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CHAPTER 3

THE EU EXECUTIVE POWERS,
OVERSIGHT AND INSTITUTIONAL WORKINGS

INTRODUCTION

This chapter discusses the increasing role of the European Union in security, as well as the EU's executive powers and its institutional workings in the context of security. The objective is to sketch a portrait of the EU setting how it unfolds in the context of secrecy and oversight. It is necessary to have a general understanding of the EU's 'sophisticated institutional structure'¹ and complex workings before delving into the specific aspects of the regulation and practice of official secrets in the EU and their consequences on oversight. Hence, the purpose of this chapter, together with the previous chapter on secrecy and democracy, is to provide the foundations of the thesis and structure the ensuing chapters.

This chapter builds on a general constitutional understanding of the EU as a multi-layered system where a number of actors partake in EU decision-making at different levels. The focus of this chapter is to map EU executive and oversight actors, their interactions and workings, especially in security policies. Executive actors lead the development of the EU's powers in security. Moreover, executives 'design' this development as they establish security agencies and information exchange systems that cater to security cooperation. The chapter aims to map these aspects of EU security and discuss their relevance for information sharing with oversight institutions. With regard to the latter, the chapter examines whether and how oversight institutions are interconnected in order to ensure the flow of information for oversight processes.

Firstly, this chapter discusses EU executive power, focusing on the development of the EU as a security actor as well as the plurality of national and EU executive actors involved in EU security policy. Secondly, it examines oversight institutions and their interactions with EU executives. Thirdly, the chapter elaborates on the EU's institutional workings.

¹ See Opinion 2/13 of the Court (Full Court) of 18 December 2014, EU:C:2014:2454, para 158.

3.1 EXECUTIVE POWER IN THE EU

This section outlines the EU's growing powers in security and unveils the complexities of power sharing between actors at the EU and at the national level. In addition, this section maps the plurality of executive institutions, bodies and agencies and highlights their significance and functioning in security. In turn, these aspects to the EU's powers in security reveal some of its key features as a security actor.

3.1.1 Growing Powers in Security

The EU has a wide array of executive powers including in security policies.² Especially in the post-Lisbon context, the EU is considered as a security actor with its own importance,³ taking into account the revisions of the EU's competences in security.⁴ In EU primary law, 'national security' explicitly remains 'the sole responsibility of each Member State'.⁵ Yet, as the Court of Justice of the European Union (hereinafter: CJEU) in *Svenska v Council* stated,⁶ the EU's competences in security have a broad character covering both aspects of internal and external security. More specifically, the EU's competences relate to the Area of Freedom Security and Justice (hereinafter: AFSJ) as well as the Common Foreign and Security Policy (hereinafter: CFSP). In these fields, the EU has established numerous legislative instruments and international agreements.⁷

Security polices and cooperation in the EU started to develop both within and outside the EU legal remit. The growth of the EU's powers in security is driven by executive actors and triggered by external influences and the necessities of the EU

2 For the notion of 'executive' in the EU context, see Deirdre Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution* (OUP 2009).

3 See Mai'a K. Davis Cross, *Security Integration in Europe: How Knowledge-based Networks Are Transforming the European Union* (Univeristy of Michigan Press 2011).

4 See Title V, TFEU. The EU has legislative competences in establishing *inter alia* uniform asylum system, uniform status for third country nationals, mutual recognition and enforcement of judgments, setting minimum rules for and combating terrorism, human trafficking, illicit drug trafficking, money laundering, corruption, counterfeiting and organised crime.

5 Art 4(2) TEU. See art 72 TFEU, where similarly the Member States aim to make sure that their prerogatives are safeguarded, such as in the maintenance of law and order.

6 Case T-174/95 *Svenska Journalistförbundet v Council*, EU:T:1998:127, para 121. See also Case C-70/94 *Werner v Germany*, EU:C:1995:328, para 25; and Case C-72/83 *Campus Oil v Minister for Industry and Energy*, EU:C:1984:256, para 34.

7 For example see Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57; Directive 2012/13 on the right to information in criminal proceedings [2012] OJ L142/1; Directive 2011/99 on the European protection order [2011] OJ L338/2.

to respond to them.⁸ In the post-Maastricht phase, steps were taken to enhance mutual cooperation between Member States regarding internal and external security. New bodies and structures were established and cooperation through information exchanges was particularly salient. For example, Article K1 (9) of the EU Treaty first mentioned a ‘Union-wide system for exchanging police information’, which in turn led to the establishment of Europol, an agency for intelligence cooperation through a Ministerial Agreement.⁹ Moreover, in this period, the EU was also focused on developing coordinated diplomatic action and building on what had been undertaken under European Political Cooperation.¹⁰ The Helsinki Presidency meeting in 1999 most evidently showed the Member States’ political willingness to develop the EU’s military and non-military crisis management means and to reinforce European security and defence policy.¹¹ The security developments in the Balkans at the time and the NATO response to them were an impetus for the EU to rethink its role in security and its future level of autonomy for action.¹² A consensus was emerging among Member States that ‘the European Union should have the autonomous capacity to take decisions and, where NATO as a whole is not engaged, to launch and then to conduct EU-led military operations in response to international crises in support of the [common foreign and security policy].’¹³ This was also a time when the Union was preparing for the enlargement of ten new Member States, which in turn implied that the EU would gain new and more resources of information in security policies.¹⁴

The Lisbon Treaty strengthened the EU’s international role in a variety of international fields, including in military and civilian missions.¹⁵ Today, the EU has six military missions and eleven civilian missions spread across Africa, Asia and Eu-

8 See George Tsebelis and Geoffrey Garrett, ‘The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union’ (2001) 55 *International Organization* 357; and Paul Pierson, ‘The Path to European Integration: A Historical Institutionalist Analysis’ (1996) 29 *Comparative Political Studies* 123, 123.

9 Rachel Woodward, ‘Establishing Europol’ (1994) 1 *European Journal on Criminal Policy and Research* 7.

10 Simone J. Nuttall, *European Political Cooperation* (OUP 1992) 674.

11 Helsinki European Council, 10 and 11 December 1999, Presidency Conclusions, para 1.

12 For the EU’s more current engagement in the Balkans see Steven Blockmans, ‘Between Dream and Reality: Challenges to the Legal Rapprochement of the Western Balkans’ in Peter Van Elsuwege and Roman Petrov (eds), *Legal Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union: Towards a Common Regulatory Space?* (Routledge 2014).

13 Richard G. Whitman, ‘NATO, the EU and ESDP: An Emerging Division of Labour?’ (2004) 25 *Contemporary Security Policy* 430, 437.

