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CHAPTER 7

THE PRACTICE OF EU OVERSIGHT:
SECURITY IMPLICATIONS

INTRODUCTION

What I have learned in my long experience, what I can say for democracy is that there is no final or ultimate solution.

It is a process... constant checks and balances.

We have to make sure to create a margin or borders of checks but we must understand that there will be cases that outline these borders.¹

Democratic constraints of secrecy establish ‘borders of checks.’ These checks are challenging to maintain in the context of the European Union, with the growing tension between networked executives and intelligence cooperation, on the one hand, and compartmentalised oversight structures, on the other hand. Secrecy increases the existing information asymmetries and enables the creation of new ones spread throughout the multi-layered structures of the EU. In exercising their oversight functions, EU institutions seem to adapt to secrecy rationales rather than taking the lead in maintaining democratic constraints.

This chapter addresses the broader questions regarding secrecy and oversight. It goes beyond the detailed rules of classified information and limitations of access to official secrets, and instead focuses on the secrecy implications for oversight. The purpose of this chapter is to examine whether oversight institutions do indeed provide a counterbalance to executive secrecy in the EU and more importantly, to question how the regulation and practice of secrecy affects the practices of EU oversight. In this regard, the chapter pays particular attention to public deliberation, as it is one of the main democratic constraints of secrecy, as well as the implications of secrecy for the exercise of fundamental rights. Both of these aspects are crucial for the evaluation of secrecy in the EU and also illustrate the adaptations and changes to oversight that the chapter aims to uncover.

Firstly, the chapter discusses the EU’s practice of oversight especially as it concerns the disclosure of secrecy and the limitations on fundamental rights. Secondly, it elaborates on the changes to oversight processes in the EU due to secrecy regulation.

¹ Respondent No. 25

7.1 OVERSIGHT BEYOND SECRECY LIMITATIONS

Rules of official secrets create limitations to oversight processes by blocking valuable information for the institutions, as the previous Chapter VI discussed in detail. The complex and multi-layered setting of the EU makes the challenges of secrecy even more pronounced. For example, compartmentalisation of information due to secrecy regulation expands both at the national and the EU level as the rules regarding disclosure of information have an adverse effect on each other.² Beyond practices more directly related to secrecy, the setting of the EU itself makes oversight problematic due to the lack of clarity regarding the division of powers, especially regarding security policies in the Common Foreign and Security Policy.³ Hence, EU oversight institutions do indeed face significant challenges to review executive action. However, the responsibility of oversight institutions is not relinquished due to these serious challenges. Oversight institutions are accountable for defending citizens' rights and interests in openness when the latter are unjustly limited due to executive secrecy claims. Moreover, executive secrecy is not a new problem in conducting oversight, rather the contrary, considering that some level of executive secrecy is typically present in issues of security. Hence, it would be expected that oversight institutions make the necessary policy arrangements to provide a counterbalance to secrecy and executive power. This section examines the EU oversight practice of disclosing secrecy beyond the limitations imposed by the rules of official secrets. The main focus is on the European Parliament as it is in a position to provide an active form of oversight. By an active role, this chapter implies that the European Parliament is in a position to actively choose the issues over which it exercises oversight, through parliamentary inquiries and questions. Whereas Chapter VI examines the rules and powers of the European Parliament to review executive secrecy claims, the focus in this chapter is to examine the practice of the European Parliament on disclosing secrecy and/or bringing issues veiled by secrecy to public attention and debate.

Although the focus is on the active oversight role of the European Parliament, judicial review is also salient. Chapter VI notes the crucial role of the Court in protecting fundamental rights when executive claims to secrecy limit these rights. The

2 Deirdre Curtin, 'Top Secret Europe', lecture delivered upon appointment to the chair of Professor of European Law, Universiteit van Amsterdam, 20 October 2011.

3 Ramses A. Wessel and Leonhard den Hertog, 'EU Foreign, Security and Defence Policy: A Competence-Responsibility Gap?' in Malcolm D. Evans and Panos Koutrakos (eds), *International Responsibility: EU and International Perspectives* (Hart Publishing 2012) 339-358.

Court deals with the confidential information and material that are relevant for the particular case at hand and the Court may discard undisclosed secret material, as we saw with the *Kadi II* case and the *ZZ* case. Related to this power to dismiss secret material, the Court also has final authority to decide on the consequences of executive non-disclosure. In this regard, the Court has repeatedly annulled executive sanctions on individuals due to non-disclosure of documents.⁴ The counterbalance power of the Court with regard to the disclosure of secrecy in the EU in cases pertaining to the right of public access to information is less straightforward than the issues arising in the cases of judicial protection. The Court has laid the foundation for an overall improvement of transparency in the EU through numerous cases, many of which have set more strict standards for secrecy in the EU. However, when it comes to classified information and public access, particularly regarding the interpretation of Article 9 of Regulation 1049/01 and the exceptions to public access under Article 4(1a) relating to security and international relations, the Court leaves a wider executive discretion in deciding for non-disclosure.

Administrative review by the European Ombudsman, as Chapter VI elaborates, is important to the oversight of secrecy in the EU as the prerogatives of the European Ombudsman relate to requesting documents from institutions in cases of public access to documents to review whether the documents should be disclosed. However, regarding classified information specifically, as was noted, cases are limited in the practice of the European Ombudsman. Moreover, in practice the European Ombudsman's inquiries for maladministration 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.

In light of these considerations regarding judicial and administrative review, the focus is most centrally on the European Parliament and the different institutional measures it could utilise to disclose secrecy. It should first be pointed out that a distinction must be made between instances when the European Parliament discloses salient information that also becomes available to the public and cases of privileged access to classified information and oversight, which implies that the information remains secret for the public. From the perspective of public knowledge and deliberation,

⁴ 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' (2012) Amsterdam Centre for European Law and Governance Working Paper Series 2012-02, 12-13.

the European Parliament's efforts regarding public disclosure are more significant as they enable the engagement of citizens and civil society as opposed to a focus on inter-institutional oversight.

