For a recent discussion on European Union and the importance of information see, Deirdre Curtin, Herwig Hofmann and Joana Mendes, 'Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda' (2013) 19 *European Law Journal* 1.

26 Dennis Thompson, 'Democratic Secrecy' (1999) 114 *Political Science Quarterly* 181.

27 Art 1 and Art 2 TEU.

28 Daniel Naurin, *Dressed for Politics: Why Increasing Transparency in the European Union Will Not Make Lobbyists Behave any Better Than They Already Do* (Göteborg 2004) 30.

inquiry based on forty original interviews as well as an analysis of theoretical works on secrecy and democracy.

This research draws attention to the EU administrative practice of keeping official secrets and provides a critical analysis from a democratic perspective, particularly focusing on the consequences for oversight in the EU.

In mapping EUCI rules, this thesis relies on the life-cycle approach to information management.²⁹ It is generally accepted that the concept of the life-cycle of information is not static and abstract but rather a practical plan for managing information.³⁰ Applying this approach means looking at the entire process of EUCI, from the initial stage of classifying a document, throughout the entire classification stage and until such time as the document may be declassified. The process of classification consists of many decisions that trigger each other and different officials are in charge of making these decisions. The life-cycle approach is useful in order to give a comprehensive overview and to identify which decisions have more relevance and may have consequences for oversight. This approach is also in line with applicable EUCI rules. For example, the concept can be found in the Council Decision on the security rules for protecting EU classified information.³¹ This approach to the deconstruction of the EUCI system is also valuable for mapping the practice.

Practice also matters. It provides information for the analysis of law and a 'real' life view of the applicability of law. This research is also motivated to examine its practice by the lack of comprehensive sources on the functionality of the EUCI system. As is further discussed below, studying legal sources alone, whether administrative rules or case law, does not provide an elaborate and nuanced view of EUCI and is not sufficient to understand the basic workings of the system. Hence, a strict legal reading of EUCI would not reveal significant practical issues in order to comprehend working methods and effects on oversight.

The analysis and evaluation of secrecy in the EU is not derived from external standards, but follows the EU's primary law obligations of democratic principles

29 It was introduced as a conceptual framework to analyse information in government policies in 1993 by DeSanti and only a year later Hernon provided the first in-depth analysis of the information life-cycle, tracing the concept in policy instruments and literature: Vincent M. DeSanti, 'A Policy Framework on the Dissemination of Government Electronic Information: Some Remarks' (1993) 10 *Government Information Quarterly* 256; Peter Hernon, 'Information Life Cycle: Its Place in the Management of U.S. Government Information Resources' (1994) 11 *Government Information Quarterly* 147.

30 Hernon, *ibid.*

31 See Council Decision 2013/488/EU of 23 September 2013 on the security rules for protecting EU classified information [2013] OJ L274/1, arts 5(2), 9(1), 11(1).

and openness in particular.³² The EU's compound nature, where some elements are comparable to international organizations and other elements to a national political setting, does still appear to be applicable. However, this might not be descriptively helpful and raises concerns about standard of evaluations (for example, whether democratic arrangements should be measured against a national or an intergovernmental organization standard?), and could fail to convince the reader who may still rightly question how one may discuss a legal phenomenon without fully settling the question of its legal setting. For scholars with a particular normative reading on the EU, for example that of federalism, the concepts and their applicability would follow such normative framework. As elaborated in Chapter III, this thesis does not follow a strict normative prism, however it adheres to a general constitutional understanding of the EU in line with its primary law commitments to democracy and institutional balance, both of which form the building blocks of a Union bound by the rule of law and fundamental rights. This thesis does not attempt to render the EU more state-like or define its integration processes, but focuses on the internal requirements for the EU's legal setting and principles by which it is bound to exercise its powers.

The specific sources of data and methods for conducting this research are based on and guided by the research question.³³ To reiterate, this thesis considers whether EUCI law and practice impede oversight in the EU. Hence, this research has an explanatory component, focused on mapping the regulation and practice of EUCI, and an evaluative component that is based on a democratic perspective and which critically assesses the consequences of this system.

