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

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Publication date

2015

Document Version

Final published version

[Link to publication](#)

Citation for published version (APA):

Abazi, V. (2015). *Secrecy and oversight in the European Union: The law and practice of classified information*. [Thesis, fully internal, Universiteit van Amsterdam].

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CHAPTER 8

CONCLUSION

8.1 ASSESSING SECRECY IN THE EU

This thesis appraises the law and practices of official secrets in the European Union from a democratic perspective. This concluding chapter brings to the fore the main aspects the thesis intended to expose and provides the findings of the foregoing chapters. It also discusses the implications of secrecy within the broader EU constitutional setting. The chapter sets out the theoretical insights yielded by this research and those aspects of EU practice where openness should be taken into account.

Having a legal framework for official secrets has enabled the EU to exchange sensitive information with the Member States and with third parties on salient security issues. In the security and intelligence community, secrets are only shared if there is a common understanding between the parties about the rigidity in the protection of secrets. The Council, as the main driver of the rules of official secrets in the EU, has established a system of official secrets in the EU that respects this logic of secrecy protection and has influenced other institutions and agencies to expand it. The principle aim of the EU secrecy regulatory regime is to enable the EU to receive and exchange sensitive information that is salient for the EU being an informed security actor.

While it is not questioned that there should be rules on official secrets and that these contribute to the EU's security architecture, this thesis points out that the establishment of these rules as well as their practice ignores the values and limitations derived from the EU constitutional principle of openness. More importantly, EU rules of official secrets have the potential to impede oversight in the EU as they grant absolute discretion to executive actors as secret-keepers to decide on disclosure. And indeed, the practice of European Union Classified Information (hereinafter: EUCI) shows a number of examples where judicial, parliamentary and administrative oversight are delayed or obstructed due to non-disclosure. Hence, this thesis demonstrates that the most pressing issue is the firmness of the executive power regarding secrecy that is developed and expanded through internal rules and shadowy working practices, despite clear constitutional stipulations in favour of openness. This thesis finds that the inaccessibility of official secrets is a recurrent problem in the interplay between the executive prerogatives of secrecy and democratic oversight. An additional concern

is that EU oversight institutions have adapted to secrecy rules that disproportionately affect public deliberation and fundamental rights but do not limit executive discretion on final disclosure. These adaptations of EU oversight have been pragmatically settled behind closed doors by executive and oversight institutions.

The initial step of this thesis was to take the rationale of the principle of openness as the basic and foundational premise in establishing democratic constraints of secrecy. This sets the thesis apart from most literature on secrecy and democracy, since the predominant approach has been to address the necessity of secrecy and only thereafter to accommodate arrangements that facilitate openness without undermining secrecy. This thesis does not take openness and secrecy as two equally relevant virtues, which could simply be balanced against each other. Instead, this thesis has placed key significance on openness, since democratic processes of accountability and deliberation depend on openness for their realisation and qualified secrecy as a necessary exception that should be restrictively applied.

The theoretical framework of this thesis has aimed to lay out the complexities of secrecy and understand how it structures relations and distributes power in an institutional setting. In light of this understanding, the main objective was to establish constraints of secrecy in a manner that ensures the functionality of democratic processes of accountability and deliberation. This approach does not imply that we should ignore relevant aspects of secrecy; it merely shows preference for the argument that secrecy should not trump openness to the point that it renders democratic oversight unattainable. In this respect, this thesis has made efforts to introduce novel perspectives on how secrecy could be constrained. And this brings us to the second salient aspect of the thesis: an understanding of democracy which combines processes of oversight and public deliberation. The theoretical framework establishes democratic limits to secrecy not only to the extent that the information caters to oversight bodies, but also to the higher goal of enabling public deliberation.