14 For an overview of European integration since 1945, see Desmond Dinan (ed), *Origins and Evolution of the European Union* (2nd edn, OUP 2014).

15 Marise Cremona, ‘The Union as a Global Actor: Roles, Models and Identity’ (2004) 41 *Common Market Law Review* 553.

rope.¹⁶ For example, the EU's largest civilian mission is EULEX, located in Kosovo, with the central aim of assisting and supporting the local authorities in implementing the rule of law by focusing on judicial reform.¹⁷ Despite the progress of the EU in external security and cooperation, its competences in CFSP are difficult to precisely delineate between the EU and national level and the relevant legal provisions are spread out between the Treaty on European Union and the Treaty on the Functioning of the European Union. Namely, the EU has a general competence for CFSP within TEU and various more specific powers within TFEU.¹⁸ In this area of EU law, the EU's competences are undefined, in the sense of being neither exclusive nor shared.¹⁹ Moreover, acts cannot be of legislative nature in the CFSP, which implies that no ordinary or specialised legislative procedures can take place. Furthermore, these acts differ from 'standard EU legal acts,'²⁰ and include general guidelines and decisions related to a variety of positions or actions to be taken by the Union.²¹

Contrary to CFSP, the EU's competences in the AFSJ are more clearly defined since according to Article 4(2)(j) TFEU, the AFSJ is a domain of 'shared competence' between the EU and the Member States. The EU's competence in the AFSJ is seen as an 'inevitable consequence'²² of the cross border nature of crime which in turn is a result of the single market and the elimination of internal borders followed by the incapability of EU member states to deal with crime individually.²³ Although the AFSJ is intended to cover the internal security aspects, external elements are not uncommon. In line with Article 216(1) TFEU, the EU can act externally on any AFSJ subject matter if there is a primary law defined internal objective and if external

16 European External Action Service, 'Ongoing Missions and Operations – June 2015' <<http://www.eeas.europa.eu/csdp/missions-and-operations/>> accessed 31 August 2015.

17 Council Decision 2014/349/CFSP of 12 June 2014 amending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo (*hereafter EULEX Kosovo*) [2014] OJ L174/42.

18 For example, see art 215 TFEU.

19 One reason for not stipulating the CFSP as a shared competence, has been said to be that shared competences are described as having a pre-emptive effect. See Piet Eeckhout, 'The EU's Common Foreign and Security Policy after Lisbon: From Pillar Talk to Constitutionalism' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law after Lisbon* (OUP 2012).

20 Eeckhout, *ibid*, 265.

21 Eeckhout (n 19) 280.

22 Christina Eckes and Theodore Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice: A European Public Order* (CUP 2011) 1-2.

23 For a different rationale see Cathryn Costello, 'Administrative Governance and the Europeanization of Asylum and Immigration Policy' in Herwig Hofmann and Alexander Türk (eds), *EU Administrative Governance* (Edward Elgar 2006) 289. Other experts criticise the functionality in AFSJ as having been driven with 'institutional design and control pragmatically tailored to ever expanding policy aspirations rather than articulating a sense of the best constitutional settlement for a mature polity', see Neil Walker (ed), *Europe's Area of Freedom, Security and Justice* (OUP 2004) 31.

action is necessary to achieve that objective.²⁴ For example, the EU has concluded international agreements aimed at fighting serious crime and terrorism, which precisely exemplify this mixture between the elements of the AFSJ and external security.²⁵ Similarly, although the EU's restrictive measures, also known as sanctions directed against third countries or individuals, fall under the CFSP,²⁶ they also contribute to the internal security in the EU.

Despite the significant development of the EU's powers in security policies, as may be noted from the discussion above, Member States retain a significant role leading to EU powers being fragmented between the EU and the national level. Member States, as was noted, have recognized the necessity of cooperating on security policies as security threats become more advanced and borderless. Yet, simultaneously, member states are protective of their powers. For example, as was noted above, Member States emphasise in Article 4(2) TEU that 'national security' remains a national prerogative. Moreover, regarding information sharing, which is a crucial aspect of security policies in the EU, Article 346(1a) provides that 'no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interest of its security'. Indeed, the exact division of powers between the EU and its Member States was determined 'rather fluidly' until the Lisbon Treaty came into force.²⁷ The Lisbon Treaty categorises the EU's powers into four types: exclusive, shared, coordinating and complementary,²⁸ aiming to introduce a 'more detailed and organic discipline' of competences.²⁹ The differentiation of the powers between the EU and Member States depends on whether it excludes the other authority from acting within the same policy area or whether co-existence is possible. However, competences of the EU in security issues exemplify the complexity of setting clear divides as reliance and coordination between the EU and Member States is key for the overall functioning of security measures.

24 Jörg Monar, 'The EU's Growing External Role in the AFSJ Domain: Factors, Framework and Forms of Action' (27 (2014) *Cambridge Review of International Affairs* 147.

25 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.

26 Art 215 TFEU.

27 Grainne de Burca and Bruno de Witte, 'The Delimitation of Powers between the EU and its Member States' in Anthony Arnall and Daniel Wincott (eds), *Accountability and Legitimacy in the European Union* (OUP 2002) 201.

28 See Title I 'Categories and Areas of Union Competence' art 2-art 6 TFEU.

29 Lucia S. Rossi, 'Does the Lisbon Treaty Provide a Clearer Separation of Competences between EU and Member States?' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law after Lisbon* (OUP 2012) 85.

Provisions in primary law such as those outlined on national security and information sharing, should be read in light of established EU principles regarding the interaction between the EU and its Member States. In this regard, firstly, the principle of conferral is salient as it provides that the EU has only those competences that are conferred on it by the Member States.³⁰ Yet again, the applicability of the principle of conferral is more complex in practice since issues are indeed interconnected and have a mutual impact on whether the EU can act and to what extent it can do so. Both internal and external issues of EU law and policy are not as clear-cut as to be easily split between the EU and Member States, as policies mostly rely on cooperation and coordination of all actors involved and can seldom be fully handled by one actor alone or only at the EU or national level. For example, operational powers in security, whether in law enforcement or intelligence cooperation, remain at the national level. Yet, the strategic reporting done at EU level on the basis of national information derived from such operational actions is crucial for the ability of Member States for example to conduct cross-border arrests or apply measures in counter-terrorism. Another significant example is a situation in international law where, although the EU has the competence to act under EU law, it must however rely on the Member States to act on its behalf due to the ‘blindness of international law towards compound subjects.’³¹ The aspect of reliance in the relationship between the EU and its Member States directly links with the second key EU principle in this regard. Namely, the principle of sincere cooperation matters with regard to the interpretation of the member states’ obligations to the EU.³² In practice, the principle of sincere cooperation is ensured through procedural co-operation, which implies mutual consultation and an exchange of information between the EU and the Member States.³³ Indeed, when Member States show a reluctance to share information relevant for security, as in the case *Commission v Finland*, the Court held that derogations provided for in Article 346(1)(a) must be interpreted strictly and that the provision cannot be understood in such a way as to confer on Member States a power of veto on the basis of national security.³⁴ The Court stated that the principle of sincere cooperation requires Member States not to depart from the application of EU law. This is

30 See arts 4(1) and 5(1) TEU. Conferral is also stipulated in art 3(6) TEU, art 7 TFEU; art 19 TFEU; see Opinion 2/13 (n 1) para 164, where the Court states that it is a fundamental principle of EU law.