In order to map the legal regime, this research is based on a varied and wide selection of EU legal sources. The Treaties, secondary rules and case law are examined alongside internal administrative rules, policy documents and guidelines. Despite the lack of binding legal effect of the latter sources, the regime of EUCI, as discussed in detail in Chapter IV, builds on such rules to a large extent and they are therefore a relevant source to be included in the analysis. The sources for mapping the practices consist of original material derived from forty semi-structured interviews, the details of which are further elaborated below. The evaluative part of this research is based

32 Art 1 TEU, Art 2 TEU, Title II TEU.

33 Stated by Robert Cryer et al (eds), *Research Methodologies in EU and International Law* (Hard Publishing 2011). See also David Feldman, 'The Nature of Legal Scholarships' (1989) 25 *Modern Law Review* 498, who argues that the overall aim of research is to use methods that would be 'best suited' for the questions this research aims to answer.

on democratic theory and draws from literature that develops the understanding of democracy and principles of openness.

This research makes use of different research methods in a complementary manner. The *analysis of case law* is an essential method of this research and is particularly relevant for the specific objective of examining the consequences of secrecy. The facts of the cases, the legal issues at hand and the reasoning of the Court are all crucial components for analysing law and deriving observations that are significant for the case in question but which have broader implications for the interpretation of the law. However, the research goes beyond a strict focus on the case law of the Court of Justice of the European Union for a number of relevant reasons. Firstly, as is mentioned above, the lack of a systematic study on the legal regime of EUCI and how it functions demands more attention than a mere focus on the legal consequences of these rules that are the subject of adjudication. In fact, some of these consequences only become clear once we know how the overall system works internally from an administrative viewpoint. Secondly, there are modest numbers of cases and limited types of issues that reach the Court that have to do with particular rights that the EUCI system affects most directly. This is not to say that EUCI has minor consequences, since it has already been pointed out that its effects involve both individual rights and institutional oversight. Yet, focusing on these cases would be too narrow to construct a more comprehensive understanding of EUCI and to grasp the significance of these rules at the administrative level. Thirdly, the nature of the cases differs, as does the Court's approach to their adjudication, which in turn implies that methodological difficulties would arise in terms of drawing more general conclusions if the broader context is not elaborated upon. Lastly, the Court's jurisdiction is limited in issues of security, whereas EUCI is more prominent in this field. This aspect should be considered together with the fact that the Court is a passive actor, as it cannot select what cases are brought forward.

In order to gain access to original and new material, *forty semi-structured interviews* were conducted with the actors directly involved in the application of the EUCI rules and with individuals with extensive experience in this field. These interviews provide information for this research on issues that arise in day-to-day EU practice and insight into what the EUCI regulatory regime looks like to participants, what mechanisms and customs it employs and why it takes the form that it does. These interviews also allow the research to consider the applicability of the rules and identify possible tension or mismatch between EUCI and oversight.

Semi-structured interviews were conducted with EU officials who have specific insight into the workings of EUCI procedures, those who have technical expertise but who are not necessarily involved in producing sensitive documents and officials who do not deal with the technical aspects and who have a broader (political) overview and functions. In addition to current EU officials, interviews also include former EU officials holding different positions, such as technical classification officers as well as those at director level. Their insights are helpful in re-constructing the process of how EUCI developed in the EU and for noting the changes in working methods in EU institutions in broad terms. Besides the perspectives of officials, this thesis benefits from interviews with former and current Members of the European Parliament. By including their experience and perspectives, this thesis provides a diverse view of the challenges of oversight as well as a better practical understanding of how oversight of secrecy actually takes place in the EU.

