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Abazi, V.; Eckes, C.

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CLOSED EVIDENCE IN EU COURTS: SECURITY, SECRETS AND ACCESS TO JUSTICE

VIGILENCA ABAZI AND CHRISTINA ECKES*

Abstract

In 2015, the General Court's Rules of Procedure introduced for the first time an EU closed evidence procedure that allows the use of closed or semi-closed evidence, i.e. reliance on evidence that is not, or not fully, disclosed to the applicant. This article shows that the EU closed evidence procedure does not comply with the requirements of the ECHR where even the essence of the evidence is kept from the applicant. It also identifies procedural ambiguities where compliance with the ECHR depends on the interpretation of the Rules by the GC. The article further argues that as the Rules were not introduced through publicly debated law, but were drafted and developed mostly behind closed doors, they lack democratic legitimacy.

1. Introduction

The right of access to justice is a well-established right under EU law, the European Convention on Human Rights, all constitutional orders of the Member States and several international human rights instruments.¹ Individuals must have at their disposal remedies to challenge the legality of measures adversely affecting their legal position. Access to the evidence and information on which the opposing side relies is essential for the full realization of access to justice.

Security policies adversely affect the application of the right of access to justice since they often require a certain degree of secrecy for their successful realization.² EU restrictive measures (usually termed “sanctions”), for example, target individuals and have severe effects.³ The Council adopts

* Assistant professor in European law, Maastricht University and professor of European law, University of Amsterdam, respectively. We would like to thank Bruno de Witte for his helpful comments on an earlier draft. All remaining errors are our own.

1. Art. 47 EU Charter of Fundamental Rights (CFR); Art. 6 ECHR. E.g. the Universal Declaration of Human Rights and International Covenant on Political and Civil Rights.

2. Abazi, *Official Secrets in the European Union*, (OUP, 2018 forthcoming).

3. See *infra* section 2.1.

sanctions based on official secrets, often classified information provided by the Member States.⁴ It has also repeatedly refused access to classified information even to the Court of Justice because Member States wanted to keep the information confidential.⁵ In cases, in which the Court did not have access to the relevant information, the right of access to justice could only be protected by annulling the contested measure.⁶

The European Court of Human Rights (ECtHR) and the Court of Justice have as a matter of principle accepted that national security interests might justify a certain degree of secrecy. For both courts, the issue is not whether, but rather to what extent secrecy in judicial review may be considered lawful and not unduly encroaching on access to justice. In 2015 the Rules of the Procedure of the General Court (GC) were revised to address security concerns and regulate access to official secrets.⁷ The General Court for the first time has a detailed procedure addressing classified documents,⁸ a category of documents denoting highly relevant information for national security. The new procedures for the General Court to manage classified documents, to a large extent drawing from the general rules on classified documents established by the Council,⁹ place the Court closer to security actors in terms of exchange of classified documents but also provide it with the authority to question the classification marking.¹⁰

The Rules of Procedure also allow, for the first time in the history of the EU Courts, the use of closed evidence, i.e. reliance on evidence that is not disclosed to the applicant.¹¹ This revision took place behind closed doors, shielded from the scrutiny of the public. Although the GC did not take into

4. Eckes, “Decision-making in the dark? Autonomous EU sanctions and national classification”, in Cameron (Ed.), *Legal Aspects of EU Sanctions* (Intersentia, 2013).

5. Case C-280/12 P, *Council v. Fulmen and Mahmoudian*, EU:C:2013:775.

6. See e.g. Joined Cases C-584, C-593 & 595/10 P, *European Commission and others v. Yassin Abdullah Kadi*, EU:C:2013:518, para 123: “If the competent European Union authority finds itself unable to comply with the request by the Courts of the European Union, it is then the duty of those Courts to base their decision solely on the material which has been disclosed to them. If that material is insufficient to allow a finding that a reason is well founded, the Courts of the European Union shall disregard that reason as a possible basis for the contested decision to list or maintain a listing”. See also the ECJ’s instructions to national courts in Case C-300/11, *ZZ v. Secretary of State for the Home Department*, EU:C:2013:363, para 63.

7. Rules of Procedure of the General Court, O.J. 2015, L 105/1.

8. Decision (EU) 2016/2387 of the General Court of 14 Sept. 2016 concerning the security rules applicable to information or material produced in accordance with Art.105(1) or (2) of the Rules of Procedure, O.J. 2016, L 355/18.

9. Council Decision of 23 Sept. 2013 on the security rules for protecting EU classified information, 2013/488/EU, O.J. 2014, L 274/1.

10. See *infra* section 2.2.

11. Applicant is used in the context of cases before the Court of Justice, since these cases involve an individual directly challenging a sanctions decision at the EU courts. Defendant is

account the attempts by civil society organizations to provide input, guidelines by the Council's Security Committee were influential in shaping the rules. Article 105 of the Rules of Procedure introduces a new level of secrecy in EU judicial review with immediate and far-reaching consequences for the right of access to justice and for the public nature of judicial review at the EU Court of Justice.

This article presents and critically evaluates the legal framework for using closed evidence before the GC (the EU closed evidence procedure). The starting point of this article for assessing the EU closed evidence procedure differs from the substantive assessment made by scholars who base their evaluation on a *balance* between security and access to justice.¹² We take the ECHR as interpreted by the ECtHR as the yardstick, which is based on the underlying logic that any derogation from or limitation of access to justice must be justified and can only be justified if it meets certain requirements. These requirements are: it must be enshrined in law, pursue a legitimate objective, be necessary and proportionate, and leave an absolute core of the right intact; this core cannot justifiably be infringed, even on balance with security interests.¹³ We show that some aspects of the EU closed evidence procedure do not comply with this yardstick. We further identify how the EU closed evidence procedure limits access to justice, and show its implications for the responsibility of Member States under the ECHR, as well as for the power dynamics between national courts and the ECJ.

Our analysis is divided into two main parts. Section 2 provides the context of relevant security considerations and explains the perceived need for a closed evidence procedure in the EU. We address the complexities of the repeatedly annulled sanctions decisions, and explain how the EU closed evidence procedure accommodates security interests of the Member States.

used in the context of the case law of the ECtHR, since these are usually cases brought against a State following domestic proceedings in which the individual was the object of a penalty or sanction.

12. See generally Cole, Fabbrini and Vidaschi (Eds.), *Secrecy, National Security and the Vindication of Constitutional Law* (Edward Elgar, 2013) where a number of contributors discuss and seek the balance between fair trial procedures and national security secrecy; Elworthy, "Balancing the need for secrecy with the need for accountability", (1998) 143 *The RUSI Journal* 5; Samaha, "Government secrets, constitutional law, and platforms for judicial intervention", 53 *UCLA Law Review* (2005), 909. For a broader critique on disadvantages of "simplistic" delineations between publicness and secrecy, see Birchall, "Introduction to 'secrecy and transparency': The politics of opacity and openness", (2011) 28 *Theory, Culture and Society* 7 and Horn, "The logics of political secrecy", 28 *Theory, Culture and Society* (2011), 103.

13. See in particular below the "gist" requirement and the requirement of disclosure to an independent judge.

Section 3 normatively evaluates the closed evidence procedure. Building on the case law of the ECtHR and principles of fundamental rights protection under EU law, we identify how the EU closed evidence procedure restricts the right of access to justice. In Section 4 we draw conclusions from this evaluation.