This thesis has tried to detail the often hidden practices and factors taking place despite of or due to the lack of openness obligations. The objective of the thesis was not to provide a static picture, but to show the dynamics of the relations and the implications of secrecy for EU institutional structures. The idea of the non-static relates not only to the differences between law and practice but more broadly it is also linked to the two main dimensions of this thesis, i.e. firstly, openness and secrecy and secondly, executive and oversight relations. Although this thesis juxtaposes these notions and relations, it does so with the aim of conceptually clarifying their

implications. It does not overlook the fact that the categories of openness and secrecy are not clear-cut or that there is some level of implausibility in the institutional efforts to ensure them. Moreover, oversight is not limited to a form of unilateral control by one entity of another. Rather, it is a dynamic and continuous process of adjustment of powers between the institutions. Against this background, this thesis addresses both the *potential* for openness and oversight and the ‘*real*’ practices.

8.2 FINDINGS

Secrecy poses a persistent tension between oversight institutions and executive power. The aim of a legal system that adheres to principles of openness is to establish institutional arrangements that safeguard necessary secrets without impeding democratic processes that rely on openness. With this in mind, this thesis delved into discussing democratic constraints and examining to what extent these were ensured in the EU. How do institutional arrangements in the EU respond to the tension posed by secrecy? Is the equilibrium favourable to openness in the EU or does the pendulum swing in favour of secrecy?

The findings regarding the EU’s institutional arrangements follow the established three main democratic constraints to secrecy. To recall, firstly, openness is essential for both the processes of accountability and deliberation. Hence, the assertion that limits to openness must be legitimate and necessary. Secondly, accessibility to the relevant information is the first and key step for the initiation of oversight, which therefore poses the additional constraint that openness cannot be limited to the extent that oversight ceases. Thirdly, with respect to public deliberation, openness cannot be limited to the extent that the public does not know whether a secret is being kept or does not know the outcome of oversight.

8.2.1 *Legitimate and Necessary Secrecy*

The basic and most difficult issue to ascertain is whether a claim to secrecy is necessary and legitimate save for cases where the abuse of power or negligence is obvious. This constraint is not only directed at a singular case of invoking secrecy, but it also relates to how the system of official secrets is established. We evaluate this constraint regarding

the overall regulation of secrecy in Chapter IV, the practice of establishing individual decisions of classification in Chapter V, as well as whether and how the Court of Justice of the European Union, the European Parliament and the European Ombudsman assess executive claims to secrecy and safeguard openness to the extent that is necessary for effectuating individual rights and public deliberation in Chapter VI.

Chapter IV demonstrates that the executive institutions, particularly the Council, have led to the establishment of the regulation of official secrets in the EU. Executive actors have been solely and completely in charge of the design of the secrecy architecture in the EU, establishing the rules of official secrets in a piecemeal approach, with separate internal rules for each institution, agency or body. This patchwork regulation of EUCI is established in a shadowy manner and defended by EU officials as the only possible manner to establish rules due to the lack of explicit legal bases in the Treaties.

The lack of an act unifying the rules of EUCI has meant that there has been a concerted push by the Council, in particular its Security Committee, for a horizontal 'harmonization' of rules through peer pressure and common standards encompassing not only the executive actors but also oversight institutions. Remarkably, the oversight actors did not establish their rules in a more open manner or openly debate the consequences of such rules for openness. These efforts towards introducing similarities in the rules are not steered towards openness. Limitations of public access to documents and openness in the EU more generally are not considered as a matter for concern or a constraint on the regulation of official secrets in the EU, which in turn implies that the logic of necessary and legitimate secrets is lacking from an openness perspective in the EU regulation of classified information.

Chapter V addresses who has the power to make the assessment of whether a secrecy claim is necessary and legitimate. This is particularly relevant to the individual decisions of classifications made in EU practice as well as to the oversight actors' *ex post* evaluation. Every EU official can potentially classify documents. The initial decision to classify a document is not supported or guided in any manner, which would make the official with classifying authority more aware and prudent of the consequences of her decision from an openness perspective. The determination of what is necessary and hence legitimate to be classified in the EU is strictly limited to security concerns. The decision to classify raises further concerns when we turn to the legal terminology applicable for the four different labels of classification: *Restricted*, *Confidential*, *Secret*, *Top Secret*. As we noted, the interests that are supposed to be

protected are stated in a broad manner and in practice they can encompass anything from negotiation mandates, to background facts or simply the interests of the official with classifying authority. As some candid statements from EU officials illustrated, it is also the case that some officials use the security label as a signal of importance for their work in what was noted as ‘stamps-of-importance’.