7.1.1 European Parliament and Unveiled Secrecy in Practice

The starting point of any scrutiny process is access to the relevant information. In order to turn the potential of the oversight prerogatives into actual practice, oversight actors should be able to access classified information fully and in a timely manner. In other words, it is the inaccessibility of classified information that stops the oversight processes even without being able to actually address substantive policy questions. Moreover, when oversight actors are not granted access to classified information, this problem becomes an issue in itself and a point of dispute between oversight and executive institutions, resulting in attention being drawn away from the actual policy or substantive issues.⁵ For example, the European Parliament disagreed with the Council regarding the latter's failure to share information at the conclusion of an international agreement, despite the fact that the European Parliament's prerogative for information is explicitly stipulated in Article 218 TFEU.⁶ Before specifically addressing how the European Parliament contributes to the disclosure of secrecy, it should be pointed out that comparative examples show that in fact the institutional mechanisms of checks and balances do not always expose secrecy even if there is doubt of possible misconduct. Research shows a variety of reasons why this is the case. For example, neither judges nor parliamentarians would expose something that is presented to them in the name of national security as strictly relevant and with possible severe consequences if the information is disclosed.⁷ For parliamentarians, it is also noted that they would not engage more seriously in issues that do not benefit them politically or benefit their constituency. Lack of resources to confirm their doubt is another reason why oversight actors refrain from the disclosure of secrecy. Most importantly, there are instances when oversight is not a question of an institutionalised check, but rather as comparative examples in the US show, a handful of representatives being 'briefed' about security programmes behind

5 See Marike de Goede, 'The SWIFT Affair and the Global Politics of European Security' (2012) 50 *Journal of Common Market Studies* 214.

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

7 Stephen J. Schulhofer, 'Secrecy and Democracy: Who Controls Information in the National Security State?' (2010) Public Law and Legal Theory Research Paper Series, Working Paper No. 10-53, 15 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1661964> accessed 30 August 2015.

closed doors.⁸ In light of these comparative perspectives, we focus on the European Parliament and whether it is able to trigger disclosure and/or institutional mechanisms of responding to secrecy.

A. The Press and Unauthorised Disclosure of Secrecy

Unauthorised disclosure of secrecy, otherwise known as ‘leaks’, refer to classified information that is disclosed to the public, the press or a specific individual, without the authorised permission of the executive actor in possession of the information. In important cases regarding possible abuse of power, the European Parliament has been able to react and receive more information only after the initial information was leaked to the press. Once the European Parliament has the information, it becomes more relevant to examine the type of oversight mechanisms utilised.

The first salient example in this regard is the recent case of the EU’s mission in Kosovo, EULEX. Initially, the local Kosovar newspaper leaked information about possible abuses and corruption of EULEX officials. The European Parliament was “utterly shocked” by the revelations as it had no information regarding the possible wrongdoings, first published in a local daily press.⁹

In response to the leaks, the European Parliament immediately made efforts to react through institutional means and called for an investigation. It sent a letter to the High Representative responsible for the EU mission and questioned officials of the EEAS, although this session took place behind closed doors. The letter of the European Parliament does not hide its frustration at not being able to rely on receiving classified information regarding the matter directly from the High Representative, but that it instead had to rely on leaks. In fact, the MEPs straightforwardly posed the question to the High Representative that if the leaked news ‘had not appeared in the press when would we have found out?’¹⁰ The leaks regarding the possible abuse of power at EULEX, led the European Parliament to request an independent review of the case. Indeed, here we see the direct influence of the European Parliament with regard to initiating and steering the oversight processes due to the leaked documents and allegations they give rise to. However, in line with the competence divisions, it is the High Representative

8 Dan Froomkin, ‘The Inverse of Oversight: CIA Spies on Congress’ *The Intercept* (5 March 2014).

9 Andrew Rettman, ‘MEPs Ask Tough Questions on EU mission in Kosovo’ *Euobserver* (Brussels, 6 November 2014).

10 European Parliament Committee on Foreign Affairs, Letter to the High Representative Federica Mogherini, 5 November 2014, Ref: D(2014)52464 <<https://s3.eu-central-1.amazonaws.com/eu-obs-media/80f8f54af7a911e5a6ed2c6e0d7483f9.pdf>> accessed 30 August 2015.

that chose the independent reviewer and assigned the specific review tasks. After an investigation lasting four months, the independent reviewer concluded that allegations of a cover up seem to have been unfounded. However, according to him, an internal investigation should have been opened at the outset. The report found that most of the issues raised were more a result of administrative and structural limitations, rather than deliberate errors.¹¹ More relevant for the current discussion, is the role and the results of the European Parliament regarding the case. The European Parliament in this case was not able to disclose the secrecy involved, in fact it did not even learn about it through official channels of communication at the EEAS or the High Representative, but through the information leaked by the press. However, it is salient that the European Parliament took a hard stance and requested an independent review, which did take place, although the effective changes at EULEX remain within the prerogatives of the High Representative.

Besides cases concerning EU bodies, the disclosure of information by Edward Snowden regarding mass surveillance under the authority of the US National Security Agency is another example that points to the role of the European Parliament in the practice of secrecy disclosure. This case illustrates the difficulties of the European Parliament to gain access to national classified information from national parliaments. It also points to the new challenge for parliaments to gain access to classified information on issues that fall beyond their jurisdiction despite the fact that the consequences of these acts have an impact on EU fundamental rights. Moreover, the case seems to indicate that the powers of the European Parliament are limited when it comes to initiating institutional oversight that requires cooperation with the other institutions.