The diversity of interviewees in terms of policy issues, hierarchical level and whether they are current or former officials, provides this research with a comprehensive and nuanced understanding of EUCI practice.³⁴ The nature and structure of the questions is also relevant in this respect. Interviews included questions that were raised with all officials interviewed and some questions that were focused on acquiring knowledge of the institution in question. The latter aspect is very relevant for establishing a coherent picture, since each body and institution has developed its own EUCI rules internally. Open questions were also addressed, since specific EUCI guidelines are often classified and the interviews are therefore the only open source available. The questions are constructed in a manner that would lead to generating knowledge that is specific to practitioners.

Besides interviews with EU officials and parliamentarians, this research includes interviews with individuals from civil society, security experts and academics involved in this issue. The thesis has benefited from different perspectives on what the most pressing issues are and more practical and policy perspectives on what solutions might be attainable in practice.

Literature review is another main building block of this research, especially for the development of the conceptual framework, and in this respect considerable effort is made to integrate different strands of literature. The necessity of analysing diverse literature derives partly from the subject matter and partly from the belief that only a

³⁴ On the relevance of the representative character of the sample of interviewees, see Robert S. Weiss, *Learning from Strangers. The Art and Method of Qualitative Interview Studies* (Free Press 1994), 17.

more comprehensive approach is suitable for addressing the complexities of secrecy and democracy. Secrecy is not strictly speaking a legal concept. This certainly does not mean that law does not recognise and indeed regulate its existence, but rather that from a conceptual and theoretical perspective it is political scientists and sociologists who have taken the lead in advancing its understanding.³⁵ The aim of this research is to build on such conceptualisations and to complement them with a legal perspective, as the following Chapter II will reveal in more detail.

Document analysis enables this research to carefully ‘investigate’ the many and fragmented rules on how secrecy works in the EU. Efforts are made to piece together EU documents, some of which are publically available and some crucial ones which are derived from public access requests filed with varied institutional actors. The latter documents were publically unavailable prior to this research. EU institutions responded to all requests for public access to documents in a timely manner, however the most significant documents were only very partially disclosed. Many important documents were extensively blacked out and hence strenuous efforts were required to uncover the puzzle of how the EUCI rules developed, particularly where they refer to exchanges of opinions and discussions between the European Parliament and the Council.

The scope of this research is another significant consideration from a methodological perspective. Firstly, the scope of this research is pertinent and necessary when we take into account the many and severe consequences of EUCI for oversight. It is actually surprising that, despite the development of these rules during the past two decades, it is only now that this type of secrecy practice is receiving more attention in the context of the EU. In contrast, many studies have been conducted that examine the emergence and development of classified information systems in the US, both from an administrative and constitutional perspective. Secondly, the EUCI rules and practice extend to almost all EU actors. This merits an analysis at an internal working level and of the resulting legal complexities. Thirdly, an aspect that distinguishes the form of the EUCI rules from other forms of secrecy is that this system, due to

35 Exceptionally, see constitutional scholars and those focused on administrative law: Curtin, ‘Overseeing Secrets’ (n 17); Pozen, ‘Deep Secrecy’ (n 22); David E. Pozen, ‘The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information’ (2013) 127 *Harvard Law Review* 512; David E. Pozen, ‘The Mosaic Theory, National Security and the Freedom of Information Act’ (2005) 115 *Yale Law Journal* 628; Mark Fenster, ‘The Implausibility of Secrecy’ [2012] *Law Review* 1; Mark Fenster, ‘The Opacity of Transparency’ (2006) 91 *Iowa Law Review* 885; Alasdair Roberts, *Blacked Out: Government Secrecy in the Information Age* (CUP 2006); see, Adam Samaha, ‘Government Secrets, Constitutional Law, and Platforms for Judicial Intervention’ (2005) 53 *UCLA Law Review* 909. Anne Peters, ‘Transparency, Secrecy, and Security’ in Julia Iliopoulos-Strangas, Oliver Diggelmann and Hartmut Bauer (eds), *Rule of Law, Freedom and Security in Europe* (Nomos 2010).

its functioning principles, leads to the expansion of both the regulation of secrecy and of the number of documents excluded from the public and to the dependence of oversight actors on executives with respect to accessibility. Concurrently, such principles are fundamental to facilitating the exchange of information and trust between executive actors both within the EU and with outsiders parties. Hence, there is a continuous tension between rigid EUCI rules to maintain confidentiality among sharing executive actors and the accessibility of the information by 'outsiders'. A detailed and systematic study of these complexities and their implications is necessary.