Determining whether a claim to secrecy is necessary and legitimate involves a level of discretion from the official. This is a crucial aspect of the system of classifying information and one that EU officials are aware of as something that is inevitable in the system. This therefore makes the sanctioning of the decision to classify or instilling other internal mechanisms of review impossible, since a subjective decision cannot be organised with objective rules according to the pragmatically-minded EU officials interviewed in this thesis. Yet, in the EU the predominant manner of classifying documents is through derivative classification, which implies that EU officials reproduce, extract or summarize classified information and apply classification markings derived from the original source material. In most cases, the latter is information deriving from the Member States. The derivative classification operates strictly from a security perspective and enforces a more rigid secrecy culture as it makes the highest classification label applicable to the entire document when, for example, a variety of documents with different security labels are used. Furthermore, it creates an element of non-responsibility for the EU officials, as the official merely needs to reproduce the classification stamp without challenging it. In fact, from a security perspective, maintaining the originator’s security label is seen as a positive aspect of the rules because it provides the necessary assurances of a rigid security culture. Through derivative classification the national culture of secrecy pierces through at the EU level. Although derivative classification reduces the EU level discretion on classifying, it certainly does not imply that over-classification is avoided since, as EU officials’ statements reveal, some national capitals have a tendency to over-classify.

Against this background, Chapter VI raised the pertinent question of the external review of the assessment of necessary and legitimate secrecy. 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 of whether a document 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. 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 Court exercises a 'marginal' review in cases pertaining to the right of public access to information and allows a higher margin of executive discretion for non-disclosure. 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. Yet the Court seems to gradually establish a differentiation on the applicability of the exceptions under Article 4(1)(a) Regulation 1049/01. In this vein, if the undisclosed document concerns public interests and relates to possible future legislative changes and in particular fundamental rights, the Court seems to favour disclosure even in connection with security and international relations exceptions and hence limit the extent of executive secrecy in these fields. The Court makes a strict assessment when the right to defence and a fair trial are concerned and substantively assesses whether the executive claim to secrecy is well-founded. 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.

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 institution claims to protect. In line with the cases examined, practice shows that the European Ombudsman has never asked an institution to declassify a document. It is not within the scope of the European Ombudsman's review to examine whether a classification marking is justified and necessary. In cases dealing with the refusal of access based on the protection of international relations, the European Ombudsman refers to documents whose disclosure was refused in a brief manner, merely stating that disclosure of certain documents should be reconsidered. The institution that refuses access to sensitive information must give its reasons for refusal. The role of the European Ombudsman is limited to verifying whether the institution has complied with this duty.

8.2.2 Oversight and Access to Official Secrets

Accessibility to the relevant information is the first and key step for the initiation of oversight. As Chapter II argues, secrecy gives power and protection and enables the secret-keeper to steer the actions of outsider institutions. Hence, the single most relevant requirement for the institutional arrangements regarding oversight is that oversight institutions have the means to know or to access official secrets *independently* from the discretion of the secret-keeper. The external oversight institutions should not fully rely on the willingness of executive institutions to disclose official secrets. However, this normative perspective is not upheld in the case of the EU. The current oversight structure in the EU faces typical challenges of oversight in security policies due to the struggle regarding access to classified information as a result of predominant executive discretion.

Chapter VI shows that by law the institutions enjoy ‘privileged’ access to classified information, which derives specifically from their constitutionally stipulated role in oversight. This implies that access is strictly related to the institution’s prerogatives and that the information is not made publically accessible. However, limitations to access are very significant and they concern the rule of originator control that extends to the point of fully blocking access to classified information for oversight actors. EU oversight actors are reliant on executive actors for access to official secrets and face a clear limitation that can be invoked against their privileged right to access. Furthermore, this limitation is stipulated both internally within the rules of oversight actors, hence it is based on EU law, as well as being included in all external arrangements and agreements that the EU has with third parties and with Member States.

Many of the problematic aspects regarding access to classified information have their origin in the executive engineering of the EUCI regulatory regime. This is the case because, as Chapter IV argues, the system of official secrets in the EU is established and functions to foster a rigid security culture and openness considerations are lacking. The establishment of the EU regulation of secrecy was predominately driven by administrative pragmatism, is influenced by NATO military secrecy and is strictly security-oriented.