2. Security and the need for closed evidence in EU Courts

2.1. Security, sanctions and secrets

Security policies require some level of secrecy for their realization. In the EU context, several security policies are – at least partly – based on official secrets, including classified information. Examples are anti-terrorism measures such as individual sanctions¹⁴ and expulsion measures on grounds of public security.¹⁵ European sanctions freeze the assets of those they target, restrict their free movement, and interrupt their ability to take part in (economic) life, e.g. to receive remuneration for work. In the context of such severe restrictions of fundamental rights, judicial review is a crucial procedural mechanism to protect innocent individuals – e.g. in the case of mistaken identity or false evidence obtained under torture – from measures that ultimately threaten an individual’s economic and social existence.

Autonomous European sanctions are adopted in a two-tier composite procedure, in which the Council takes the decision to impose restrictive measures on a particular individual based on the decision of a competent national authority.¹⁶ Competent national authorities are usually part of the executive branch.¹⁷ For the initial imposition of sanctions, the competent national authority must share its decision with the Council, but not necessarily any additional information beyond that.

14. Council Common Position of 27 Dec. 2001 on the application of specific measures to combat terrorism, O.J. 2001, L 344/93; Council Regulation (EC) 2580/2001 of 27 Dec. 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, O.J. 2001, L 344/70.

15. Derogation from free movement of person on the basis of Art. 45(3) TFEU and Art. 52 TFEU. On basis of security, Member States may also derogate from EU law in the area of the free movement of goods (Art. 36 TFEU) and capital (Art. 65 TFEU).

16. Art. 1(4) of Council Common Position 2001/931/CFSP and Art. 2 of Council Regulation (EC) 2580/2001, both cited *supra* note 14.

17. Art. 1(4) of Council Common Position 2001/931/CFSP refers to authorities equivalent to a judicial authority, but see Eckes and Mendes, “The right to be heard in composite administrative procedures: Lost in between protection?”, 36 *ELJ* (2011), 651.

On several occasions, the Council has denied the Court access to information protected as – often national – official secrets. Member States predominantly invoked the justification of national security to protect their official secrets. In the sanctions case of *OMPI* for example, France refused to disclose official secrets to the ECJ on the grounds of national security rules for their protection. Remarkably, these objections were raised by France *vis-a-vis* the Court despite the fact that such information had been shared with the governments of all Member States.¹⁸ Similarly in another sanctions case, *Fulmen v. Council*, the UK refused to grant the Court access to official secrets for reasons of national security.¹⁹ In both cases the refusal resulted in an annulment of the challenged sanctions measures for the very reason that without access to the confidential information, the Court was unable to review the merits of the case. In fact, in a long list of sanctions cases, the Court annulled listing decisions of the Council due to the lack of access to the underlying information.²⁰ The Court logically could not take into account evidence that was not disclosed to it; it must be able to take a fully informed decision.²¹ Furthermore, the ECJ has adhered strongly to a *threshold of minimum disclosure* to the applicant. In Case C-27/09 P, *OMPI*,²² the Court held that without the relevant information, the affected person would not be in the position to submit their observations to correct an error or produce information in favour of their position.

Non-disclosure of official secrets because of security considerations stands in direct relation with the level of trust between the Court and the Council, but also among Member States. Sharing official secrets across

18. Opinion in Case C-27/09 P, *French Republic v. People's Mojahedin Organization of Iran*, EU:C:2011:482, para 72; Eckes, op. cit. *supra* note 4, at p. 12–13.

19. Case C-280/12 P, *Council v. Fulmen*, para 77.

20. See *supra* note 6. Most well known are the *Kadi* (European sanctions based on UN Security Council Resolution) and the *OMPI* sagas (autonomous European sanctions): Joined Cases C-584, C-593 & 595/10 P, *Commission v. Kadi*; Case T-85/09, *Kadi v. Commission*, EU:T:2010:418; Joined Cases C-402 & 415/05 P, *Kadi and Al Barakaat v. Council*, EU:C:2008:461; Case C-27/09 P, *France v. People's Mojahedin Organization of Iran*, EU:C:2011:853; Case T-284/08, *People's Mojahedin Organization of Iran v. Council*, EU:T:2008:550; Case T-256/07, *People's Mojahedin Organization of Iran v. Council*, EU:T:2008:461; Case T-228/02, *Organization des Modjahedines du peuple d'Iran v. Council*, EU:T:2006:384. See also Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (OUP, 2009). Eckes, "EU restrictive measures against natural and legal persons: From counterterrorist to third country sanctions", 51 CML Rev. (2014), 869.

21. See Eckes (2009), op. cit. *supra* note 20, who points out that the "Court could hardly have expressed criticism more clearly" towards the executive institution regarding the secret nature of the procedure that led to the listing of *OMPI* and which resulted in the Court not being in a position to take an informed decision, at p. 307.

22. Eckes, *ibid*, at 306.

borders requires an exceptionally high level of trust.²³ Despite free movement and non-discrimination on the basis of nationality, EU law continues to acknowledge that certain public offices, such as national security services, may still be limited to one's own nationals. Notwithstanding some exceptions, cases of counter-terrorism sanctions against individuals amply demonstrate Member States' hesitation to share sensitive information with the executives of other Member States, sometimes even within the EU institutional structures such as the Council. In turn, the Council was unable, because of the composite listing procedure in which national authorities take the relevant decision,²⁴ to share the relevant information with the Court. The resulting repeated annulments then raised serious legitimacy concerns; in particular where the annulments were followed by a swift re-adoption with minor procedural adaptations by the Council in cooperation with the Commission.

Against this background, the pressure on the Court mounted to find ways of reconciling security concerns with due process rights. Newspapers even voiced speculations that the US had exercised pressure on the EU to give the Court the procedural means to receive official secrets in order to end its repeated annulment of sanctions, including those giving effect to UN Resolutions.²⁵ In the Introductory notes to the Rules of Procedure, the GC points out that the revision was driven by the need to "provide solutions to procedural situations" involving the management of and access to confidential material and information.²⁶ Yet, what triggered the creation and adoption of a general procedure of EU closed evidence procedure is the need to protect from judicial annulment very specific and in many ways exceptional measures adopted on the basis of confidential information, namely "restrictive measures" (sanctions).²⁷ Before evaluating how this procedure affects the protection of the right of access to justice, we will establish its scope of application and unveil the process of its adoption.

23. Agreement between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union, O.J. 2011, 202/13. See also Abazi, *op. cit. supra* note 2.

24. See Eckes and Mendes, *op. cit. supra* note 17, for more details.

25. Norman, "EU governments approve secret evidence in sanctions cases", *The Wall Street Journal*, 10 Feb. 2015.

26. The draft rules of procedure of the General Court were submitted to the Council in March 2014, see Council document 7795/14, COUR 12, INST 157, JUR 164, see in particular the fifth objective, Chapter 6, Section 3 and Chapter 7. The draft rules were discussed in the meeting of the Security Committee of the Council on 23 Sept. 2014 (see provisional agenda, point 7); in the Working party on the Court of Justice on 10 Oct. 2014 (provisional agenda, point 2).

27. Introductory notes to the Rules of Procedure on Chapter 7, at 101, annexed to a letter from Mr Marc Jaeger, President of the General Court of the European Union, to Mr Evángelos Venizélos, President of the Council of the EU, Brussels, 14 March 2014, see Council document 7795/14, COUR 12, INST 157, JUR 164.

