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CHAPTER 6

EU OVERSIGHT OF SECRECY

INTRODUCTION

This chapter evaluates the institutional arrangements for the oversight of secrecy in the European Union. It examines the three branches of oversight powers: the Court of Justice of the European Union, the European Parliament and the European Ombudsman. These EU oversight institutions are responsible for constraining secrecy in accordance with processes of accountability and deliberation and for safeguarding the public interest in openness as well as the protection of fundamental rights.

The review of executive claims to secrecy and oversight actors' access to classified information are the two main dimensions in overseeing secrecy. For example, ensuring the right of public access to documents is the key to processes of both accountability and deliberation and hence the Court and the Ombudsman have essential roles in reviewing the executive secrecy limiting this fundamental right. Besides public access to documents, institutions' own accessibility to European Union Classified Information (hereinafter: EUCI) is indispensable for conducting oversight. Yet, as this chapter reveals, executive actors have significant discretion to limit the disclosure of official secrets making access to EUCI the main oversight challenge.

Parliamentary, judicial, and administrative¹ oversight are often treated separately in the literature as they concern different types of institutions that have a varied nature and position towards executive actors in the overall EU constitutional architecture. Yet, there is nothing unique about the challenges each institution faces regarding classified information, since the difficulties are rooted in the same rules of official secrets. In addition, oversight institutions have a comparable role in reviewing executive discretion in order to determine the necessity of secrecy. Examining these oversight institutions together provides a more comprehensive insight and a better comparative understanding of the tensions between executive secrecy and oversight in the EU.

First, this chapter examines the oversight arrangements directed at reviewing executive claims for the necessity of secrecy and second, it enquires into the oversight actors' powers and challenges in accessing EUCI.

¹ The ombudsman is treated as semi-judicial as well, which also applies in the case of the European Ombudsman, see Paul Craig, *EU Administrative Law* (OUP 2012) 739-762.

6.1 REVIEWING EXECUTIVE SECRECY

To what extent do EU executive institutions and bodies have sole discretion to determine the necessity of secrecy? This section aims to answer the question by examining in detail whether and how the Court of Justice of the European Union, the European Parliament and the European Ombudsman review executive claims to secrecy and safeguard openness to the extent this is necessary for effectuating individual rights and public deliberation. As discussed in Chapter II, the first and key step of oversight is to decipher legitimate and necessary secrets from unnecessary executive claims to secrecy. This external review is particularly salient in the EU considering that, as Chapter V showed, internal administrative reviews are either completely lacking or not geared towards ensuring a balance with openness. Internally the EUCI system functions under the logic of security, as many EU officials explained in the interviews.² This chapter examines the oversight actors' review of secrecy claims and how an external balance is drawn between safeguarding necessary secrets and ensuring fundamental rights and public interest in openness.

6.1.1 *The Courts and Fundamental Rights*

The Court of Justice of the European Union has the authority to make the final assessment on whether and to what extent the *failure to disclose* classified information affects the realization of fundamental rights in the European Union.³ Judicial review is not an external check on *how* the EU executives classify documents in a strict sense. This implies that the Court does not evaluate the decision to classify a document in terms of the assigned classification grading or the time of declassification.⁴ Nor does the Court directly evaluate whether a genuine security or other interest did

2 Respondents No. 1, 4, 6, 21, 22.

3 See Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and Others v Kadi* (known as *Kadi II*), EU:C:2013:518, para 129; Case C-300/11 *ZZ v Secretary of State for the Home Department*, EU:C:2013:363, para 67.

4 See however that in the US, courts do evaluate whether the document should have been classified at all. DC District Judge Richard W. Roberts ordered the U.S. Trade Representative to disclose a classified document to a FOIA requester because the classification of the document was not properly supported. See *Center for International Environmental Law v Office of the United States Trade Representative*, <http://fas.org/sgp/jud/ciel/042612-notice.pdf> Civil Action No. 01-CV-498 (RWR/JMF). The number of cases involving security remains small, since courts, especially in the post-9/11 context, hesitate to override executive evaluations on the need for secrecy. But see *Gulet Mohamed v. Eric Holder*, Civil Action No. 1:11-cv-50 (AJT/TRJ) <http://fas.org/sgp/jud/statesec/gulet-091514.pdf>.

indeed exist at the time of classifying the document. Rather, the Court's review aims to ensure that the executive claims to secrecy do not unfairly limit the public interest in disclosure or override individual rights.

Case law brings two main strands of instances where executive secrecy claims are counterbalanced by fundamental rights.⁵ Firstly, secrecy is balanced against the public interest in disclosure pertaining to the right of public access to documents under Regulation 1049/01, stipulated as a fundamental right under Article 42 of the Charter of Fundamental Rights.⁶ The Court has continuously emphasized the democratic nature and necessity of public access to documents.⁷ However, this is not an absolute right, and restrictions are foreseen and limited to the exceptions under Article 4 of Regulation 1049/01.⁸ The mandatory exceptions under Article 4(1)(a) are most relevant because they concern documents that may be classified due to their sensitivity with respect to the EU's security or international relations interests.⁹

Secondly, secrecy is measured against the individual's right to information pertaining to the right of defence and of a fair trial, guaranteed under Article 47 of the Charter of Fundamental Rights. The principle of effective judicial protection is a general principle of EU law 'stemming from the constitutional traditions common to the Member States.'¹⁰ The right to defence includes both the right to be heard and the right to have

5 It is worthwhile recalling the distinction made for cases of professional secrecy, which differ from official secrets due to their specific nature. The scope of cases that we are interested in therefore relates specifically to classified information, which is understood as sensitive information as provided in 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 9. Regarding professional secrecy, see Case T-462/12 R *Pilkington Group Ltd v Commission*, EU:T:2013:119, where certain passages have been redacted from the judgment – the information is missing and is stated only as [confidential]. See Case T-371/94 *British Airways and Others v Commission*, EU:T:1998:140, para 63; Case T-353/94 *Postbank v Commission*, EU:T:1996:119, para 87; information regarding the costs and organisation of public services may constitute a business secret if it relates to a business which has actual or potential economic value and the disclosure or use of the information could result in economic benefits for other companies - Joined Cases T-109/05 and T-444/05, *Navigazione Libera del Golfo Srl v European Commission*, EU:T:2011:235, para 144.

6 Also art 15(3) TFEU; see Chapter III.

7 See Case C-280/11 P *Council v Access Info Europe*, EU:C:2013:671; Case C-350/12 P *Council v Sophie in 't Veld*, EU:C:2014:2039.

8 Regulation 1049/2001 (n 5) art 4(1)-(3) enumerates the exception grounds to the public right of access to documents. Art 4(1) lists all mandatory exceptions, including public security, defence and military matters, international relations, and financial, monetary or economic policy.

9 See Regulation 1049/2001 (n 5) art 4(1)(a) in relation with art 9(1).

10 On the basis of the European Convention for the Protection of Human Rights and Fundamental Freedoms. See also Deirdre Curtin, 'The Right to Fair Procedures in Administrative law' in James O'Reilly (ed), *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh* (Round Hall Press 1992).

access to one's file.¹¹ However, similarly to the right of public access to documents, this right is not absolute and derogations are foreseen, particularly on the basis of public security. A variety of security policies in the Area of Freedom, Security and Justice and Common Foreign and Security Policies give rise to a tension between secrecy and the right to a fair trial. For example, cases relate to anti-terrorism measures such as individual sanctions¹² or expulsion measures under grounds of public security.¹³ The Court's review of executive claims to secrecy in these cases differs in terms of the scope of the review and the extent that executive secrecy is justified vis-à-vis the invoked right.

A. Scope of Review: Wide Margin of Executive Discretion?

The Court exercises a 'marginal' review in cases regarding the right of public access to information and allows a higher margin of executive discretion in non-disclosure.¹⁴ The Court assesses whether the procedural rules and duty to state reasons have been complied with, whether the facts have been accurately stated and whether there has been a manifest error of assessment of the facts or misuse of power. The *Sison II* case is a key example of a restricted review on the basis of exceptions laid down in Article 4(1)(a) of Regulation 1049/01. Mr Sison, a resident in the Netherlands, filed a public access to information request at the Council in view of the fact that in 2007, the Council adopted a decision which it then confirmed on several occasions to include the name of Mr Sison in the list of persons whose assets are frozen pursuant to the EU regime of counter-terrorist sanctions.¹⁵ Mr Sison's request was motivated by the need to gain access to information that had been used to include him on the sanctions list. However, his request was rejected and the Court explicitly restricted itself to what it

11 Access must be granted either to the decision or the file where the reasons for the decision are stated because the individual concerned must be able to ascertain the reasons of the decision against her. This in turn enables the person to defend her rights in the 'best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point' to applying for a judicial review of the lawfulness of the decision. *Kadi II* (n 3) para 100. Some scholars argue that the Court has been 'activist' and 'imposed' a right be heard as a general rule of Union law. See Craig (n 1) 290.