Chapter VI further reveals that the executive actors have discretion to decide on whether information should be disclosed to the oversight institution when the originator rule is invoked. This level of final control does not emerge from constitutional norms but has been developed in the EU by the executive institutions themselves.

The originator control leads to consequences of classification and blocking information that is disproportionate because it not only affects the original document but also the deriving documents. This effectively leads to the EU documents *de facto* never breaking away from national and foreign classification decisions. 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.

Paradoxically, in the period when the oversight institutions had not yet established internal rules on official secrets and hence their oversight practices did not incorporate secrecy, the oversight of executive action was more rigid and the institutional battles to gain access to classified information were more pronounced. This arose because there was stronger opposition to and rejection of the rules of official secrets, and particularly the European Parliament made efforts to point out the secretive way in which the executives established the system. In fact, we note in Chapter IV that the European Parliament was for a long period fully opposed to the establishment of the regulation of official secrets in the EU. The CJEU too was firm and categorically did not accept secret evidence, i.e. material that is undisclosed to the party. The internalisation of rules on official secrets by EU oversight institutions is a turning point for secrecy and its practice and oversight in the EU. Upon the incorporation of the EUCI rules by the oversight institutions, we have witnessed the development of closed oversight and secret evidence, which raise concerns for public deliberation and due process rights respectively. Partly, EU oversight institutions incorporated originator control because they had no option to do otherwise at the time the legal arrangements for access to EU executive classified information were made. To some extent, however, the oversight institutions have accepted the originator rule without fully realising its limitations. The current oversight structures in the EU no longer challenge the manner in which secrecy is structured and have become part of the sharing ring of classified information.

8.2.3 Public Deliberation Boundaries To Secrecy

For the realisation of deliberation, openness cannot be limited to the extent that the public would not know at all whether something is being kept secret or know the outcomes of oversight. Contrary to such normative assumptions, in the context of the EU we see the potential for both deep secrecy and closed oversight.

Chapter VI shows that in the EU deep secrecy is possible in cases concerning the right of public access to documents. As Chapter II explains, deep secrecy refers to information or documents whose very existence is unknown as opposed to shallow secrets, where the content of the document is protected (undisclosed) but its existence is public or could be disclosed. The Court affirmed that the originator of sensitive information, which could be an EU institution or agency, Member State or a third party, is justified in refusing not only to disclose the document's content but also its *very existence* on basis of Article 9(3) of Regulation 1049/01 and that the identity of the originator could also remain undisclosed.

Chapter VII elaborates on the relevance of openness in oversight for facilitating public deliberation. In the analysis of oversight and executive relations regarding secrecy, the general assumption has been that oversight actors provide the necessary efforts for oversight, whereas secrecy challenges oversight institutions to such an extent that they find themselves disarmed when it comes to access official secrets. However, EU oversight actors did not fully debate or realise what the effects of the rules of official secrets would be for their core functions of oversight, deliberation and protecting EU fundamental rights. Firm conclusions on this matter cannot be drawn since both the European Parliament and the General Court made the changes to their rules in a secret manner, without any involvement by outside concerned parties and in fact instead, in the case of the General Court, explicitly rejected public legal opinion submitted to it by advocates for a fair trial. It remains speculative whether oversight institutions could have established different legal arrangements about rules of official secrets with more public pressure, but we clearly see that closed-door meetings of oversight actors have led to institutional arrangements that are unsatisfactory from a democratic perspective. Closed oversight creates the effect that oversight actors become part of the system that legitimises secrecy, but creates a further separation and distance from the citizens whose rights and interests they are meant to protect.

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. However, due to closed oversight and the obligations of the European Parliament not to disclose EUCI in any manner, the specific outcomes of oversight processes are not made public. Access to classified information and the issues contained therein are

not allowed to be included in the meeting minutes. The European Parliament has no other institutional measures through which it could alert the public and raise concerns regarding issues covered by secrecy, which could possibly lead to the avoidance of policy controversy, transparency and critical debate. Individual MEPs could, for example, alert the press on some issues they consider relevant for further discussion. However, this manner of bringing attention to policy questions under secrecy could also be driven by political interests that are not only concerned with public debate and transparency. Parliamentary questions are the only institutional form of public oversight. They are also published on European Parliament's website as well as in the EU's official journal. The caveat here is that the content of classified information is not discussed. Hence, oversight processes that are open may leave crucial questions regarding classified information unanswered by invoking executive confidentiality.