Unlike the EULEX case, which clearly relates to EU powers and bodies, it might not be immediately obvious what the role of the European Parliament is and what it can contribute, since surveillance is not an EU power and this was also not performed by EU authorities. In fact, as Chapter II elaborates in depth, the relevant EU bodies in issues pertaining to intelligence cooperation have mostly coordination roles. However, the involvement of the European Parliament is justified considering that these

11 Vincent Van Doninck, 'Report on Corruption Claims within EU Mission in Kosovo' *EUReporter* (16 April 2015); Jean-Paul Jacqué, *Review of the EULEX Kosovo Mission's Implementation of the Mandate with a Particular Focus on the Handling of the Recent Allegations*, 31 March 2015, <http://www.eeas.europa.eu/statements-eeas/docs/150331_jacque-report_en.pdf> accessed 30 August 2015. Federica Mogherini, 'Statement by High Representative/Vice-President Federica Mogherini on the report by Jean-Paul Jacqué on the EULEX Kosovo mandate implementation in case of recent allegations' (14 April 2015) <http://eeas.europa.eu/delegations/kosovo/press_corner/all_news/news/2015/20150414_en.htm> accessed 30 August 2015.

measures affect the right to privacy and data protection, which are enshrined in the Charter of Fundamental Rights. Hence, this is not a question of power limitations regarding intelligence oversight, but rather the involvement of the European Parliament is justified due to the consequences that these actions have for EU fundamental rights. Another relevant reason for the European Parliament's involvement has to do with the existence of oversight models that go beyond traditional divisions. It is still predominantly the case that democratic oversight of intelligence activities is conducted at the national level, yet due to the international nature of security threats there is a continuous and high level of exchange of information between Member States and third countries such as the US, which in turn implies a need for improvement of oversight mechanisms at national level and EU level.

The oversight by the European Parliament concerned examining the role of national intelligence cooperation and discussing the effects and implications for EU fundamental rights. The report of the European Parliament for instance made an important finding that the oversight of intelligence bodies in the majority of the EU Member States lacks a strong legal framework, *ex ante* authorisation and *ex post* verification as well as adequate technical capability and expertise.¹² Besides the capabilities and legal frameworks, the report also points to concerns regarding the degree of control.¹³ This case further shows the point discussed about the lack of cooperation for oversight, which is certainly a problem in a context where intelligence cooperation is interconnected. The European Parliament in its report explicitly notes that the national authorities declined to cooperate with the inquiry of the European Parliament, specifically the British and French Parliament declined to participate. Such lack of sharing information shows 'again the uneven degree of checks and balances within the EU on these issues and that more cooperation is needed between parliamentary bodies in charge of oversight.'¹⁴ The other salient question remains whether the European Parliament's report and calls for more action to the Commission led to more significant consequences and institutional changes. In this regard, we see that besides the lack of cooperation by some national parliaments, the European Parliament also faces difficulties in initiating oversight and policy changes when it requires

12 European Parliament, Committee on Civil Liberties, Justice and Home Affairs, *Report on the US NSA Surveillance Programme, Surveillance Bodies in Various Member States and their Impact on EU Citizens' Fundamental Rights and on Transatlantic Cooperation in Justice and Home Affairs*, (2013/2188(INI)), 21 February 2014 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2014-0139+0+DOC+PDF+V0//EN>> accessed 30 August 2015.

13 *ibid*

14 *ibid* 46.

the cooperation of the EU executive actors. Since the Commission refused to suspend the TFTP agreement, which the European Parliament requested, the Council merely set up a ‘transatlantic group of experts on data protection’, which met three times and produced a report. Furthermore, the second expert group to be set up by the Council did not inform the European Parliament on the questions of intelligence cooperation with the US. The European Council has merely addressed the surveillance problem in a statement of Heads of State or Government.¹⁵

Another inquiry regarding surveillance concerns the ECHELON case, a comprehensive global interception system. The European Parliament led an inquiry into the suspicion of possible surveillance in the ECHELON case, which predominantly concerned commercial espionage and competitive advantages. The similarities of the cases are relevant with regard to the European Parliament’s oversight prerogatives and the inquiries. The EP learned about this possible surveillance programme through a report concerning national and international communications interception networks. The author of this report claimed that all e-mail, telephone and fax communications in Europe were routinely intercepted by the US National Security Agency. This is an example of the European Parliament being much more directly engaged through setting up the temporary committee and contributing to the disclosure of secrecy about this interception system. The European Parliament issued a significant report, the findings of which shed light on what was a secret programme at the time. Firstly, the report of the European Parliament clearly confirmed that the purpose of the ECHELON system is interception and that it is concerned with private and commercial communications and not military communications. Secondly, the European Parliament’s findings were relevant for informing other EU institutions since ‘many senior Community figures, including European Commissioners, who gave evidence to the Temporary Committee claimed to be unaware of this phenomenon.’¹⁶ Lastly, through collaboration with the US authorities, the European Parliament was able to provide a more concrete idea of the consequences caused by the programme and it revealed that 5% of intelligence was gathered via non-open sources and was used as economic intelligence, possibly resulting in a situation that enabled the US industry to earn up to US\$ 7 billion in contracts.¹⁷

15 European Council, ‘Conclusions of the European Council 24-25 October 2013’ Brussels, 25 October 2013.

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

17 *ibid* 224.