2.2. *Accommodating security needs: Open, semi-closed and closed evidence*

The closed evidence procedure is set out in Article 105 of GC's Rules of Procedure. This provision is located in a separate Chapter 7, that was newly introduced by the 2015 revision and refers specifically to "confidential" information or material regarding security and international relations. As part of this chapter, the specific regime of how to treat highly sensitive information under Article 105 is limited to information concerning security and international relations. The GC's revised Rules of Procedure do not specifically refer to classified information or set out special rules for the Common Foreign and Security Policy (CFSP). Hence, Article 105 applies to all policies, CFSP and those under the TFEU. This in turn implies that judicial proceedings involving closed evidence could stretch beyond cases involving sanctions and could also apply to asylum or criminal law cases, e.g. where these cases have a national security dimension.²⁸

Article 105 consists of 11 paragraphs setting out the rules of the closed evidence procedure before the GC. The provision explicitly stipulates that it constitutes an exception to the adversarial principle (paras. 1 and 8). Paragraph 1 sets out the overriding reasons that may justify confidential treatment and explains how a main party can request to have the closed evidence procedure applied. Paragraph 2 allows the GC to request confidential information. Confidential information is not shared with the other party while the GC assesses its relevance and confidentiality (para 3). Paragraphs 4 to 8 set out the rules for the different scenarios where the GC finds the information relevant, or even essential, and considers the request for confidential treatment either justified or not justified. It provides details as to when the Court will "weigh" the requirements of effective judicial protection against the interest of the Union and/or Member States. It also sets out what happens in cases when it is possible to share a "non-confidential summary of the information" (para 6), or cases when the information is essential for deciding the case but no summary can be shared (para 8). Basic rules of how the GC should manage the confidential information are laid down in paragraphs 9 and 10, and the GC has adopted Security Rules pursuant to paragraph 11 of Article 105 that further define "information" and how the GC manages it.

Three categories of evidence may result after Article 105 is invoked: (i) open evidence (ii) semi-closed evidence, but providing the applicant with

28. Eckes, "The law and practice of EU sanctions", in Blockmans and Koutrakos (Eds.), *Research Handbook on CFSP* (Edgar Elgar 2018) (forthcoming). See also Case C-300/11, ZZ.

the gist of information that is of a non-confidential nature, or (iii) closed evidence, where the applicant is not given even the gist of the information against them.

The judgment will be based on open evidence (i) if the Court considers the presented information relevant but is not convinced as to its confidential nature. The party that submitted the information may choose to have it disregarded rather than communicated to the applicant.²⁹ The party has a prescribed period to decide whether or not it agrees with the communication of the information to the applicant. As the default position – if the party does not consent to disclosure – the Court will not take the submitted information into account.

The judgment will be based on semi-closed evidence (ii), if the GC considers the information both relevant for the case and of a confidential nature. The GC then departs from the adversarial principle and communicates only a non-confidential version of the information to the applicant.³⁰ Article 105(5) is ambiguous on how the GC will “accommodate” the tension between claims to secrecy and the necessity of sharing incriminatory evidence with the applicant. It simply stipulates that the GC will make a “reasoned order specifying the procedures to be adopted”³¹. The Security Rules do not provide any further indication on how the GC will conduct this assessment, either.³¹ It may thus be assumed that the Court will adopt a case-by-case approach. Importantly, under Article 105(6) a non-confidential version or a non-confidential summary of the information or material, containing the essential content, will be disclosed to the applicant, which may be seen as the “gist” of evidence that the applicant should know in order to be able to counter the arguments against them.³²

Finally, the GC may base its judgment on closed evidence (iii) without disclosing even a non-confidential summary to the applicant.³³ This is the highest level of secrecy introduced by the Rules of Procedure. It marks a clear departure from the Court’s approach in its case law prior to the introduction of Article 105, according to which a minimum of information must be disclosed to the applicant.³⁴ Article 105(8) provides some constraints on how the GC should approach such a case: first, the GC may take into account closed evidence only if it is essential for the decision in the case; second, the GC must confine itself to information that is strictly necessary; and third, in its final

29. Art. 105(4) GC Rules of Procedure.

30. Art. 105(5) and (6) GC Rules of Procedure.

31. Decision 2016/2387, cited *supra* note 8.

32. See Opinion of A.G. Sharpston in Case C-27/09, *OPMI*, arguing in favour of gist of disclosure.

33. Art. 105(8) GC Rules of Procedure.

34. See *supra* Section 2.1.

judgment, the GC must take into account that the applicant has not been able to make their views known on the closed evidence against them. It is questionable however whether these constraints are sufficient for ensuring that the right of access to justice is not encroached upon. We will examine this issue in detail in the following section 3 by providing a critical analysis of the compatibility of the EU rules on closed evidence with the ECHR as interpreted by the case law of the ECtHR as well as principles of fundamental rights protection under EU law.

A common aspect of all three categories of evidence under Article 105 is that the Court decides whether the confidentially submitted information is relevant (semi-closed) or even essential (closed evidence) to the case, and whether it is indeed confidential in nature. Overriding considerations pertaining to the security of the Union or its Member States are the decisive criterion for whether the alleged confidentiality holds up as justified. Neither classification by the Union nor by the national authorities predetermines the Court's decision. However, such classification remains relevant in that neither the GC nor the ECJ have access to the highest category of classified information protected within the European Union Classified Information (EUCI) regime.

The framework on European Union Classified Information results from the more general security rules initially introduced by the Council in 2001.³⁵ This was the first clear establishment of European Union classified information separate from national rules on classified information and hence resulting in a separate legally protected category of information. European Union Classified Information is protected in four fairly wide and vaguely defined categories: Restricted, Confidential, Secret and Top Secret. The Security Rules of the GC and ECJ refer to EU Secret as the highest level of classification marking that the Courts receive.³⁶ The Council's Security Committee also specifically argued that the Court should not have access to Top Secret documents.³⁷ As will be further highlighted below (section 2.3), the role of the Council's Security Committee is significant not merely for advising which type of official secrets will be made available, but also the design and debate of closed evidence overall.

35. Council Decision 2001/264/EC of 19 March 2001 adopting the Council's security regulations, O.J. 2001, L 101/1.

36. See Decision 2016/2387, cited *supra* note 8.

37. In practice, this might not be an issue for the Court since in the Council's records of classified information the category of Top Secret has remained almost non-existent in the last ten years; nevertheless it is still unclear why this category should be completely excluded in advance.

2.3. *Introducing closed evidence behind closed doors*

Modern constitutional democracies need to address security concerns and accept, as a result, a certain level of secrecy, including within the judiciary. Within the EU this has become most apparent in the context of sanctions. Yet, how to deal with security matters and what level of secrecy is justifiable in modern constitutional democracies are questions that go far beyond a security-focused discussion and should not be conducted by security experts only. A public debate is particularly necessary in a case where the rules have far-reaching consequences for the right of access to justice, which lies at the core of the rule of law.³⁸ Yet, the EU closed evidence procedure was developed in closed-door meetings and without public debate. Under Article 254 TFEU, the formal revision process requires the GC to establish its Rules of Procedure in agreement with the Court of Justice and seek the approval of the Council. On 14 March 2014, the President of the GC sent a draft of the current rules of procedure for approval to the President of the Council.³⁹ Just over a year later, the new rules entered into force.

It is not fully clear when the GC started the internal drafting process of the new rules. Yet, already in May 2013, a group of human rights experts expressed their concerns with regard to due process rights in the context of possible changes to the GC's procedure, in a letter to the President of the ECJ. Although they had no access to draft documents or meetings, they had informally learned that the GC might, among other possible security driven revisions, introduce closed evidence, including security clearances for the judges; called for an open deliberation of these rules considering their critical and profound impact on the fundamental right of access to justice.⁴⁰ In particular they pointed out that other "stakeholders" had had access to the draft and hence the chance to comment on it,⁴¹ such as the Council, the Commission and the Member States, but that civil society had been entirely excluded from the debate.

38. See above all Habermas' procedural account of democratic legitimacy that presumes that a collective will can only be formed in a legally structured political community and in which in turn the legal rules are enforced by the judiciary. See Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Massachusetts Institute of Technology Press, 1996).

