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CHAPTER 4

THE EU REGULATION OF SECRECY

INTRODUCTION

This chapter examines the establishment and the growth of secrecy regulation in the European Union and maps the legal framework applicable to European Union Classified Information (hereinafter: EUCI). The aim of the chapter is twofold: uncovering the complexities of the comprehensive regulatory regime of the EUCI and, more importantly, assessing whether and to what extent the presumption in favour of openness is taken into account when establishing rules on secrecy. From the perspectives of accountability and public deliberation, openness in the regulation of secrecy is a basic requirement. It implies that rules on secrecy are publically debated and due consideration is given to the extent of limits posed by secrecy regulation on the applicability of openness.

Established mostly behind closed doors, the EUCI rules reflect the EU's dynamic evolution through formal and informal changes and show the dominance of executive actors, especially the Council. The regulation of secrecy also illustrates the 'contest of powers' in the EU both at a horizontal level, in inter-institutional relations, and at a vertical level, between the EU and Member States. This chapter reveals the inter-institutional disagreements between executive institutions and the European Parliament as well as between the Council and the Commission over the regulation of secrecy in the EU. In addition, the chapter points out the influence of Member States and a security actor like NATO in the development of EUCI and it examines the role of secrecy regulation in the EU's efforts to increase its autonomy in security policies.

Section I provides a detailed account of the applicable legal framework. Section II discusses the origin and establishment of the rules. Section III assesses the EUCI rules from the perspective of openness and the relevance of EUCI on the EU's efforts to enhance its security role and cooperation with other security actors. Section IV concludes.

4.1 THE LEGAL REGIME OF EUROPEAN UNION CLASSIFIED INFORMATION

Specific rules on classified information have existed in European law since 1958. On the basis of Article 24, Treaty Establishing the European Atomic Energy Community, Regulation No. 3 laid out the legal framework for Euratom Classified Information.¹ This *lex specialis* regime regarding classified information has a very narrow scope and it is established to safeguard sensitive information in the interests of the Member States that pertain directly to the Euratom Treaty ‘only to the extent strictly necessary’.²

The comprehensive and sophisticated regime on EUCI, our main focus, results from the more general rules initially introduced by the Council in 2001.³ This was the first clear establishment of EU classified information as separate from national information and national rules on classified information.⁴ The EUCI regime emerged and remains under the internal discretion of the EU’s executive institutions. Furthermore, it developed and continues to expand under the public radar.⁵ The EU executive actors assert that the rules on classified information are instrumental in the EU’s security policy enhancement, beginning with the reforms of the Maastricht Treaty⁶ and particularly after the EU’s Helsinki Conclusions in 1999 when the Union faced the challenge of managing an ‘increasingly complex external and internal agenda’, including issues of military and civilian crisis management operations and sharing intelligence analysis.⁷

Unlike the Euratom Treaty, there is lack of a specific legal basis for the protection of classified information in the Treaty of the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).⁸ Although the EUCI system is not a practice developed fully outside the Treaties, the ‘pragmatic’ choice of the EU institutions,⁹ under the influence of the Council, has been to establish a system of

- 1 This Regulation is still applicable – see Commission Regulation (Euratom) No 302/2005 of 8 February 2005 on the application of Euratom safeguards [2005] OJ L54/1, art 35(1).
- 2 Regulation No 3 of 31 July 1958 implementing Article 24 of the Treaty establishing the European Atomic Energy Community [1958] OJ 17/406, art 9. See Opinion 1/78 regarding the Convention on the Physical Protection of Nuclear Materials, Facilities and Transports for peaceful purposes [1979] ECR 02871, on the relation between Euratom and EU law.
- 3 Council Decision 2001/264/EC of 19 March 2001 adopting the Council’s security regulations [2001] OJ L 101/1.
- 4 Previous rules of the institutions were focused on safeguarding measures for sensitive information but did not establish classified information as a separate category of information. See Section 4.1.3 below on the development of the rules.
- 5 Deirdre Curtin, ‘Overseeing Secrets in the EU: A Democratic Perspective’ (2014) 52 *Journal of Common Market Studies* 684, 695-696.
- 6 See Simon Nuttall, *European Political Cooperation* (OUP 1992).
- 7 Helsinki European Council, 10 and 11 December 1999, Presidency Conclusions, Annex III.
- 8 The question of legal basis is particularly relevant in the context of the EU taking into account the nature of its conferred powers in line with art 4(1) TEU and art 5(1) TEU.
- 9 David Galloway, ‘Classifying Secrets in the EU’ (2014) 52 *Journal of Common Market Studies* 668, 668.

classified information on the basis of rules of procedure. As a result, secrecy is considered an administrative issue and within the internal discretion of each institution. The following subsections examine these aspects of EUCI in detail.

4.1.1 *Secrecy and EU Primary Law*

Article 339 TFEU, the only provision referring explicitly to secrecy in the Treaties,¹⁰ stipulates the protection of *professional* secrecy.¹¹ Seen from its outcome, professional secrecy, similarly to classified information policies, refers to the public unavailability of information. However, professional secrecy does not refer strictly to classified information and it does not set procedures for the management of EUCI. Professional secrecy could be seen as an obligation of the official towards the EU institution. The official undertakes to preserve the integrity of the institution and keep confidential ‘information about undertakings, their business relations or their cost components.’¹² Professional secrecy does not stipulate specific measures for the protection of sensitive information in a technical sense and it does not establish measures of physical security. Moreover, the obligation of professional secrecy is not limited to sensitive information due to security or international relations.¹³ Rather, it encompasses wider information pertaining to the work of the institution that aims to preserve the institutional workings and/or the interests of a third party. For example, a Commission official is under an obligation not to disclose any information regarding a cartel case she might be working on.¹⁴ Another difference is that classified information as a category is strictly temporal; the information is always assumed to have a public character and that it will at some point be declassified. With professional secrecy, however, the obligation of the official is applicable even after she has terminated the working arrangement with the institution.¹⁵ These differences imply that the establishment of administrative procedures for classified information diverges from the legal

¹⁰ But see Protocol (No 3) on the Statute of the Court of Justice of the European Union [2012] OJ C326/210, arts 2, 10, and 13; Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank [2012] C326/230, art 37 on professional secrecy.

¹¹ This provision stipulates professional secrecy more broadly in the EU, see Protocol No. 4, *ibid*, art 37 regarding professional secrecy for the ECB.

¹² See art 339 TFEU.

¹³ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43, art 4(1)(a) and art 9.

¹⁴ Respondent No. 16.

¹⁵ Art 339 TFEU. See second line: ‘even after their duties have ceased’.

arrangements necessary for professional secrecy.¹⁶ In the EU, professional secrecy and the EUCI system are established separately, and whereas the legal basis for the former is unquestionable, the latter practice of secrecy is not explicitly stipulated in primary law, leading to questions regarding its legal basis.

Arguably, Article 15 TFEU, pertaining to openness and the right of public access to documents, could be a legal basis for the establishment of rules on classified information. The limitations 'on grounds of public interest' stipulated therein could be linked with the system of classified information, in view of the latter's aim to protect sensitive information in the interests of the Union or one or more Member States.¹⁷ The current Regulation 1049/01 on public access to documents, the only legislative act relevant to classified information, provides the security grading (classification category) in Article 9 and stipulates a special security management for this type of information when public access requests are handled. Considering that the rationale and scope of Regulation 1049/01 pertains to *public access* as opposed to security arrangements for safeguarding sensitive information, a separate legal act on EUCI system would be necessary. However, some aspects of the system of classified information, for example the exchange with third states, do not strictly relate to the limitations of public access, which makes Article 15 TFEU a less suitable legal basis for a more comprehensive and general legislative act on classified information. Nevertheless, a combination of provisions could facilitate the different aspects of the classification regime. It would be conceivable, for example, to rely on Article 4(3) TEU pertaining to sincere cooperation between the EU and the Member States as they are supposed to 'assist each other' in fulfilling tasks derived from primary law as well as Article 13(2) TEU on horizontal mutual sincere cooperation.

Another possible option for a legal basis of EUCI rules could be Article 352 TFEU, the 'flexibility clause'.¹⁸ When the EU does not have an explicit competence in primary law in order to act, this provision may be applied, under the condition that the act in question pertains to the achievement of the objectives set out in the Treaties. One can

16 See Sissela Bok, 'The Limits of Confidentiality' (1983) 13 *The Hastings Center Report* 24, who actually argues in favour of professional secrecy understood as confidentiality but is against the extent to which it can become secrecy as a shield of error that undermines and contradict the bonds that confidentiality is supposed to protect. See also Chapter 2, Section 2.1.2 on the functions of secrecy.

17 See art 15(3) TFEU, second subparagraph: 'General principles and limits on grounds of public or private interests governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.'

18 See Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (2nd edn CUP 2010) 214. See also Theodore Konstantinides, 'Drawing the Line Between Circumvention and Gap Filling: An Exploration of the Conceptual Limits of the Treaty's Flexibility Clause' (2012) 31 *Yearbook of European Law* 227.

imagine different stipulations in the Treaty regarding the security of the EU,¹⁹ or provisions pertaining to the workings of the EU,²⁰ to which the rules could relate. However, according to the relevant EU officials involved in the establishment of the regulation of EUCI, it was ‘impossible’ to match the rules on classified information with a specific objective or policy of the EU.²¹ This finding by EU officials that more specific objectives or policies about EUCI could not be found *at all* in primary law seems surprising considering that they have consistently defended the protection of EUCI as a key necessity for the EU’s security related policies.²² The EU’s cooperation with Member States as well as third parties is another aspect that is salient for establishing a system of classified information. Article 352(4) TFEU provides a limitation for a general legislative act as it stipulates that the flexibility clause ‘cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy’. However, it should be stressed that this is a limitation to establish a *single* legislative act on EUCI under the scope of which all types of classified information would be handled. Yet, it does not as such preclude the possibility for a legislative act on the EUCI system pertaining to all other fields with the exception of CFSP. In fact, in the current legal framework too, some issues under CFSP, such as access to classified information by the European Parliament, are treated separately from EUCI more generally.²³ Using Article 352 TFEU as a legal basis would indeed not result in establishing a single unified legislative act for all types of EUCI, regardless of the EU law field, but it would also not lead to the current patchwork of internal rules and decisions, established under the full discretion of institutions, and mostly behind closed doors.