31 Robert Schütze, *European Constitutional Law* (CUP 2012) 217.

32 Art 4 TEU. This principle also applies on a horizontal level among EU institutions, see art 13(2) TEU.

33 Stephan Bitter, ‘Loyalty in the European Union – A Review’ (2002) 3 *German Law Journal*.

34 Case C-284/05 *Commission v Finland*, EU:C:2009:778, para 47.

precisely why the duty of sincere cooperation between the Member States and the EU is essential, since through this principle the EU is able to move forward in its workings for which access to national sensitive information is paramount. From the discussion, two significant aspects with regard to actors in EU security policy may already be deduced: firstly, it becomes apparent that security actors encompass both the national level and EU level, and secondly, it also becomes apparent that information exchange and its analysis is essential within this cooperation, which in turn implies that cooperation is focused around instruments and bodies of information exchange and analysis. We turn now to examine these actors in security more specifically.

3.1.2 *Plurality of Executive Actors*

The powers in security policies are exercised by a number of executive actors at different levels of decision-making. This subsection focuses on what characterises each actor and how these actors interact by firstly, examining ‘core’ executive institutions, and secondly, looking at other relevant actors in EU security policies. As information sharing and coordination is a significant task or even the main *raison d’être* of some of these actors, specific attention is paid to this aspect of their functioning. In this respect, the reliance on the Member States resurfaces, whether on national authorities or rules, in line with the previous discussion on the importance of Member States in security policies.

A. Core Actors:

European Council, Council and Commission

The locus of executive power in the EU is situated within multiple key institutions: the European Council, the Council and the Commission.³⁵ Each institution takes a different lead in variance with the area of EU law. For example, whereas the Commission is forefront in the EU’s internal market policies, the European Council is significant for the CFSP. Nevertheless, in both internal and external security, the Council’s prerogatives matter when it exercises its executive functions in cooperation for more operational security aspects as well as its functions as co-legislator especially for issues relating to the AFSJ.

³⁵ See Deirdre Curtin, ‘Challenging Executive Dominance in European Democracy’ (2014) 77 *The Modern Law Review* 1.

The European Council is seen as the ‘constitutional architect’,³⁶ that provides the specific and regular stimuli for the development of the EU.³⁷ Yet, it is noteworthy that the European Council does not have legislative functions,³⁸ although in the AFSJ, in accordance with Article 68 TFEU, the European Council is in charge of defining the ‘strategic guidelines for legislative and operational planning’, which is specific to this policy area. Nevertheless, it is the Commission that has an almost exclusive right to formally propose legislative acts,³⁹ despite the fact that it increasingly has to share the political right of initiative with the European Council,⁴⁰ the Council,⁴¹ the European Parliament⁴² and, since the introduction of the citizen’s initiative, with the organised civil society.⁴³ Moreover, it has been noted that for security policies the Commission has ‘difficulties in establishing itself as an agenda setter’ despite its legal prerogatives.⁴⁴ Some level of collaboration exists in the complex workings between the Commission and the European Council. For example, the Commission is involved both in the preparatory phase and in the implementing phase of European Council sessions.⁴⁵ In line with Article 15(6)(b) TEU, the President of the European Council is supposed to ‘ensure the preparation and continuity of the work of the European Council in co-operation with the President of the Commission’. With regard to the Council, it has been noted that in practice the European Council acts as an arbitrator for handling disputes or conflicts that arise in the Council concerning relevant interests of Member States. More specifically, the European Council ‘plays an arbitration role with a

36 Wolfgang Wessels et al, ‘Democratic Control in the Member States of the European Council and the Euro zone Summits’ (2013) study requested by the European Parliament’s Committee on Constitutional Affairs, 14.

37 Schütze (n 31) 103; The EC could be further seen to play significant constitutional functions (see art 48 TEU; art 49 TEU; art 31(3) TEU) as well as institutional functions (see art 14(2) TEU; art 18(1) TEU). See, however, Mark Pollock, *Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU* (OUP 2003).

38 Art 15(1) TEU.

39 Art 17(2) TEU; the Commission also has a right to withdraw proposals: Case C409/13 *Council v Commission*, EU:C:2015:217, para 74.

40 Art 15(1) TEU.

41 Art 241 TFEU.

42 Art 225 TFEU.

43 Art 11 TEU. See also Olivier Höing and Wolfgang Wessels, ‘The European Commission’s Position in the Post-Lisbon Institutional Balance: Secretariat or Partner to the European Council?’ in Michele Chang and Jörg Monar (eds), *The European Commission in the Post-Lisbon Era of Crises: Between Political Leadership and Policy Management* (Peter Lang 2013) 133.

44 Maylis Labayle, ‘The New Commission’s Role in Freedom, Security and Justice in the Post-Lisbon Context: New Era or Missed Opportunity?’ in Michele Chang and Jörg Monar (eds), *The European Commission in the Post-Lisbon Era of Crises: Between Political Leadership and Policy Management* (Peter Lang 2013) 236.

45 Höing and Wessels (n 139) 43.

political authority of appeal in order to release sensitive documents and resolve conflicts that paralyse the Council.⁴⁶ The relation between the Council and the Commission is also paramount as there are a number of acts in security that the Council adopts by a qualified majority upon a proposal from the Commission. For example, according to Article 70 TFEU, the Council has the authority to evaluate the implementation of policies in AFSJ by Member States, upon a proposal from the Commission.