12 Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism [2001] OJ L344/93; Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism [2001] OJ L344/70.

13 Derogation from free movement of person on the basis of art 45(3) TFEU and art 52 TFEU. Member States may derogate from EU law on the basis of security and also in the areas of the free movement of goods (art 36 TFEU) and capital (art 65 TFEU).

14 Regarding exceptions under Regulation 1049/2001 (n 5) art 4(1)(a), the Court uses the terminology of 'marginal' for its review. See Case C-266/05 P *Sison v Council* (known as *Sison II*), EU:C:2007:75, paras 34-35.

15 See Common Position 2001/931/CFSP (n 12); Council Regulation (EC) No 2580/2001 (n 12).

called a ‘marginal’ review focusing on the procedural aspects of the non-disclosure decision of the Council.¹⁶ The Court did not ascertain any procedural errors in the Council’s assessment and dismissed the claims of Mr Sison, also on the grounds that he had failed to show the *public* interest of disclosure as opposed to merely a personal interest, which is the rationale for applying Regulation 1049/01.

Broad and general references to security by executive actors aiming to maintain secrecy are insufficient for the Court to accept restrictions of public access to documents.¹⁷ It must be clearly evident that the disclosure of documents would impair the EU’s interests, as the case of *Kuijjer v Council* illustrates.¹⁸ In addition, the Court’s review follows the broader established principle on the overall application of Regulation 1049/01, i.e. giving the widest possible public access to documents held by the institutions.¹⁹ In line with *Hautala v Council*, derogations from public access to documents must remain within the limits of what is appropriate and necessary for achieving the intended aim.²⁰ Significantly, in the recent case of *Council v In ‘t Veld*, the European Court of Justice for the first time explicitly affirmed that even in international relations the institutions are obliged to explain whether disclosure could ‘specifically and actually’ undermine a protected interest.²¹ Although the ECJ does not require the institution to show actual prejudice, the institution cannot automatically invoke the exceptions if it fails to demonstrate specifically and actually how granting access to the requested document gives rise to a risk that undermines public security or international relations.²² Nevertheless, these developments in case law do not override marginal review established in *Sison II*, as the Court explicitly asserted in *Council v In ‘t Veld*.²³ Yet, the Court seems to gradually establish a differentiation on the applicability of the exceptions under Article 4(1)(a). If the undisclosed document concerns public interests and relates to possible

16 *Sison II* (n 14) para 34.

17 See also Regulation 1049/2001 (n 5) Preamble para 7, which explicitly foresees that the right of access also applies to documents relating to the common foreign and security policy and to police and judicial cooperation in criminal matters.

18 Case T-211/00 *Kuijjer v Council*, EU:T:2002:30, paras 60-61. Also, Case T-264/04 *WWF European Policy Programme v Council*, EU:T:2007:114, para 39.

19 Art 1 of the Regulation dealing with its ‘purpose’. Case T-174/95 *Svenska Journalistförbundet v Council*, EU:T:1998:127, para 66; *Kuijjer v Council* (n 18) para 55; *Sison II* (n 14) para 61.

20 Case T-14/98 *Hautala v Council*, EU:T:1999:157, para 28.

21 This requirement has been established before for the other exceptions under Regulation 1049/2001 (n 5) art 4, but not for the mandatory exceptions under art 4(1)(a) of that regulation. Before *Council v in ‘t Veld* (n 7), the General Court in Case T-331/11 *Besselink v Council*, EU:T:2013:419 also referred to the requirement of specifically and actually undermining an interest as opposed to a broad reference to a protected interest.

22 See also Case C-350/12 P *Council v in ‘t Veld*, Opinion of AG Sharpston, EU:C:2014:88.

23 *Council v in ‘t Veld* (n 7) para 63.

future legislative changes and in particular fundamental rights,²⁴ the Court seems to favour disclosure even under security and international relations exceptions and hence limit the extent of executive secrecy in these fields.²⁵

The Court makes a strict assessment where the right to defence and fair trial are concerned and substantively assesses whether the executive claim to secrecy is well founded. If the Court finds that the reasons provided by the executive institution do not preclude partial disclosure 'at the very best', the Court 'gives the opportunity' to executive institutions to disclose the information.²⁶ If the executive institution does not grant disclosure, the Court only conducts an examination of the contested measure on the basis of the material that has been disclosed. However, if the Court finds that the executive claim to secrecy is well founded, the Court validates the claim that secrecy is necessary. In such instances, the Court explicitly affirms its authority to conduct the *final* assessment as to whether and to what extent the failure to disclose classified information to the individual concerned affects her ability to defend her rights and takes this into consideration in the final judgment.²⁷

Cases such as *OMPI* and *Kadi II* are the most important among a growing number of cases where executive secrecy in the context of counter-terrorism measures challenges essential procedural rights of a fair trial and effective judicial review.²⁸ More specifically, these measures concern individual sanctions of freezing assets on the basis of lists of suspects for terrorism. The *OMPI* was sanctioned on the basis of the EU lists of terrorists, contrary to the *Kadi II* case, subject to the EU sanctions giving effect to the United Nations lists of terrorists suspects.²⁹ The relevance of this distinction of the basis for the listing has to do with the Court's scope of review, which is broader if the sanctions are based on the EU lists, since they are established by the

24 In the case of *Besselink v Council* (n 21) - the ECHR; in the case of *Council v in 't Veld* (n 7) - privacy rights.

25 See Vigjilencja Abazi and Maarten Hillebrandt, 'The Legal Limits to Confidential Negotiations: Recent Case Law Developments in Council Transparency: *Access Info Europe* and *in 't Veld*' (2015) 52 *Common Market Law Review* 1.

26 See Rules of Procedure of the General Court [2015] OJ L105/1; Rules of Procedure of the Court of Justice of 25 September 2012 [2012] OJ L265/1, as amended on 18 June 2013 [2013] OJ L173/65; Rules of Procedure of the General Court [2015] OJ L105/1; *Kadi II* (n 3).

27 *Kadi II* (n 3) para 129; *ZZ v Secretary of State for the Home Department* (n 3) para 67.

28 See also section 3.2 below.

29 On 28 September 2001, the United Nations Security Council adopted Resolution 1373 (2001) laying down strategies to combat terrorism by all means, in particular their financing. Paragraph 1(c) of that resolution provides that all States must freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled by such persons; and of persons and entities acting on behalf of, or at the direction of, such persons and entities.

Council.³⁰ Secrecy is also invoked in cases of expulsion and limitations of freedom of movement. The Court applies the same strict scope of review and requires some level of disclosure to the person subject to expulsion, as clarified in the *ZZ* case. This case regards a EU citizen who was subject to an expulsion measure on grounds of public security without having been informed of the grounds justifying that measure, either in detail or in summary form, because the UK authorities claimed that disclosure would be contrary to the interests of state security.³¹ This aspect of the case raises questions regarding the extent of non-disclosure of information that could be deemed acceptable to the Court, which the following subsection explains.

B. Extent of Nondisclosure: Justified ‘Deep Secrecy’?

As elaborated in Chapter II, an important type of secrecy is ‘deep secrecy’, which refers to information or documents whose very existence is unknown. This is the opposite of what are called ‘shallow secrets’, where the content of the document is protected (undisclosed) but its existence is public or could be disclosed. The relevance of these types of secrets relates to whether EU executive actors may make claims to deep secrecy and what the Court’s review would be in this regard.

In the case of *Sison II*, the Court affirmed that the originator of sensitive information, which could be an EU institution or agency, Member States or a third party,³² is justified in refusing not only the disclosure of the document’s content but also its *very existence* on basis of Article 9(3) of Regulation 1049/01.³³ Moreover, the identity of the originator of the document could also remain undisclosed.³⁴ The *Sison II* case gives rise to the need to further clarify Article 9(1) of Regulation 1049/01 as a basis for classified information and its relation to Article 4(1)(a) as the only legal basis for exceptions to public access, more recently reiterated by the Court in the judgment *Jurašinović v Council*.³⁵

Article 9 of Regulation 1049/01 is intended to provide special treatment for sensitive information, especially in relation to the officials responsible for processing the public access request and as such this provision is not a basis for refusal of access to

30 Common Position 2001/931/CFSP (n 12); Council Regulation (EC) No 2580/2001 (n 12).

31 *ZZ v Secretary of State for the Home Department* (n 3).

32 *Sison II* (n 14) para 75; Case C-266/05 P *Sison v Council* (known as *Sison II*), AG Geelhoed noted in points 58 and 59 of his Opinion, EU:C:2006:427.

33 *Sison II* (n 14) para 101.

34 *Sison II* (n 14) para 102. There is a difference if legislation is concerned, as derived from *Council v Access Info Europe* (n 7) para 40 where the Court clearly established that when it comes to legislative processes the identity of the decision-makers (thus not originators of documents as such) must be publically disclosed due to democratic accountability concerns.