The EU oversight institutions aim to assert their role in oversight, yet oversight behind closed doors does not enable citizens to gain a better understanding of or clarity about the allocation of responsibilities on what the European Union does and whether these decisions are made at the national or European level.

8.3 IMPLICATIONS

8.3.1 Constitutional Shifts: Peer-to-Peer Accountability

Secrecy creates indeterminacy in oversight processes because it is less predictable to what extent the oversight institutions may actually access classified information, particularly if, such as the case in the EU, there is a complete reliance on the discretion of the executive institutions for disclosure. The inaccessibility of classified information can delay or block EU judicial, administrative and parliamentary oversight. Secrecy also creates a structural imbalance of power. The EU oversight institutions are reliant on the discretion of secret-keepers to actually conduct their constitutional prerogatives and core functions in the EU. Considering these aspects of secrecy, it is perhaps hardly surprising that the main focus of EU oversight institutions has been to make the necessary legal and practical arrangements to access classified information. And it is precisely these arrangements that give rise to constitutional shifts in the EU in the manner in which oversight currently takes place.

The main implication for the oversight institutions that have internalised and incorporated the rules of official secrets is that establishing oversight arrangements disproportionately favours peer-to-peer accountability while leading to closed oversight and secret evidence. These new oversight arrangements create further distance from the potential for public deliberation in the EU and give rise to serious concerns about the impact on fundamental rights, particularly on effective judicial protection.

Rules of official secrets have re-structured oversight in the EU because the EU oversight institutions have changed their review procedures to safeguard official secrets. In their efforts to conduct oversight in the face of new security policies in the EU that require the use of secrecy, EU oversight institutions have adjusted to secrecy and security rationales. This, however, has come at the cost of negative implications for public deliberation and fundamental rights. The EUCI rules are essential for exchanging classified information and, in turn, indispensable for the functioning of security policies. However, the extent to which this system goes unchallenged and the extent to which access to classified information is the main focus of the oversight institutions is unsatisfactory from the perspectives of openness and fundamental rights. The oversight institutions have changed their approach to EU official secrets from something they opposed and contested to something that is accepted as long as they have access to official secrets, and they have therefore adjusted their oversight processes accordingly.

Closed oversight and secret evidence is not unique to the EU. Indeed comparative examples from Member States show that they too, despite long traditions of civil liberties, have adapted to and adopted oversight processes that seriously challenge public deliberation and fundamental rights in the face of security and the necessary secrecy rules in this regard.¹ Moreover, the oversight of intelligence agencies has traditionally been more secluded from public view. What is different in the EU, however, is that oversight processes were negotiated by the executive and oversight institutions themselves instead of by publically debated and constitutionally set arrangements. Rather, these changes have been established in inter-institutional agreements and internal rules of procedure fully negotiated behind closed doors and most of the documents remain undisclosed or are severely redacted even a decade after these arrangements were made.

Beyond public debate and fundamental rights, additional relevant implications arise for oversight processes in light of the current arrangements for access to official

¹ See David Cole, Federico Fabbrini, Arianna Vidaschi (eds), *Secrecy, National Security and the Vindication of Constitutional Law* (Edward Elgar 2013).

secrets. Firstly, as we note in Chapter VII, the oversight institutions have adapted to the executive actors demands for strict access that makes the usability of the information from the perspective of oversight very difficult to maintain. Secondly, the originator rule is still incorporated and the EU oversight institutions have therefore not managed to remove the indeterminacy factor from the EU regulation of secrecy. Consequently, it remains questionable to what extent oversight is indeed effective. Moreover, whereas the EU oversight institutions legitimise the system by the mere fact that they are not the outsider institutions to secrecy, this form of oversight weakens their core constitutional functions of public deliberation and fundamental rights protection, without having the certainty of accessibility to official secrets.