However, these provisions are not the basis for the current legal regime on EUCI. Examining EU documents that refer to the internal discussions between the institutions,²⁴ discussions that in fact took place behind closed doors, it becomes

19 See Title V TFEU

20 See art 13(2) TEU, art 7 TFEU.

21 Galloway (n 9) 675.

22 See, for example, decisions prior to the Council Decision of 2001, which directly link the relevance of classified information with the developing of EU’s security prerogatives and the EU’s cooperation both with the Member States and with third parties. A particular emphasis should be given to competences under CFSP, which under the pillar system, did not fall under the prerogatives of the Commission and a legislative act on such issue was legally explicitly excluded.

23 See the two separate agreements of the EP with the Council on access – Inter-institutional agreement of 12 March 2014 between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy [2014] OJ C95/1; and Draft Arrangement between the European Parliament, the Council and the External Action Service concerning access by the European Parliament to classified information in the area of the Common Foreign and Security Policy, Council Doc. 15343/12.

24 These documents were mostly made available to the author on the basis of public access to documents requests.

apparent that according to the Council, the key concern is that a legislative act on the basis of Article 352 TFEU would not encompass the *national* classified information exchanged among Member States ‘in the interest of the Union’ or between them and the EU institutions or agencies.²⁵ However, what is surprising in this regard is that the bases of rules of procedure, favoured and applied by the Council, do not facilitate such exchange either and in fact a separate international agreement is signed between Member States acting within the Council for this type of classified information.²⁶ The primary law stipulations on public access to documents were also deemed inappropriate considering their rationale on openness as opposed to security. By contrast, the European Parliament favours legislation on classified information that would specifically take into account the relevant case law on the wide applicability of access to information as well as the necessities of inter-institutional sincere cooperation. This is a shift from its previous opposition to the adoption of *any* form of rules on classified information. The following subsection examines the institutional debates behind the establishment of EU CI.

4.1.2 Institutional Turf Battles for Legislation on Secrecy

The European Parliament has tried to raise attention to the need for legislation on classified information that reflects the post-Lisbon constitutional architecture of oversight and constitutional commitments to the principle of openness.²⁷ Yet, the

25 Security Committee, State of play of work on the review of the security rules governing EU classified information, 23 October 2008, Doc. 14594/08 – see specifically: ‘The Committee recognised that it is not possible within the European Union to have a single legal instrument binding the institutions and the Member States for protecting all classified information exchanged in the interests of the EU. While the Commission representatives considered that the Treaties contain provisions enabling the adoption of rules on the protection of classified information for areas falling respectively within the TEC and the TEU, the Committee largely took the view that no obvious general legal bases appeared to exist for this purpose. However, it acknowledged that it may be possible to regulate in this way certain aspects of security, particularly relating to industry and the internal market. At any event, even if an appropriate legal basis could be identified for a Community instrument regarding such aspects, distinct instruments would still be needed to cover activities under Titles V and VI of the TEU. Moreover, none of these instruments can regulate the exchange of national classified information between Member States in the interests of the Union. This situation will not change in the near future.’

26 Agreement between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union [2011] OJ C202/13.

27 The EP has paid attention to classified information even in a context where its powers have been more limited. In 1999, the EP adopted a Resolution on openness, which also called for better classification decisions. See European Parliament, Resolution of 12 January 1999 on Openness within the European Union, A4-0476/98, OJ C104/20 of 14/04/1999. See Deirdre Curtin, ‘Official Secrets and the Negotiation of International Agreements. Is the EU Executive Unbound?’ (2013) 50 *Common Market Law Review* 423.

European Parliament is not the first institution to support a legislative act on EUCI. In 1988, in a very different setting of EU law, the Commission and some Member States already recognized the necessity of establishing a more general act on classified information as opposed to Regulation No. 3 specifically pertaining to Euratom Classified Information. The German delegation presented a memorandum to the Council calling for Community rules on security measures applicable to classified information produced within, or transmitted between, the institutions or between the institutions and the Member States in connection with Community activities.²⁸ This initiative led the Commission to present a proposal for a Council regulation on the security measures applicable to classified information produced or transmitted in connection with the European Economic Community or Euroatom activities.²⁹ Although the Commission in its proposal clearly acknowledged the lack of a specific Treaty provision allowing the adoption of a board regulation on classified documents, it did not consider such limitations to be an obstacle for establishing a legislative act. On the basis of the Commission's proposal, the rationale for the regulation related to the development of the Community which had led to an increased flow of information, some of which was sensitive and required protection.³⁰ At the time, the European Parliament was a fierce opponent of this proposal although its legislative powers were limited and it had almost no significance in the area of security, for which the rules on classified information were drafted. The EP's opposition to the rules was allegedly motivated by the lack of rules on public access to information.³¹ The Council officials publically note that this opposition by the European Parliament 'explains why the first post-Maastricht rules [of classified information] were developed as internal decisions of the Commission in 1994... and the Secretary-General of the Council in

28 See Bart Driessen, 'The Council of the European Union and Access to Documents' (2005) 30 *European Law Review* 675.

29 Commission, 'Proposal for a Council Regulation (EEC) on the security measures applicable to classified information produced or transmitted in connection with EEC or Euratom activities' COM(92) 56 final.

30 At the time, the development of principles of democracy and transparency were not well-established or stipulated in primary law, yet it is noteworthy that the proposal for the regulation of classified information took due account of access to information as 'one of the fundamental principles of democracy' and explicitly stated that the classification of information must be limited to 'the absolute minimum'. See Preamble, para 4 of the proposal, *ibid*.

31 Respondent No. 13. See also Ulf Oberg, 'EU Citizen's Right to Know: The Improbable Adoption of a European Freedom of Information Act' (1999) 2 *Cambridge Yearbook of European Legal Studies* 303.

1995,³² and why the Commission withdrew its legislative proposal under the justification of not fulfilling the principle of subsidiarity.

However, interviews with key EU officials, including from the Council, who partook in the debates regarding this proposal in the early 1990's, suggest an additional and different reason for the Commission's withdrawal of the legislative proposal.³³ As explained in Chapter III, the multiplicity of actors and the varied competences in the EU result in institutional efforts to protect or advance certain (institutional) interests in what has been referred to as a 'contest' of powers between EU institutions.³⁴ To some extent, this type of contest between the institutions and protection of interests was a factor in the Council's adamant position against a legislative act on classified information led by the Commission. The Council insisted on maintaining its discretion over the establishment of the rules, an issue that might also explain its strong insistence on rules of procedure, now stipulated in Article 240 TFEU, as the valid legal basis.³⁵ For example, a senior Council official directly involved in the process at the time, explains in a candid manner that:

There was huge reaction from the Council because the Commission has nothing to do with [the regulation of classified information]... This was a prerogative of the Council. [The regulation of classified information became a point of] competence and political opposition between the Council and the Commission.³⁶

This statement goes against current claims by the Council officials that the legal basis of procedure rules was a consensus matter for the institutions, including the Com-

32 Galloway (n 9) 674. See Commission Decision C (94) 3282 of 30 November 1994 on the security measures applicable to classified information produced or transmitted in connection with activities of the European Union and Council Decision No 24 of 30 January 1995 on measures to protect classified information applicable to the General Secretariat of the Council. It is noteworthy that 6 days after the withdrawal of the proposal for a regulation, the Commission adopted a decision on security measures applicable to classified information. *Two years later*, the Secretary General of the Council adopted for its part Decision No. 24 of January 1995 on measures to protect classified information. The two-year delay has not been examined or elaborated in the literature and there are no legal documents from that period that might shed light on the matter. One might suspect that since at that time secrecy was rather the norm in any case – there was still no firm access to information rights – and competences did not include security and defence issues such as was the case later, a legal formal regime of classification was not deemed urgent.

33 Respondents No. 12, 13, 15, 16.

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

35 This empirical finding of the insiders views and debates at the time of the proposal, does address to some extent the calls by academics who note that for outsiders it is not clear precisely why Art. 240(3) TFEU is chosen by the Council as a legal basis, considering also that by their nature the rules of procedure do not have any external binding effect.

36 Respondent No. 12.

mission, and that it provided a pathway, which ‘neatly avoided competence-based policy discussions.’³⁷ Moreover, the Council’s efforts to assert control over EUCI rules when a legislative act was proposed by the Commission, gives rise to the question of whether the regulation of classified information is indeed an example of the EU ‘working pragmatically to integrate a new sector of activity involving national sensitivities and [avoiding] the potential for legal or institutional turf battles,’³⁸ as recently claimed by Council officials. Looking at these interactions between the institutions in practice, it is less convincing that institutional turf battles were avoided, but it rather seems that the Council succeeded in protecting its discretion in establishing a system of rules internally. This, as we will discuss further below, in fact expanded to all other institutions and agencies incorporating the standards set by the Council, including to oversight institutions.