Another aspect of the scope of the research pertains to the field of EU law and the actors analysed. As to the former, Article 9 of Regulation 1049/01, as the only legislative act dealing with EUCI, stipulates that this regime should be applied to sensitive information in the field of public security, defence and military matters. However, individual decisions regarding EUCI by executive actors refer to a broader scope of the rules and include 'all areas' that require management of classified information. In practice, EUCI mostly applies to security and international relations matters. The focus of this thesis on internal and external aspects of security as well as international relations is therefore determined by the applicability of the EUCI regime in these fields. In addition to the reasons strictly related to the EUCI system, it is also relevant to point out that the Lisbon Treaty has significantly renewed the legal and institutional framework of the Union. In the past ten years the European Union has made efforts to become a salient security actor and many of these efforts include establishing systems and bodies for the exchange and coordination of information. Although national security remains the sole responsibility of each Member State in the European Union, the challenge of addressing security threats has nevertheless triggered executive actors to establish a comprehensive, cooperative and cohesive approach to security.³⁶ The development and use of EUCI has been proclaimed as being indispensable to these efforts.³⁷

36 Art 4(2) TEU. See European Council, *The European Security Strategy – A Secure Europe in a Better World*, December 2008. See also, Anja Dalgaard-Nielsen, 'Homeland Security: American and European Responses to September 11th' in Jess Pilegaard (ed), *The Politics of European Security* (Danish Institute for International Studies 2004); House of Lords, Committee on the European Union, *The European Union Internal Security Strategy Report*, April 2011. More generally, see Martin Trybus and Nigel White (eds), *European Security Law* (OUP 2007).

37 David Galloway, 'Classifying Secrets in the EU' (2014) 52 *Journal of Common Market Studies* 668. See also Council Decision 2000/527/EC of 14 August 2000 amending Decision 93/731/EC on public access to Council documents and Council Decision 2000/23/EC on the improvement of information on the Council's legislative activities and the public register of Council's documents [2000] OJ L212/9.

The basis for the selection of EU actors is derived from the field of study. The aim of this research is to capture the security issues of the relevant institutions. The actors directly involved in classifying information are quite numerous and vary from political institutions to agencies that are entrusted with operational tasks such as policing and investigation matters. For the purposes of this research, the Council of the European Union, the Commission of the European Union, Europol and the European External Action Service are closely examined. The rules of other EU actors are not ignored, but this thesis draws its main examples from these four key actors. These various actors have been selected because of their organizational position in the EU, their nature and their relation to internal or external aspects of security. The diversity of these actors enables this thesis to point out whether the interconnectedness and similarities of the EUCI system apply to the EU.

The selection of field and actors influences whether the issues derived from the analysis can be applied more generally and whether they affect the broader conclusions regarding secrecy in the EU. In this respect, the diversity of the actors and legal sources used allows a comprehensive study of EUCI. Moreover, throughout the chapters, this thesis explicitly points out issues that are widely applicable in the regime and questions whether they are specific to an actor or situation. Lastly, oversight actors and implications are also extensively examined. The main focus is on oversight at EU level, specifically by the European Parliament, the CJEU and the European Ombudsman, with each actor having a different role both broadly within the EU structure and specifically with regards to EUCI. National actors are also considered when it is necessary to portray a more complete picture of the implications of EUCI rules.