The common feature of the cases discussed thus far is that the European Parliament always learned about the alleged abuses of power through leaked information, i.e. unauthorised disclosure of classified information. Some scholars argue that precisely when abuse of secrecy takes place, leaks are the most likely means to actually disclose secrecy.¹⁸ Considering that some of these secrets are deep secrets, such as the PRISM surveillance programme revealed by the Snowden Leaks, which in turn means that only a highly selected number of individuals know about it and the programme is non-existent for most oversight actors, and taking into account that the inside-insiders would have no incentive to disclose the information, it perhaps indeed remains viable that abuses of secrecy could be revealed merely through leaks. However, the revelation or disclosure of secrecy, albeit the core issue, is only the starting point of oversight. Institutionalised mechanisms of oversight are still needed to address the consequences of secrecy. This implies that while Snowden together with the press did indeed enable the disclosure of deep secrecy, it is only through legal reforms that the prerogative of security agencies and how oversight is exercised over them can be shaped and legal consequences would follow for the security agencies involved. Indeed, this is precisely what we witness with the case of Snowden leaks as it took Congress to reform the legal framework enabling the prerogatives of the NSA.¹⁹ In this regard, the question then arises whether if the MEPs had the information, hence if it were not always an external source, would they leak the information themselves. Many of the EU officials interviewed from executive institutions and security agencies,²⁰ suspect that MEPs would leak classified information and cannot really be trusted because they have self-serving interests to promote their political agenda. On the contrary, the MEPs claim that they would leak information because sometimes it is the only way for the public to know. For example, an MEP explains:²¹

‘Yes, I leak. Obviously not for issues that concern persons or their personal matters, but if there are cases when we ask for information that is not being given to us but only to the Commission or the Council and we are dealing with questions like it was the case with the Passenger Name Record, yes I would leak with no hesitation. Also, the public must know. This isn’t about political gains; this is about excessive secrecy that is not necessary in cases where I think there should be a debate about this.’

18 Rahul Sagar, ‘On Combating the Abuse of State Secrecy’ (2007) 15 *Journal of Political Philosophy* 404.

19 Jennifer Steinhauer and Jonathan Weisman, ‘U.S. Surveillance in Place Since 9/11 Is Sharply Limited’ *The New York Times* (Washington, 2 June 2015).

20 Respondents No. 1, 3, 6, 7 10, 22.

21 Respondent No. 26.

Leaks might reveal deep secrecy and abuses of secrecy, but as a means of revelation they are not, and some would argue should not,²² be an accepted or regular form of informing and initiating oversight.

B. Parliamentary Inquiries Shedding Light on Secrets

Disclosure of secrecy in a number of cases takes place through information received from NGOs or informal discussions with inside officials from executive institutions. The basis of information for possible initiation of oversight is therefore once again external, yet in this case the information may be less reliable as the European Parliament does not receive classified information *per se* through unauthorised sources but relies on ‘hints’ of information. Whereas, similar to the examples of leaks, the European Parliament does not directly contribute to the disclosure of secrecy, it does initiate inquiries that reveal important facts and it is important to stress that in these cases the aim is not merely focused on closed oversight but also on informing the public and possibly steering public pressure towards action by executive institutions. The following cases illustrate this type of revelation and oversight. Firstly, in April 2005, the European Parliament issued a Resolution after it had been informed unofficially by Commission officials, as an MEP indicated,²³ about a secret agreement between Italy and Libya, in which Italy would have the right to send back refugees *en bloc*, despite this being contrary to the EU law.²⁴ The content of the agreement between the two countries was in fact secret and was not revealed to the European Parliament. It was also not transparent that the Commission took part in a technical mission to Libya on illegal immigration in 2004. Against this background and executive secrecy by both national and EU executive bodies, the European Parliament decided to set up an investigation of its own and several MEPs went directly to Lampedusa to assess the situation. The European Parliament had received information from NGOs about the severe conditions in Lampedusa where ‘there were 900 people in places where there should only be 200’.²⁵ During the inquiry, the European Parliament issued a report and aimed to raise more public pressure on the matter. However, as an MEP who partook in the investigation admits:²⁶

22 Eric A. Posner, ‘Before You Reboot NSA, Think About This: The Paradox of Reforming the Secrecy-Industrial Complex’ *The New Republic* (6 November 2013).

23 Respondent No. 26.

24 European Parliament, *Resolution by the European Parliament on Lampedusa*, 14 April 2005.

25 Respondent No. 26.

26 Respondent No. 26.

You cannot always mobilise the public to the extent that more serious consequences would follow. This is very hard at the EU because it always becomes a question of who is responsible and a typical problem is the outsourcing of responsibility. This raises questions: Who are you dealing with? Who if anyone should be discharged? And this is where there is a big difference between the national and the EU level. At the national level we talk about resignations and this is a big threat; at the EU level this is not the style. You don't have this at the EU level, you cannot build enough pressure.

The case of Lampedusa illustrates that most of the tensions that the oversight structures in the EU face, such as the level of secrecy and non-cooperation with the European Parliament, are faced by both the national authorities as well as the Commission. Yet, it also illustrates precisely the point that we made initially, that the oversight bodies are responsible for investigating and raising public attention despite these limitations. What we see in this case is that the MEPs took direct action: they went to Lampedusa to further investigate and obtain the facts first hand and in this regard they also cooperated with the NGOs that were working and sharing information with the European Parliament. Besides reporting on the issues and aiming to raise public pressure, MEPs have limited means to deliver oversight with direct sanctions such as resignations. However, it is on issues of this nature that cooperation with national bodies of oversight may yield results and sharper mechanisms of accountability. The Lampedusa case shows, as one MEP explained, 'an example of going even further than what the limitations [executive secrecy at national and EU level is] impose on us'.²⁷

Another pertinent case regarding the oversight of the European Parliament on the basis of 'inside' information regards the Report of the European Parliament on the alleged investigations conducted by the US Central Intelligence Agency in the territories of some Member States that possibly included torture.²⁸ Upon information received from a variety of inside sources, the European Parliament initiated an investigation that most directly relates to its efforts to disclose deep secrecy and the possible violation of human rights in these investigations. Importantly, the Report exposed that 'at least 1,245 flights operated by the CIA flew into European airspace or stopped at European

²⁷ Respondent No. 26.