The Council takes the lead not merely by being a co-legislator in the field of AFSJ, as it has always played a major role in relation in the configurations of the Foreign Affairs Council and Justice and Home Affairs, but also retains significant executive powers with regards to both internal and external security, for example in the imposition of sanctions and the blacklisting of terrorists.⁴⁷ Moreover, the Council is responsible for taking decisions on foreign policy matters and crisis management operations. The Council's lead in security also relates to its key position for external cooperation in security policies and the internal structures in the Council that result from such cooperation. For example, with the signature of an interim security agreement with NATO on 26 July 2000, an interim military committee within the Council was established, leading to the influx of more sensitive information.⁴⁸ In addition, the Council Secretariat was the seat of the new crisis management structures and the EU military staff, which supported the Secretary-General who also exercised the role of a High Representative for CFSP at the time.⁴⁹ The Council Security Committee is another important internal body that resulted from the increased role in security and the Council's efforts to establish legal and technical arrangements that facilitate this role. This Security Committee, composed at the time of representatives from the Council and each Member State as well as the Commission, was particularly focused on the development and expansion of security cooperation through exchanges of sensitive information and the technical security facilities necessary for the influx of such information. Besides new internal structures within the Council, it also set up EU agencies with key roles in security cooperation such as Europol.⁵⁰ The Council's role is pertinent in that it also expanded security cooperation externally with third countries and organizations including Russia, Ukraine, Israel and the International Criminal Court, to name but a few examples.⁵¹

46 Olivier Costa and Nathalie Brack, *How the EU Really Works* (Ashgate 2014) 61.

47 Curtin, 'Challenging Executive Dominance' (n 35) 6.

48 David Galloway, 'Classifying Secrets in the EU' (2014) 52 *Journal of Common Market Studies* 668, 674-75.

49 *ibid* 675.

50 See Section 3.1..2 Point B.

51 General Secretariat of the Council, 'Exchange of EU classified information (EUCI) with third States and international organisations', 7 July 2011, Doc. 12619/11.

B. Multitude of Agencies, Bodies and Other Actors

In the overall EU institutional framework some actors cannot be subsumed under bodies or agencies, but they nevertheless play a very salient role in decision-making both for internal policies as well as for external affairs. The President of the European Council and the High Representative of the Union for Foreign Affairs, who also acts as a vice-President of the Commission, are two key figures in the EU, although they seem to have essentially more 'coordinating functions rather than real executive power'.⁵²

The role of the High Representative is to express the Union's position relating to the common foreign and security policy in the international fora. In line with Article 18(2) TEU, the High Representative contributes to the development of the CFSP, for which her position as Chair of the Foreign Affairs Council is also relevant.⁵³ The position of the High Representative also includes powers of implementation and supervision, such as supervising the appointed special representatives of the EU.⁵⁴ The responsibilities of the High Representative to ensure consistency in the EU's external action is also important with regard to implementation powers.⁵⁵ Such obligation is directly linked to the importance of efficient systems of information exchanges between Member States, EU institutions and delegations.⁵⁶ In these functions, the High Representative relies on the European External Action Service as the 'EU's diplomatic arm',⁵⁷ which was formally launched at a 'low key event' behind closed doors in December 2010.⁵⁸ The EEAS is seen as a bridge between the Council and the Commission in external action and also cooperation with national

52 Gerard Conway, 'Recovering a Separation of Powers in the European Union' (2011) 17 *European Law Journal* 304, 322.

53 Art 27(1) TEU.

54 Art 33 TEU.

55 Art 18(4) TEU.

56 Since the entry into force of the Maastricht Treaty, the established diplomatic missions of the European Community are called 'delegations' and are managed by the Commission. Officially, the 130 Commission delegations changed status on 1 December 2009, making them part of the EEAS structure although their transformation into EU delegations under the authority of the High Representative has pointed to some of the tensions inherent in the new system. See for more Laura Rayner, 'The EU Foreign Ministry and Union Embassies' (2005) The Foreign Policy Centre <<http://fpc.org.uk/fsblob/499.pdf>> accessed 31 August 2015. For an historic development overview, see European Commission, *Taking Europe to the World: 50 Years of the European Commission's External Service* (European Communities 2004); Michael Kluth and Jess Pilegaard, 'The Making of the EU's External Action Service: A Neorealist Interpretation' (2012) 17 *European Foreign Affairs Review* 303, 307.

57 Council Decision 2010/427/EU of 26 July 2010 Establishing the Organisation and Functioning of the European External Action Service [2010] OJ L201/30; European External Action Service, 'The EU's Many International Roles' <http://eeas.europa.eu/what_we_do/index_en.htm> accessed 31 August 2015.

58 Andrew Rettman, 'Ashton Names EU Foreign Service Priorities at Low-key Launch Event' *EUObserver* (Brussels, 2 December 2012).

administrations.⁵⁹ EU delegations are also part of the EEAS structures and under the authority of the High Representative, which were managed by the Commission prior to the Lisbon revisions. The EU Intelligence Analysis Centre (INTCEN) is another significant internal structure within the EEAS, directly accountable to the High Representative. INTCEN receives intelligence from Member States with the aim to provide assessments and briefings for security policies at the EU level. INTCEN acts as a 'single entry point' for sensitive information coming from Member States' civilian intelligence and security services.⁶⁰ As these different aspects and internal structures of the EEAS show, one of its key roles is to support the High Representative to conduct and formulate policy proposals in the field of CFSP and in this regard to also ensure consistency of EU external relations as a whole, making coordination of information with Member States, EU delegations and third parties its key function.

A pool of bodies mostly focused on information gathering, coordination and reporting exist. The EU executive actors increasingly depend on the workings of the vast number of agencies and bodies that assist the security coordination and mutual cooperation. Most EU agencies and bodies in the area of security do not have operational powers but their primary tasks and rationale of existence is focused around information analysis and reporting. Due to their mostly coordinating roles, information exchange is crucial for their added value to the existing national security authorities. Frontex, the EU Satellite Centre, the European Defence Agency and Eurojust are some of the most significant agencies in EU security policies. Frontex is an agency for the Management of Operational Cooperation at the External Borders of the Member States and it coordinates Joint Operations and acts as an intelligence body, gathering information on the situation at the external borders and compiling risk assessments. Eurojust is responsible for judicial cooperation in criminal matters and its principal task is to support and improve the coordination of investigations and prosecutions among the competent judicial authorities of the EU member states when they deal with serious cross-border and organised crime. Europol is an EU agency in law enforcement cooperation with the main task of exchanging and analysing sensitive information in this field with the aim of facilitating national authorities in combating serious crimes. Despite the lack of coercive powers, Europol is a significant actor in the fight against terrorism and other

59 Eeckhout (n 19) 288. See also Steven Blockmans et al, *EEAS 2.0: A Legal Commentary on Council Decision 2010/427/EU Establishing the Organisation and Functioning of the European External Action Service* (Centre for European Policy Studies 2013).