35 Case C-576/12 P *Jurašinović v Council*, EU:C:2013:777.

documents and it cannot be seen as limiting access in anyway.³⁶ The mere fact that a document is classified as ‘sensitive’ within the meaning of Article 9(1) of Regulation 1049/2001 cannot prevent the application of the exceptions provided in Article 4(1) (a). To hold otherwise, would deprive Article 4 of ‘all practical effect’.³⁷ Hence, the relation between Article 4 and Article 9, clarified further by the General Court in *Corporate Europe Observatory v Commission*,³⁸ means that the presence or absence of one of the designations referred to in Article 9(1) of Regulation No 1049/2001 or of the ‘EU Restricted’ classification on a document does not constitute a conclusive factor in the assessment of whether or not the document must be protected.³⁹

However, if the originator of the sensitive information refuses disclosure on basis of discretion as stipulated in Article 9(3) of Regulation No 1049/2001, the Court in *Sison II* held that: ‘the originating authority of a sensitive document is empowered to oppose disclosure not only of that document’s content but even of its existence’.⁴⁰ In this respect, although the sensitivity of the information or the fact that it is classified in any of the categories is only relevant with regard to the internal ‘special treatment’ or internal management of the document,⁴¹ under Article 9(3) the originator retains authority to refuse disclosure of the document in a request for public access. This manner of applying Article 9 leads effectively to a situation of deep secrecy for the individual requesting public access as she would not be able to know neither whether the document indeed exists nor its originating authority.

Contrary to such level of secrecy in cases of public access requests, a minimum level of disclosure was necessary in the cases pertaining to the right to defence and a fair trial. The extent of justified secrecy is narrower and some level of openness is imperative for the realization of these rights. In cases of sanctions such as counter-terrorist measures or expulsion on basis of public security, the Court has consistently held that information must be available, despite the low threshold, and that the Court would only base its judgment on disclosed information.⁴² In the case of *OMPI*, a case that marks

36 *Jurašinić v Council*, *ibid*, para 43 and 46.

37 *Jurašinić v Council* (n 35) para 47.

38 Case T-93/11 *Stichting Corporate Europe Observatory v Commission*, EU:T:2013:308.

39 *Stichting Corporate Europe Observatory v Commission*, *ibid*, para 55.

40 *Sison II* (n 14) para 101.

41 *Sison II* (n 14) para 103.

42 See Case T-284/08 *People’s Mojahedin Organization of Iran v Council* (OMPI/PMOI III), EU:T:2008:550, paras 71-73; Case C-27/09 P *France v People’s Mojahedin Organization of Iran*, EU:C:2011:853. See also Christina Eckes, ‘Decision-making in the Dark? Autonomous EU Sanctions and National Classification’ Amsterdam Centre for European Law and Governance Working Paper Series 2012-02, 12-13.

the first decision by the Court to annul a designated Union list for freezing the assets of terrorist suspects,⁴³ the Court held clearly that without the relevant information the person affected adversely by the measure would not be in a position to submit her observations to correct an error or produce information in favour to her position and crucially, that the Court itself must be able to take a fully informed decision.⁴⁴ Furthermore, as evident in the *ZZ* case, for the expulsion of an EU citizen on the basis of security, the individual must be given a precise and comprehensive statement of the grounds of the decision.⁴⁵ Although a statement could be qualified in cases of security considerations, the disclosure of a summary must be considered. The person must have ‘full knowledge of relevant facts.’⁴⁶ However, the threshold of minimum disclosure towards the individual could be fully relinquished for future cases involving classified information under the new Rules of Procedure of the General Court, in force since April 2015.⁴⁷ The following Chapter VII discusses this revision and its implications in more detail, yet it should be noted here that according to the new Article 105 of the Rules of Procedure of the General Court, there is an option not to share confidential information and material that has been submitted to the Court with the party due to security concerns.

C. Duty to State Reasons: A Sufficient Safeguard?

The duty to state reasons is a crucial procedural criterion in both sets of reviews as it is relevant for the individual to defend her rights, for the institution to be reflective and self-restrained and for the Court to be able to be fully informed in order to review the decision.⁴⁸ In principle, the statement of reasons must be ‘appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question.’⁴⁹ However, in both set of cases it seems that the Court allows for a brief statement of reasons, where the extent it allows the individual to defend her essential procedural rights can be questioned.

43 See also Christina Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (OUP 2009) 306.

44 As Eckes points out, the ‘Court could hardly have expressed criticism more clearly’ towards the executive institution regarding the secret nature of the procedure that led to the listing of OMPI and resulted in the Court not being in a position to take an informed decision. Eckes, *ibid*, 307.

45 *ZZ v Secretary of State for the Home Department* (n 3).

46 *Kadi II* (n 3) para 100.

47 Rules of Procedure of the General Court [2015] OJ L105/1. See Chapter IV for an elaboration on how these rules were developed and adopted by the Court mostly in secret and explicitly refusing external expert opinions on the effects of the rules on human rights.

48 Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte*, EU:C:1991:438.

49 *Sison II* (n 14) para 80; Case T-92/98 *Interporc v Commission*, EU:T:1999:308, para 55.

Regarding the exceptions under Article 4(1)(a) Regulation 1049/01, the Court leaves a margin for institutional discretion by only requiring a short statement of reasons. The Court held that abstaining from reference to issues that would *indirectly* undermine the protected interest is justified when Article 9 of Regulation 1049/01 is taken into account. The Court justifies such brevity by:

The need not to undermine the sensitive interests protected by the exceptions ... through disclosure of the very information which those exceptions are designed to protect.⁵⁰

Similarly, in cases in the sanctions regime, the Court accepts a short statement of reasons. For example, in the case of *Council v Fulmen*,⁵¹ the Court held that the statement of reasons may be brief *if* the individual is able to first, understand what the person is accused of and second, on basis of such information the person is able to dispute either the accuracy or the relevance of the information. The evidence does not need to be detailed, as the Court held in *Al-Aqsa v Council*.⁵² In sanctions cases, it is further relevant whether the individual is listed for the first time or whether it is a recurring measure. When the individual is initially listed, the statement of reasons does not need to be issued before the measure is applied so as to preserve the element of ‘surprise’ that secrecy offers.⁵³ As Chapter II explained, in the application of security measures, secrecy may be used to create a situation where the intended target is left unprepared to take counter-action. In sanctions cases, in order for the measure to be successful, the individual should not be aware that her assets will be frozen. In specific circumstances it is also possible that ‘restrictions on access may concern the specific content of or particular reasoning of [the restrictive] decision, or even the identity of the authority that took it’.⁵⁴ Regarding the subsequent listing, considering that the element of surprise is no longer necessary, the institution must provide the ‘actual and specific reasons’ for the justification of the continuation of the measure.⁵⁵

50 *Sison II* (n 14) para 82; Case T-110/03 *Sison v Council*, EU:T:2005:143, paras 62 and 63.

51 Case C-280/12 P *Council v Fulmen and Mahmoudian*, EU:C:2013:775, paras 61, 62, 68.

52 Joined cases C-539/10 P and C-550/10 P *Al-Aqsa v Council and The Netherlands v Al-Aqsa*, EU:C:2012:711.

53 See Chapter II.

54 Case T-228/02 *OMPI*, EU:T:2006:384, para 148.

55 Case T-228/02 *OMPI*, *ibid*, para 143.

6.1.2 Parliamentary Review and Disclosure of Secrets

This section examines whether the European Parliament is empowered to evaluate or give its opinion on decisions relating specifically to the EUCI system, for example whether a document should be classified or disclosed to the public, as well as oversight powers through which the European Parliament could contribute to the disclosure of executive secrecy. This section does not address questions of access to classified information and the institutional structures set up in this regard. The latter aspects of oversight and the European Parliament are addressed separately below,⁵⁶ as they constitute salient issues regarding secrecy and oversight and are broader than addressing the review of classification decisions. .

Parliamentary review of executive claims to secrecy does not include institutional mechanisms through which the European Parliament could review the executive decisions on whether to classify a document. On the contrary, executive actors have the potential to alert each other about the possible wrong classification label or make their views known when they disagree with the classification label, such as *Confidential*, *Secret* or *Top Secret*. For example, Europol can address a Member State if it considers that a document should be classified in a lower or higher security level or should not be classified at all.⁵⁷ Exceptionally, only with regard to the Commission, the European Parliament has a similar prerogative to raise attention to its disagreement regarding the classification decision. If the European Parliament doubts the confidential nature of the information or its appropriate level of classification, it may consult the Commission to make the necessary changes.⁵⁸ At the consultation, the chair of the parliamentary body concerned represents the European Parliament whereas a Member of the Commission with responsibility for that area represents the Commission, after internally having agreed with the Commission official responsible for security matters. If the two institutions have divergent views regarding the classification status of the document despite consultations, the issue is referred to the Presidents of the two institutions so that they may resolve the dispute.⁵⁹ If an agreement is not reached at the end of the procedure and consultation, the President of Parliament

⁵⁶ See Section 6.2.