39. See *supra* note 27.

40. Lester, "Organizations call on European Court to consult on classified evidence rule change", *European Sanctions*, 27 July 2013, available at <www.europeansanctions.com/2013/07/27/organizations-call-on-european-court-to-consult-on-classified-evidence-rule-change/>.

41. Lawyers' Letter to the President of the Court of Justice of the EU, 21 May 2013, page 1, available at <www.dropbox.com/s/m9rqvr3s43tx9r8/letter%20to%20ECJ%201.docx>; or see the link in the article by Lester, *op. cit. supra* note 40.

However, the Court rejected this call for public deliberation. It considered itself under no legal obligation to discuss publicly the revision of its rules.⁴² This position is disconcerting in light of the fact that the changes to the rules of procedure affect fundamental rights and change the manner in which the adversarial principle is practised in the EU.⁴³ By contrast to the complete rejection of the experts' intervention, the opinion of the Council's Security Committee on the draft Security Rules was taken into account both by the Council's Working Party on the Court of Justice as well as by the GC itself.⁴⁴ The Council's Security Committee made suggestions that opened the way for secrecy management in the Court as if the latter were to operate as a security agency, including rigid rules on sharing of official secrets, as well as a vetting procedure conducted by national security authorities in accordance with national laws and regulations.⁴⁵

This complete lack of public debate on a significant alteration of the way the right to access to justice can be exercised in the EU is highly problematic. The judicial practice of closed evidence raises additional issues, since studies of comparative practices of closed evidence, such as in the US, show that judges often show a high level of deference to the executive when it comes to issues of security and official secrets.⁴⁶ Will the Court readily accept the official secrets as provided by different constellations of executive power in the EU? How will it in practice take into account that certain evidence is kept from the applicant? These questions are still unanswered, since the EU closed evidence procedure has – to the best of our knowledge – not so far been used. Guided by the case law of the ECtHR and broader principles of administering justice in modern constitutional democracies, we will address in the following main section 3 the question: What are the implications of the EU closed evidence procedure for access to justice?

42. Lester, "Draft European Court rules propose secret hearings", *European Sanctions*, 6 April 2014, available at <www.europeansanctions.com/2014/04/06/draft-european-court-rules-for-secret-hearings/>.

43. An issue that the Court acknowledges in its elaboration of the draft rules, since the adversarial principle clearly required that all information and material must be fully communicated between the parties. See Draft Rules of Procedure of the General Court, cited *supra* note 26, at 104.

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

45. Decision 2016/2387, cited *supra* note 8; Decision 2016/2386 of the Court of Justice concerning the Security rules applicable to information or material produced before the General Court in accordance with Art. 105 of its Rules of Procedure, O.J. 2016, L 355/5.

46. E.g. Schulhofer, "Oversight of national security secrecy in the United States", in Cole et al. (Eds.), *Secrecy, National Security and the Vindication of Constitutional Law* (Edward Elgar, 2013). See also in the context of terrorism, Fabbrini, "Extraordinary renditions and the State secret privilege: Italy and the United States compared", *2 Italian Journal of Public Law* (2011), 315.

3. Normative assessment of closed evidence

In this section we first explain the relevance of the ECHR and the case law of the ECtHR within the EU legal order (3.1). We then identify the limits imposed by the ECHR on the use of closed evidence (3.2). In the remainder of section 3 we provide a detailed appraisal of the EU closed evidence procedures against the ECHR-derived criteria that the GC should meet in the use of closed evidence (3.3).

3.1. *ECtHR's case law as source of guidance within the EU legal order*

The EU's binding catalogue of rights, the Charter of Fundamental Rights (CFR), sets out the general requirements that any limitation of Charter rights must meet in its Article 52(1). Any limitation must be "provided for by law", "respect the essence of" the rights it affects, and meet the requirements of the "principle of proportionality", i.e. "limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others." Delegated decisions determining such a limitation within the framework of delegated powers established by national law implementing EU law in principle meet the requirement of "provided for by law".⁴⁷ An additional administrative step imposed in order to exercise the right of access to justice, such as the exhaustion of administrative remedies, does not interfere with the essence of that right.⁴⁸ To be proportionate, the ECJ has held in settled case law, measures adopted may not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question, since the disadvantages caused by the legislation must not be disproportionate to the aims pursued.⁴⁹ Within the logic of preliminary references, the ECJ

47. Case C-277/16, *Polkomtel sp. z o.o. v. Prezes Urzędu Komunikacji Elektronicznej*, EU:C:2017:989, paras. 51–53, with references to Case C-283/11, *Sky Österreich GmbH v. Österreichischer Rundfunk*, EU:C:2013:28, paras. 46 to 48, and Case C-201/15, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v. Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengvis*, EU:C:2016:972, para 70.

48. Case C-73/16, *Peter Puškár v. Finančné riaditeľstvo Slovenskej republiky*, EU:C:2017:725, paras. 62–64 (limitation of Art. 47 CFR).

49. Case C-473/16, *F v. Bevándorlási és Állampolgársági Hivatal*, EU:C:2018:36, para 55, with references to Joined Cases C-96 & 97/03, *A. Tempelman and Mr. Mrs. T.H.J.M van Schaijk v. Directeur van de Rijksdienst voor de keuring van Vee en Vlees*, EU:C:2005:145, para 47; case C-83/14, *CHEZ Razpredelenie Bulgaria AD v. Komisija za zashtita ot diskriminatsia*, EU:C:2015:480, para 123; Case C-601/15, *J. N. v. Staatssecretaris van Veiligheid en Justitie*, EU:C:2016:84, para 54. In Case C-473/16, *F* the Court found that a psychologist's expert report could not be used to establish the sexual orientation of a person seeking international protection.

usually leaves the proportionality assessment to national courts.⁵⁰ When the ECJ assesses the proportionality of a human rights interference itself, it does so in a detailed and rigorous manner.⁵¹

Article 52(3) and 53 CFR are expressions of the particular constitutional status of the ECHR within the EU legal order. They declare that a Charter right corresponding to a right under the Convention should be interpreted in the same way as the Convention right (Art. 52(3) CFR) and that protection under the Charter must at all times respect the minimum standard of the Convention (Art. 53 CFR). Additionally, Article 6(3) TEU stipulates that the EU's general principles are *inter alia* based on the ECHR. Furthermore, while the Charter only refers to the Convention itself and not to the case law of the ECtHR (except in its Preamble),⁵² the ECJ has ruled in *J.McB. v. L.E.* that where rights in the Charter correspond to rights in the ECHR, it will follow the case law of the ECtHR.⁵³ Hence, the ECHR as interpreted by the ECtHR is in many ways the prime source for EU fundamental rights, determining their material scope and interpretation. This is why we evaluate the EU closed evidence procedure as to its compatibility with the ECHR, and offer additional principled reflections on Article 105 and the procedure that led to its adoption.

Whereas closed evidence was newly introduced within the EU context by the 2015 revision of the GC's Rules of Procedure, several national systems have used closed evidence in various proceedings.⁵⁴ In multiple instances, such use of closed evidence has been challenged before the ECtHR. This body of case law offers an important source of guidance for the interpretation and evaluation of the EU closed evidence procedure. Furthermore, the ECHR is the single most important international agreement compelling EU Member States, which are without exception Contracting Parties to the Convention, to respect fundamental rights. Member States cannot escape their Convention obligations by hiding behind the EU. They remain responsible for measures implementing EU law and can ultimately be held responsible for most actions of the EU.⁵⁵ As to actions of the EU, the ECtHR established a general

50. Case C-277/16, *Polkomtel*, paras. 51–55.

51. Case C-73/16, *Peter Puškár*, paras. 68–70 (limitation of Art. 47 CFR).

52. Art. 52(3) CFR.

53. Case C-400/10, *J. McB v. L. E.*, EU:C:2010:582. The explanations to the Charter offer a list of “corresponding rights”. This is a good basis to estimate the scope of application of the ECJ's ruling.