8.3.3 *Security and Relations with Member States*

Rules of official secrets have been a factor that enabled the EU to make itself independent from the Member States, both in information input and the rules for arranging classified information. Furthermore, secrecy regulation has enabled the EU to build relations with important third parties that would not have been possible otherwise and hence increase its own sources of security information. Having a system of EUCI has put the EU on the map with respect to the exchange of sensitive information with important actors. Gaining more autonomy through secrecy was an opportunity recognized by EU security actors, specifically Secretary General Solana during his time in office, for the establishment of the EUCI system and developing an independent EU network for the exchange of official secrets.

The system of classified information has positive implications for the security of the EU and the ability of EU security agencies to receive and exchange classified information. The EU's security policies extend *inter alia* to military and non-military operations in third countries, sanction regimes as a means of counter-terrorism measures, as well as intelligence reporting and analysis. All these issues rely on the exchange of sensitive information and in turn require that the EU is an informed security actor.

EUCI has direct implications on the relationship with the Member States. The EUCI system reveals the Member States' centrism in EU security policies. A significant aspect in this regard is the EU's dependency on the Member States for the exchange of classified documents. In general, Member States have retained a dominant position in this sphere and their relation to the system of classified information has

taken place in accordance with their national rules. Consequently, their classification culture became indirectly “binding” on the EU. Historically, Member States have different approaches to classification and some do over-classify. Yet, the EU has also used the rules of official secrets as a matrix for separation from the Member States. Through the use of secrecy, the EU has provided itself with the means to create some independence from the Member States regarding security due to its direct external cooperation with relevant third parties. Moreover, the EU has direct influence on how the Member States share official secrets. In this respect, the Decision of the Secretary General on measures for the protection of classified information adopted in July 2000 also committed the Member States to *the extent required* for the proper functioning of the Council.² This was a first attempt to encourage the Member States to apply EU rules on classification as opposed to national ones more actively.

8.4 THEORETICAL INSIGHTS

This thesis has gathered insights from a wide range of literature and in turn aims to contribute to some specific elements that have not been empirically demonstrated thus far with regard to secrecy. The Weberian argument of secrecy yielding power has been repeatedly asserted in the literature, yet most contributions merely reference the link between power and secrecy without fully engaging in how secrecy empowers the secret-keeper. This research contributes to the theoretical mapping of the function of the power of secrecy, which is in turn empirically established in the context of the EU. Research shows that the secret-keeper has the power to alter the action of its target, derived from special hidden information, and is able to disclose information selectively in accordance with her interest. Furthermore, research has pointed out that besides power, secrecy has the function of protection and enables trust between secret-keepers. Most importantly, this thesis argues that secrecy leads to a dependency relationship of the outsider towards the secret-keeper. In this regard, secrecy empowers the secret-keeper through enabling discretion whereas it prevents the uninformed from assuming control or interfering. Secrecy endows a document with power, by the mere fact that is undisclosed, is something selective and is meant for the very few.

² Decision of the Secretary General on measures for the protection of classified information applicable to the General Secretariat of the Council, 2000/ C 239/01

This research transcends a strict focus on the unavailability of information and rather adopts the perspective of the dynamic interactions between the secret-keeper and the outsiders. Consequently, it shows that secrecy is a significant factor in the adaptation of the relationships, which to some extent are even more pronounced in this context, such as that of the EU since it evolves in a more rapid manner through formal and informal changes. In this regard, this thesis shows that most often it is not the secrets *per se* that matter but the resulting relations. This dynamic in the relationship is caused by whether executive institutions give access and whether oversight actors actively seek information. Such aspects are applicable in EU practice, especially the dominance of the executive institutions through internal rules and committees maintaining an information advantage and final discretion of its disclosure.

8.5 EU PRACTICES OF OFFICIAL SECRETS: TOWARDS OPENNESS

The basic dilemma of secrecy and oversight is, as noted at the outset of this thesis, how to delineate necessary official secrets and to ensure the processes of oversight while safeguarding them. The practice in official secrets is characterised by the particularities of the structure and institutional workings of the EU. This adds a layer of complexity with regard to secrecy and oversight as compared to the common national setting.