⁵⁷ Council Decision 2009/968/JHA of 30 November 2009 adopting the rules on the confidentiality of Europol information [2009] OJ L332/17, art 11(3). However, in practice, this happens rarely, Respondent No. 1.

⁵⁸ Framework Agreement on relations between the European Parliament and the European Commission [2010] OJ L304/47, Annex II paras 2(3) and 2(4).

⁵⁹ EP-Commission Framework Agreement, *ibid*, Annex II para 2(3).

calls on the Commission to forward the confidential information in question. Before the expiry of that deadline, the Commission informs Parliament in writing of its final position.⁶⁰ The reference to the European Parliament should not be misleading to represent that every Member of the European Parliament would be able to give such opinions regarding the classification level. As it will be further elaborated below, only certain committees of the European Parliament deal with access to classified information on a regular basis as a result of their oversight functions.

With respect to the Council, the European Parliament has no opportunity to show its disagreement over what it would consider an unnecessary classification decision, as the Interinstitutional Agreement in 2014 foresees no such review mechanism. This agreement does not lay down a detailed procedure to be followed in cases of doubt regarding the confidential nature of information or its appropriate level of classification.⁶¹ This lack of procedures for review is not accidental, but rather the Council took a clear position during the negotiations of the agreement that it did not want its decision to classify a document to be assessed by the European Parliament. This position of the Council is identified from both the interviews conducted with Council officials as well as documents pertaining to the negotiations.⁶² The Interinstitutional Agreement regarding the exchange of classified information in the Common Foreign and Security Policy of 2002 does not stipulate a possibility for the European Parliament to express its view on the classification decisions. The European Parliament is not satisfied with this outcome and expressly stated it regrets that ‘unlike the Framework Agreement between the Commission and Parliament, the agreement does not lay down a detailed procedure to be followed in cases of doubt regarding the confidential nature of an item of information or its appropriate level of classification.’⁶³ Besides the Council, the European Parliament does not have review or consultation prerogatives towards EU agencies or bodies dealing with classified information. In fact, as we will discuss in the following section, the European Parliament has only recently legally established a right of access to classified information. In this respect, assessments of classification decisions could be considered a much more advanced step that this oversight institution does not have. Therefore, the only option for the

60 EP-Commission Framework Agreement (n 58), Annex II, para 2(4).

61 European Parliament decision of 13 September 2012 on the conclusion of an interinstitutional agreement 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 (2012/2069(ACI)), point 5.

62 European Parliament decision of 13 September 2012, *ibid*; Respondents No. 6, 13, 16.

63 European Parliament decision of 13 September 2012 (n 61), point 5.

European Parliament to raise attention if it considers that an executive claim to secrecy is unwarranted is vis-à-vis the Commission, although it should be emphasized that it is not an obligation for the Commission to follow the European Parliament's opinion on the classification marking.

The lack of powers of the European Parliament in a more strict sense, referring specifically to the decisions within the EUCI system, does not imply that it lacks other oversight mechanisms and prerogatives through which it could check executive action and seek disclosure of secrecy. Particularly noteworthy are examples where individual MEPs summon executive institutions to the Court or where the European Parliament does this at an institutional level. For instance, under the public access to documents regime as provided in Regulation 1049/01, Sophie In 't Veld, a Dutch ALDE MEP has sought to disclose executive secrecy pertaining to international relations both from the Commission on the negotiations around the Anti-Counterfeiting Trade Agreement (ACTA)⁶⁴ and from the Council regarding the Terrorist Finance Tracking Programme.⁶⁵ Besides judicial avenues as a means to disclose executive secrecy, the European Parliament uses its veto powers acquired in the post-Lisbon context, by refusing or delaying consent to international agreements in its political efforts to disclose executive secrecy. For example, the European Parliament refused consent to the EU-US SWIFT Agreement and delayed consent to USA and Australia Passenger Name Records Agreements. Regarding the SWIFT Agreement, the European Parliament gave its consent at a later stage but scholars note there were 'no remarkable differences between the first and second SWIFT agreements.'⁶⁶ Rather, the difference was that during the second round, the European Parliament was fully informed at all stages of the negotiations, hence it succeeded in disclosing executive secrecy for oversight purposes.⁶⁷ Chapter VII elaborates in detail the European Parliament's efforts in practice to constrain secrecy despite the challenges it faces due both to the EUCI regulation and to the inaccessibility to classified information.

64 Whereas the litigant in that case was unsuccessful, the ACTA was subsequently abandoned after protracted major public pressure opposing the agreement.

65 Case T-301/10 *In 't Veld v Commission*, EU:T:2013:135.

66 See Juan Santos Vara, 'The Role of the European Parliament in the Conclusion of the Transatlantic Agreements on the Transfer of Personal Data after Lisbon' (2013) CLEER Working Papers 2013/2, <http://www.asser.nl/upload/documents/20130226T013310-cleer_13-2_web.pdf> accessed 29 August 2015, on how the EP vetoed PNR and other agreements.

67 *ibid* 20.

6.1.3 EU Secrecy under Administrative Review

This subsection examines the role of the European Ombudsman in reviewing executive secrecy claims and determining whether they are sufficiently warranted. Investigating maladministration is the key function of the European Ombudsman, which is precisely what is needed in cases involving secrecy considering that the latter may shield embarrassing or incriminating information, as discussed in detail in Chapter II. The European Ombudsman has dealt with two types of cases regarding classified information: first, cases on the refusal of EU institutions to grant public access to documents, and second, inquiries of maladministration.

The role of the European Ombudsman with regard to cases on the refusal of public access is to determine whether the institution's claim to secrecy is justified. The European Ombudsman has the power to request the documents and determine if public access should be granted or whether disclosure would undermine the interests that the institutions claim to protect. This review mechanism is not strictly addressed at classified information but rather involves any document the disclosure of which has been refused by the institution. Looking at the practice of the European Ombudsman, it seems that it has never asked an institution to declassify a document and when review of denied access requests pertain to Article 4(1) of Regulation 1049/01, similarly to the Court, the European Ombudsman conducts a narrow procedural review. The European Ombudsman has pointed out that the standard of review it carries out is compatible with that of EU courts.⁶⁸ The review of refusal of public access to documents on the grounds of the protection of public interest regarding international relations is limited to the verification of compliance with procedural requirements and duty to state reasons as well as the assessment of the accuracy of factual statements and lack of errors or misuse of powers.⁶⁹

The European Ombudsman does not review whether a classification label is justified and necessary. In cases dealing with the refusal of public access requests based on protection of international relations,⁷⁰ the European Ombudsman refers

68 Draft recommendations of the European Ombudsman in the inquiry into complaint 1398/2013/ANA against the European Commission, made in accordance with Article 3(6) of the Statute of the European Ombudsman, point 66.

69 Draft recommendations 1398/2013/ANA, *ibid*, point 66; Decision of the European Ombudsman closing her inquiry into complaint 1633/2008/DK against the European Commission, point 17; Decision of the European Ombudsman closing her inquiry into complaint 488/2007/PB against the European Commission, point 50.

70 See, for example, Inquiry into complaint 1398/2013/ANA (n 68).

to documents whose disclosure was refused in a brief manner, merely stating that disclosure of such documents should be reconsidered. An institution that refuses access to sensitive information must give reasons for its refusal. The role of the European Ombudsman is limited to verifying whether the institution has complied with this duty. Hence, the review of the European Ombudsman is not based on whether a document should be classified or declassified; rather it is focused on whether the reasons provided as to why the document should be undisclosed to the public are satisfactory. Regarding the scope of the duty to state reasons, the decisions of the European Ombudsman point out that it follows the reasoning of the Court. While in its earlier cases, the European Ombudsman considered that a brief statement of reasons could suffice in cases where more elaborate statements could undermine the very interest the institution seeks to protect,⁷¹ over the years the European Ombudsman has expanded the duty to state reasons into an obligation to show how disclosure would specifically and actually undermine the protected interest,⁷² and that such a risk is foreseeable and not merely hypothetical.⁷³ The European Ombudsman is entitled to inspect the document and it can verify whether public access was justifiably denied regardless of whether EU institutions provide a brief or a detailed statement of reasons.⁷⁴ If the European Ombudsman finds that partial or complete public access to the disputed document could be granted, it will make recommendations to that end and give the institution in question a deadline within which it has to implement the recommendations.⁷⁵ The European Ombudsman may review executive claims to secrecy through conducting inquiries for maladministration. However, the European

71 Decision of the European Ombudsman closing his inquiry into complaint 523/2009/TS against the Council of the European Union, points 20 and 22; Decision of the European Ombudsman closing his inquiry into complaint 944/2008/OV against the Council of the European Union, point 30.

72 Decision of the European Ombudsman closing his inquiry into complaint 1051/2010/BEH against the European External Action Service (EEAS), point 42.