54. In fact, the ECJ seemed to require Member States to set up closed evidence procedures to be able to review all evidence in the context of security concerns limiting the rights under the citizens' rights directive: Case C-300/11, *ZZ*, para 59.

55. ECtHR, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, Appl. No. 45036/98, judgment of 30 Jun. 2005. See for exceptional cases that escape the jurisdiction of the ECtHR: Eckes, “EU accession to the ECHR: between autonomy and adaptation”, 76 MLR (2013), 254.

presumption, in *Bosphorus*,⁵⁶ that the protection of fundamental rights, and in particular the judicial protection by the ECJ, under what was then Community law, is equivalent to the protection under the Convention. Yet, this presumption can be rebutted if the protection offered by the Union is shown to be manifestly deficient.

The *Bosphorus* presumption cannot logically apply to CFSP. Even if the general exclusion of CFSP from the jurisdiction of the ECJ in Article 275 TFEU has itself become subject to multiple exceptions, e.g. for review on procedural grounds and a wide interpretation of Article 275(2) TFEU, and even if the Union is of course bound by fundamental rights also when it acts under the CFSP, the ECJ does not have general jurisdiction to enforce these rights.⁵⁷ It is hence impossible to argue that the ECJ, with this limited jurisdiction in CFSP, is institutionally in the position to offer *equivalent* protection to that of the ECtHR. In the present context, it should be recalled that the vast majority of European Union Classified Information and also the information that leads to the adoption of autonomous EU sanctions pertain to the realm of CFSP. Hence, EU law enjoys a special status that makes full review by the ECtHR of non-CFSP policies unlikely,⁵⁸ while CFSP should as a matter of principle be subject to full review by the ECtHR. Consequently, not only those legally affected by national measures but also those affected by acts of the EU institutions enjoy, as a matter of principle, the ECtHR's protection of their rights to an effective remedy and access to justice⁵⁹ – with the exception of acts of the institutions that cannot be attributed to the Member States. The most pertinent example in the present context is the ECHR case of *Gasparini*, which the ECtHR found inadmissible because the States involved, when they transferred some of their sovereign powers to NATO, could not foresee or expect that NATO's internal dispute resolution mechanism might flagrantly breach the provisions of the Convention.⁶⁰

56. *Bosphorus*, Appl. No. 45036/98, cited *supra* note 55.

57. Eckes, "Common foreign and security policy: The consequences of the Court's extended jurisdiction", 22 *ELJ* (2016), 492. See also the Courts' recent case law on its jurisdiction under CFSP: Case C-72/15, *Rosneft Oil Company OJSC v. Her Majesty's Treasury*, EU:C:2017:236; Case C-455/14 P, *H v. Council et al*, EU:C:2016:569; Case C-439/13 P, *Elitaliana SpA v. Eulex Kosovo*, EU:C:2015:753 and Opinion 2/13, *Accession to the ECHR*, EU:C:2014:2454. The ECJ's limited jurisdiction over CFSP was also one of the core concerns of the ECJ when rejecting the draft ECHR accession agreement in Opinion 2/13.

58. Eckes, "Does the European Court of Human Rights provide protection from the European Community? The case of *Bosphorus Airways*", 13 *EPL* (2007), 47.

59. See for lacuna of this protection from acts of the EU institutions, Eckes (2014), *op. cit. supra* note 20.

60. ECtHR, *Gasparini v. Italy and Belgium*, Appl. No. 10750/03, judgment of 12 May 2009; but also ECtHR, *Connolly v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and UK*, Appl.

3.2. Lawfulness of closed evidence under the ECHR

Article 6 ECHR protects the right of access to justice and Article 13 ECHR grants subsidiary protection of the right to an effective remedy. Article 6 ECHR sets high standards,⁶¹ with the intrinsic aim of ensuring the fairness of the proceedings as a whole. The precise procedural requirements that are necessary in order to satisfy the right of access to justice depend on the nature of the proceedings and the intrusiveness of the act at stake.⁶² A fair trial in criminal court is ensured where the prosecution has presented evidence capable of fulfilling the burden of proof and the defence has had an opportunity to influence the court's view at least to the same extent.⁶³ In *Ruiz v. Spain* the ECtHR further explained that the right to an adversarial trial requires placing the plaintiffs and defendants in a position in which they "have knowledge of and remark on the particulars or evidence adduced by the other party".⁶⁴

Yet, the entitlement to disclosure of relevant evidence is not an absolute right. Competing interests, either of another individual or the public, might make it necessary to withhold certain evidence from the defence. The ECtHR allows the Contracting Parties a margin of appreciation when restricting Convention rights.⁶⁵ This margin is particularly wide for matters of national security,⁶⁶ although the ECtHR also reiterated on a number of occasions that

No. 73274/01, judgment of 9 Dec. 2008 (available in French only). See similarly ECtHR, *Boivin v. 34 Member States of the Council of Europe*, Appl. No. 73250/01, judgment of 9 Sept. 2008.

61. Art. 6 ECHR requires "within a reasonable time" a "fair and public hearing" by an "independent tribunal established by law".

62. ECtHR, *Helmets v. Sweden*, Appl. No. 11826/85, judgment of 29 Oct. 1991.

63. Warbrick, "The principles of the European Convention on Human Rights and the response of States to terrorism", 7 EHRLR (2002), 301–305. ECtHR case law concerning closed evidence: *Rowe v. UK*, Appl. No. 28901/95, judgment of 16 Feb. 2000, paras 60–3; *Atlan v. UK*, Appl. No. 36533/97, judgment of 19 June 2001; *Dowsett v. UK*, Appl. No. 39482/98, judgment of 14 May 2002; *Fitt v. UK*, Appl. No. 29777/96, judgment of 16 Feb. 2000; *Jasper v. UK*, Appl. No. 27052/95, judgment of 16 Feb. 2000; *Edwards v. UK*, Series A no. 247-B, judgment of 25 Nov. 1992; *Botmeh and Alami v. UK*, Appl. No. 15187/03, judgment of 7 June 2007.

64. ECtHR, *Ruiz-Mateos v. Spain*, Appl. No. 12952/87, judgment of 23 June 1992. See also the ECJ's reading of Art. 47 CFR e.g. in Case C-300/11, *ZZ*, para 65.

65. ECtHR, *Waite and Kennedy v. Germany*, App. No. 26083/94, judgment of 18 Feb. 1999, para 59.

66. See e.g. ECtHR, *Chahal v. United Kingdom*, Appl. No. 22414/93, judgment of 15 Nov. 1996, para 131, and *Jasper v. United Kingdom*, Appl. No. 27052/95, paras 51–3; ECtHR, *Tinnelly and McElduff v. United Kingdom*, Appl. No. 20390/92 and 21322/92, judgment of 10 July 1998, para 76, all with further references.

only those measures that were *necessary* could be permissible in the light of Article 6(1) ECHR and that only a national court with *full access* to the evidence in the light of all the facts can take a decision on this.⁶⁷

In a series of cases,⁶⁸ the ECtHR established more specific rules on how the non-disclosure of evidence to the defence could be counter-balanced by additional procedural safeguards. The ECtHR does not assess the necessity of withholding of evidence itself.⁶⁹ Instead, its task is to “ascertain whether the decision-making procedure applied in each case complied with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused”.⁷⁰ The ECtHR has also emphasized that the fact that information is confidential in cases engaging national security does not free national authorities from effective judicial control,⁷¹ and explained in more detail what must be disclosed to satisfy the Convention. Namely, in *A v. UK*,⁷² the ECtHR held that Art 5(4) ECHR requires more than “purely ... general assertions”. The judicial decision to maintain detention cannot be “based solely or to a decisive degree on closed material”.⁷³ The individual cannot be subject to rights-restricting measures based largely or entirely on closed material.