More recently, the debate on a possible legislative act on EU secrecy regulation has resurfaced. In 2009, the European Parliament preferred including general provisions on the classification of documents in Regulation 1049/01, in the context of the ongoing efforts to revise the public access regime in line with the Lisbon Treaty.³⁹ In March 2014, through its Resolution on public access to documents, the European Parliament asked the Commission to propose a separate regulation on the rules and the criteria for classified information.⁴⁰ Besides more openness towards the citizens, in the legislative act on classified information, the European Parliament aims to stress ‘the important role of proper classification rules for sincere inter-institutional cooperation.’⁴¹

However, the European Parliament does not have the legal prerogatives (or political power) to change the nature and the establishment of the classification system. Although the Lisbon Treaty did indeed make significant changes to the role of the European Parliament and especially with regard to its oversight functions, the classification system pertains to areas of EU law for which the EP’s prerogatives are even more limited. For

37 Galloway (n 9) 676.

38 David Galloway, *Classifying Secrets in the EU* (Working Paper presented at Transparency and Access to the Records and Archives of the EU Institutions Seminar, the European University Institute, Jan. 25, 2013), 14.

39 The EP calling for secrecy and transparency rules to be reconsidered – see European Parliament resolution of 17 December 2009 on improvements needed to the legal framework for access to documents following the entry into force of the Lisbon Treaty, Regulation (EC) No 1049/2001 — the Council has adopted its internal rules (Decision 2009/937/EU of 1 December 2009) and a revision of its security regulations (Document 13885/1/09) and the Member States negotiated an agreement on the protection of classified information exchanged in the interests of the EU [2011] OJ C202/13.

40 European Parliament resolution of 11 March 2014 on public access to documents (Rule 104(7)) for the years 2011-2013 (2013/2155(INI)), point 31. The right to initiate legislation belongs almost exclusively to the European Commission, see art 17(2) TEU.

41 The European Parliament in its resolution of 14 September 2011 on public access to documents (Rule 104(7)) for the years 2009-2010 (2010/2294(INI)), point 12.

example, the European Parliament's role has evolved very slowly with regard to the EU's external relations,⁴² and primary law does not foresee consultations with the European Parliament where an agreement *exclusively* concerns the CFSP.⁴³

4.1.3 Executive Engineering of the EUCI Rules

The EUCI legal framework is administrative and fragmented. The EU executive and administrative actors have established the rules on classified information on basis of their own prerogatives.⁴⁴ The only directly relevant legislative act for EUCI, as we noted above, is Regulation 1049/01 regarding the right of public access to documents in the EU.⁴⁵ Therein, Article 9 indicates the security grading of sensitive information and the special treatment such information must undergo when it comes to access requests due to its security sensitive nature. This is not, however, a regulation on classified information and it does not stipulate measures for its protection.

The patchwork of EU rules on classified information consists of rules of procedure, on the basis of which each administrative actor establishes more detailed provisions and guidelines.⁴⁶ For example, the Commission had a basic internal

42 Stefan Krauss, 'The European Parliament in EU External Relations: The Customs Union with Turkey' (2000) 5 *European Foreign Affairs Review* 215.

43 Paul Craig and Grainne De Burca, *EU Law: Text, Cases, and Materials*, (5th ed, OUP 2011) 336, author's emphasis. See also Case C-130/10 *Parliament v Council*, EU:C:2012:472, para 82. However, in Case C-658/11 *Parliament v. Council*, EU:C:2014:2025, the Court held that the European Parliament is entitled to immediate and full information at all stages of the negotiation of international agreements, including under the CFSP, and that consequently, that right having been impinged, the Council's decision had to be annulled (paras 86 and 87).

44 The following decisions are applicable: Council Decision 2013/488/EU of 23 September 2013 on the security rules for protecting EU classified information [2013] OJ L274/1; Council Decision 2009/968/JHA of 30 November 2009 adopting the rules on the confidentiality of Europol information [2009] OJ L332/17; Decision of the High Representative of the Union for Foreign Affairs and Security Policy of 19 April 2013 on the security rules for the European External Action Service [2013] OJ C190/1; European Commission, Rules of Procedure [2000] OJ L308/26, as amended by Commission Decision 2011/737/EU, Euratom of 9 November 2011 [2011] OJ L 296/58.

45 Regulation No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding Public Access to European Parliament, Council and Commission documents [2001] OJ L145/43.

46 See art 240 TFEU about the Council and art 249 TFEU about the Commission. See *inter alia* Doc. 10873/11 Guidelines on marking EU classified information; Doc 14125/02 Procedure for releasing EU classified information originating in the Council to third states and international organisations; Council Security Committee (2011) 'Guidelines on downgrading and declassifying Council Documents' Doc. 14845/11; Doc. 13140/11 High classified information exchange requirements for the European Council and the Council. See document 13140/11 of 20 July 2011 about the need of the European Council and the Council to exchange information and how this is to be done. See Document Guidelines Doc. 10873/11 - The General Secretariat - Guidelines on marking EU classified information – previously approved by the Security Committee.

protection regime in place from 1986,⁴⁷ whereas the current applicable framework was revised on March 2015.⁴⁸ The Council revised its rules in 2013, which the European Council also applies.⁴⁹ The Council's rules also set a minimum standard for other actors in the EU, for example bodies such as the European External Action Service,⁵⁰ although in the case of the latter it is the High Representative that adopts the applicable decision. Regarding agencies, such as Europol, the current applicable regime is based on a Council Decision adopting the rules on confidentiality for Europol as well as a separate Council Decision for cooperation of Europol with third parties.⁵¹ The EUCI regime in fact extends to other EU bodies and agencies such as Frontex, the EU Satellite Centre, the European Defence Agency and Eurojust.⁵² In addition, agreements and memorandums of understanding that facilitate the exchange of classified information are common among the EU institutions and bodies as well as between them and third parties.⁵³ Lastly, the rules are not only fragmented horizontally at the EU level, but also vertically between the EU and the national level.⁵⁴

47 Commission decision of 7 July 1986 on classified documents and security measures applicable to them, SEC(86)1132 final.

48 Commission Decision (EU, Euratom) 2015/444 of 13 March 2015 on the security rules for protecting EU classified information [2015] OJ L72/53.

49 Council Decision 2013/488/EU (n 45). Apart from formal agreements, systems for electronic exchange of information have been set up such as between the European Council and the Council for high classified information, Confidential and Secret (Doc. 13140/11).

50 Decision of the High Representative of 19 April 2013 (n 45).

51 Yet, this will be changed in the foreseeable future, considering the new primary law basis for Europol, art 88 TFEU, which provides for the adoption of a Europol Regulation, which will be a basis for the regime on Europol classified information. See Vigjilencia Abazi, 'The Future of Europol's Parliamentary Oversight: A Great Leap Forward?' (2014) 15 *German Law Journal* 1121.

52 Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L349/1, as amended by Regulation (EC) No 863/2007 of the European Parliament and of the Council [2007] OJ L199/30 and by Regulation (EU) No 1168/2011 of the European Parliament and of the Council [2011] OJ L304/1; Council Decision 2014/401/CFSP of 26 June 2014 on the European Union Satellite Centre and repealing Joint Action 2001/555/CFSP on the establishment of a European Union Satellite Centre [2014] OJ L188/73, art 15; Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency [2004] OJ L245/17, as amended by Council Joint Action 2008/299/CFSP [2008] OJ L102/34, art 30; Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime [2002] OJ L63/1, as amended by Council Decision 2003/659/JHA [2003] OJ L245/44 and by Council Decision 2009/426/JHA [2009] OJ L138/14, art 39a.

53 Inter-institutional agreement between the European Parliament and the Council (n 24). For exchange between administrative bodies, see the Agreement between Eurojust and Europol, 1 October 2009, The Hague. Some of these arrangements are technical modalities, which despite a non-binding nature of the EU overall, have problematic effects on the exchange and access of classified information.

54 Each member state has its own rules on classified information, most of which are stipulated in a legislative act. See table of equivalence for classification grading between the EU level and national level for the applicable laws: Council Decision 2013/488/EU (n 45) Appendix B.

This piecemeal approach, with separate internal rules for each institution, agency or body does not mean that these actors did not face strong influences on how their rules should specifically develop. The Council has led the development and expansion of the EUCI rules as well as established the minimum standards for the security and exchange of classified information.⁵⁵ The Council's influence on the overall legal arrangements of EUCI stems from its institutional significance in the field of security but also from its position of 'ownership' of most classified information. Whereas the former point relates to the Council's functional advantage, the latter is a more specific issue regarding classified information and the principles through which it works. For example, in the case of Europol and the EEAS, the Council is in a structural position to influence their rules through adopting their constituting Decision,⁵⁶ but in the case of other actors, the Council uses access to its classified information as a condition for the external actors to adapt their rules to those of the Council.

The actual discussions and 'engineering' of the EUCI system took place within the Council Security Committee, a working body established by the Council Decision on classified information in 2001, despite the fact that formal approval takes place at the ministerial level. The Council Security Committee is composed of representatives from the Council and each member state as well as the Commission and the EEAS.⁵⁷ Representatives of Europol and Eurojust also attend when discussions concern these

55 Note the difference with Regulation No 3 Euratom (n 2) where the Commission takes the lead, as well as the initial stages of the development of the rules, as we saw above on a possible legislative act proposed by the Commission.