73 Decision of the European Ombudsman closing the inquiry into complaint 2275/2013/ANA against the European Commission, point 27; Decision of the European Ombudsman closing the inquiry into complaint 2266/2013/JN against the European Commission, points 40 and 41; Draft recommendations 1398/2013/ANA (n 68) point 64; Decision of the European Ombudsman closing her inquiry into complaint 1454/2012/ANA against the European Commission, point 51; Decision of the European Ombudsman in her inquiry into complaint 2393/2011/RA against the European Parliament, point 53.

74 Cases where the European Ombudsman inspected the file and found denial of disclosure justified: Decision 2275/2013/ANA (n 73), points 28-30; Draft recommendations 1398/2013/ANA (n 68), point 68; Decision 1454/2012/ANA (n 73), point 52; Decision of the European Ombudsman closing her inquiry into complaint 339/2011/AN against the European Commission, points 38-40; Decision 1051/2010/BEH (n 72), points 43-50; Decision 523/2009/TS (n 71), points 20-22; Decision of the European Ombudsman closing her inquiry into complaint 90/2009/(JD)OV against the Council of the European Union, points 27-36; Decision 944/2008/OV (n 71), points 28-30.

75 See, for example, Draft recommendations 1398/2013/ANA (n 68), points 70-72, art V.

Ombudsman's practice thus far does not include cases relating exclusively to classified information in the sense of the misuse of classification authority or revelations of embarrassing information for the EU institutions.

The European Ombudsman has a stronger position than the European Parliament with regard to assessing secrecy claims, and shares more similarities with the Court regarding the evaluations in cases of public access requests. In terms of implications for the institutions, however, the European Ombudsman's review is more limited than the Court's considering that the latter delivers legally binding judgments as opposed to recommendations. These aspects of differences and similarities between the institutions bring us to some preliminary remarks regarding the overall oversight institutions' review of executive secrecy.

The EU executive institutions do not have the sole prerogative to determine the level of secrecy in the EU when it comes to classified information. Each oversight institution has some powers to limit the claims to secrecy. The European Parliament has the most direct mechanism for giving an opinion regarding the classification decision on whether it should be classified or the level of classification, but this is strictly limited to the Commission. The Council was specifically opposed to the European Parliament having such powers with regard to classified documents, regardless of the policy area.⁷⁶ The Court and the European Ombudsman have review mechanisms that are focused on the failure of the executive institutions and bodies to disclose information and address the implications arising from non-disclosure. The common feature of all oversight actors is that they rely on access to classified information in order to employ their oversight functions. The following section elaborates in detail on the legal framework and practice regarding access to classified information by oversight institutions.

6.2 ACCESS TO OFFICIAL SECRETS

Informed oversight is complex and depends on many factors, some of a practical nature, such as sufficient resources,⁷⁷ and other factors of a political nature, such as the

⁷⁶ As we saw, this applies to both the 2014 and the 2002 agreements: Interinstitutional 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; Interinstitutional 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.

⁷⁷ For example, sufficient time and assisting staff at oversight institutions for the conduct a systematic information analysis are relevant aspects.

parliamentary representatives' selectivity of issues to oversee in accordance with the perceived interests of their electorate. Accessibility to information is a pre-condition for overseeing executive decision-making, although the availability of information *per se* does not necessarily lead to the relevant information or the understanding required for oversight institutions to review executive actions. Whereas publicly available information is easily accessible through open sources and the oversight institutions' own information services, classified information requires direct sharing from the executive institutions. This section examines first, whether oversight actors have the prerogatives to access classified information fully and timely, and second, whether they are able to obtain this information without reliance on the discretion of the executive institutions.

6.2.1 *Privileged Access to EUCI*

EU oversight institutions have *privileged* access to classified information. The understanding of this access to information as 'privileged' denotes its difference from *public* access available to any individual (physical or natural person residing in the EU) within the scope of Article 2 of the Regulation 1049/01 on public access to documents. The privileged access to classified information has two main features. First, it is strictly related to the institution's oversight prerogatives and its constitutional role in the broader setting of checks and balances. Second, privileged access to classified information means that the information does not become publically accessible. It remains to be seen only by the oversight actor. This is in contrast to public access to documents under Regulation 1049/01, considering that if access is granted the information becomes available not only to the requesting party but also to the public at large.

Primary law does not specifically stipulate privileged access to classified information by the oversight institutions. However, different provisions apply as a basis for privileged access, considering that this type of access is related to the institutions' prerogatives in oversight. For example, Article 14(1) TEU provides a clear oversight role for the European Parliament. Other provisions enumerate its powers of consent or consultation and the informing obligations by the executive actors in this regard. Article 36 TEU stipulates that the High Representative will regularly consult the European Parliament, whereas Article 71 TFEU provides that the Council's standing committee on operational cooperation for internal security informs the European Parliament. The clearest obligation for the executive institutions to inform the European Parliament is

stipulated in Article 218(10) TFEU regarding international agreements. Similarly for the CJEU and European Ombudsman, primary law provides only a broad basis for privileged access, taking into account that on basis of Article 19(1) TEU the CJEU is to ensure that EU law is observed, whereas Article 228 TFEU lays out the European Ombudsman's prerogative of administrative review through inquiries.

In their Rules of Procedure, each oversight institution has specific provisions regarding access to classified information. For example, the General Court's access rights are stipulated in Article 91(b-c) Rules of Procedure regarding measures of inquiry in conjunction with Articles 103-105 Rules of Procedure specifically pertaining to confidential information and material. In a similar fashion, the European Ombudsman and the European Parliament provide specific rules on access to classified information. Article 3(2) of the European Ombudsman Statute provides for an obligation for EU institutions and bodies to provide information, whereas the European Parliament has a separate Annex VII on classified information in its Rules of Procedure. In accordance with Article 220 of the European Parliament's Rules of Procedure, the European Ombudsman is also obliged to inform the European Parliament. Moreover, and unlike with the other oversight institutions, the European Parliament through Interinstitutional Agreements has specific arrangements with the Council and the Commission regarding access to classified information.⁷⁸ The European Parliament's prerogative to access classified information however does not apply across the board to all bodies and institutions. For example, until the legal revisions under the Lisbon Treaty, agencies such as Europol and Eurojust were not under legal obligations to grant access to classified information to the European Parliament. More relevant than the broad stipulations about privileged access to EUCI is the actual practice, especially as it concerns the scope of information sharing as well as whether oversight actors are able to access EUCI in a timely manner. The following subsections examine these aspects of privileged access.

A. Scope and Time of Privileged Access

The scope of privileged access to EUCI in practice may be examined through the number of documents exchanged as well as the categories of classification. In the EU, no set of public data exists for the amount of shared classified information. Systematic overview of classified information received by the European Parliament from

⁷⁸ Interinstitutional Agreement of 12 March 2014 between the European Parliament and the Council (n 76); Interinstitutional Agreement of 20 November 2002 between the European Parliament and the Council (n 76); Framework Agreement between the European Parliament and the Commission (n 58).

the Council or the Commission is lacking. Interviews with the many EU officials involved in the EUCI did not shed light on this matter either. Consistently, officials have refused to give an approximate number for the documents shared with the European Parliament.⁷⁹ It remains speculative whether such hesitation is motivated by security concerns or whether there is simply no specific systematic overview of the information shared overall, although in accordance with Article 3(1) second sentence of Annex II, the European Parliament and the Commission are obliged to ensure the registration and traceability of classified information.⁸⁰ There is a register of documents exchanged between the Commission and the European Parliament, which is not specifically for classified information, but information more generally.⁸¹ Similarly regarding the Council, Article 6 of the Interinstitutional Agreement on exchange of classified information in CFSP, provides that documents classified as *Confidential*, *Secret* and *Top Secret*, will be registered for security purposes and ensure traceability at all times. Despite these provisions however, a registry for classified information is not accessible and numbers are publically unknown.

The type of issues covered by classified information and the categories of classification also point to the application of privileged access in practice. For example, the scope of 2014 Agreement between the European Parliament and the Council does not include the category of *Limité* documents, which is not strictly foreseen as a classification category, although this marking too makes information inaccessible. The Council considers *Limité* documents as ‘internal to the Council’,⁸² and not to be shared externally, although in practice this is one of the biggest categories of information.⁸³ By contrast, in the framework agreement between the EP and the Commission, it is explicitly stated that the broader notion of confidentiality is applicable, which includes both EUCI and documents that are not public due to other reasons, such as internal documents or documents related to professional secrecy.⁸⁴

79 Respondent No. 1, 3, 6, 8, 13.

80 For example, the documents classified as ‘CONFIDENTIAL UE’ and ‘SECRET UE,’ are supposed to be forwarded from the Commission’s Secretariat General central registry to the equivalent competent Parliament.

81 Agreement between the European Parliament and the Commission on procedures for implementing Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, as amended by Decision 2006/512/EC [2008] OJ C143/1.

82 Council, ‘Handling of documents marked LIMITE’, 16 March 2006, Doc. 5847/06.

83 Council Annual Reports on access to documents 2012, 2013, and 2014 available at < <http://www.consilium.europa.eu/en/documents-publications/publications/>>. Also Deirdre Curtin, ‘Overseeing Secrets in the EU: A Democratic Perspective’ (2014) 52 *Journal of Common Market Studies* 684, 685-86.