67. See ECtHR case law in note 63 *supra*, as well as *Chahal v. UK*, cited *supra* note 66 in which the ECtHR held that a claim by the executive that national security justified not disclosing evidence to the other party must be subject to judicial review in a procedure that offers the individual a substantial measure of procedural justice. This case triggered the introduction of the special advocate system in the UK. See the ECJ’s instructions to national courts on this point in Case C-300/11, *ZZ*, paras. 59–60. The ECJ also instructed the national courts that they have the task of assessing the evidential value of confidential material when determining the restrictions on the right of defence, in particular due to failure to disclose the evidence and the precise and full grounds on which the executive decision is based, Case C-300/11, *ZZ*, para 67.

68. See ECtHR case law in note 63 *supra*.

69. In *Rowe* and in *Atlan* the ECtHR found a violation of Art. 6(1) ECHR as the prosecution could not, without the knowledge and approval of the trial judge, decide that the evidence in question is not disclosed to the defendant. Similarly, in *Dowsett* the ECtHR found a violation because the prosecution withheld evidence on its own initiative and without placing it before the court in an *ex parte* procedure. In the cases of *Fitt* and *Jasper* by contrast, all the evidence that the prosecution intended to withhold was placed before the trial judge, *ex parte*, and ECtHR found in these cases the requirements of Art. 6 ECHR satisfied. See case law in note 63 *supra*.

70. ECtHR, *Atlan v. UK*, cited *supra* note 63, para 37 et seq, at 41 with reference to the leading case, *Rowe v. UK*, cited *supra* note 63, at paras. 60–3.

71. ECtHR, *Chahal v. United Kingdom*, cited *supra* note 66.

72. ECtHR, *A v. UK*, Appl. No. 3455/05, judgment of 19 Feb. 2009. Art. 5(4) of ECHR on Right to liberty and security stipulates that “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”.

73. *Ibid.*, cited in *SSHD v. AF* (No 3) [2009] 3 WLR 74, 96 [51].

Irrespective of how compelling the closed evidence is, individuals must have access to the “gist” of the case against them.⁷⁴

In *Nasr and Ghali v. Italy*,⁷⁵ the ECtHR shed further light on important limitations to closed evidence. Governments cannot invoke State secrecy to shield off accountability and State secrets privilege cannot apply in cases where the information is already public.⁷⁶ In the case of *Nasr and Ghali* proceedings had taken place before a domestic court under Mr Nasr’s alias *Abu Omar*. These proceedings had established the factual situation, and identified and convicted the responsible persons.⁷⁷ However, the Italian Government had interfered with the execution of the judgment, relying on State secrecy.⁷⁸ The ECtHR held that that the Italian Government did not rely on State secrecy in order to genuinely protect confidential information, but rather to protect Italian authorities from prosecution in the context of an extraordinary rendition by the CIA.⁷⁹ The ECtHR firmly rejected that State secrecy could create a shield of impunity for Italian authorities, and found a violation of the right to an effective remedy.

The ECHR and the case law of the ECtHR allow the following criteria to be identified for evaluating the lawfulness of the use of closed evidence. Firstly, closed evidence must be the exception. This entails that the rules allowing for closed evidence must be narrowly construed and that the use of closed evidence must be necessary in the specific case.⁸⁰ Secondly, an independent court must have full access to the information and the authority to decide whether information may be withheld and to whom such information is disclosed.⁸¹ Thirdly, when information is withheld additional safeguards must be introduced to ensure the impartiality of the court.⁸² Fourthly, the core and minimum requirement of the adversarial principle is that at all times the

74. While the ECtHR did not phrase it in these exact words, this is how *A v. UK* (cited *supra* note 72) should be interpreted. See also the interpretation of this case by the House of Lords in *AF* (No 3) v. *SSHD* [2010] 2 AC 269, in relation to control orders. The House of Lords held and later confirmed in relation to asset freezing – *Mastafa v. HM Treasury* [2013] 1 WLR 1621 – that the ECHR required that the individual must be provided with the “gist” of the case against her. The ECJ expects this also from national courts: Case C-300/11, *ZZ*, para 69.

75. ECtHR, *Nasr and Ghali v. Italy*, Appl. No. 44883/09, judgment of 23 Feb. 2016.

76. *Ibid.*, para 268.

77. *Ibid.*, see the reference to the judgment of the District Court of Milano of 4 Nov. 2009.

78. *Ibid.*, para 269.

79. *Ibid.*, para 265.

80. This already follows from the legal methodology that exceptions to a general rule should be interpreted narrowly. It is supported by the great value that the ECtHR attaches to judicial review as the central piece of the rule of law. Most specifically, it flows from the necessity requirement discussed above, see e.g. *Chahal v. UK*, cited *supra* note 66.

81. This follows from the requirement that national courts must carry out a necessity test, see also *Rowe, Atlan, Dowsett, Fitt and Jasper*, cited *supra* note 63.

82. See, above all, *Chahal v. UK*, cited *supra* note 66.

essence or gist of information is disclosed to the defendant.⁸³ Fifthly, the extent to which it is possible for the State to conceal information from the defendant stands in direct proportion to the gravity of the measures adopted against the defendant.⁸⁴ The more intensively a State measure interferes with the rights of the individual the stronger the procedural safeguards and the better the position to defend themselves must be. Sixthly, information that is already public cannot qualify as closed evidence.⁸⁵ Finally, confidentiality cannot be used to shield those responsible.⁸⁶

The following subsection first elaborates to what extent these criteria are fulfilled in the EU. It then turns to an additional eighth requirement that can be drawn from the underlying rationale of the ECHR and the case law of the ECtHR on how a restriction to fundamental rights should be determined, but that is also a realization of the principle of democracy in its most fundamental sense: rules on how to manage closed evidence should be adopted following a public debate and set out in law.⁸⁷

3.3. *Appraisal of the EU closed evidence procedure*

3.3.1. *Secrecy as necessary exception*

Judicial review as a matter of principle takes place in open court and requires full disclosure of all information to the defendant. Closed evidence is the exception, which must be narrowly interpreted and specifically justified as necessary.⁸⁸ Article 105 of the Rules of Procedure of the GC does not use the notion of “necessary” to determine when closed evidence could be invoked, but rather refers to “strictly required”. Semantically this is a stringent formulation.⁸⁹ Yet, it differs from Article 52(1) CFR on the limitations to the Charter rights, as well as the case law of the ECtHR and the ECJ. All three refer to and consider the relevant threshold to be “necessary”.⁹⁰ It also departs from the “necessity” element of the general test of proportionality, which is backed up by an extensive body of relevant case law for its interpretation. This may potentially give more leeway to different justifications of secrecy as “required”.

83. *A v. UK*, cited *supra* note 72.

84. *Helmerts v. Sweden*, cited *supra* note 62.

85. *Nasr and Ghali v. Italy*, cited *supra* note 75.

86. *Ibid.*

87. See Thompson, “Democratic secrecy”, 114 *Political Science Quarterly* (1999), 181; see Curtin, “Overseeing secrets in the EU: A democratic perspective”, 52 *JCMS* (2014), 684.

88. See *supra* section 3.2.

89. Compare also the French version: “... dans la stricte mesure où la situation l’exige ...” and the German version: “... in dem Umfang, den die Situation unbedingt erfordert”.