56 It further becomes the 'task' of the body in question to establish a system: organize security and the overall management of classified information, its implication and whom it is shared with. Hence, the Council, through its prerogative as an EU executive and having the prerogative to establish these other bodies, has also managed to set the rules on classified information. See Council Decision adopting the rules on the confidentiality of Europol information (n 45); Decision adopting the implementing rules governing Europol's relation with partners, including the exchange of personal data and classified information [2009] OJ L 325/6. Unlike the previous experience with Europol, whereby the Council established both the Decision to create it as an agency and its system for classified information, for the EEAS the Council Decision merely stipulates in the preamble that rules should be 'laid down covering the activities of the EEAS...for the protection of classified information' and Article 10 provides the legal basis to do so. In the case of the EEAS, it is the High Representative who should actually adopt the rules once they have been agreed by the Security Committee of the EEAS and Council Security Committee has given its opinion. This position is understandable considering that the EEAS is accountable to the High Representative and is autonomous from the Council.

57 The novelty in regard to the composition, is the inclusion of EEAS. During the negotiations for the EUCI Decision II, the Council Security Committee considered that cooperation with EEAS would result in a better protection of classified information if permanent presence of the EEAS is warranted (Doc. 14475/1/10 REV 1, Amendment of Article 16(2) of the draft Council security rules for protecting EU classified information): 'At its meeting on 29 September 2010, the Council Security Committee considered that close cooperation with the EEAS on matters relating to the protection of EUCI could be facilitated in practice by ensuring a permanent presence of the EEAS in CSC meetings to shape discussions on the basic principles and minimum standards for protecting EUCI. The Committee agreed to report this change to the Antici Group, which is finalising work on the Council security rules.'

agencies.⁵⁸ The direct participation of national authorities also illustrates the sensitivity of the issues regarding classified information, since Member States' power over State Secrets is of core significance to their sovereignty and it pertains to their full prerogatives in 'national security'.⁵⁹ In the past decade, the CSC has been the key actor in the discussions and development of the EUCI rules.⁶⁰ It is in this forum of discussions that decisions about the legal basis, reforms and minimum standards of the classification system take place.⁶¹ In addition, the cooperation and exchange of classified information are also issues that were initially established at this level and were, in principle, merely approved by the Council.⁶² Most importantly, the CSC has a direct impact on the rules for classified information, not only with regard to the Council or administrative actors, but also through its opinions and recommendations, and it has directly shaped the rules on classified information of the European Parliament and the General Court.⁶³ Namely, it is the CSC that has been directly involved in the processes of evaluating the legal arrangement and recommending the necessary revisions during the establishment of the Inter-institutional agreement between the Council and the European Parliament on the exchange of classified information as well as the process of the General Court's revision of its Statute in 2015, which for the first time in the Court's history, explicitly provides a provision on confidential information and material.

58 Council Decision 2013/488/EU (n 45) art 17(2) second subparagraph.

59 See art 4(1) last sentence, TEU.

60 By comparison, in Regulation No 3 regarding Euratom classified information (n 2), it is the Commission that has a more dominating role and specifically the Security Bureau, which was established under the authority of the Commission. Similarly to the Council's Security Committee, the Commission Security Bureau had supervisory prerogatives for the application of the Regulation not only with the Commission but also with 'institutions, committees, services and installations of the Community'. Art 6(b) Regulation No 3 (n 2) includes empowerment for Commission Security Bureau to verify national procedures and it could propose amendments if it considered them necessary to the Regulation.

61 Policy on creating EU classified information, 30 May 2011, Doc. 10872/11; State of play of work on the review of the security rules governing EU classified information, 23 October 2008, Report Doc. 14594/08; Draft Council Decision on the security rules for protecting EU classified information- Declarations for the Council minutes, 16 July 2013, Doc. 12433/13 ADD 1; Guidelines on downgrading and declassifying Council documents, 3 September 2011, Doc. 36/11; Opinion of the Council Security Committee on the draft Security Rules of the General Court, 7 October 2014, Doc. 14024/14.

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

63 Documents derived from public access request filed by the author: ST 13086 2003 INIT, ST 11395 2012 INIT, ST 12737 2010 INIT, ST 9518 2009 ADD 1, ST 6770 2000 INIT, ST 7756 2013 INIT, ST 11036 2011 INIT, ST 13885 2009 INIT, ST 13096 2007 INIT, ST 6230 2013 INIT, ST 15104 2010 INIT, ST 13646 2009 INIT, ST 7592 2003 INIT.

4.1.4 EUCI Rules and Oversight Institutions

EU oversight actors, specifically the European Parliament and the CJEU, have adopted their rules on classified information in much the same fashion as EU executive actors: under internal discretion through administrative measures with no public debate. Whereas Chapter VI and VII focus on the implications of the oversight actors' rules on classified information, the current discussion considers the procedural aspects of the rules and the manner in which they are adopted.

The regulation of classified information adopted by the EU oversight actors adds to the patchwork of EUCI rules and completes the expansion of these rules in the EU overall. It could indeed be seen as the last stage of the slow expansion of the EUCI rules that started with the core executive actors, and developed in other EU agencies and bodies as well as with third parties. Prior to the current regulation of EUCI, the oversight actors had provisions related to limitations of the principle of openness. Yet, it is only very recently,⁶⁴ that regulated secrecy in the form of classified information has become part of their overall working methods, particularly in the realization of their oversight prerogatives. For example, the EP's first mention of 'confidentiality' is based on its Rules of Procedure in 1989.⁶⁵ Annex VII on classified information of the EP's Rules of Procedure constituted the general rules, which were amended in November 2001 due to legislation on public access to documents.⁶⁶ At this stage, the EP did not have other specific rules on classified information and neither did it have proper agreements for the exchange of classified information. With the enactment of Regulation 1049/01 on public access to information, the EP made further changes to its Rules of Procedure, especially regarding the notion of confidentiality as a reason to restrict access to documents. The EP aligned its system with Article 4 of Regulation 1049/01 as the only basis for the possible rejection of public access to documents. According to the new changes, confidential documents were only excluded from public access by virtue of Article 4 of Regulation (EC) 1049/2001 and the EP's confidentiality provision in Annex VII could not as such be the basis for nondisclosure of documents.

64 Decision of the Bureau of the European Parliament of 6 June 2011 concerning the rules governing the treatment of confidential information by the European Parliament [2011] OJ C190/2; Rules of Procedure of the General Court [2015] OJ L105/1, art 105(11).

65 As we have noted earlier, confidentiality is a broader notion referring to professional secrecy and not as such directly encompassing classified information.

66 This was done on the basis of the report by MEP Hanja Maij-Weggen: Report of 15 October 2001 on the adaptation of the Rules of Procedure to the Regulation (EC) No. 1049/2001 of the European Parliament and of the Council regarding public access to documents (2001/2135(REG)).

The rules specifically addressing EUCI are a result of the necessity of the European Parliament to exchange classified information with the executive institutions, starting with the first Agreement in 2002, and with the Council regarding classified information in the area of security and defence policy.⁶⁷ Almost a decade later, the Bureau of the EP, which is composed of the President and the 14 Vice-Presidents of Parliament, established the internal rules for EP classified information,⁶⁸ taking into account the inter-institutional agreements of the EP with the Council and the Commission for the exchange of classified documents.⁶⁹ The Bureau did not have an open deliberation or involve a broader public discussion on the EP's internal rules on EUCI.⁷⁰ Hence, the EP did not set its rules on classified information in an open manner and did not make any attempt to create a public debate about how these rules should be established. This lack of openness in how the EP developed its own rules makes its position of demanding an open debate about EU rules on secrecy to some extent less credible.

The General Court, as part of the broader revision of its Rules of Procedure, is the latest institution to adopt provisions regarding information and material that is confidential in nature. According to the GC's documents, the rationale of having specific provisions on confidentiality is to address a legislative gap.⁷¹ Chapter 7 of the Rules of Procedure, particularly Article 105, deals with the handling of confidential information and material 'pertaining to the security of the Union or that of one or more of its Member States in the conduct of their international relations'. The scope of EUCI is important in this regard, which on the basis of textual reading of the provision seems specifically limited to international relations. This differs from the Council's rules on

67 Inter-institutional Agreement of 20 November 2002 between the European Parliament and the Council concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy [2002] OJ C298/1. See also the EP decision of 23 October 2002 implementing the inter-institutional agreement with the Council, which laid down basic principles and the necessary measures to be able to exchange information in the area of security and defence policy.

68 See Rule 24, EP Rules of Procedure, July 2014.

69 See Rule 25, EP Rules of Procedure, July 2014.

70 EP Rules of Procedure, July 2014, Rule 25(12): 'The Bureau shall lay down rules concerning the treatment of confidential information by Parliament and its bodies, office-holders and other Members, taking into account any inter-institutional agreement concluded on such matters. Those rules shall be published in the Official Journal of the European Union and annexed to these Rules of Procedure.'