84 Framework agreement between the European Parliament and the Commission (n 58) Annex II, art 1(2) second sentence states that ‘confidential information’ will include both the classified information in the strict sense (EUCI) but also ‘non-classified’ other confidential information’.

The European Parliament's access to classified information in issues of CFSP is stipulated both through the Interinstitutional Agreement of the Council concluded in 2002 and the Council Decision establishing the European External Action Service in 2010.⁸⁵ The initial proposal for the EEAS Decision did not make any mention of the European Parliament's access to classified information. It kept the text of primary law very strictly that the 'the High Representative will regularly consult the European Parliament on the main aspects and the basic choices of the CFSP' and that the views of the European Parliament are taken into consideration. The EP insisted on access rights to the EEAS classified information by applying the existing provisions under the 2002 Interinstitutional Agreement with the Council.⁸⁶ The final Council Decision does stipulate in the preamble (paragraph 6) that the European Parliament will have access to classified information in accordance with this Interinstitutional Agreement.⁸⁷

Both the Court and the European Ombudsman have broad stipulations about receiving access to any information that they require for their review.⁸⁸ For instance, regarding the European Ombudsman, Article 3 of the Statute stipulates that the EU institutions and bodies are obliged to provide access to 'any information' and files requested.⁸⁹ There is no enumeration of types of information, as the European Ombudsman in line with her inquiries must determine what information is specifically relevant. The European Ombudsman is entitled to inspect and copy the files.⁹⁰ In addition to powers at EU level, the European Ombudsman has 'direct vertical' investigative powers that pertain to the relations between the Ombudsman and the national authorities.⁹¹ National authorities too are obliged to provide the European Ombudsman with any

85 Interinstitutional Agreement of 20 November 2002 between the European Parliament and the Council (n 76); Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service [2010] OJ L201/30.

86 Interinstitutional Agreement of 20 November 2002 between the European Parliament and the Council (n 76).

87 Political scientists argue that the final arrangement highlights that 'the Council decided against its own rational cost-benefit calculation'. Elisabeth Wisniewski, 'The Influence of the European Parliament on the European External Action Service' (2013) 18 *European Foreign Affairs Review* 81, 94.

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

89 Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties [1994] OJ L113/15, as amended by decision of 14 March 2002, OJ L92/13 and decision of 18 June 2008, OJ L189/25 (*hereinafter the Statute of the European Ombudsman*), recital 6 and art 3(2); Decision of the European Ombudsman adopting implementing provisions of 8 July 2002 as amended by decisions of the Ombudsman of 5 April 2004 and 3 December 2008, art 5(1), available at <<http://www.ombudsman.europa.eu/en/resources/provisions.faces>> accessed 29 August 2015.

90 Statute of the European Ombudsman, *ibid*, recital 6 and art 3(2); Decision of the European Ombudsman on implementing provisions, *ibid*, art 5(2).

91 Craig (n 1) 739-762.

information that may help to clarify instances of maladministration by Union institutions.⁹² The European Ombudsman has also ‘indirect vertical’ investigative powers, which are concerned with access to documents that originate in a Member State, but are in the possession of a Union institution or body.⁹³

The time of receiving access to classified information is salient to ensure timely oversight of executive decisions. In principle, the Agreements between the EP and the executive institutions provide that information should be shared ‘regularly’, ‘without delay’ and ‘immediately.’⁹⁴ Moreover, Article 108(1) of the European Parliament Rules of Procedure stipulates that access should be to ‘immediate, regular and full information.’ Another similar example is Article 110(4) on the obligation of the appointed Special Representative to keep the European Parliament ‘fully and regularly informed.’

Specific timeframes are not stipulated with regarding to the Court or the European Ombudsman. Neither the Statute of the European Ombudsman nor the Implementing Measures refer to a specific time regarding access to EUCI. Arguably, in line with Article 3 of the Statute, in order for the European Ombudsman to conduct an inquiry, access to information should be granted without delay. However, the European Ombudsman announces the inquiry and visit to the institution being examined, which means there is a lack of immediate and unannounced access to documents. This in turn ‘gravely undermines the efficacy of the Ombudsman’s investigative efforts as it provides the targeted institution or body with ample time to go through the file in question and suppress written evidence of any administrative irregularity.’⁹⁵ For example, in some cases the files inspected were found to be incomplete, and crucial documents were missing under unspecified circumstances.⁹⁶

In practice, lack of timely access is commonly noted especially with regard to the European Parliament. For example, regarding the preparation of the Schengen Borders Code, the European Parliament wanted to obtain copies of classified documents,

92 Statute of the European Ombudsman (n 89) art 3(3).

93 This type of power was the most hotly debated issue in the discussions of the Ombudsman’s Statute in the Luxembourg Interinstitutional Conference, Richard Corbett, ‘Governance and Institutional Developments’ (1994) 23 *Journal of Common Market Studies* 27, 33.

94 Interinstitutional Agreement of 12 March 2014 between the European Parliament and the Council (n 76); Interinstitutional Agreement of 20 November 2002 between the European Parliament and the Council (n 76); Framework Agreement between the European Parliament and the Commission (n 58). These notions refer to the exchange of information more broadly and do not strictly concern EUCI.

95 Alexandros Tsadiras, ‘Unravelling Ariadne’s Thread: The European Ombudsman’s Investigative Powers’ (2008) 45 *Common Market Law Review* 757, 765.

96 See Complaint 466/97/PD [1999] EOAR 135; and Complaint 548/2002GG [2003] EOAR 115.

yet this was rejected and only a special meeting behind closed doors took place.⁹⁷ In another instance, regarding the Schengen Information System for Bulgaria and Romania, the European Parliament received important classified information through diplomatic channels of exchange with the Romanian Ambassador as opposed to getting information directly from the Council.⁹⁸ Lack of timely access to information has also been noted regarding the European Parliament and Commission relations.⁹⁹

B. Insiders of Oversight Institutions

Who specifically is granted access to classified information? By looking deeper than the bird-eye view of the institutional level, findings emerge that access to EUCI internally within oversight institutions is more limited. The question of access to classified information is most complex with regard to the European Parliament considering it is the largest oversight institution and not a unified actor, like the European Ombudsman, or several individuals, like the Court.

Only certain committees of the European Parliament deal with access to classified information on a regular basis as a result of their functions, although any committee may request from the President of the European Parliament that access to classified information be provided. The Committee on Foreign Affairs is one of the key committees dealing with classified information. This Committee is responsible for the promotion, implementation and monitoring of the EU's foreign policy. The other key committee to deal with issues of oversight and classified information within the EP is the Committee on Civil Liberties, Justice and Home Affairs (LIBE), first established in 1992. The LIBE Committee is responsible for legislation in the areas of transparency and of the protection personal data. The Treaties and the European Parliament's Rules of Procedure expressly confer upon LIBE the responsibility to hold the Council and Commission accountable in the area of freedom, security and justice.

A distinction also exists between individuals who have the prerogatives to request access to classified information and those that actually gain access to the material at the

97 General Secretariat of the Council, 'Draft Interinstitutional Agreement concerning access by the European Parliament to classified information of the Council [and of the Commission] in the field of Freedom, Security and Justice – List of documents sent to the European Parliament in the field of Freedom, Security and Justice during the following period: 1/07/2004-30/06/2005', 20 March 2006, Council Doc. 7542/06.

98 *ibid.*

99 Sergio Carrera, Nicholas Hernanz and Joanna Parkin, 'The "Lisbonisation" of the European Parliament: Assessing Progress, Shortcomings and Challenges for Democratic Accountability in the Area of Freedom, Security and Justice' (2013) CEPS Paper in Liberty and Security in Europe No. 58.

European Parliament. In addition, access varies and is determined in accordance with the level of the classified information.¹⁰⁰ Regarding the Council, on the basis of Article 3(1) of the 2002 Agreement, the following have a right to request access to classified information: the President of the European Parliament and the Chairman of the CFA Committee.¹⁰¹ These requests are addressed to the Presidency of the Council or the High Representative. When requests are approved due to the prerogatives of the EP in this field, access is given at the premises of the Council to the President of the European Parliament and by what the Interinstitutional Agreement calls ‘special committee’, which is in fact composed of only *five* individuals of which the Chairman of the CFA and four members designated by the Conference of Presidents.¹⁰² Furthermore, when access is granted, the President of the EP may decide that information is intended for the Chairman of the CFA or access to information is restricted to the members of the CFA only. Access to EUCI on the basis of the 2014 Agreement with the Council is of wider scope *ratione personae*. Access is also granted to rapporteurs and shadow rapporteurs provided that they have security clearance or ‘for whom notification has been made by a competent national authority that they are duly authorised by virtue of their functions in accordance with national laws and regulations’.¹⁰³

Similarly with regard to the Commission, there is a difference between individuals who are authorised to request access to EUCI and those that are granted access. The scope of authorised individuals in the latter category is bigger.¹⁰⁴ On the basis of Annex II, Article 1(3), the Commission may forward any information on its own initiative. In line with Article 1(4) Annex II, the following may request access to

100 See Interinstitutional Agreement of 12 March 2014 between the European Parliament and the Council (n 76) art 4.

101 Note that since the agreement dates from before the Lisbon changes, the Interinstitutional Agreement refers to the committee as it was structured in 2002, i.e. Chairman of the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy.