90. See e.g. Case C-300/11, *ZZ*, para 64.

Although Article 105 is expanded in 11 paragraphs and aims to set detailed procedural rules for the GC on how the use of closed evidence should be practised, ambiguities persist about when secrecy may be invoked and justified. Article 105(5) for example provides that the Court is to “weigh” the requirements of effective judicial protection against the interest of the Union and/or Member States; yet, it does not give further guidance on how such weighing should take place. “Weighing” without further qualification indicates a pragmatic rather than a principled approach to what the relationship between openness and secrecy should be. The provision in no way frames the relationship between the general rule of openness and full judicial protection on the one hand, and the exception of non-disclosure justified by specific overriding reasons on the other. It is also silent as to which interests and aspects should be taken into account by the Court. This is in contrast not only with the case law of the ECtHR but also with the general and fundamental principle of openness in democratic societies, codified for the EU in Article 1 TEU.

3.3.2. *Who is in charge of determining discretion and disclosure*

Article 105(3) to (5) provide that the GC has the authority to assess the confidentiality of the submitted information. It may decide that the party’s decision of non-disclosure is unjustified in light of all information, and it may disregard the information in deciding the case. In this sense, the GC acts as the deciding domestic judge from the perspective of the ECtHR. For procedural fairness to be guaranteed, the deciding domestic judge must have access to all the material and be fully informed when he or she assesses the validity of the claim to confidentiality and determines whether and which additional procedural safeguards must be introduced in order to uphold as far as possible the adversarial principle. According to Article 105 the GC has full factual assessment powers and full access to all the evidence relevant to the case. The EU closed evidence procedure hence meets these two basic requirements.

However, some reservations persist with regard to the GC’s assessment of confidentiality, its access to all confidential material, and its ability to introduce additional procedural safeguards. Firstly, research on national courts’ reviewing powers as to whether information is security sensitive has shown that, apart from cases where executive secrecy is clearly misused, the courts largely show deference to the national executive on the confidentiality of information.⁹¹ This position is understandable, since courts neither have the security expertise nor do they have their own counter-sources which would allow them to assess comprehensively in light of all complexities and context whether and to what extent the information presented as harmful is in fact

91. E.g. Schulhofer and Fabbrini, *op. cit. supra* note 46.

harmless. Hence, courts are in the position to dismiss information that clearly is undeserving of classification marking; yet, this will most likely only have marginal effects on the reduction of confidential material within the judiciary.

Secondly, the discretion to disclose information, including under the GC's changed rules of procedure, still belongs to the *originator* of the information. The simple fact that the Court has confidentiality rules in place does not as such require the institution or Member States to share any particular material. A rational strategy from their perspective would be to submit only just enough information to avoid annulment of the measure, rather than to aim at giving the court a complete picture. Judicial challenges against sanctions led – as we showed above – to the adoption of the EU closed evidence procedure and are the most likely type of cases in which it could be used. In these cases, the EU Courts have accepted that even if the Council lists *multiple* reasons for imposing sanctions on an individual, it is sufficient for the measure to be upheld in Court if the Council is able to substantiate *one* of these reasons with evidence.⁹² A likely outcome in the context of closed evidence procedures would be that the Council only submits information to substantiate one of the reasons for sanctioning the individual. As a result, the Court could not review or address the validity of the other reasons. These would remain (publicly) stated allegations that are not subject to judicial review. From the perspective of access to justice this selective picking of evidence raises great concern as it limits the possibility for holistic review of all evidence that could be relevant to attain a judgment. This gap in review is not caused by the EU closed evidence procedure, but it is also not remedied by Article 105, which does not engage with the completeness of the submitted information. Moreover, Article 105(2) provides that the GC may, as a measure of inquiry, request confidential material; yet it does not impose a legal obligation to grant access. The GC will only take “formal note” that access has been denied if that is what happens.

Another aspect of the ECtHR's case law is that it excludes invoking secrecy if the information is no longer secret, i.e. if it is available in the public domain. Consequently, in instances where the information is already public,⁹³ the EU institutions and the Member States should not be able to refuse to share the information with the Court and the other party. This requirement about sharing the information if it is public may be concluded from the ECtHR's case law, but it is not specified in the EU rules.

Thirdly, impartiality must be guaranteed. This – in line with the ECtHR's case law – is determined on the basis of a subjective and an objective test. While the former relates to the behaviour of a particular judge, the latter

92. Case C-376/10 P, *Pye Phyo Tay Za v. Council*, EU:C:2012:138, para 67. See also Eckes (2014), op. cit. *supra* note 20, at 887.

93. See *infra* for details on public information, section 3.3.5.

requires institutional and circumstantial conditions that allow ascertaining whether the court itself offers sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.⁹⁴ Article 105 in this respect establishes some constraints on the Court, such as taking into account closed evidence only if it is essential for it to rule on the case, confining itself to information that is strictly necessary, and taking account that the applicant has not been able to make their views known on the closed evidence against them. Yet the procedure is centred on the Court without an “intervention” of an independent outsider party, such as the special advocate in the UK system and the ECtHR’s case law. In principle, a special advocate is a specifically appointed lawyer who represents the person’s interests regarding the material that is kept secret from that person, as the special advocate is given access to the classified material used as evidence against the person. The special advocate hence serves as an independent additional safeguard to ensure the rights of the person, distinct in its role from the judges involved in the review.

The ECtHR clearly requires that when secrecy is invoked and Convention rights are limited, additional safeguards must be introduced against arbitrariness of the public authorities. While special advocates are not specifically mentioned, Article 105(6) allows the General Court to specify procedures to be adopted to accommodate fair trial requirements. This provision could hence be understood as opening the possibility for the introduction of a special advocate model in the EU context. Yet, firstly, this is not beyond doubt and certainly does not introduce any obligations on the court; and secondly, the role of a special advocate would be even more critical in instances provided by Article 105(8) where the individual does not even have access to the gist of the information.⁹⁵ Article 105(8) in particular is too centred on the Court and only provides limitations on how the Court should act on closed evidence, but does not provide for an additional court-independent safeguard against the risk of judicial error or bias.

Finally, where a party submits allegedly confidential information to the GC and the GC finds this information relevant but not confidential, the submitting party is free to withdraw the information. The Court has then seen relevant information that is no longer part of the proceedings and should hence no longer be part of the consideration of the case at hand. Particularly in light of the relative inexperience of ECJ judges to deal with closed evidence,⁹⁶ leaving

94. ECtHR, *Micallef v. Malta*, Appl. No. 17056/06, judgment of 15 Oct. 2009, para 93.

95. See for more details, *infra* section 3.3.3.

96. The majority of judges serving at the ECJ and the CG are not from legal practice. Indeed, a large majority were academics before they joined the court. See background of the judges respectively for ECJ available at <www.curia.europa.eu/jcms/jcms/Jo2_7026/en/> and the GC available at <www.curia.europa.eu/jcms/jcms/Jo2_7035/en/>.

known information out of considerations may raise questions as to their formal impartiality.

3.3.3. *Essence or gist requirement*

Paragraphs 5 and 6 of Article 105 set out the rules for the second level of secrecy ((ii) semi-closed evidence). They comply with the case law both of the ECtHR and ECJ on the need to provide the applicant with the gist of the evidence against them. Article 105(8) by contrast allows for the third level of secrecy ((iii) closed evidence). It opens the possibility that the individual will not even receive the essence of the information on which the Court bases its judgment. This is a core aspect where the new rules of procedures fail to meet the requirements for lawfully introducing secrecy in court proceedings. This should be seen as an unlawful interference with the essence of the right of access to justice, explicitly protected by Article 52(1) CFR. It conflicts with the case law of the ECtHR, which requires that some *minimum level of information must be disclosed* to the defendant. Moreover, the EU courts themselves recognized in the above cited sanctions cases⁹⁷ the necessity of some essential information being disclosed to the applicant, especially in cases where the measures have a severe effect on the applicant. This is a fundamentally problematic aspect of the EU closed evidence procedure, which in the event of a challenge to the ECJ should be found in breach of Article 47 CFR, as interpreted in the light of Article 52 CFR, as well as Article 6 ECHR as interpreted by the ECtHR.