4. CONTRIBUTION TO THE LITERATURE

Openness has received considerable attention in literature about the European Union, whereas its counterpart, secrecy, has surprisingly remained an under-researched subject. This does not imply that openness in the EU has not been discussed from legal or political science perspectives. These discussions, however, centre on the difficulties and limitations of the application of the principle of openness or on missing transparency instruments. For example, legal scholars critically discuss the Court's interpretation of Regulation 1049/01 on public access to documents as it pertains to

the exceptions under Article 4 and the limitations thereof for public access to EU decision-making processes.³⁸ Others have also discussed the Court's own lack of transparency.³⁹ Political scientists focus on various administrative practices such as the lack of mandatory lobby registers or closed door meetings.⁴⁰ Rather than highlighting the lack of openness due to the missing transparency mechanisms or the failure of the existing ones in practice, the focus of this thesis is on secrecy *per se*.

This thesis offers the first systematic and in-depth account of EU secrecy rules and practice and a critical analysis of their consequences for oversight. In doing so, it draws from a few pioneering contributions focusing specifically on the legal framework for official secrets in the EU,⁴¹ and the effect of this framework on parliamentary oversight,⁴² as well as research on attempts by EU institutions to maintain an internal space to think, negotiate and deliberate 'without being disturbed' by the broader public.⁴³ This thesis develops the initiated debate further by adding a more comprehensive and integrated analysis of EU CI and its consequences for parliamentary, judicial and administrative EU oversight. This research is not merely focused on each institution individually, but bridges the issues that arise in the different contexts of oversight. This thesis also differs in this regard from recent political science contributions focusing exclusively on the European Parliament and access to EU CI.⁴⁴ Efforts are made to analyse the broader changes taking place on how oversight is conducted in

38 Päivi Leino, 'Just a Little Sunshine in the Rain: The 2010 Case Law of the European Court of Justice on Access to Documents' (48 (2011) *Common Market Law Review* 1215; Päivi Leino, 'Case C-353/99 P, *Council v. Heidi Hautala*, judgment of the Full Court of 6 December 2001, nyr, appeal against the judgment of the Court of First Instance of 19 July 1999 in Case T-14/98, *Hautala v. Council*, [1999] II-2489' (2002) 39 *Common Market Law Review* 621; Päivi Leino, 'Case C-64/05 P, *Kingdom of Sweden v. Commission of the European Communities and Others*, judgment of the European Court of Justice (Grand Chamber) of 18 December 2007, nyr' (2008) 45 *Common Market Law Review* 1469; Dariusz Adamski, 'How Wide is "The Widest Possible?" Judicial Interpretation of the Exceptions to the Right of Access to Official Documents Revisited' 46 *Common Market Law Review* 521; Dariusz Adamski, 'Approximating A Workable Compromise on Access to Official Documents: The 2011 Developments in the European Courts' (2012) 49 *Common Market Law Review* 521.

39 Alberto Alemano, 'Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy' (2014) 39 *European Law Review* 72.

40 Daniel Naurin, 'Taking Transparency Seriously' (2002) Sussex European Institute Working Paper No 59, 11 <<https://www.sussex.ac.uk/webteam/gateway/file.php?name=sei-working-paper-no-59.pdf&site=266>> accessed 17 May 2015; Daniel Naurin, *Deliberation Behind Closed Doors. Transparency and Lobbying In The European Union* (ECPR Press 2007).

41 Curtin, 'Official Secrets' (n 16). Birkinshaw has touched upon this topic in overview: Patrick Birkinshaw, *Freedom of Information: The Law, the Practice and the Ideal* (4th ed, CUP 2010).