102 See Interinstitutional Agreement of 20 November 2002 between the European Parliament and the Council (n 76) art 3(3): ‘The President of the European Parliament and a special committee chaired by the Chairman of the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy and composed of four members designated by the Conference of Presidents shall be informed by the Presidency of the Council or the Secretary-General/High Representative of the content of the sensitive information where it is required for the exercise of the powers conferred on the European Parliament by the Treaty on European Union in the field covered by the present Interinstitutional Agreement. The President of the European Parliament and the special committee may ask to consult the documents in question on the premises of the Council.’

103 Interinstitutional Agreement of 12 March 2014 between the European Parliament and the Council (n 76) art 4(2)(b).

104 When the EP requests classified information from the Commission: ‘Details of the category or categories of persons who are to have access to the confidential information shall be communicated simultaneously with the request.’ See Framework Agreement between the European Parliament and the Commission (n 58) Annex II, art 2(5)(3) second sentence.

the EUCI: the President of Parliament, the chairs of the parliamentary committees concerned, the Bureau and the Conference of Presidents, the head of Parliament's delegation included in the Union delegation at an international conference.¹⁰⁵ Access to classified information, in line with Article 2(5) first sentence, Annex II, is determined by the level of the classification and access may only be granted to Parliament officials and those employees of Parliament working for political groups to whom it is strictly necessary, and who have been designated in advance by the parliamentary body as having a 'need-to-know' and who have been given an appropriate security clearance. Hence, the security principles of 'need-to-know' and the security clearance are not only applicable for determining inside-insiders within the executive institutions, as discussed in Chapter V, but also apply to the European Parliament. Access to classified information by the officials working at the European Parliament is equally important for an effective oversight considering that they conduct the preparations for meetings, reports, and other relevant issues within the administration.¹⁰⁶

Based on Article 2(5) second sentence, due to the prerogatives of the Parliament, MEPs who have not been given a personal security clearance could be granted access to documents classified as *Confidential* under practical arrangements defined by common accord, 'including signature of a solemn declaration that they will not disclose the contents of those documents to any third person'. Such arrangements are not applicable for access to documents classified at the level of *Secret*.

Against this background, it becomes apparent that classified information is not generally shared but is strictly limited to those who internally in the European Parliament the President deems relevant to know and have access to the information. In this regard, it is more appropriate to conclude that access to EUCI is concentrated among certain MEPs and relevant Committees as opposed to discussing access at a level of the European Parliament as an institution. It is equally important to note that the requests for access to classified information are not of strict obligatory nature since the executive institutions have the option to refuse such requests.

The most pressing aspect is that even privileged access to EUCI faces the challenge of the executive discretion of non-disclosure. In the following subsection we turn to discuss these limitations, particularly focusing on those that pertain to the regime of EUCI.

¹⁰⁵ The Commission may forward any confidential information on its own initiative to Parliament: Framework Agreement between the European Parliament and the Commission (n 58) Annex II, art 1(3).

¹⁰⁶ Interinstitutional Agreement of 12 March 2014 between the European Parliament and the Council (n 76) art 4.

6.2.2 Limited Access: The Biggest Challenge

Inaccessibility to classified information is a common problem between all EU oversight institutions and executive actors. The originator control is the most pressing access limitation pertaining strictly with the EUCI regime. The originator rule has become very rigid in the EU because firstly, both executive and oversight actors have fully incorporated it in their EUCI regimes, and secondly, externally this rule is included in all EU agreements or technical arrangements with third parties for the exchange of classified information. Chapter IV discusses in more detail the manner in which this rule was established and how it is expanded in the EU institutions. This section examines how specifically the discretion of the executive institutions to conceal plays out against the oversight institutions' right to privileged access to classified information.¹⁰⁷

The originator rule is predominantly invoked by Member States under the justification of national security. In the case of *OMPI*, France refused to disclose classified information to the Court on the grounds of national security rules and procedures for the protection and disclosure of classified information. Remarkably, these objections were raised by France towards the Courts despite the fact that such information had been shared with the governments of all Member States.¹⁰⁸ The UK too in the case of *Fulmen v Council* refused to grant the Court access to the classified information on basis of national security.¹⁰⁹ External parties that have agreements with the EU for the exchange of classified information, also invoke national security concerns to limit sharing documents with EU oversight institutions. For example, the US Treasury Department refused authorisation to Europol to share the classified report regarding the TFTP programme with the European Ombudsman's on justifications of national security.

Some key aspects of the originator rule are unclear regarding its applicability and consequences in the EU. First, it is not fully clear upon which specific legal basis this limitation is applicable within the EU legal order. Disagreements persist between the oversight institutions on whether the originator rule blocks access to classified information as a matter of arrangements for exchange of classified information agreed

¹⁰⁷ Unlike Section 6.1 of this chapter where we addressed whether there is a sole prerogative of the executive actors to decide on secrecy claims, the current discussion is different because we are not concerned with secrecy effects in relation to individual rights or public access, but with effects on privileged access pertaining to oversight.

¹⁰⁸ Case C-27/09 P *France v People's Mojahedin Organization of Iran*, Opinion of AG Sharpston, EU:C:2011:482, para 72; Eckes, 'Decision-making in the Dark?' (n 42) 12-13.

¹⁰⁹ *Council v Fulmen and Mahmoudian* (n 51) para 77.

between the executive institutions. For example, in the TFTP case, the Legal Service of the European Parliament opined that the discretion of the originator is final vis-à-vis the European Ombudsman, not on the basis of the technical arrangements between the EU agency and the US, which are not of a nature of an international agreement and cannot constitute a binding effect on the EU institutions, but on the basis of the Statute of the European Ombudsman, which itself accepts that privileged access to classified information is not absolute.¹¹⁰ It is indeed hard to specifically decipher whether the applicability of the originator rule means a final limit for access and if so upon what legal basis this is the case, since the originator consent is included in the rules of each institution, both executive and oversight, and also in all agreements and Council Decisions, such as for Europol and the EEAS. Yet, it must be stressed that the oversight institutions have incorporated the originator condition. Hence, this rule currently forms part of their own regimes. It may be argued therefore, the applicability of the rule and the resulting limitation of access is due to the oversight institutions acceptance of limited privilege access. This relates to the second aspect of oversight and the originator rule in need of clarification: Why would the oversight institutions accept limitations to privileged access to classified information?

Partly, EU oversight institutions have incorporated the originator control because they had no choice to do otherwise at the time of making the legal arrangements for access to EU executive classified information. For example, the Council conditioned access by the European Parliament clearly with the adoption of the originator rule,¹¹¹ and in some cases the Council refused to grant access to classified information to the Court precisely noting the lack of confidentiality rules for the Court,¹¹² until the latter was recently the last oversight institution to incorporate it. It is quite remarkable that the Council through arrangements for access to EUCI, *de facto* conditions and affects the constitutionally set prerogatives of oversight institutions. It was noted in Chapter II, that the secret-keeper through secrecy has the power to alter the actions of the outsider institution. The outsider is reliant on the secret-keeper, giving the latter discretion to affect the relationship in line with its interests. It seems that this misbalanced relation between the secret-keeper and the outsider is not prevented in the institutional setting of the EU, as would be expected from an openness perspective.

110 European Parliament Legal Service, Legal Opinion regarding the European Ombudsman's access to documents concerning Europol's activities under the TFTP Agreement, 2 February 2015, Document: SJ-1058/14, D(2015)1986.

111 See David Galloway, 'Classifying Secrets in the EU', paper presented at Transparency and Access to the Records and Archives of the EU Institutions Seminar, European University Institute, 25 January 2013.

112 *Council v Fulmen and Mahmoudian* (n 51).

To some extent however, the oversight institutions accepted the originator rule without fully realising its limitations. Accepting what is presented as ‘confidentiality’ is seen as a *sine qua non* for conducting oversight in issues pertaining to security and secrecy. However, confidentiality in this case does not imply merely having access to classified information behind closed doors and not sharing with the public. It goes further and limits privileged access fully. For example, it is worthwhile to note the surprise of the European Ombudsman regarding the lack of access to the TFTP report. The rules of the Statute of the European Ombudsman were changed long ago and have incorporated the originator rule, yet it is only after the opinion of the EP’s Legal Service in 2015 with regard to the rigidity of originator consent that the European Ombudsman actually realised the consequences and understandably disagreed with them.¹¹³

The originator rule limits privileged access to classified information and does so based on the rules internalised by the oversight institutions, regardless of whether the latter had no choice in doing so or were not fully aware of the profound resulting consequences. Is the originator rule leading to a kind of ‘EU executive privilege’?