Regarding the delineation of necessary secrecy, firstly, EU practice reveals that the EU is not a producer of original secrets but to a large extent derives its official secrets from the Member States and third parties. This means that rigid rules on the exchange of classified information in the EU are more applicable and significant. It also implies that in most situations, EU oversight institutions will request privileged access to derivative official secrets, leading *de facto* to an external authority, whether the originator body at the national level or of a third state, to decide on the disclosure of the official secrets for the European Parliament, the Court and the European Ombudsman. Secondly, as Chapter III describes, the EU is characterised by the plurality of executive institutions. In this respect, the exchange of classified information and possible information asymmetries that arise can be seen not only from the angle of the executive towards oversight actors, but also from the angle of the relations

between executive actors. Research indicates that Member States' executive bodies are reluctant to share classified information with EU level security and intelligence agencies, but further empirical research could map this underexplored aspect more broadly in the EU, including at a horizontal level.

The second salient aspect of oversight and the secrecy dilemma concerns the level of openness required for processes of oversight while safeguarding necessary secrecy. In this respect, specific EU institutional issues arise that also show how EU oversight differs from national oversight. First, EU oversight differs in the respect that the European Parliament and the Council consist of different political majorities. The European Parliament is directly elected at EU level whereas the Council has a direct link to the national electorate. Hence, disagreements in policy making are likely, making the availability of the same classified information to the European Parliament relevant for an informed debate and policy choices. Yet, simultaneously within the EU institutional structure, the Council acts as an executive actor and hence has an information advantage as it actually receives official secrets directly from other executive actors. Second, in the procedure of preliminary reference, which is specific to the EU judicial system, the Court does not have a fact-finding function, but merely guides itself through the information submitted to it by the national court. In this respect, the accessibility of classified information at the national level is important for the Court to be able to reach an informed judgement at the EU level, yet EU rules cannot establish procedures of what information national executive agencies give to national courts. Lastly, with regard to the European Ombudsman, its authority does not extend to national administration and the latter is only obliged to submit classified information to the extent that it concerns the application of EU law. Yet, in practice issues are more intermingled, making the availability of information more limited for the European Ombudsman.

While taking into account these specificities of the EU, this thesis maintains that the presumption in favour of openness could be spelled out differently at two different levels: first, at the broad policy level of regulating secrecy and second, with regard to the specific decision to classify documents. Regarding the broader policy, applying the presumption in favour of openness means having an EU public debate on official secrets, especially about balancing oversight and secrecy. As we saw, rules of official secrets in the EU have a tremendous impact on oversight and fundamental rights and hence should not be at the full discretion of internal regulation and closed-door debates between EU institutions.

Regarding the specific decision to classify documents, the biggest issue with EU administrative practice is that once a classified document is created, it keeps expanding into a number of other classified documents. This does not mean that EU officials prefer secrecy or intentionally over-classify. Yet, due to the structure and rules of classified information, even if one document is classified it amplifies into many more. In current EU practice, there is no internal incentive or pressure to reconsider classification decisions from a perspective of openness and the consequences of over-classification. An EU official has much to lose if she does not classify a document she should have, whereas there are no internal checks or incentives that provide for mechanisms to prevent over-classification. Instead of this, considerations in favour of openness should guide the decision of the official and, specifically, this would mean that the briefing process that every EU official receives at the start of her employment contract could be focused on directly linking classifying information with its openness implications. Moreover, a written justification for the decision to classify a specific document could accompany the document and make it clear what specific reasons make secrecy legitimate and necessary. The registration of classified documents and public records are other specific means of applying the aspect of openness within the classification procedure. Keeping track of classified information is relevant for the usability of the information but even more so for possible declassification purposes. Lastly, more openness and accessibility to documents could be ensured if EU practice favoured and made it a principle that only specific sensitive parts of a document are classified and not necessarily the entire document.

Engineered by executive actors, the current EU model of secrecy ensures the discretion of the secret-keepers and a rigid security culture in the exchange of official secrets. It would be desirable from a democratic perspective that the oversight institutions assume more responsibility and pave the way forward to establish more openness in EU law of official secrets that is publically debated.