60 European External Action Service, Fact Sheet on the EU Intelligence Analysis Centre (2015) <http://eeas.europa.eu/factsheets/docs/20150206_factsheet_eu_intcen_en.pdf> accessed 31 August 2015.

serious crimes, through its threat assessment and analytical reports such as the European Organised Crime Threat Assessment and the EU Terrorism Situation and Trend Report. Europol has undergone many changes due to the shifting context of security threats and also the development of the European Union legal order. Currently, Europol is undergoing a legal revision on the basis of Article 88(2) TFEU. For the first time, this important EU agency in security will be established via a legislative process, whereby the European Parliament has direct influence over its reform.⁶¹ Indeed, this aspect of involvement of the European Parliament for the revision of Europol, gives rise to questions regarding the broader role of the European Parliament but also other oversight institutions within the framework of EU security policies. Hence, the following section turns to examine oversight in the EU.

3.2 EU OVERSIGHT

The notion of oversight refers to an actor scrutinising another actor's activities with the aim of evaluating its compliance with particular criteria and, on this basis, issuing recommendations or orders to the actor concerned.⁶² By oversight actors this chapter is referring to institutions whose role is to monitor and/or to sanction executive action as well as to represent citizens interest and defend their rights. More specifically, this chapter looks at the role of the European Parliament, the CJEU and the European Ombudsman. Each of these institutions holds a key position in the overall oversight of executive power in the EU as they play different roles and have different particular prerogatives. Yet, the common aspect of parliamentary, judicial and administrative oversight is that each institution acts on its constitutional mandate to ensure primary law principles of democracy and openness in the EU and fundamental rights. More than any other Treaty reform so far, the Lisbon amendments focus on multiple aspects for the EU's democratic legitimacy and democratic functioning.⁶³ The EU commits to

61 See Vigjilencia Abazi, 'The Future of Europol's Parliamentary Oversight: A Great Leap Forward?' (2014) 15 *German Law Journal* 1121.

62 Madalina Busuioac, *European Agencies: Law and Practices of Accountability* (OUP 2013) 35.

63 This should not be misunderstood as meaning that this thesis claims the EU *is* democratic or not. This chapter is not engaged in a debate of democratic deficit, albeit an important ongoing one for decades. See Weiler et al, 'European Democracy and its Critique' (1995) 18 *West European Politics* 4; Majone, 'Europe's "Democratic Deficit": The Question of Standards' (1998) 4 *European Law Journal* 5. Title II of the TEU stipulates the EU's democratic principles. Art 10 TEU clearly stipulates that the EU is founded on representative democracy, citizens being directly represented by the European Parliament, and each citizen having the right to participate in EU decision-making. Civil society and national parliaments are also given a democratic role through participation and procedures of scrutiny. See Art 11 and Art 12 TEU, respectively.

take decisions ‘as openly as possible.’⁶⁴ The scope of the principle of openness covers all aspects of the decision-making process: legislative, administrative, regulatory and operational.⁶⁵ Especially in issues of security, ensuring oversight and openness is pertinent for enabling public deliberation about the extent of executive powers and whether they are balanced with other public interests and fundamental rights.

Oversight of the security policies of the EU is a developing matter and this has direct implications with regard to what extent oversight powers extend to EU security policies and whether executive actors are accountable to EU oversight institutions at all. Moreover, certain specific features of the EU oversight institutions make oversight of security more challenging. The following subsections address these issues for each EU oversight institution.

3.2.1 *The European Parliament*

Oversight by the European Parliament of security policies is both a salient and a challenging task. The first and basic reason for oversight by the European Parliament of security policy is to ensure its democratic legitimacy, as it is the only directly elected EU institution.⁶⁶ The European Parliament also provides a public deliberation platform and this function is the second crucial reason for its role of communicating to the citizens what takes place at the EU level. Parliamentary oversight contributes to public deliberation, especially if oversight is conducted in an open manner and oversight results are reported and discussed publically. Hence, the European Parliament is able to provide a link between the processes of oversight and their significance for public deliberation, as was elaborated in more detail in Chapter II. The involvement of the European Parliament is also salient from a practical perspective because it provides a different standpoint on the issues regarding security and it is in a position to possibly challenge ‘group thinking’ and a predominant executive rationale in

64 Art 1 TEU.

65 Openness is seen as a means that would make EU decisions better reflect the will of citizens. See in this regard the distinction on the role of openness for what the author calls input and output legitimacy: Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (OUP 1999) 6. See also Commission, ‘Better regulation for better results – and EU agenda’, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2015) 215 final; Jean-Claude Juncker, ‘A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change’, Speech given to the European Parliament on 15 July 2014.

66 Art 10(2) TEU affirms the position of the EP as the direct representative of the citizens of the EU.

decision-making regarding security policies.⁶⁷ The EU officials in fact explain that a growing sense of community and shared perspective is becoming applicable in the EU as well. This can be illustrated from an EU high official's explanation of security measures regarding information that the: '...socialization among security experts in EU institutions and Member States has fostered a shared common interest in developing and preserving the integrity of the framework... In other words, equivalence is driven through peer pressure (including through a system of visits to Member States and EU agencies by an EU assessment team)...'⁶⁸ Lastly, the European Parliament is also in a position to actively choose the issues over which it exercises oversight, through parliamentary inquiries and questions as well as other oversight mechanisms.

The European Parliament has a variety of specific oversight powers. For instance, Article 14(1) TEU stipulates that the European Parliament exercises functions of political control and consultation, and Article 218(10) TFEU affirms the prerogative of the European Parliament to be informed on international agreements.⁶⁹ The European Parliament has extensive budgetary power and can censure the Commission, which is seen as the 'most conspicuous manifestation of the European Parliament's significant power to control the Commission, but not the most important one' because the European Parliament has little control over the choice of the new college.⁷⁰ Moreover, the European Parliament has the potential to create different types of committees and their powers are determined at the time when they are set up, such as the standing committee, special committee and the committee of inquiry.⁷¹ The European Parliament can also initiate oversight in instances when it does not set up its own inquiry committees. For example, the European Parliament can request the High Representative to establish an external review of issues regarding the EU's security policies and missions, as was recently the case with the setting up of an independent review for suspected corruption at the EU's civilian mission EULEX.

Parliamentary oversight of security policies is also a challenging task due to significant issues concerning the EU's constitutional structure as well as challenges more typical for the oversight of security. The European Parliament's prerogatives in oversight have increased in a slow manner and it often advances its position through

67 M. Turner and A. Pratkanis, 'Twenty-five Years of Groupthink Theory and Research: Lessons from Evolution of a Theory' (1998) 73 *Organisational Behavior and Human Decision Process* 105.