²⁸ European Parliament, *Report on the Alleged Use of European Countries by the CIA or the Transportation and Illegal Detention of Prisoners*, (2006/2200(INI)), 30 January 2007 <<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2007-0020&language=EN>> accessed 30 August 2015.

airports between the end of 2001 and the end of 2005.²⁹ Most significantly, the Report shed light on the fact that the majority of cases involved incommunicado detention and torture.³⁰ The European Parliament's efforts were also aimed at uncovering not merely the manner in which the investigation was conducted by the US authorities, but to possibly point out the responsibility and involvement of national authorities from the EU Member States. In this regard, the European Parliament revealed that the practices were known to the British intelligence services and that the intelligence material obtained in this manner was 'tolerated by the UK government'.³¹ Furthermore, the European Parliament pointed out the involvement of Poland, which allowed the secret detention centres to be based there, and which has been more recently confirmed by a ruling of the European Court of Human Rights.³² This inquiry of the European Parliament and the resulting report is valuable from another viewpoint. Although it is not an expected role as such for the European Parliament, it contributes to a more informed oversight than at the national level and possibly adds a more nuanced perspective. In this regard, it was noted that 'the investigation carried out by the Polish Parliament was not conducted independently and that statements given to the Committee delegation were "contradictory"'.³³ Besides bringing different issues clouded by secrecy into public view, it is relevant to examine whether and how EU oversight responds to challenges of executive secrecy when it limits the protection of fundamental rights. In this respect, the role of the Court of Justice of the European Union is key and hence the following section examines this in more detail.

7.1.2 Ensuring Fundamental Rights Despite Secrecy

The CJEU, as we noted in Chapter VI, deals with two main strands of cases that relate to classified information, which affect fundamental rights. Firstly, the Court examines claims of secrecy against the protection of a fair trial and effective judicial protection and secondly, secrecy claims arise in cases of public access to documents. In these two types of cases, the Court offers a counterbalance to executive secrecy in different extents.

²⁹ *ibid* point 42.

³⁰ European Parliament, *Report on the Alleged Use of European Countries by the CIA* (n 28) point 36.

³¹ European Parliament, 'CIA activities in Europe: European Parliament Adopts Final Report Deploring Passivity from Some Member States' Press Release, 14 February 2017 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20070209IPR02947+0+DOC+XML+V0//EN>> accessed 30 August 2015.

³² *Al Nashiri v Poland* App no 28761/11 (ECtHR, 16 February 2015).

³³ European Parliament, *Report on the Alleged Use of European Countries by the CIA* (n 28) point 170.

The Court offers key safeguards in cases pertaining to the right of defence and judicial protection. As we saw in Chapter VI, most of the cases of such nature relate to the individual sanctions regime in which national authorities do not share the classified information with the other party and in some cases they do not share the information with the Court either. In such instances, the Court does not take into account the arguments raised by the executive institutions on the basis of undisclosed material and the Court consistently annuls the Council's decisions precisely on the basis of secrecy. Due to the changed Rules of Procedure of the Court, which we discuss below, we have yet to see whether judicial review will remain a strong safeguard when it comes to secrecy and cases regarding a right to defence.

Unlike the right to a fair trial and judicial protection, public access to documents does not directly affect the individual requesting public access to information, as the regime of Regulation 1049/01 is intended to foster public interest in disclosure. In cases like *In't Veld v Council*, the Court tries to reach a balance between the justified interest of the institution in secrecy or non-disclosure and the democratic necessities of accountability and deliberation. The Court in cases like *Access Info* clearly emphasizes the relevance of participation (and debate therefore) during the process and similarly it seems for international agreements from which constitutional or legislative implications follow. In public access requests pertaining to exceptions for international relations, the Court could be seen to be a counterbalance to some extent but it does give broad discretion to the institutions regarding whether documents should be undisclosed. Most notably, as explained in Chapter VI, in the *Sison II* case, we see the Court accepting a level of deep secrecy as being justified to protect the originator of the information.³⁴

In both types of cases, the manner in which the Court also ensures a limitation to the institutions' discretion and aims to ensure that the right in question is upheld through the requirement of a statement of reasons. However, it is maintained here that this statement of reasons is rather 'thin' and hence it is questionable to what extent it could be seen as sufficient scrutiny of the institution and a safeguard of the right in question. The Court has stated that the degree of precision of the statement of reasons 'must be weighed against practical realities and the time and technical facilities available for making the decision.'³⁵ As we also discussed in Chapter VI, with

³⁴ See Chapter VI, Section 6.1.1.

³⁵ Case T-228/02 *OMPI*, EU:T:2006:384, para 141; Case C-350/88 *Delacre and Others v Commission*, EU:C:1990:71, para 16.

regard to 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 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.’³⁶ Similarly, in cases of the sanctions regime, the Court accepts a short statement of reasons. For example, in the case of *Council v Fulmen*,³⁷ the Court held that the statement of reasons may be brief and it is considered as a satisfactory level of information *if* the individual is able to first, understand what the person is accused of and second, on basis of such information the individual 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*.³⁸ Scholars have pointed out that in cases of sanctions, the Court has adopted a structurally lower standard of review in order to avoid repeated annulments.³⁹

The Court provides a different level of counterbalance and a different level of rigidity in its review contingent upon the right at question. The Court’s different take on these rights could be linked to the following reasons. First, the Court’s assessment of secrecy might be different considering that the rationale for openness and accessibility of information in these sets of cases is of different nature: whereas public access to information norms aim to support the realization of democratic principles, such as accountability and participation, and the right of the individual to her file is crucial for a meaningful exercise of essential procedural rights. Second, in the context of security measures, judicial review may be the ultimate safeguard. As Advocate General Sharpston emphasized in the *OMPI* case, in the context of security measures against terrorism, judicial review ‘is all the more essential because it constitutes the *only safeguard* ensuring that a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights.’⁴⁰ Third, another relevant point regarding the broader legal context is the difference in transparency cultures of the Member States

36 See Case C-266/05 P *Sison v Council* (known as *Sison II*), EU:C:2007:75, para 82; Case T-110/03 *Sison v Council*, EU:T:2005:143, paras 62 and 63.