71 Draft Rules of Procedure of the General Court, 14 March 2014, at 103. Available at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-06/tra-doc-en-div-t-0000-2013-201311050-05_00.pdf>. Noteworthy now that AG Bot in the ZZ case had alluded to the lack of possibilities for the court to deal with classified information especially in terms of receiving it and whether or not this is shared with the applicant due to the lack of specific rules on this: Case C-300/11 ZZ v *Secretary of State for the Home Department*, Opinion of A.G. Bot, EU:C:2012:563,

EUCI, which do not limit the scope of EUCI to security or international relations.⁷² The scope of the rules might become clearer after the General Court adopts the more detailed guidelines implementing Article 105 of the Rules of Procedure.⁷³

Perhaps not surprisingly,⁷⁴ the Court revised the rules behind closed doors. Lawyers and experts from varied organizations sent a letter to the President of the CJEU offering an opinion on the legal implications for due process rights arising from the changes of the GC's procedure with regard to classified information. They also advised that an open deliberation be held on these issues, considering their critical impact on the fundamental right of defence.⁷⁵ However, the Court rejected an open discussion on the basis that it was under no obligation to discuss publically or with third parties the revision of its rules of procedure.⁷⁶ This direct rejection is remarkable considering that the changes to the rules of procedure affect fundamental rights in the EU and could profoundly change the manner in which the adversarial principle is practiced in the EU.⁷⁷ By contrast, the opinion of the Council's Security Committee on the draft Security Rules was taken into account both by the Council's Working Party on Court of Justice as well as by the General Court itself.⁷⁸ On the basis of Articles 253(6) and 254(5) TFEU, Rules of Procedure of the General Court and the European Court of Justice are proposed by them and approved by the Council. On March 2014, the President of the General Court submitted the proposed rules to the Council, which it approved and the rules have been in force since April 2015. Despite the Court's efforts to adopt rules that are in line with and in favour of the Council, not all Member States are content. For example, the UK has clearly shown its opposition and is not convinced that it has the assurances it needs regarding the liberty to withdraw classified information shared with the Court.⁷⁹

⁷² Council Decision 2013/488/EU (n 45) art 1.

⁷³ Rules of Procedure of the General Court [2015] OJ L105/1, art 105(11).

⁷⁴ See Alberto Alemanno and Oana Stefan, 'Openness at the Court of Justice of the European Union: Toppling a Taboo' (2014) 51 *Common Market Law Review* 97. Also Deirdre Curtin, 'Judging EU Secrecy' [2012] *Cahiers de Droit Européen* 459.

⁷⁵ Maya Lester, 'Organisations Call on European Court to Consult on Classified Evidence Rule Change' (*European Sanctions*, 27 July 2013) <<http://europeansanctions.com/2013/07/27/organisations-call-on-european-court-to-consult-on-classified-evidence-rule-change/>> accessed 26 May 2015.

⁷⁶ Maya Lester, 'Draft European Court Rules Propose Secret Hearings' (*European Sanctions*, 6 April 2014) <<http://europeansanctions.com/2014/04/06/draft-european-court-rules-for-secret-hearings/>> accessed 26 May 2015.

⁷⁷ An issue that the Court acknowledges in its elaboration of the draft rules since the adversarial principle clearly required that all information and material must be fully communicated between the parties. See Draft Rules of Procedure of the General Court (n 72) 104.

⁷⁸ General Secretariat of the Council, 'Rules of Procedure of the General Court of the European Union: Approval by the Council', Doc. 5007/15, Point 3.

⁷⁹ UK Parliament, European Scrutiny Committee, 'Rules of Procedure of the General Court', 14 January 2015. Available at <<http://www.publications.parliament.uk/pa/cm201415/cmselect/cmeuleg/219-xxviii/21916.htm>>.

The European Ombudsman, unlike the European Parliament and the General Court, does not have a separate set of rules for classified information or special arrangements for classified information.⁸⁰ Article 3(2) of the Statute addresses classified information as a category that requires special handling by the EO when such information is requested from the EU administration in line with its prerogatives to initiate an inquiry or address a complaint received by individuals. Although this provision does not strictly pertain to the system of EU CI, when we examine the background of its revision, it is noticeable that the current version accommodates the rules of EU CI. The table below illustrates the changes.

Table 4.1 Comparative overview of the European Ombudsman’s provisions on EU CI

Statute 1994 OJ [1994] L 113 (First statute)	Statute 2008 OJ [2008] L 189 (Current statute/third amendment)
<i>Article 3(2) first and second paragraph</i>	<i>Article 3(2) first and second paragraph</i>
The Community institutions and bodies shall be obliged to supply the Ombudsman with any information he has requested of them and give him access to the files concerned.	The Community institutions and bodies shall be obliged to supply the Ombudsman with any information he has requested from them and give him access to the files concerned.
They may refuse only on duly substantial grounds of secrecy.	Access to classified information or documents, in particular to sensitive documents within the meaning of Article 9 of Regulation (EC) No 1049/2001, shall be subject to compliance with the rules on security of the Community institution or body concerned.

Quite exceptionally with respect to institutions, the European Ombudsman’s rules on the level of secrecy and classified information have been subject to public

⁸⁰ Note however that the Statute of the EO, mentions the following in the preamble: ‘the Ombudsman should have agreed in advance with the institution or body concerned regarding the conditions for treatment of classified information or documents and other information covered by the obligation of professional secrecy’.

debate as the European Parliament approves the Statute. Looking at the negotiations, the issue of classified information is a significant point of disagreement between the Council and Commission vis-à-vis the EP's proposal.⁸¹ The executive institutions insisted on more rigid rules regarding (non)accessibility to classified information, whereas the EP aimed to ensure that the work of the European Ombudsman is not hindered by secrecy and an executive discretion to prevent access. The final text is a 'scheme where the Ombudsman's investigative prerogatives largely retained the scope put forward by the MEPs but clearly lost a considerable part of their intensity.'⁸²

The patchwork and administrative nature of the EUCI system seems of secondary importance when compared to the secretive manner in which these rules were established in all the EU institutions. From our discussions, it becomes evident that the presumption in favour of openness was not taken into account either by the executive institutions or, remarkably, by the oversight actors, even in contexts when external opinions were submitted, as was the example with the General Court. The secretive manner in which the rules were established raises questions from the perspective of public deliberation, which this Chapter will address in Section III.

The competence gained by the EU in security dominated its approach to the establishment of classified information rules in early 2000. The following Section II sheds light on the more specific considerations that have driven the EUCI system.

4.2 REVISIONS AND RIGIDITY OF OFFICIAL SECRETS

The current EUCI rules reflect the revisions mainly commenced by the Council, especially its Secretary General, in the years of 2000-2001 as a result of the development of the EU's competences in security policies. Although the impetus for revisions of classified information rules had already begun with the adoption of the Maastricht Treaty and the clear ambitions of the EU to enhance its role in security, the Helsinki Presidency meeting in 1999 clarified the need for further work on the modalities to be developed regarding the cooperation between the EU and NATO, taking into account the needs of all EU Member States.⁸³ Consequently, four ad hoc NATO-EU working groups were

81 Alexandros Tsadiras, 'Unravelling Ariadne's Thread: The European Ombudsman's Investigative Powers' (2008) 45 *Common Market Law Review* 757, 758-759.

82 *ibid* 759-760.

83 Richard G. Whitman, 'NATO, the EU and ESDP: An Emerging Division of Labour?' (2004) 25 *Contemporary Security Policy* 430, 438.

established to facilitate the development of EU – NATO relations and in this respect the working groups covered issues pertaining to the EU’s military capabilities, the EU access to NATO assets and capabilities and the definitive arrangements to be concluded between the EU and NATO.⁸⁴ The proximity with NATO and the necessary steps taken for cooperation are seen as a direct influence of NATO regarding how the EU regime on classified information should be established, particularly as a result of the immediate and rapid changes that were made to the rules on classified information.⁸⁵ The NATO influence is not only noted with regard to the EU, but also with regard to Member States, asserted through the security of information agreements. For example, the agreement between NATO and Austria shows that the ‘operative provisions of this agreement replicate, with some formal adaptations, the exact text...down to the article numbers’ of the NATO rules.⁸⁶ This type of influence was even more clearly asserted towards the states in Central and Eastern Europe during their accession period.⁸⁷

This section examines the rules on ownership of classified information as well as the security grading, which are the key issues alluding to whether a more rigid culture of secrecy was introduced in the EU as result of cooperation with NATO. These aspects are also highly relevant from an openness perspective. What can become a secret? How rigid or broad are the categories of secrets in the EU? How strong is the control of the originator over the secrets she produces? Chapter II showed that secrecy empowers the secret-keeper as a result of the control she can have over the information. Do institutional arrangements of secrecy in the EU maintain this control? The discussion on these two aspects of classified information, ownership and the classification category of secrecy, is far from a ‘dry bureaucratic’ procedure description.⁸⁸ They represent the extent of the balance between openness and the culture of secrecy, and provide the answer on whether and to what extent the presumption in favour of openness matters in the EU or whether indeed a NATO culture of military secrecy pervades.

84 *ibid* 450. At Ambassador level, the group responsible for permanent EU–NATO arrangements met for the first time in September 2000.

85 See Alasdair S. Roberts, ‘Entangling Alliances: NATO’s Security Policy and the Entrenchment of State Secrecy’ (2003) 26 *Cornell International Law Journal* 329; 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; Curtin, ‘Overseeing Secrets’ (n 5); Martin Reichard, *The EU-NATO Relationship: A Legal and Political Perspective* (Ashgate Publishing 2006).