68 Galloway (n 48) 677.

69 See also the European Parliament's significant budgetary power as provided in art 319 TFEU.

70 Costa and Brack (n 46) 124.

71 EP Rules of Procedure, July 2014: Rule 196 – Standing committee; Rule 197 – Special Committee; Rule 198 – Committee of inquiry.

institutional practice and informal *de facto* changes.⁷² We saw that executive institutions dominate security policies and the ‘design’ of most of the mechanisms of security cooperation and agencies in this regard, as was particularly the case with the Council. This affects oversight and also the position of oversight institutions, into what some scholars have termed ‘implementing’ actors, in the sense that they adapt their oversight processes in line with the established institutional setting of executive institutions. A more specific aspect to the EU in this regard of the relationship between the executive and oversight institutions can also be seen in the relation between the Council and the European Parliament. Namely, these two institutions in their role as co-legislators consist of different political majorities. The European Parliament is directly elected at EU level whereas the Council has a direct link to the national electorate. Hence, while the European Parliament may have disagreements with the Council more often than perhaps is the case in national parliamentary democratic systems, the Council however simultaneously acts as an executive actor and hence has the information advantage from its cooperation with other executive actors. Linked to this is the second point, that the EP’s oversight prerogatives vary depending the EU actor. For example, the European Parliament is not in a same oversight position with the Council as with the Commission: whereas it can dismiss the latter, it has no such powers towards the former. The European Parliament does not have equivalent oversight prerogatives towards the European External Action Service, which is rather under the authority of the High Representative, as with Europol for which the European Parliament has scrutiny. Hence, in cases of intelligence cooperation, as it is the case with INTCEN, the European Parliament has no direct oversight role, despite the fact that INTCEN can accumulate material and information, which is possibly too invasive of privacy rights,⁷³ through the information received from the national security agencies. Furthermore, regardless of the actor and pertaining to the mechanisms of oversight, it is worthwhile pointing out that the EP’s investigative powers fall short of the powers of national committees of inquiry since they do not have the legal authority to conduct evidence-gathering about general subjects in relation to alleged maladministration and inquiries into actions by third-country authorities.⁷⁴

72 Editorial, ‘Between the Constitutional Document and the Constitutional Settlement’ (2014) 10 *European Constitutional Law Review* 375.

73 Alissa J. Rubin, ‘Lawmakers in France Move to Vastly Expand Surveillance’ *The New York Times* (Paris, 5 May 2015).

74 European Parliament Research Service, ‘The ECHELON Affair: The EP and the Global Interception System 1998-2002’ Study, November 2014, at 222 <http://www.europarl.europa.eu/EPRS/EPRS_STUDY_538877_AffaireEchelon-EN.pdf> accessed 30 August 2015.

3.2.2 *The Court of Justice of the European Union*

Judicial oversight is important to ensure that executive power is exercised in line with the rule of law and respect for fundamental rights.⁷⁵ Especially for cases regarding security measures, judicial oversight may be the only institutional mechanism to ensure a fair balance between the individual right and the executive prerogatives of the institution.⁷⁶ Judicial oversight is ensured by the CJEU, which as an EU institution, includes the Court of Justice, the General Court and specialized Courts.⁷⁷ The CJEU ensures the interpretation and application of the Treaties, albeit its interpretations are not always uncontroversial as it is often depicted as adopting an activist role.⁷⁸

The Court's oversight of security policies has been limited especially prior to the Lisbon Treaty revisions. With regard to external security, the Court is still limited to 'boundary-policing', i.e. determining whether the issue in question falls within the competence of the EU under TFEU or if is related to the implementation of common foreign and security policy under TEU,⁷⁹ and the Court can only review the legality of decisions authorizing restrictive measures against individuals.⁸⁰ The Lisbon Treaty foresees the possibility that when acts of EU security agencies produce 'legal effects' these can fall under the judicial scrutiny of the CJEU.⁸¹ As a result, agencies like Frontex for example could be held accountable before the Court for any actions that may have resulted in alleged breaches of fundamental rights. Another specific aspect with regard to the CJEU is the reference to a preliminary ruling. Namely, in this procedure the national courts refer a case to the Court in order to question it on the interpretation or validity of European law. The relevant aspect with regard to security policies is that in cases of preliminary reference the Court guides itself through the information submitted to it by the national court.

75 See in general A. V. Dicey, *The Law of the Constitution* (ed.J.W.F Allison OUP 2013). See Case C-294/83 *Les Verts v Parliament*, EU:C:1986:166, para 23. See also Laurent Pech, "A Union Founded on the Rule of Law": Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6 *European Constitutional Law Review* 359.

76 Case C-27/09 P *France v People's Mojahedin Organization of Iran*, Opinion of AG Sharpston, EU:C:2011:482, para 75.

77 Art 19 TEU.

78 Mark Dawson, 'How Does the European Court of Justice Reason? A Review Essay on the Legal Reasoning of the European Court of Justice' (2014) 20 *European Law Journal* 423, 426.

79 Art 40 TEU, See also Paul Craig and Grainne De Burca, *EU Law: Text, Cases, and Materials*, (5th ed, OUP 2011).

80 Individual sanctions cases art 275 TFEU.

81 Art 263 TFEU.

3.2.3 *The European Ombudsman*

The role of the European Ombudsman in administrative oversight⁸² is not merely complementary to the role of the European Parliament and the CJEU, but has a unique added value due to its duality of tasks and position in the administrative setting. Introduced into the institutional landscape of the EU in the Maastricht Treaty, the European Ombudsman inquires into possible maladministration in the EU although it should be stressed that the European Ombudsman does not have the competences to scrutinise the work of administrative bodies of Member States.⁸³

In line with Article 228 TFEU, in conjunction with Article 3(1) of the Ombudsman Statute and Article 9(1) of the Implementing Provisions,⁸⁴ the European Ombudsman exercises control over EU administration under its own initiative. It also has the power to receive individual complaints, which the European Ombudsman addresses through various administrative mechanisms.⁸⁵ The European Ombudsman has investigative measures to ascertain the factual basis of the cases and means of remedial action in order to address instances of EU maladministration.⁸⁶ Although its decisions and recommendations are not legally binding and the European Ombudsman cannot impose any legal sanction upon the institution, in practice the institutions mostly follow the European Ombudsman's recommendations. The European Ombudsman has a unique review position because it is neither focused on creating political opposition to the executive institutions or defending different interests, as is the position of the European Parliament, nor is it focused on declaring their acts void or annulling them, as the Court is in a position to do. The European Ombudsman reviews the EU administration not only with the aim of identify maladministration, but in practice the European Ombudsman also focuses on highlighting best practices as well as negative examples which creates pressure towards improving institutional workings.

82 Although some argue that the European Ombudsman is a hybrid body combining both instruments of parliamentary and judicial scrutiny, see Paul Magnette, 'Between Parliamentary Control and the Rule of Law: The Political Role of the Ombudsman in the European Union' (2003) 10 *Journal of European Public Policy* 677, 677 and 678.