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

38 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.

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

40 Case C-27/09 P *French Republic v People’s Mojahedin Organization of Iran*, Opinion of AG Sharpston, EU:C:2011:482 (hereafter ‘Sharpston Opinion’), para 75, author’s emphasis.

regarding public access to information.⁴¹ Whereas some Member States might not ensure the right to public access to documents at all or leave a very broad scope to administrative discretion, others have a strong (constitutional) tradition to maintain the openness and availability of public information.⁴² This is in contrast with procedural rights of a fair trial and right to defence, which are common in all legal orders of Member States and furthermore are stipulated in the European Convention of Human Rights.⁴³

7.2 OVERSIGHT BEHIND CLOSED DOORS

We have seen through a number of issues how secrecy challenges oversight and the limitations that it imposes. We have discussed both the prerogatives of the oversight institutions and through examples from practice we have also seen whether and to what extent oversight institutions in the EU actually provide a counterbalance to secrecy. Through the discussion, we noticed the changes and adaptations that oversight actors have made to their oversight structures in order to make their access to classified information possible and hence to be able to actually conduct oversight. The aim of this final subsection is to address precisely this, the changes that secrecy has caused to oversight structures and discuss their implications. This subsection hence is about addressing secrecy and oversight in the EU from a new angle, that of the broader effects of secrecy on how oversight is to be conducted in the EU.

Due to secrecy, oversight institutions have adapted to *closed oversight*. Closed oversight means that both the manner in which the oversight is conducted and the results of the oversight are unavailable to the public. Closed oversight from the strict perspective of checking and reviewing decisions of the executive are not necessarily problematic as they ensure the purpose of scrutinising executive power. However, seen from the perspective of public deliberation as the final constraint of secrecy, we note that openness should have a higher level of applicability, which means that the public should know whether a secret is being kept and what the results of oversight processes are through reports or deliberation. The following section examines

41 Paul Craig, *EU Administrative Law* (OUP 2012) see especially 356-366. See also Deirdre Curtin, 'Digital Government in the European Union: Freedom of Information Trumped by "Internal Security"' in Alasdair Roberts (ed), *National Security and Open Government: Striking the Right Balance* (The Maxwell School of Syracuse University 2003).

42 See also Ulf Oberg, 'EU Citizen's Right to Know: The Improbable Adoption of a European Freedom of Information Act' (1999) 2 *Cambridge Yearbook of European Legal Studies* 303.

43 See Article 6 ECHR.

the changes to oversight that the European Parliament and the Court recently have introduced and how these changes have an impact on their core oversight functions due to facilitating rules of official secrets. The European Ombudsman, unlike the European Parliament and the General Court, does not have a separate set of rules for classified information or special arrangements for classified information.⁴⁴ As Chapter IV elaborates, the Statute addresses classified information as a category that requires special handling by the European Ombudsman when such information is requested from the EU administration in line with its prerogatives to initiate an inquiry or address a complaint received by individuals. The European Ombudsman reviews the requested document in a confidential setting. However such closed oversight does not directly result from the new rules of official secrets in the EU, hence in the current discussion the focus is specifically on the changes that the European Parliament and the Court have made due to EU's regulation of secrecy.

7.2.1 Missing Public Deliberation

*Keeping oversight means two main things, first having the powers and second mobilising the public. I think that the European Parliament has focused and still does the first thing; it is always trying to secure its powers – it is used to do that – it knows how to do that. Debate is completely underdeveloped.*⁴⁵

This is a frank summary by a former Member of the European Parliament regarding the balance and difficulties in ensuring both processes of oversight and public deliberation. How does the European Parliament understand its role in oversight and secrecy and how does it deliver it? Some argue that holding actors to account is about 'managing and cultivating one's reputation vis-à-vis different audiences. It is about being seen as a reputable actor in the eyes of one's audience(s), conveying the impression of performing competently one's (accountability) roles, thereby generat-

⁴⁴ Note, however, that the Statute of the European Ombudsman mentions the following in the preamble: 'the Ombudsman should have agreed in advance with the institution or body concerned regarding the conditions for treatment of classified information or documents and other information covered by the obligation of professional secrecy'. See 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*).

⁴⁵ Respondent No. 26

ing reputational benefits.⁴⁶ Besides reputation, it might be said that it is about powers, as we have noted on several occasions in the power contest between the oversight institutions and executives.

The European Parliament seems to be asserting its powers of oversight and in this respect pushing for access to EUCI. However, research also shows a change of its working methods and increasingly internalisation of executive working methods.⁴⁷ The question then is to what extent is the European Parliament fostering processes of oversight, but also ensuring its deliberation function and bringing secrecy practices more into citizens' view. The necessity of openness for deliberation creates a higher threshold on the question of to what extent secrecy should be limited because it always requires that some information is directly available to the citizens.