86 Reichard, *ibid*, 318.

87 Roberts (n 86); Reichard (n 86).

88 Similarly see, Reichard (n 86) 20.

4.2.1 From NATO ‘Cosmic Top Secret’ to ‘EU Top Secret’?

A security grading or classification category is not only a technical question of security measures to be applied for sensitive information. Its power is to limit the accessibility of that information and do so with varying consequences. The level of vagueness or precision of the wording of the legal stipulation that requires information to be classified already indicates to what extent concerns regarding openness are taken into account and whether secrecy is applied only to the extent that is strictly necessary. Although most would agree that some security circumstances necessitate secrecy, the specific stipulation in the classification category for security justification may be ‘uncertain or probabilistic, setting the stage for disagreements over its necessity.’⁸⁹ The only legislative act referring to the EU classified information, Regulation 1049/01, does not provide a specific definition for each grading. Article 9(1) only enumerates the categories starting from the highest level to the lowest: Top Secret, Secret, and Confidential. The definitions are stipulated in the classification rules of each institution.⁹⁰

Regarding the NATO influence, scholars point out the inclusion of the label Top Secret, the highest level in the EU framework, as an equivalent category of NATO’s highest marking ‘Cosmic Top Secret.’⁹¹ However, if we look further back at the development of the European rules of classified information, it is noticeable that the category already existed in the *lex specialis* regime of Euratom Classified Information, although it was not stipulated in the Council’s classification rules of 1995. Rather, the main significant revisions in light of NATO are the definitions of the classification levels. Regulation No. 3 on Euroatom classified information stipulates four categories. In order to analyse their wording, I will provide the definitions of Article 10:

- *Eura - Top Secret*: where unauthorised disclosure of the information would have extremely serious consequences for the defence interests of one or more Member States;
- *Eura - Secret*: where unauthorised disclosure of the information would have serious consequences for the defence interests of one or more Member States;

89 Steven Aftergood, ‘An Inquiry Into the Dynamics of Government Secrecy’ (2013) 48 *Harvard Civil Rights – Civil Liberties Law Review* 511, 513. See Chapter V on how, in practice, the interpretation of the classification decisions takes place in the EU.

90 Council Decision 2013/488/EU (n 45) art. 2; Decision of the Bureau of the European Parliament of 15 April 2013 concerning the rules governing the treatment of confidential information by the European Parliament [2013] OJ C96/1, art 2; Decision of the High Representative of 19 April 2013 (n 45) art 2 of Annex A; Commission Decision (EU, Euratom) 2015/444 (n 49) art 3.

91 Kaljia E. Schilde, ‘Cosmic Top Secret Europe? The Legacy of NATO and Cold War US Policy on European Union Information Policy’ (2015) 24 *European Security* 167.

- *Eura - Confidential*: where unauthorised disclosure of the information would be harmful to the defence interests of one or more Member States;
- *Eura - Restricted*: where unauthorised disclosure of the information would affect the defence interests of one or more Member States but where a lesser degree of security is required than in the case of documents classified as *Eura - Confidential*.

Applying one of the categories, as can be seen, requires more than a vague probability that the risk of disclosure is present. All categories use the wording ‘*would have*’ and refer to ‘*consequences*’ as opposed to a chance or likelihood. These are relevant features to take notice of and examine whether they have been changed.⁹² However, as we noted previously in this chapter,⁹³ Regulation No. 3 is not applicable to the classification of documents more broadly and in other areas besides the Euratom. In this respect, the Council’s Decision on its classification rules of 1995, applicable only to the Council’s General Secretariat and the Commission’s rules of 1993 are more significant.

The Council Decision of 1995 stipulates only three categories of classification: Secret, Confidential and Restricted. It is immediately noticeable that there is no category of Top Secret. This Decision refers also to unclassified limited documents – *Limite*. Although it is not foreseen as a classification marking in the strict sense as the three grades mentioned, it too limits the accessibility of documents and it is intended to replace the documents previously marked as restricted. Article 2 of this Decision stipulates the definitions of the classification markings:

- *Secret*: information unauthorized disclosure of which could seriously harm the essential interests of the European Union or of one or more of its Member States;
- *Confidential*: information unauthorized disclosure of which could harm the essential interests of the European Union or of one or more of its Member States;
- *Restricted*: information unauthorized disclosure of which would be inappropriate or premature.

Although the categories do not include the Top Secret grading, it is noticeable that the wording is less strict than Regulation No. 3. For example, provisions refer to

⁹² Another aspect of the grading has to do with the scope of the interests that are being protected. The Regulation is directed at the protection of the interests of the Member States, and there is no separate mention of interests of institutions or interests at the supranational level.

⁹³ See Section 4.1.

'*could*' and there is a lack of reference to consequences but rather broadly stipulated '*interests*,' which provides more leeway for classifying information. More importantly, the category of Restricted is revised to a more open-ended and vague definition by broadly referring to '*inappropriate*' and '*premature*' disclosure.

The Commission rules of 1993 stipulated the category of Top Secret prior to the Council rules of 1995. The Commission also had specific provisions authorizing the exchange of classified information with the West European Union and NATO, hence before the Council's changed rules in 2000,⁹⁴ and the legal definitions of the categories were similar to those of NATO.⁹⁵

The 'Solana decisions,' named after the Council's Secretary General who revised the system in 2000, are the most pertinent regarding the NATO influence. The Secretary General made most of the changes in a rapid manner and in secret.⁹⁶ The plans for the changes were laid out in a secret 'Note for the Committee of Permanent Representatives regarding Security Plan for the Council'. In this Note, the SG stated that the 'higher level of security required to protect information under the [European Security and Defence Policy] makes it necessary to amend existing legislation or to adopt new texts.'⁹⁷ Moreover, the Council had refused to provide copies of drafts to NGOs because this 'could fuel public discussion on the subject and raise questions among the Council's partners as to the latter's reliability as regards its obligations under the security arrangements.'⁹⁸

The Decision of the Secretary General on measures for the protection of classified information applicable to the General Secretariat of the Council was adopted in July 2000.⁹⁹ This Decision abolished the possibility for officials to change a document's specific classification marking.¹⁰⁰ Additionally, 19 days after the new decision on classification rules, the Secretary General also amended previous Council Decisions regarding public access to the Council's documents as well as the

94 See also Reichard (n 86).

95 *ibid.*

96 General Secretariat of the Council, Council Guide, Part III, 'Delegates' Handbook' (2000) available at <<http://aei.pitt.edu/8825/1/8825.pdf>> accessed 25 August 2015.

97 General Secretariat of the Council, 'Note for the Permanent Representatives Committee on the Council Security Plan,' 30 June 2000, Doc. SN 3328/1/00 REV 1, at 4.

98 See Council letter to NGO Statewatch, as a response to a request for access to the document setting out the options for changing the 1993 Decision put before the COREPER meeting of 26 July 2000, 14 August 2000. See further Reichard (n 86) 331.

99 Decision of the Secretary-General of the Council/High Representative for the Common Foreign and Security Policy of 27 July 2000 on measures for the protection of classified information applicable to the General Secretariat of the Council [2000] OJ C239/1.

100 See Council Decision No 24 (n 33) art 3(3).

improvement of information on the Council's legislative activities and the public register of documents.¹⁰¹ With these revisions, the Secretary General widened the scope of the notion of public security, including military and *non*-military crisis management, which in turn meant a higher margin for classification and rejection of public access to documents.¹⁰²

These changes seem to be a 'one-way influence from NATO to the EU'¹⁰³ and that in building its classified information policy, the EU 'had to come to terms with a significant part of NATO's internal culture of military secrecy.'¹⁰⁴ However, before the 'Solana changes' and the agreement with NATO,¹⁰⁵ in 1999 the EU concluded 'arrangements for enhanced cooperation' with the Western European Union.¹⁰⁶ In the Annex of the arrangements, two separate letters were included for the exchange of classified information with the Council and the Commission. This aspect in the development of the EU rules is sometimes overlooked, despite the fact that the EU rules followed the wording of the WEU security regulations.¹⁰⁷ It should be pointed out, however, that WEU itself was influenced by NATO and hence the differences between the two are not significant.

The more general rules of the Council in 2001 set the standard for the current EUCI system. The wording of the categories is significant with regard to the highest and the lowest classification category. Whereas the latter remains vague despite the change from 'inappropriate' and 'premature' to 'disadvantageous', the former is made more rigid by referring to 'only' and 'exceptionally grave' prejudice to the 'essential' interests, although what specific interests of the EU and Member States are 'essential' is still open to discussion. The Commission's rules are revised with the same wording.

To what extent have the security context and specifically the NATO rules altered EU security labels and do the latter comply with the presumption in favour of openness? From our discussion, it becomes clear that NATO had a significant influence, but the WEU rules initially mattered as well. Hence, we cannot portray NATO as the

101 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.

102 See Council Decision 2000/527/EC, *ibid*.

103 Reichard (n 86) 311.

104 *ibid* 20.

105 General Secretariat of the Council, Council Guide, Part III, 'Delegates' Handbook' (n 97).

106 Council Decision of 10 May 1999 concerning the arrangements for enhanced cooperation between the European Union and the Western European Union [1999] OJ L153/1.

107 Reichard (n 86) 323. Interviews with EU officials also reveal that the WEU had a significant impact on EU rules. Respondent No. 11.

sole influential actor. Moreover, the purpose of the classification system is to protect information, but also to exchange it. Consequently, the EU adapted to labels that were also in line with Member States, considering the latter's extreme relevance for EU level cooperation on security. While the manner in which these rules were reformed is alarming from an openness perspective, some of the categories of definitions have become rather more specified. However, the lowest category *Restricted*, which is in fact the one most commonly used in the EU, is still very open-ended, creating a margin to classify a broad range of issues and hence possibly leading to over-classification. In Chapter V, we will examine how this category plays out in practice.

4.2.2 Originator Control: From 'Soft' to 'Hard' Gatekeeping of Secrecy

Secrecy gives control over the classified information and an advantage of selective disclosure to the secret-keeper. The principle of originator control embodies this aspect of secrecy in an institutionalized sense. Originator control means that the actor who provides the classified information retains complete control over its dissemination by other actors, with whom such information has been initially shared. This logic of ownership, as we explained in Chapter II, derives from the exclusivity the secret-keeper has over disclosure or sharing of its secrets. The originator rule is a key principle in the classification system that leads to an inevitable clash between, on the one hand, the confidentiality and trust among secret-keepers and, on the other hand, the openness and accessibility of information for accountability and deliberation purposes. The originator of secrets through this rule aims to safeguard its discretion of whether, if at all, the party with whom this information is shared may disclose its secrets.