83 Paul Craig, 'The Ombudsman' in Paul Craig, *EU Administrative Law* (OUP 2012) 742.

84 Decision of the European Ombudsman adopting implementing provisions of 8 July 2002 as amended by decisions of the Ombudsman of 5 April 2004 and 3 December 2008 <<http://www.ombudsman.europa.eu/en/resources/provisions.faces>> accessed 31 August 2015.

85 Magnette (n 82).

86 Craig (n 1) 752.

3.2.4 *Interplays in Information: Oversight and Executive Actors*

Deep tensions persist between executive limitations and oversight necessities for information. As the discussion on EU executive institutions and agencies showed, at the EU level information exchanges from the Member States is key for the functionality of security policies and many of the EU actors are solely established for the purpose of information exchanges. However, these channels of information do not always extend to EU oversight institutions, becoming a key challenge in conducting oversight. A level of interconnectedness between oversight institutions is indispensable to address this challenge. The European Parliament turns to adjudication when executive institutions fail to comply with Article 218(10) TFEU on information sharing. Furthermore, the European Ombudsman calls upon the European Parliament to act within its legislative and political powers, when its own prerogatives reach limits and administrative recommendations are not enough to receive information from EU security agencies. Recent cases from practice illustrate the interconnectedness of oversight powers. For example, the case of the *European Parliament v Council* concerned the lack of information sharing by the Council to the European Parliament on an international agreement.⁸⁷ On the one hand, the Council claimed that this agreement pertained exclusively to the Common Foreign and Security Policy, an area of EU policy to which the European Parliament has no political oversight powers.⁸⁸ On the other hand, the European Parliament invoked Article 218(10) TFEU, on the basis of which it is supposed to be informed about international agreements. The Court found that the Council has an obligation to inform the European Parliament, on basis of Article 218(10) TFEU and sincere institutional cooperation, including for issues under CFSP.⁸⁹ Another similar example concerns the European Ombudsman, as it was refused access to an Europol document pertaining to the Terrorist Finance Tracking Programme Agreement with the US.⁹⁰

The interconnection between oversight institutions expands not only on a horizontal level but also between the European Parliament and national parliaments, although some scholars have noted that the relation between national parliaments and the European parliament can also be antagonistic and the cooperation formal.⁹¹ This

87 Case C-658/11 *Parliament v Council*, EU:C:2014:2025.

88 Art 218(6) TFEU; *Parliament v Council*, *ibid*,

89 *Parliament v. Council* (n 87) paras 86-87.

90 See more details in Introduction of this thesis.

91 Christina Fasone, 'European Economic Governance and Parliamentary Representation. What Place for the European Parliament?' (2014) 20 *European Law Journal* 164,

interconnectedness between the European Parliament and national parliament with regard to exchanges of information is particularly relevant considering that, on the one hand, there are issues for which the European Parliament does not have full prerogatives and hence does not receive full access to relevant information and, on the other hand, national parliaments only have prerogatives and scrutiny powers towards their national government and hence face limitations of scope and jurisdiction and the practical resources to be able to practice oversight or be well informed. Empirical research shows that when inter-parliamentary meetings take place between the European Parliament and the national parliaments, they mostly discuss and refer to issues related to CFSP and AFSJ.⁹²

However, the interconnectedness of information sharing between the EU level and the national level also has negative implications in the cases where national rules block information sharing at the EU level of oversight or EU rules delay or obstruct the receipt of information by the national parliament. For example, the Portuguese Assembly was able to debate the Memorandum of Understanding and the Financial and Economic Assistance Programme only one year after their adoption when the measures agreed with what is called the Troika, the European Central Bank, the International Monetary Fund and European Commission, were included in the annual Budget Act.⁹³ Another significant example regarding the lack of information sharing concerns the German Bundestag regarding the European Financial Stability Facility led the German Constitutional Court to rule that the German Parliament's rights to be informed are to be suspended only if it is absolutely necessary.⁹⁴

3.3 INSTITUTIONAL WORKINGS

Executive institutions have led the growing powers of the EU in security. Executive institutions, particularly the Council have established the security agencies and bodies that facilitate executive cooperation and the growing networked exchange of security information. In other words, more cooperation at EU level has led to the dominance of the executives in security policies whereas oversight institutions, at national

92 See Sandra Kröger (eds) *Democracy and Representation in the EU* (Palgrave MacMillan 2012).

93 Cristina Fasone, *Powers of Parliaments in Euro-crisis Budgetary Reforms*, Paper presented at 'Constitutional Change Through Euro-Crisis Law' Workshop, EUI, 17-18 October 2014.

94 Zitiert: BVerfG, 2 BvR 987/10 vom 7.9.2011, Absatz-Nr. (1 - 142)

and EU level, especially with regarding to information exchange, face challenges in establishing and asserting their oversight powers. Partly, this executive dominance in security policies is established through the manner in which the executive bodies have made these decisions. Research points out that ‘the problem of democratic legitimacy [in the EU] does not lie at the formal Treaty level, but rather in the daily practice of the institutions and their various administrative components.’⁹⁵ Hence, the current discussion focuses particularly on the institutional workings of the executives and aims to point out the main aspects regarding information exchanges.

Most of the relevant decisions in the EU’s security policies are of non-legislative nature, established internally within the discretion of the institution, or between the institutions in closed debates. Within executive institutions, internal administrative rules seem a common manner for addressing salient institutional aspects, as is information management. Inter-institutional agreements between the European Parliament on the one hand, and the Council as well as the Commission, on the other hand, also address the cooperation among the institutions including with regard to information exchanges. However, the discussions that lead to these decisions and agreements take place mostly behind closed doors whereas the resulting documents often remain outside the public remit or are heavily redacted. Indeed, long-standing concerns persist in the academic and public debates regarding the EU’s development and nature of integration through stealth and competence creep.⁹⁶ The EU constitutional presumption in favour of openness juxtapositions the institutional working methods susceptible to closed doors meetings. Such tendency towards secrecy follows not only non-legislative acts, but also closed-door meeting and keeping secret the identity of political decision-makers even in legislative processes.⁹⁷ The EU political decision-makers seem to be more convinced that a level of informality and hence less visibility around those processes is necessary and desirable when serious EU issues are at stake and rapid action is needed.⁹⁸ This type of action in the EU is more characteristic of core executives, but not exclusive to them. The European Council for example has been noted to make most of its important decisions informally at the dinner after the first day meetings.⁹⁹ Even the organisation

95 Deirdre Curtin, ‘Overseeing Secrets in the EU: A Democratic Perspective’ (2014) 52 *Journal of Common Market Studies* 684, 687; See also Bojan Bugarić, ‘Openness and Transparency in Public Administration: Challenges for Public Law’ (2004) 22 *Wisconsin International Law Journal* 483.