42 Curtin, 'Overseeing Secrets' (n 17).

43 Deirdre Curtin, 'Judging EU Secrecy' [2012] *Cahiers de Droit Européen* 457, 459.

44 Guri Rosén, 'Can You Keep a Secret? How the European Parliament got Access to Sensitive Documents in the Area of Security and Defence' (2011) RECON Working Paper 22. Available at: <<http://www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers2011.html>> accessed 5 June 2015; Guri Rosén, 'EU Confidential: The European Parliament's Involvement in EU Security and Defence Policy' (2015) 53 *Journal of Common Market Studies* 383.

the EU as opposed to offering a limited account of the challenges.⁴⁵ This aspect of the thesis relies on empirical perspectives derived from interviews with EU officials and political actors at the oversight institutions. It therefore contributes to debates about the evolution of the EU through both formal and informal practices.⁴⁶

There are currently no books that focus exclusively on secrecy practices within the EU. A broader discussion by legal scholars on EUCI is also missing. This has to do perhaps with lawyers' focus on case law, whereas cases specifically dealing with issues of classified information are few and arise mostly in the context of other EU policies or actions. Exceptionally, in the context of the individual sanctions regime, a recent contribution shows how national rules on classified information have an impact on open adjudication at EU level and on the lack of accessibility to classified information for the individuals in question, which in turn raises concerns about the effective exercise of defence rights.⁴⁷ The impact of EUCI on individual rights and the limitations imposed on the Court's open adjudication due to the treatment of classified information is one of the key issues analysed in this thesis. This research addresses the complexities of access to classified information derived from rules at national level that challenge EU oversight and also looks at how the EUCI system limits oversight by national actors.

Besides academic discussions, EU rules on official secrecy have been the subject of some pragmatic analysis, mostly provided by EU officials.⁴⁸ Although these elaborations are insightful, they often lack a critical perspective on the democratic implications. In addition to insiders' views, a study conducted for the European Parliament in 2010 offers a broad-brush outline of the EU classification system in the light of the

45 Some discussion on the effects of executive decision-making on the EP has taken place. See CEPS study on EP internalisation of secrecy practices: Sergio Carrera, Nicholas Hernanz and Joanna Parkin, 'The "Lisbonisation" of the European Parliament: Assessing Progress, Shortcomings and Challenges for Democratic Accountability in the Area of Freedom, Security and Justice' (2013) CEPS Working Paper No. 58. However, this thesis offers a more in-depth account and not only on the EP but also the Court.

46 See Adrienne Heritier, *Explaining Institutional Change in Europe* (OUP 2007) 47. Isabella Eiselt and Peter Slominski, 'Sub-constitutional Engineering: Negotiation, Content and Legal Value of Interinstitutional Agreements in the EU' (2006) 12 *European Law Journal* 209.

47 Christina Eckes, 'Decision-making in the Dark? Autonomous EU Sanctions and National Classification' in Iain Cameron (ed), *EU Sanctions: Law and Policy Issues Concerning Restrictive Measures* (Supranational Criminal Law Series, Book 15, Intersentia 2013). See Nik de Boer, 'Secret Evidence and Due Process Rights under EU Law: ZZ' (2014) 51 *Common Market Law Review* 1235, on the discussion on EUCI and expulsion of an EU citizen for public security reasons.

48 Galloway (n 37); Bart Driessen, *Transparency in EU Institutional Law* (2nd ed, Kluwer Law International 2012). See also Guido Stärkle, 'La Protection et le Traitement des Informations Classifiées dans le Cadre de la Politique de Sécurité et de Défense Commune (PSDC) au sein des Institutions et Agences de l'Union Européenne' (2011) 47 *Cahiers de Droit Européen* 155.

adoption of the Lisbon Treaty.⁴⁹ However, much has evolved within the EUCI system since then, including the European Parliament's establishment of its own rules on the protection and sharing of classified information.