A form of originator control has existed in the EU since before the significant revisions of the classification system in 2000-01. Article 25(2) of the Euratom Treaty stipulated this principle, which was further established in Regulation No. 3. Hence, this principle did not emerge in EUCI during the NATO influenced revisions, as it was already part of European law. However, it was the type of originator rule that changed due to the Solana Decisions.

The distinction is made between a 'soft' and 'hard' form of the originator principle. Prior to the Solana Decisions, the EU had practiced a soft form of originator control, the 'authorship rule', where Member States could request non-disclosure of

a document.¹⁰⁸ In Declaration No. 35 of the Amsterdam Treaty, the Member States reserved an explicit right to ‘request the Commission or the Council not to communicate a document from that state to third parties without its prior agreement’. The authorship rule became relevant for Member States considering the reforms of the Amsterdam Treaty and the inclusion of openness and access to information in the EU, as a consequence of which the EU’s documents became directly accessible to European citizens. The Member States aimed to continue to preserve the discretion to decide whether that would indeed be the case for documents originating from them. The authorship rule was a ‘soft’ form of control because the Member States had to expressly request the non-disclosure of the documents. On the contrary, the originator rule is considered ‘hard’ because it places the onus on the requesting party to obtain a written consent from the originator before being able to receive any document and the consent of the originator is (almost) absolute.¹⁰⁹ Remarkably, in NATO the originator consent even applies to documents that are not classified when they are shared outside the organisation.¹¹⁰

The hard form of originator rule existed between the EU and the WEU prior to the former’s security arrangements with NATO. Article 1(d) of Annex V of the Agreement between the Council and the WEU, stipulates the control of the originator. The rule was included in the Council Decision on classified information in 2001, and also stipulated in Article 9 of Regulation 1049/01 on public access to documents. In fact, Article 4 of the Regulation 1049/01 also foresees the possibility for Member States to give their opinion on the disclosure of documents, however the Court of Justice of the European Union has drawn a distinction between the originator rule in Article 9 and Member States’ prerogatives stipulated in Article 4, as the case of *Sweden v Commission* illustrates. According to the Court, unlike Article 9(3) that stipulates originator control, Article 4(5) does not ‘make the prior agreement of the Member State an absolute condition for the disclosure of a document, but makes the possible need for such agreement subject to a prior expression of will by the Member State concerned’.¹¹¹ In relation to Article 4(5), the Court further clarifies that the

108 Reichard (n 86) 323; Rosen (n 86).

109 See Chapter VI, Section 6.2.2

110 NATO C-M(55) 15 Final, p. 11, para 3.

111 Case C-64/05 P *Sweden v Commission* EU:C:2007:802, para 47. The Court applies the same understanding of the article, by making it further clear in Case T-59/09 *Germany v Commission*, EU:T:2012:75. Namely, Article 4(5) of Regulation No 1049/2001 entitles the Member State concerned to object to the disclosure of documents originating from it only on the basis of the exceptions listed in Article 4(1), (2) and (3) of the regulation and if it gives proper reasons for its position.

author of the document is irrelevant because the right to access documents extends not only to EU level but also to ‘documents received from third parties, including the Member States, as expressly stated by Article 3(b) of the regulation.’¹¹² However, and more important to our discussion, in the case of *Sison II* specifically regarding classified information within the meaning of Article 9, the Court acknowledges the originator control and the full discretion of the originator of the document, not merely the disclosure of the substance of the document but also its very existence.¹¹³ This high level of secrecy in the context of requests for public access to documents has an impact on oversight as well, as we will discuss in Chapter VI.

The relevance of the originator rule from a security perspective is presented as indispensable.¹¹⁴ The Council consistently defends the originator rule as instrumental to the EU to gain the trust of other security actors by assuring them that they retain absolute control over their State secrets and sensitive information. In this regard, the originator control is seen as a relevant security factor in forming autonomous relations with Member States and third parties and to enhance the EU’s perception as a serious security actor. For example, the Solana Decision clearly provides that:

[T]he exchange of information... *will work only if the originator of such information can be confident* that no information put out by him will be disclosed against his will. It is therefore necessary to provide that a Council document from which conclusions may be drawn regarding content of classified information put out by a natural or legal person, a MS, another community institution or body or any other national or international body may be made available to the public *only with the prior written consent* of the author of the information in question.

While it may be a relevant factor for the exchange of classified information among the community of executive secret-keepers, the rule creates a high margin of discretion and one that seems difficult to reconcile with the presumption in favour of openness. Despite such consequences of the originator control, which Chapter VI will map in detail, the originator rule in the EU is stipulated across the board and not only with the Council and the Commission. The rule is incorporated in the EU bodies and agencies as well as oversight institutions.¹¹⁵ To some extent the rule of the originator expands through what may be portrayed as a domino effect: once an

112 Case C-64/05 P *Sweden v Commission* (n 112) para 55.

113 Case C-266/05 P *Sison v Council* EU:C:2007:75 (known as *Sison II*), paras 101-102.

114 Respondent No. 1, 3, 5, 6, 11, 18, 19, 22.

115 For example, see Decision of the Bureau of the European Parliament of 15 April 2013 (n 91) Annex II, para 24.

institution establishes this rule for how classified documents will be exchanged, in order for any other body to receive them, similar rules and arrangements must be adopted. Yet, the rule has been incorporated partly due to the fact that some actors, particularly oversight institutions, had very little possibility to reject the rule, as this was an explicit condition by executive actors.¹¹⁶ Importantly, since the oversight institutions also adopted the rules without any public discussion or openness during the process, it is difficult to assess what their positions were in this regard and whether they knowingly accepted its rigidity and with it the margin of discretion and control that it gives to the secret-keepers.

4.3 EUCI RULES: IMPLICATIONS FOR OPENNESS AND SECURITY

4.3.1 *Openness and EU Secrecy Regulation*

The principle of openness matters for the regulation of secrecy both in terms of how rules are established and the extent to which the specific secrecy rules are balanced with the application of openness. This section of the chapter, in line with the theoretical framework set in Chapter II, questions whether the EU rules on secrecy conform to the requirements of openness. The principle of openness implies that the EU rules on secrecy should be publically debated and consideration should be given to the whether the limits posed by secrecy regulation are justified and in line with the simultaneous need to ensure openness.

The elaboration in this Chapter thus far points out that limitations of public access to documents and openness in the EU more generally were not a matter of discussion as a concern or constraint to rules on EUCI for the institutions aiming to strengthen and expand rules on secrecy. In fact, for many EU officials, this seems counterintuitive. When asked about the relevance of openness as a constraint to the establishment of EUCI, during interviews, EU officials would express sudden surprise and puzzlement: Why would one think of rules on *public* access to documents or *openness* more generally when establishing *security* measures for *classified*

¹¹⁶See Galloway (n 39) for a more detailed explanation of these conditions of access and exchange of classified information with regard to the European Parliament.

information?¹¹⁷ The lack of openness in the manner in which the rules are established characterises not only the executive institutions but also the European Parliament and the General Court. To some extent, the only exception in this regard is the European Ombudsman, in view of the more open debate and contestation between the European Parliament and the Council on how to deal with access to classified information and in this regard the changes to the Statute of the European Ombudsman.

The rules of the EUCI are public. Yet, they become public once they are *finalized*. The most relevant preparatory documents as well as more specific guidelines are kept undisclosed, sometimes for decades, and even requests for public access to information on these documents are usually delayed or the documents are not granted.¹¹⁸ Arguably, these preparatory documents are sensitive and too technical to bear relevance for a broader public discussion on keeping secrets in the EU. In this regard, the nature of the act establishing secrecy rules could be considered secondary as long as interests in favour of openness are taken into account. For example, although in some Member States secrecy is stipulated by legislative acts,¹¹⁹ the rules are rigid and not in proportion to security necessities or public interests in openness. On the contrary, in the US the Executive Order of President Clinton, specifically had a clear provision in favour of openness and stipulated that in case of doubt whether to classify a document, the official is obliged to disclose the document, hence leading to a clear incentive for less classified information.¹²⁰

In the context of the EU, whereas a legislative act that unifies all the standards for how EUCI should be handled would be welcome from a perspective of effectiveness,¹²¹ as long as the administrative system showed any presumption in favour of openness, its nature would have been of secondary relevance. Yet, we clearly see that

117 Respondent No. 19, 22.

118 Significant amount of public access to documents requests were filed by the author. Besides very redacted versions of documents given by the Council, access requests were not granted by the Court and the EEAS.

119 Bulgaria, Slovenia, see Roberts (n 86). Although counter examples also exist such as Sweden. In Sweden the interest of secrecy justifying restrictions to the right of access are specified in the Constitution. Under Article 2 of Chapter 2, Freedom of the Press Act the right of access may be restricted only if the restriction is *necessary* having regard to the specific legitimate interests defined in the Constitution. More specifically, how secrecy should be dealt with is stipulated in the Secrecy Act of 1980. See Oberg (n 32) 307.

120 Executive Order 12958, 'Classified National Security Information', 17 April 1995, Section 1.2(b). See also Harold C. Relyea, 'Opening Government to Public Scrutiny: A Decade of Federal Efforts' (1975) 35 *Public Administration Review* 3; Aftergood (n 90). Note however that this remains an exception and the next Executive Act revised this rule, as each President has the authority to establish new rules on classified information.