96 Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (OUP 2005).

97 Case C-280/11 P *Council v Access Info Europe*, EU:C:2013:671

98 Valentina Pop, ‘Eurogroup Chief: “I’m for Secret, Dark Debates”’ *EUobserver* (Brussels, 21 April 2011).

99 Costa and Brack (n 46) 64.

of the European Council meetings is categorized by the 'secretive character of the forum whenever possible'.¹⁰⁰ In such instances, the regular and formal mechanisms of cooperation and information sharing are secondary. Furthermore, in some of the most pressing decisions, the European Council reached its decisions in 'hectic night sessions working under the rules of professional secrecy' with only a few public documents distributed.¹⁰¹ In this regard, it becomes apparent that it is the interplay between rules and practices that continuously affect the dynamics of EU decision-making. Therefore, synchronic and strict legal perspectives are less favourable to capture practices or institutional workings that develop in the EU.

Understanding the EU's executive institutions working methods to include a level of pragmatism and informality is particularly salient when delving deeper into the quest of how the EU works, and more specifically how oversight in the EU functions in light of such institutional context. For example, EU officials point to the pragmatism involved when it comes to ensuring security protection in information exchanges both with the Member States and among EU actors.¹⁰² In a similar manner, pragmatism is also favoured when cooperation is necessary, as EU officials explain, due to the 'dispersed nature of power in the EU's institutional structure and the sheer numbers of individuals involved in policy analysis and decision-making'.¹⁰³

The concern that arises due to this pragmatism and informality has to do with information asymmetries both for the oversight institutions as well as among executive actors. In addressing these information asymmetries and making sure that their powers are not obstructed, oversight institutions focus particularly on making sure that they too receive access to information. An important consequence in this regard is what has been referred to as a contest over the extent and security of prerogatives and competences.¹⁰⁴ Namely, as scholars point out, it is unlikely the interests of those excluded from the information sharing process will be considered as fully as those included, which increases the tendency of institutions to focus on channels of information sharing and whether they too have access to the relevant information.¹⁰⁵

100 Uwe Puetter, *The European Council and the Council: New Intergovernmentalism and Institutional Change* (OUP 2014) 104.

101 Wessels et al (n 36) 16.

102 See Galloway (n 48) 676.

103 *ibid.*

104 See Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (OUP, 2005).

105 Joseph Stiglitz, 'The Private Uses of Public Interests: Incentives and Institutions' (1998) 12 *Journal of Economic Perspectives* 7.

Information asymmetry and gaps are also a result of another key factor. Internal administrative rules compartmentalise the information in certain stages of decision-making or with certain actors leading to the creation of clusters of insiders and outsiders. These administrative rules on management of sensitive information have not received sufficient attention in the EU.¹⁰⁶ Often developed outside public scrutiny or any form of external oversight, these administrative processes compartmentalise information and enable some actors more than others to determine who gets the information and when.¹⁰⁷ These rules and practices are the focus of this research and the following chapters seek to map their establishment and functioning in practice as well as their implication for EU oversight.

CONCLUSIONS

The purpose of this chapter is to present the EU institutional framework and workings, with a particular focus on security policies, as a relevant background for setting out the debate on the more specific rules and practices of official secrets in the EU. From the elaboration, pertinent issues arise regarding EU executive power in security policies as well as the role of oversight institutions.

First of all, the chapter shows that the EU's powers of security have developed significantly and that the EU is responsible for numerous security measures addressing serious crime and terrorism, and has a broad set of security actors to coordinate these measures. It also noted that executive institutions drive the EU's security development, and particularly the Council leads in security cooperation and establishing bodies and systems of information exchange aimed at facilitating this cooperation. In light of this feature, the chapter identifies the Council as setting the design for security agencies and processes of cooperation that ensure security rationales.

Of further relevance regarding security powers is that they are fragmented between the EU and the national level as the Member States retain a significant role in

¹⁰⁶ Exceptionally: see Deirdre Curtin, 'Official Secrets and the Negotiation of International Agreements. Is the EU Executive Unbound?' (2013) 50 *Common Market Law Review* 423.

¹⁰⁷ For examples of how information asymmetries operate in politics, including a discussion of the incentives that information asymmetries create in committee structures, see David Austin-Smith and William H. Riker, 'Asymmetric Information and the Coherence of Legislation' (1987) 81 *American Political Science Review* 897; Vijay Krishna and John Morgan, 'Asymmetric Information and Legislative Rules: Some Amendments' (2001) 95 *American Political Science Review* 435. For a review of the literature on sensitive information from the perspective of economics, psychology, sociology, etc., see E. Dale Thompson and Michelle L. Kaarst-Brown, 'Sensitive Information: A Review and Research Agenda' (2005) 56 *Journal American Society for Information Science and Technology* 245.

security, especially in the CFSP, and aim to emphasize their prerogatives in security through a variety of provisions in primary law. Particularly salient in this regard, as noted in this chapter, are the Member States' powers of information sharing, considering that the exchange of information is at the crux of EU security policies and the agencies and bodies established to implement them. EU security actors rely on information from national security authorities that they then analyse and use to draw attention to particular security threats for all 28 Member States. It is also pertinent regarding this exchange whether the information researches EU oversight institutions, which is necessary for them to conduct oversight.

In this respect, another noteworthy feature that the chapter examines are the powers of EU oversight institutions, particularly the European Parliament, the CJEU and the European Ombudsman. The common aspect of these oversight institutions is firstly, their mandate in ensuring openness and fundamental rights in the EU, and secondly, that their oversight powers in security policies have been a step behind in comparison to executive cooperation and action. The latter results from the formal Treaty changes, for example the Court's oversight in CFSP is currently still limited to determining whether the issue in question falls within the competence of the EU and the Court can only review the legality of decisions authorizing restrictive measures against individuals. More importantly, however, is that oversight institutions face security policies and bodies established by executive actors and hence in practice the exercise of their oversight powers often takes place in line with already established security driven rules. These rules in turn favour the executive institutions workings. The latter are characterised by a level of pragmatism and informality as well as closed door meetings. These aspects of institutional workings are salient not only regarding questions of whether and how they correspond to the EU's legal obligation to openness and oversight, but also lead to questions about possible information asymmetries that could arise among executive actors. Information asymmetries among EU executive actors and between them and EU oversight institutions occur also as a result of internal administrative rules addressing the security information flows. What are these rules and how were they established? This will be addressed in the following chapter.