6.2.3 Creating an ‘Executive Privilege’ in the EU?

A comparative look at the US practice of secrecy points to what is called ‘executive privilege’, which enables the President and high-level executive branch officials to withhold information from Congress, the courts and the public.¹¹⁴ Established in the case of *U.S. v Nixon*,¹¹⁵ this privilege is not mentioned anywhere in the US Constitution, yet this is not the only aspect that makes whether it is constitutionally acceptable highly disputed.¹¹⁶ Rather, it is questionable whether it grants power to the executive branch that is disproportionate to those foreseen by the Constitution and leads to an unacceptable practice from a democratic accountability perspective.¹¹⁷ This final subsection questions whether, through the rule of the originator control, a version of this

113 Letter from the Ombudsman to the European Parliament LIBE Committee in relation to case 1148/2013/TN, 27 February 2015.

114 Mark J. Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability* (3rd edn, University Press of Kansas 2010).

115 *United States v Nixon* 418 US 683 (1974).

116 Heidi Kitrosser, ‘Secrecy and Separated Powers: Executive Privilege Revisited’ (2007) 92 *Iowa Law Review* 489, 514-15, 542-43.

117 Heidi Kitrosser, *Reclaiming Accountability: Transparency, Executive Power, and the U.S. Constitution* (University of Chicago Press 2015).

type of executive privilege is *de facto* being established in the EU. More importantly, it is argued that the originator control in the EU should be construed narrowly, leading to limits for public but not privileged access.

It is unquestionable that in the current practice of the EU the originator principle blocks privileged access, as the discussion above shows. The question rather becomes whether this practice is resulting in an equivalent of the US highly disputed practice of executive privilege. In essence, in both practices the executives are not sharing information and claim that this is both justified due to national security interests and within their powers to withhold information fully. More importantly, the executive institutions become the final arbiter on whether the information should be disclosed to the oversight institution when the originator rule is invoked. Furthermore, it is noteworthy that this level of final control emerges not from constitutional norms but has been developed in the EU by the executive institutions themselves, under external pressure from military actors such as NATO,¹¹⁸ and in turn it has been used as a condition to establish security agreements for the exchange of classified information with EU oversight actors. In a slow and shadowy manner, the executive institutions, particularly the Council, introduced a practice of secrecy that leads to stronger powers for them and their position of control over the accessibility of classified information.

Inaccessibility to classified information leads the oversight actors to become incapable of exercising their oversight responsibilities. The discretion of executive actors regarding limits of access should not expand to the extent of obstructing oversight processes. Moreover, as mentioned above, privileged and public access should not be treated the same. Although in the case of *Sison II*, discussed above, it was noted that a wide margin of executive discretion regarding non-disclosure is permitted and possibly the requesting party could even face deep secrecy, such limitations cannot be applicable for oversight institutions considering the constitutional stipulations of oversight, institutional balance and sincere cooperation. If the Court were to interpret the originator rule in the context of privileged rather than public access, as the case in *Sison II*, such a level of secrecy would not be acceptable since the Court faces a different set of questions when it comes to institutional balance and the constitutional architecture of peer-to-peer accountability. For example, the Court does clearly provide its own final authority to decide on the fundamental rights implication in cases of secrecy consideration in security cases, such as a fair trial and the right to defence. It could be imaginable that the Court would aim towards protecting

¹¹⁸ See Chapter IV.

the constitutional rights of the European Ombudsman and the European Parliament for access in order to conduct oversight. It is noteworthy that the Court interprets the principle of sincere cooperation and information sharing obligations between the institutions rather broadly in this regard. This becomes most clear in the case of the Mauritian Agreement concerning obligations of the Council to share information even for matters strictly pertaining to the Common Foreign and Security Policy, which is exactly the type of sensitive area of EU law with limited EU level oversight. The Court most clearly stated the obligation to share information, regardless of the area, due to sincere cooperation.¹¹⁹

Furthermore, drawing an analogy with the Court's interpretation regarding public access in cases such as *Sweden v Commission* and *Council v Hautala*, the Court would not allow a limitation of public access right that leads it to be 'frustrated without an objective reason and that the effectiveness of the right would be substantially reduced'.¹²⁰ Indeed privileged access to EUCI would lose meaning and purpose for oversight institutions if limitations are invoked precisely for the key information that oversight institutions utilise. Furthermore, the Court finds unacceptable regarding public access that: 'documents of the same kind and of the same importance for shedding light on the [European Union] decision-making process could be granted or refused depending solely on the origin of the document'.¹²¹ An additional key argument in favour of limiting the applicability of the originator rule is that national law cannot impose limitations on the realisation of EU law and prerogatives. The problem of course is that the originator rule does not merely derive from the national level but it has been incorporated at the EU level and internalised by the oversight institutions. However, it should be stressed that Member States or third parties do not have a 'general and unconditional right of veto, so that it could in a discretionary manner oppose the disclosure of documents originating from it and held by an institution'.¹²² Similarly, national security cannot be broadly invoked as a limitation to comply with sharing information. Although indeed Article 346(1a) TFEU provides that 'no Member States shall be obliged to supply information the disclosure of which it considers contrary to the essential interest of its security', the Court has already given a narrow interpretation to such exceptions. In *Commission v Finland*, the Court has held that derogations provided for in Article 346(1a) must be interpreted strictly and that the

119 Case C-658/11 *European Parliament v Council of the European Union*, EU:C:2014:2025, para 85.

120 Case C-64/05 P *Sweden v Commission*, EU:C:2007:802, para 64; *Hautala v Council* (n 20) para 26.

121 *Sweden v Commission*, *ibid*, para 72.

122 *Sweden v Commission* (n 120) para 75.

provision cannot be understood in such a way as to confer on Member States a power to depart from the application of EU law.¹²³ Crucially, the Court stated that national security justification as such does not provide a basis for the Member States not to provide information. The Member States invoking Article 346(1a) must actually prove that its application is necessary in order to protect its essential security interests and in principle make information available.¹²⁴

Lastly, the originator control leads to consequences of classification and block information that is disproportionate because it does not only affect the original document but also the deriving documents. This effectively leads to the EU documents *de facto* never breaking away from the national and foreign classification decision. Instead, the originators ensure a permanent link and discretion, which could possibly result not only in blocking privileged access but also in creating over-classification.

Overall, the establishment and practice of originator control reflects the rigid security driven logic and the technicalities of the classification without a consideration of consequences beyond the executive's needs. It reflects the one-sidedness of the EUCI regime that caters to executives and their control, but blocks even constitutionally set oversight prerogatives. This should no longer be the case in a Union that is legally dedicated to democratic principles and openness.¹²⁵

CONCLUSIONS

This chapter examines judicial, parliamentary and administrative oversight of secrecy in the EU. More specifically, it first assesses how executive claims to secrecy are reviewed. EU oversight institutions have different powers of review over executive secrecy. The European Parliament's review of the decision to classify documents in the EU is limited only to the Commission, although it seeks to disclose executive secrecy through other broader oversight powers, such as vetoing international agreements. The Court and the European Ombudsman have review powers regarding any institutions' claim to secrecy and can assess whether they unfairly limit the public interest in disclosure or override individual rights.

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

124 *Commission v Finland*, *ibid*, para 53. See Panos Koutrakos, *The EU Common Security and Defence Policy* (OUP 2013).

125 Art 1 TEU, art 10 TEU, art 11 TEU, art 15 TFEU, and art 41 of the Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

The oversight institutions' privileged access to classified documents is the second main aspect to oversight that this chapter assesses. In line with the democratic constraints established in this research, the single most important aspect regarding oversight institutions is that they do not fully depend on the discretion of executive actors regarding access to information. In an institutional setting the empowerment of the secret-keeper over the disclosure of secrecy should be matched with prerogatives of the outsiders to avoid or prevent a misbalance of powers. The EU oversight institutions enjoy a privileged access to classified information, which derives specifically from their constitutionally stipulated role in oversight. However, this privileged access is not absolute but rather limited by the rule of originator control, which extends to the point of fully blocking access to classified information for oversight actors. The EU oversight actors are reliant on executive actors for access and face a clear limitation that can be invoked for their privileged right to access. Furthermore, this limitation is stipulated internally within the rules of oversight actors, hence they are based on EU law, as well as included in all arrangements and agreements regarding classified information that the EU has with third parties as well as with the Member States. The number of cases in which the originator rule is invoked remains of secondary relevance when we consider that it may be invoked for the most relevant information that oversight actors would aim to receive.

The unbound discretion of the executive actors to limit the privileged access to classified information by EU oversight institutions is in contradiction with democratic constraints of secrecy. How do EU oversight actors respond to this discretion? Is it still possible for them to provide a counterbalance to secrecy despite these limitations? These are crucial questions pertaining to the practice of oversight that Chapter VII will address.