This thesis also provides new insights into the study of EU executive power and institutional workings, particularly of issues relating to security. For example, scholars have pointed out that executive actors deliberately create a 'safeguarded sphere', which allows democratic oversight mechanisms to be evaded.⁵⁰ This thesis hopes to demonstrate on a more detailed level how such a protected sphere is created and how it influences oversight by providing an empirical view of secrecy. Furthermore, this contribution comes at a significant time in EU development and the position of executive power in this respect. The EU executive no longer appears to be in the 'shadow', but instead seems to have taken central stage both in practice and in academic research.⁵¹ We have, however, not yet fully grasped the small-scale changes in practice that are conducive to executive power dominance and ominous to democratic oversight. Mapping the EUCI legal regime and assessing its democratic implications contributes significantly to shedding more light on how power is exercised in the European Union. In addition, this thesis advances the understanding of the institutional workings of the EU as it provides empirical material about discretion in administrative practice regarding EUCI, focuses on how decisions about keeping secrets are made in the EU and considers what the perceptions of EU officials are regarding the balance of security and secrecy. This thesis is also informative for scholars interested in EU security policies, particularly those regarding intelligence sharing and cooperation in the EU, both between EU level executive actors and information flows with Member States and other security actors such as the US.⁵² In this regard, the discussion on the applicable national rules at EU level and the influence of security actors like NATO are important to the development of secrecy regulations in the EU. Overall, this thesis seeks to provide a middle ground understanding, which is currently lacking, of how the EU's constitutional structure works and evolves by combining the internal administrative perspective on secrecy with a broader understanding of democracy.

49 Henri Labayle, 'Principles and Procedures for Dealing with the European Union Classified Information in Light of the Lisbon Treaty' (2010) Study for the European Parliament, Brussels.

50 Peter Mair, *Ruling the Void: The Hallowing of Western Democracy* (Verso 2013) 99.

51 Deirdre Curtin, *Executive Power of the European Union Law, Practices, and the Living Constitution* (OUP 2009) 24.

52 Björn Müller-Wille, 'Intelligence and Democratic Accountability: A Blessing, not a Curse' (2006) 15 *European Security* 491; James I. Walsh, 'Intelligence-Sharing in the European Union: Institutions Are Not Enough' (2006) 44 *Journal of Common Market Studies* 625.

Beyond academic debates about the EU, this thesis contributes to discussions on secrecy by explaining the intricacies and additional issues that secrecy gives rise to in a setting other than a national constitutional framework of checks and balances and by looking at specific EU practices. The concept of secrecy and its practice in other legal orders, such as the US, is the subject of extensive debates across different scientific fields.⁵³ This thesis bridges academic discussions that often take place in isolation from one another. For example, in the overall discussion of justice, theorists focus on the principle of ‘publicity’, engaging with the Kantian view that the rightness of a policy depends upon whether it satisfies publicity tests or the Rawlsian views on ‘public rule’ and ‘public reasons’.⁵⁴ Other scholars, who focus on public administration, understand openness as one of the many principles to be attained with regard to good governance and often elaborate upon the practices of public access to documents. In line with the subject matter, this research is informed by both sets of debates as the topic relates both to administrative processes and to broader democratic consequences. This thesis brings new insights for scholars interested both in the theory of publicity and the problems secrecy poses in this regard,⁵⁵ as well as those who are practically minded and want to gain a picture of how things work in practice.⁵⁶

53 Looking back at some of the main and initial contributions on the issue of secrecy: Transparency as the main ally of democracy and *the* only manner to build trust between an administration and the citizens: Woodrow Wilson, ‘The Study of Administration’ (1887) 2 *Political Science Quarterly* 197; Woodrow Wilson, *The New Freedom: A Call for the Emancipation of the Generous Energies of a People* (The Country Life Press 1916). Discussion on US secrecy: Daniel Moynihan, *Secrecy: The American Experience* (Yale University Press 1999). In the mid-1950s, the prevailing idea was that the method of nondisclosure might be tolerated so long as it is regarded as applicable only to a restricted department of affairs or during restricted periods of emergency: Clive Parry, ‘Legislatures and Secrecy’ (1954) 67 *Harvard Law Review* 737, 739. Public access to information: Harold C. Relyea, ‘Opening Government to Public Scrutiny: A Decade of Federal Efforts’ (1975) 35 *Public Administration Review* 3. Other contributions suggesting policy changes, such as tightening the criteria and standards for classifying information, improving oversight, and enforcing systematic and mandatory declassification programs: Frederick M. Kaiser, ‘The Amount of Classified Information: Causes, Consequences, and Correctives of a Growing Concern’ (1989) 6 *Government Information Quarterly* 247.