Processes of deliberation aim to grant citizens a participatory role in decision-making and hence require that they are informed about processes of oversight and the exercise of secrecy. From this perspective, it is required that core choices regarding secrecy are made in an open manner and through public debate. Hence, more clarity should be established between what is considered secret and what is open and available for citizens to discuss.⁴⁸ In this regard, it has been rightly noted that in a representative democracy 'worthy of its name one of the truly distinctive qualities of parliaments is their publicness, the fact that they constitute a public forum as opposed to an accountability relationship among peers.'⁴⁹ Does the European Parliament live up to this role? Under what circumstances and how do the MEPs (and possibly their staff) access classified information and what precisely can they do once they access those documents? The MEPs that are granted access to EUCI undergo a strict security procedure in order to review the documents. For example, in accordance with Article 6(5), Agreement between the Council and the European Parliament meetings where EUCI is discussed are *à huis clos*. Moreover, documents are distributed at the beginning of the meeting and collected again at the end, documents may not be copied by any means, such as photocopying or photographing, no notes may be taken and the minutes of the meeting cannot make any mention of the

46 Madalina Busuioc and Martin Lodge, '*The reputational basis of public accountability*' (2015) LSE Discussion Paper No. 78 <<http://www.lse.ac.uk/accounting/CARR/pdf/DPs/CARR-DP78-BusuiocLodge.pdf>> accessed 30 August 2015; Erving Goffman, *Presentation of Self in Everyday Life* (Penguin 1959) 243.

47 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.

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

49 Deirdre Curtin, 'Challenging Executive Dominance in European Democracy' (2013) Amsterdam Centre for European Law and Governance Working Paper Series 2013 – 09, 32.

discussion of the item containing classified information. Furthermore, for documents classified at a higher level than *Confidential*, the Council makes arrangements *on ad hoc* basis regarding their access and review. The experience with the Agreement shows that those documents may only be accessed at the Council's premises and under strict security, where all the above-mentioned conditions apply. These arrangements lead to closed oversight. Closed oversight means that both the manner in which oversight is conducted and the results of oversight are not public to the other members of parliament and to the general public. Closed oversight from the strict perspective of checking and reviewing executive decision-making is not necessarily problematic. Should there be an issue to raise alarm, such as the possible breach of public authority, the MEPs would have legal mechanisms to report such conduct. However, from a perspective of deliberation and public knowledge, the role of MEPs is not merely to ensure that executive actors are not breaching their powers, but it is fundamental that they provide the link between what takes place at the executive decision-making level and the citizens. It is necessary from this perspective that the MEPs discuss and communicate how the interests and rights of citizens are affected and what is relevant for them to know. The requirements for the exercise of secrecy, which are directed at ensuring deliberation, are that citizens must know that discussions or some decisions are being kept secret.⁵⁰ For example, citizens or the European Parliament would know that Europol is conducting an investigation about cybercrime in the EU, but they do not need to know which individuals are being investigated or more specific information about their location, which could possibly jeopardise the outcome of the investigation.

The second important element is that the outcomes of the oversight process should be public. Such outcomes may be a public statement, a report or a debate. However, on the basis of European Parliament's resolutions and statements regarding EUCI and the European Parliament's efforts to gain access, it is noticeable that the institutional focus and efforts were centred on the mere point of gaining access. The European Parliament's main concern was not to be outside the 'secrecy circle' and left uninformed about important EU development in the area of security and foreign relations. Less attention or concern was paid to the consequences of access and the manner in which it was organised for the European Parliament's other functions, such as deliberation, or the manner in which access would be organised. Institutional instruments which would allow the European Parliament to be able to make public a clear demarcation of what remains closed are not foreseen in the current EUCI framework, including

⁵⁰ Thompson (n 48) 193.

the European Parliament's own rules about classified information. Instead, the European Parliament has internalised equally strong principles of the EUCI system, such as the originator control. This arises since, to recall, in line with the European Parliament's new procedural rules, access to official secrets is limited in cases of the lack of the originator's consent, as Chapter VI discussed in detail. Due to closed oversight and the obligations of the European Parliament not to disclose EUCI in any manner, the specific outcomes of the oversight process are not made public. Classified information and its access by MEPs are not allowed to be included even in the meeting minutes.⁵¹ The consequences of closed oversight when considered with the fact that European Parliament has no institutional measures to alert the public (besides individual MEPs alerting the press for example), raise concerns because as recent research has shown, "democratic controversy, transparency and critical debate" are mostly avoided.⁵² Parliamentary questions are the only form of public oversight.⁵³ They are also published on the European Parliament's website as well as in the EU's official journal. The caveat here is that the content of classified information will not be discussed. Hence, when oversight processes are open, crucial questions regarding classified information may be left unanswered by invoking executive confidentiality.

7.2.2 Secret Evidence

In April 2015, the General Court adopted its new Rules of Procedure, which were fully negotiated and established behind closed doors. Article 105 of the proposed Rules of Procedure, explicitly stipulated the treatment of confidential information and material for the first time in the Court's history. This provision, 'intended to fill a legislative gap',⁵⁴ stipulates what is called secret evidence as a possible basis for the Court's decisions.⁵⁵ According to Article 105 of the Rules of Procedure of the General Court, if the material is confidential and shared with the General Court it will not be submitted to the other party. Consequences of different natures regarding disclosure to the other party could follow, depending on the General Court's evaluation whether the material should indeed be undisclosed on the basis of security concerns for the EU or its Member States. On the one hand, the General Court could ask the submitting party to disclose the

51 Art 6 (5) 2014 Council agreement; Art. 6(6) Council 2014 agreement.

52 Carrera (n 47). 4.

53 Rule 130 EP Rules of Procedure, July 2014.

54 Council of the European Union, 'Draft Rules of Procedure of the General Court', 17 March 2014, Council Doc. 7795/14, at 102.

55 Rules of Procedure of the General Court [2015] OJ L105/1, art 105(6).

information to the other main party if the General Court finds that it would not damage the interests protected. If the submitting party refuses or is unresponsive to the General Court's request, the latter will not take the confidential material into consideration in its overall review of the case. In fact, this procedure has been applicable in cases such as *ZZ* or *OMPI*. On the other hand, if the General Court finds that the disclosure of the confidential material vis-à-vis the other main party could be harmful, the General Court 'shall not communicate that information or material to that main party'.⁵⁶ This in effect means that the Rules of Procedure introduced what is called 'closed evidence' in the EU, where the information remains fully undisclosed to the party in such case. In line with Article 105(6), the party may only receive 'a non-confidential version or a non-confidential summary of the information or material, containing the essential content thereof and enabling the other main party, to the greatest extent possible, to make its views known'. This second new option for the General Court raises questions of the compatibility of the provision of non-disclosure with the right to a fair trial.