121 Respondent No. 15.

in the manner in which the EUCI is established and regarding the two main issues of ownership of classified information and classification categories, the perspective on openness is missing. Despite the European Parliament's efforts, its opinion and call have been ignored regarding a classification system that takes into account the case law on public access to documents and the new constitutional oversight architecture. Setting up rules of official secrets aimed to balance between interests in openness and secrecy would be better facilitated if there were a discussion with parties with different interests. In this respect, the EP was not able to directly influence the establishment of the classification system in the EU.

The lack of a legislative act or any involvement by an external (democratic) body and the executive nature of the rules raise questions regarding the extent of the margin of discretion in the manner the classification process takes place. In addition, any involvement of oversight bodies (parliament, court, ombudsperson) takes place within already established contours of classification, which could be disproportionately focused on executive necessity and executive interpretation of the margin of discretion. The next chapter examines whether this is the case in the EU practice of secrecy.

Besides the EU's efforts to accommodate the exchange of classified information in line with security principles, it is equally relevant that those rules do not counter the EU's commitment to openness. Beyond the current Lisbon revisions for enhanced openness, even in the time of the establishment of the rules in 2000-2001, the EU already had clear legal commitments to openness, yet it seems that these commitments and the relevance of openness are discarded in the establishment of EUCI. The lack of presumption in favour of openness is not directly related to the NATO influence of the rules as such, although it is disappointing that NATO representatives even declined to formally discuss the question of classified information with the EP, despite the latter's invitation.¹²² Regarding the Council Decision in 2001, there is an option for Member States to draw attention to over-classification, through their members at the Security Committee. However, this is clearly reserved for members of the executive branch, since it is national administrators that attend the Security Committee. National parliaments or other oversight actors do not have institutional instruments to draw attention to possible over-classification.¹²³

122 See document NOS/2(2000)102, a letter from the NATO acting director to the Chair of the Committee of Citizen's Freedoms and Rights.

123 See Security Rules 2001, Part II, Section I, paragraph 1(b) and paragraphs 3-4.

It seems that in the case of the EU the ‘rules on classification of documents and other “secrecy” measures pre-date, often quite considerably, the rules on “transparency” and access to documents and in many respects, still today, constitute a separate universe.’¹²⁴ This separate universe has direct consequences on openness in the EU but also on the realisation of fundamental rights, such as the right of defence that we will discuss in Chapter VI.

4.3.2 *EUCI Rules and Security Cooperation*

One of the key reasons for the classification of documents is to limit reachability and to select disclosure for only those actors that the secret-keeper trusts or has common security interests. Secrecy rules enable a level of autonomy for the secret-keeper to decide with whom secrets would be shared. Gaining more autonomy through secrecy was an opportunity recognized by the EU security actors, specifically by Secretary General Solana during his time in office, for the establishment of the EUCI system and developing an independent EU network for the exchange of official secrets. Once the EU system of sharing classified information was in place, it was easier for the EU to establish its own contact points with third parties and other relevant security actors, as we saw, starting with NATO. This does not imply that the Member States would not be able to prevent the establishment of an independent EU system of rules. However, as we noted there was a shared sense among Member States of the need for EU level security action and information exchange as a valuable resource in this regard. This sense was not equally appreciated by all Member States, especially those who saw the security rationale of the classified information as too limiting for the principle of openness in the EU. This is most evident with the Solana changes of EUCI. Namely, the action filed by the Netherlands against the legality of the Council Decision of 14 August 2000, with the argument that this legislation could only have been adopted and based on the then Article 255 TEC and not on Article 207 TEC, and that by doing this the Council had infringed the prerogatives of the Commission and the European Parliament since with the latter provision the Council legally did not need to involve the other institutions.¹²⁵ The case was withdrawn from the register of the Court on June 2002, as Regulation 1049/01 was already agreed and adopted

124 Curtin, ‘Official Secrets’ (n 28) 426.

125 See Case C-369/00 *Netherlands v Council* OJ C316/19 of 4/11/2000 subsequently removed from the register OJ C144/30 of 15/6/2002.

at that stage, and there was an inter-institutional agreement between the EP and the Council for the exchange of classified information in 2002. Besides opposition of some Member States pertaining to concerns for the new secrecy rules disproportionately affecting openness interests, although other Member States did not legally contest the secrecy regulation, it is questionable to what extent they would cooperate and share their national State secrets with the EU.¹²⁶ Structurally, some of the key bodies that deal with classified information in the EU, some even that are specifically meant to have a coordinating role in the exchange of classified information such as Europol and INTCEN, depend directly on Member States to receive classified information.¹²⁷ Nevertheless, especially in light of the EU's own agreements for the exchange of classified information with third parties, it is noticeable that the system of classified information also enables the EU to be less dependent on Member States.

The EUCI regime is significant for the security responsibilities of the EU as it enables the EU to establish information as resources for action in security matters. If we were to look at the current legal situation counterfactually, i.e. the EU not having an autonomous regime of official secrets, it would imply that the EU would lack its own sources of information and abilities to deal with sensitive information. With the classification system in place the EU is able to assure international actors and member states that it can safeguard their secrets. Reciprocal trust in sharing official secrets is of paramount importance for the system to actually work and enable a continuous flow of information.

Since the establishment of the Council Decision on EUCI in 2001, a three level cooperation system has been set to exchange classified information with third parties regarding security. Yet, very soon afterwards, the Council also moved forward to expand its network in many 'different areas of EU business', hence not only on security and defence matters with recognised potential contributors to EU operations (i.e. Canada, the Russian Federation and the United States), and certain international organisations such as the United Nations and the OSCE, although these would label the exchange of EUCI as *Restricted* information since they did not have a developed security policy and structure.¹²⁸ The Council is slowly moving beyond the exchange of classified information in the area of security and defence, although in accordance

126 Vigjilencia Abazi, 'The Future of Europol's Parliamentary Oversight: A Great Leap Forward?' (2014) 15 *German Law Journal* 1121, 1125.

127 Monica de Boer, Claudia Hillebrand and Andreas Nolkehillebrand, 'Legitimacy Under Pressure: The European Web of Counter-Terrorism Networks' (2008) 46 *Journal of Common Market Studies* 101.

128 Council of the EU, 'Policy orientation for negotiating security arrangements with third parties for the protection of EU Classified Information', 7 July 2003, Doc 11255/03.

with the Decision on EUCI these two fields were *the* main reason and areas where the justification for classified information exists. The broad notion of ‘different area of EU business’ created an open door for the Council to give and receive classified information and this was discussed at a level of Committee Decision behind closed doors.

CONCLUSIONS

This chapter has examined the establishment and expansion of regulation of secrecy in the EU with the underlying aim of evaluating whether concerns of openness were taken into account and what the broader relevant security implications are for the EU having a regime of official secrets. Several observations emerge from this detailed account on the establishment and legal nature of the EUCI system.

The establishment of EU regulation of secrecy was predominately driven by administrative pragmatism, influenced by NATO military secrecy and is strictly security oriented. Perspectives of necessity and effectiveness have been relevant to EUCI as opposed to openness, which was almost of no consideration. It must be added, that such one-sidedness does not arise from lack of legal obligations to openness, but is a preference of the executive actors, particularly the Council as the main architect of EUCI. Although the principle of openness did not have a constitutional character at the time when most of the EUCI rules were developed, as it is the case in the post-Lisbon context, public access to documents and other provisions related to openness did exist. As we saw, the European Parliament did not support rules on classified information precisely because of openness concerns. Whereas internal openness efforts failed, external security influences were strong, and this brings us to another observation.

NATO and WEU rules combine to influence external security for the regulation of official secrets in the EU. Even the wording of the rules is to a large extent the same, which has led scholars to point out that we can even gain an understanding of the NATO rules, which unlike the EU’s, are not public. NATO has a different organisational culture and follows a presumption of security as the primary purpose. It is difficult to talk about a presumption in favour of openness for NATO, considering that even the documents for the regulation of classified information are not publically available.¹²⁹ However, military security is not the EU’s rationale as an organisation

¹²⁹Roberts (n 86) 332.

and hence adopting secrecy rules that follow that logic seems misplaced in a legal setting that aims to be bound by democratic principles.

Adhering to openness does not strictly mean that the EU regulation of secrecy should have a legislative character, as this could take place through administrative rules if these rules were to incorporate the presumption in favour of openness. Yet, as we saw, the legal categories of what may constitute a secret in the EU remain mostly vague and, more importantly, rules that ensure full executive discretion over disclosure are incorporated throughout the EUCI, both with executive and oversight actors. Even more striking regarding the oversight actors is the manner in which they have established the rules, following the closed-door style meetings in the same fashion as the executive actors.

In this shadowy background, the Council Security Committee is the party actually giving shape to the regulation of official secrets in the EU. Remarkably, this Committee is not only deciding issues pertaining to the Council. It also shapes how the Court and the European Parliament will deal with classified information, especially when it concerns the executive actors discretion of disclosure, making sure that the hard originator rule influenced by NATO is well spread out in the EU legal system. Significantly, this Committee makes decisions mostly behind closed-doors and its opinions and recommendations become public at a later stage with mostly blacked-out passages.

The EUCI regulation in the eyes of the Council is very simple: something fully within its prerogative, mostly technical, that facilitates its position in the security discussion with other security actors, becoming a trusted institution to exchange information with ever-growing numbers of third countries and international organisations. The fact that this regulation is fragmented into so many layers of internal rules, with each EU actor having its own internal regulation, seems of secondary importance since the Council Security Committee aims to ensure coherence through laying out common standards for all EU actors.

The fragmented nature of the EUCI rules might imply that there is not one coherent EU practice on the application of classified information which may be evaluated as effective, secure, or accountable, but rather many varying per actor, and with different variables. The following chapter aims to uncover these insights from EUCI looking at the practices of different EU security actors.