54 Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* (1775). For the statement of the publicity test, see Appendix II: Of the Harmony Which the Transcendental Concept of Public Right Establishes Between Morality and Politics, available at <<http://www.constitution.org/kant/append2.htm>> accessed 24 August 2015. See John Rawls, *A Theory of Justice. Revised Edition*, (OUP, 1999) 48-49.

55 Thompson (n 26); Rahul Sagar, *Secrecy and Leaks: The Dilemma of State Secrecy* (Princeton University Press 2013).

56 Steven Aftergood, ‘Reducing Government Secrecy: Finding What Works’ (2009) 27 *Yale Law & Policy Review* 399.

5. OUTLINE OF THE THESIS

Part I of this thesis sets out the theoretical foundations and the EU institutional setting for analysing secrecy and oversight. *Chapter II* provides the theoretical framework of this research. It offers an extensive elaboration of the concept of secrecy and develops the democratic constraints for its evaluation. The latter are identified as essential and core constraints for secrecy in line with an understanding of democratic theory that integrates accountability and deliberation as equally significant processes. The chapter maintains that institutional arrangements internally, within administrative practice, and externally, through processes of oversight, should ensure the exercise of secrecy in line with the democratic presumption in favour of openness. *Chapter III* focuses on EU institutional framework and workings with the purpose of framing the discussion on secrecy and oversight in the EU. This chapter examines EU institutional settings and key features relevant for understanding how secrecy works in the EU. More specifically, the chapter addresses executive power and workings, especially in the context of EU security policies, and identifies salient aspects of EU administrative, judicial and parliamentary oversight that matter for reviewing secrecy.

Part II of the thesis maps the regulation and practice of EUCI. *Chapter IV* provides the legal framework of EUCI and examines the establishment and the growth of rules on official secrets in the EU. It uncovers the complexities of the comprehensive regulatory regime of EUCI and assesses whether and to what extent the presumption in favour of openness was taken into account on its establishment. This chapter also reveals new aspects pertaining to the EU's efforts to increase its security role and questions the influence of security actors such as NATO on the possible introduction of a military-like secrecy culture in the EU. Through the discussion on EUCI development, the chapter points out the dominance of executive actors and the 'contest of powers' in inter-institutional relations. *Chapter V* focuses on EUCI in practice, and specifically on the executive discretion to classify documents. It seeks to expose the institutional workings of EU administration behind the scenes and to assess whether and to what extent practices matches the primary law obligation of EU institutions, bodies, offices and agencies to conduct their work as openly as possible.

Part III offers a critical appraisal of secrecy and how it affects oversight in the EU. *Chapter VI* evaluates the administrative, parliamentary and judicial oversight of secrecy. The review of executive claims to secrecy and access to classified information

are the two main dimensions in overseeing secrecy. In this regard, the chapter examines the role of the European Parliament, the Court of Justice of the European Union and the European Ombudsman and observes that these oversight institutions are reliant on the discretion of the executive institutions for access to EUCI and this discretion limits their privileged right to access classified information and challenges the realisation of oversight. *Chapter VII* addresses the broader questions regarding secrecy and oversight. It first seeks to answer the question of whether oversight institutions do indeed provide a counterbalance to executive secrecy in the EU. The second aim is to transcend the discussion about the challenges secrecy causes to oversight and the latter's response to those, and to focus instead on the consequences of secrecy for conducting oversight in the EU. More specifically, it aims to examine the changes secrecy has brought to oversight structures. *Chapter VIII* presents the conclusions and the overall issues identified in this thesis. It summarizes the main findings and provides the theoretical and empirical insights of this thesis. The chapter points out how the democratic presumption in favour of openness could be applied in EU practices of official secrets.