Although limitations to the adversarial principle are possible, under which all information and material must be fully communicated between the parties,⁵⁷ it is questionable whether the new arrangements of the General Court accommodate secrecy claims more favourably and to the detriment of essential procedural safeguards. In addition, doubts have been expressed regarding the compatibility of this new provision in the General Court's Rules of Procedure with Article 6 of the European Convention to Human Rights.⁵⁸ Article 105 is a direct result of the problems of inaccessibility to confidential information and material for the Court, as witnessed in a number of cases. Article 105 is vague on how the General Court will 'accommodate' the tension between claims to secrecy and the necessity of openness for the other main party. Rather, it stipulates that the General Court will make a 'reasoned order specifying the procedures to be adopted'. Furthermore, this provision seems to fully relinquish the possibility of what the literature identifies as the 'gist' of information, an issue that Advocate General Sharpston has also argued in favour of in order for the provision to actually be in accordance with the Article 6 of the European Convention of Human Rights.⁵⁹ The 'gist' of disclosure implies that the party would be:

56 Rules of Procedure of the General Court, *ibid*, art 105(5).

57 See Rules of Procedure of the General Court (n 55) art 64.

58 Maya Lester, 'Organisations Call on European Court to Consult on Classified Evidence Rule Change' (*European Sanctions*, 27 July 2013) <<http://europeansanctions.com/2013/07/27/organisations-call-on-european-court-to-consult-on-classified-evidence-rule-change/>> accessed 30 August 2015.

59 Cian C. Murphy, 'Secret Evidence in EU Security Law: Special Advocates before the Court of Justice?' (2012) Centre for European Law, Working Papers in European Law, Working Paper 02/2012 <<https://www.kcl.ac.uk/law/research/centres/european/research/CELWPEL022012FINAL.pdf>> accessed 30 August 2015.

provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate’ and that ‘any difficulties caused to the defendant by a limitation on his rights [be] sufficiently counterbalanced by the procedures followed by the judicial authorities.’⁶⁰

The manner in which this Article will be applied in future cases remains to be seen as there are no cases as yet to which the new rules of procedure would apply. However, some remarks may be made regarding how the rules were adopted and their envisaged application. Firstly, the remarkable secrecy by which the Court established its Rules of Procedure, which is an issue of tremendous impact for fundamental EU rights and it did this precisely due to the rules of classified information. In open sources, there has merely been speculation that pressure from the US had an impact on the EU’s efforts to make the sanctioning regime more rigorous and enable the Court to receive classified information since, as we noted above, the Court repeatedly annulled the sanctions due to the lack of disclosure of evidence.⁶¹ Secondly, it remains completely vague on how the General Court will ‘accommodate’ the tension between claims to secrecy and the necessity of openness for the other main party. Although limitations to the adversarial principle are possible, under which all information and material must be fully communicated between the parties,⁶² it is questionable whether the new arrangements of the General Court accommodate secrecy claims more favourably and to the detriment of essential procedural safeguards.

CONCLUSIONS

This chapter aims to investigate the practice of oversight and questions the extent to which EU oversight provides a counterbalance to executive secrecy. The second aspects that this chapter aims to unfold are how the changes to oversight are structured due to the efforts of oversight institutions to accommodate the rules of classified information and hence be able to access EUCI.

60 Opinion of AG Sharpston in *France v People’s Mojahedin Organization of Iran* (n 40) para 244.

61 Laurence Norman, ‘EU Governments Approve Secret Evidence in Sanctions Cases’ *The Wall Street Journal* (Brussels, 10 February 2015).

62 See Rules of Procedure of the General Court (n 55) art 64.

The EU oversight institutions provide a counterbalance but in a varying manner. This variation depends on the issue at stake and the oversight institution since each oversight institution has different prerogatives vis-à-vis the executive institutions. Whereas the Court is able to annul executive decisions that go against the protection of fundamental rights, the European Parliament is able to veto international agreements that are made in secret and possibly harm citizens' interests. Hence, in line with the difference that we drew between the potential for oversight, as discussed in the previous chapter, the aim here is to provide a picture of practices regarding whether, despite the limitations to the prerogatives that the oversight institutions face, they would be able to find other oversight means and limit executive secrecy or address the consequences that arise from it.

The chapter showed that the European Parliament, even in a context of lack of formal prerogatives and with serious limitations to the cooperation with national oversight actors and EU executive institutions, is able to react to externally received information about cases involving possible abuse of secrecy and in these cases it responds through inquiries and reports that shed light on key issues that have an impact on citizens' rights. However, the practice of oversight has been fundamentally affected by the rules on classified information since both the European Parliament and the Court have made changes to their oversight arrangements leading to closed oversight and secret evidence in the EU. What is remarkable about these changes is also the fact that they have taken place behind closed doors and have altered core constitutional prerogatives through rules of procedure. More importantly, the changes to the oversight arrangements are not proportionate to public deliberation with regard to the EP's changes and possibly with regard to the right of defence pertaining to the changes of the Court.

With the aim of ensuring access to classified information, EU oversight institutions have made changes that significantly alter public debate and right of defence in the EU. What is even more remarkable is that these changes have, in fact, not tackled the main problem that generally limits accessibility to classified information: executive discretion through the originator rule. In fact, as we saw in the previous chapter, rather than changing this rule, the oversight institutions have internalised it. Instead of making the EUCI regime more prone to the presumption in favour of openness, the oversight institutions have actually adopted the logic of secrecy and security as put forward by executive institutions.