The EU closed evidence procedure “only” introduces “shallow” secrets: the uninformed party knows that executive actors are keeping something secret, although he or she has no knowledge of its content.⁹⁸ There is, in fact, a difference between shallow and deep secrets, in the sense that the latter refer to situations where the uninformed party is not aware at all that something is being kept secret. Deep secrets may be opposed to shallow secrecy, which refers to the situation where the uninformed party knows that something is kept from them but they do not know what. Allowing deep secrets would have been a further and deeper breach of access to justice, as the uninformed party (i.e. applicant) would be further impaired from providing counter-arguments to defend themselves.

3.3.4. *Proportionate restriction in light of the gravity of the measure*

Proportionality requirements apply to the specific question of the lawfulness of closed evidence. This is illustrated by the ECtHR case of *A v. UK* and was also emphasized by the UK House of Lords, when it applied this case law in

97. See Case C-280/12 P, *Council v. Fulmen* and Case C-27/09 P, *OMPI*.

98. Pozen, “Deep secrecy”, 62 *Stanford Law Review* (2010), 257.

national proceedings. In the words of Lord Phillips: “non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him, at least where he is at risk of consequences as severe as those normally imposed under a control order.”⁹⁹

The red lines imposed by the right of access to justice consequently cannot be drawn in isolation from the cases at hand. This makes it useful to consider the type of cases that gave rise to the revision of the GC’s Rules of Procedure and that will most likely be the cases before the General Court in which the closed evidence procedure is applied in the EU context: EU sanctions against individuals. Sanctions against individuals are an exceptionally grave interference with fundamental rights of an indefinite duration that amount to a quasi-criminal charge.¹⁰⁰ Hence, while the necessity of secrecy may reasonably be argued with regard to specific information, the conditions set out in this section should be applied particularly strictly in the context of sanctions cases.

3.3.5. *Public information*

The Rules of Procedure do not address what types or categories of information or materials could be considered confidential. More details on this can be found in the Security Rules, which define “information” as “any written or oral information, whatever its medium or author”.¹⁰¹ The Security rules explicitly mention that “sensitive, confidential” refers to information concerning which the “main party producing it has indicated that to communicate it to the other main party would harm the security of the Union or of its Member States or the conduct of their international relations, even when” such information is not EUCI.¹⁰² Hence, a very broad range of information could potentially be categorized as confidential.

As explained above, the decision on whether information must be considered confidential lies with the GC. This opens as a matter of principle the door to declaring information confidential that is available in the public domain. The GC should strictly and explicitly follow the case law of the ECtHR on this point. This relates to the above discussed point on the absence of deep secrets. The case law of the ECtHR does not allow Member States to declare public documents, e.g. decisions by the judiciary, confidential. The exclusion of deep secrets additionally rules out that information is kept secret

99. *Secretary of State for the Home Department (Respondent) v. AF (Appellant) (FC) and another (Appellant)* [2009] UKHL 28, para 65.

100. Eckes (2014), *op. cit. supra* note 20. As noted above in the text, detentions also constitute exceptionally grave interferences. We focus on sanctions as they are a tool that could be used by the Council and as such have given rise to case law before the General Court.

101. Art. 1(e) Decision 2016/2387 of the General Court, cited *supra* note 8.

102. *Ibid.*, para 2 of the preamble.

but used before the courts without the individual knowing. Putting responsibility for the assessment of compliance with the ECHR in the hands of the domestic court, here the GC, as such, fully corresponds to the case law of the ECtHR. A reference to that body of case law in the EU rules on closed procedure however would have been desirable.

3.3.6. *Immunity*

In the context of counter-terrorist sanctions cases before the EU Courts, the information as to which State – not in all cases EU Member States – suggested the listing has repeatedly been withheld from the applicants. Within the EU it is common procedure for Member States to require that their position and identity is not disclosed even in law-making procedures. As evident in the *Access Info Europe* case, in the context of public access to information, Member States refused to have their identity linked to their position for the legislative revision of Transparency Regulation 1049/01.¹⁰³ The Court however maintained that such information should be made publicly available, as it relates to the process of law making, in which the public nature is paramount from a democratic perspective. Although the context of adopting counter-terrorist sanctions is quite different, the important point of comparison is that sanctions restrain fundamental rights as guaranteed under EU law, which form part of the very foundations of EU law set out in Article 2 TEU.

The ruling of the ECtHR in *Nasr and Ghali* should further be interpreted as excluding a situation where the applicant does not know who initiated an allegedly unlawful listing of the applicant as a supporter of terrorism. Even though this point is not explicitly addressed in the Rules of Procedure or in the Security Rules, the GC should in its decisions on the confidentiality of information rely on the case law of the ECtHR to hold that the identity of the originator of an allegedly unlawful act cannot fall under the closed evidence rule. This should not only cover the natural person who carried out the act but extend to the legally responsible entity, i.e. State. This aspect in the procedure of closed evidence is salient, as it aims to prevent situations where the discretion to withhold information is potentially misused or abused. It requires that the listing State is identifiable and hence can be held accountable by the judiciary as to the type of evidence and arguments it provided. As was noted in *Nasr and Ghali*, States do not always invoke executive privileges of secrecy purely for national security concerns. It is important for the Court and

103. Case C-280/11 P, *Council v. Access Info Europe*, EU:C:2013:671. See for more details on the case Abazi and Hillebrandt, “The legal limits to confidential negotiations: Recent case law developments in Council transparency: *Access info Europe* and in ‘r Veld’” 52 CML Rev. (2015), 825.

the applicant to be able to know which State suggested the listing in order to better decipher the context and other interests the State may have for requesting that a particular person is placed on an EU sanctions list. The applicant must know, not only which national decision to challenge in order to attack the origin of the sanction; they must also be able to bring an action for damages against the author of the “relevant decision” before national courts.

3.3.7. *Publicly debated law*

In principle, limits to the right of access to justice may only be introduced by law. This is confirmed by Article 52(1) CFR. Establishing general limits to the right of access to justice in a delegated decision of the General Court, subject to approval by the Council, is a wide interpretation of this requirement. This alone supports the argument at least to make the procedure transparent and public.

Public debate democratically legitimates the choice as to whether and to what extent the right of access to justice can be limited in order to ensure other public interests. It would also give better effect to the Union principles and values in Articles 1 and 2 TEU, in particular that “decisions are taken as openly as possible” and the Union’s commitment to democracy and the rule of law. Publicity also allows the law-maker to justify why such limits are necessary. Furthermore, the public nature of the process of introducing closed evidence serves to establish and promote the necessary public confidence in the judiciary in a democratic society.¹⁰⁴ The reasoning is similar to the specific requirement of a “public hearing” in Article 6 ECHR, which intends not only to make the administration of justice visible and contribute to the core objective of a fair trial,¹⁰⁵ but also aims to instil public confidence in the administration of justice.

However, closed evidence in EU judicial review was not introduced through publicly debated law or an open procedure. Rather, the rules of procedure have been drafted and developed entirely behind closed doors. The Security Rules, providing more details on how Article 105 will be applied in practice, have also been discussed behind closed doors with input given only by security experts. Formally, the General Court followed the appropriate route of revising its rules of procedure; yet closed evidence was newly introduced in 2015 and has a significant impact on the fundamental right of access to justice. This should not be merely regarded as a procedural matter of

104. ECtHR, *Mežnarić v. Croatia*, Appl. No. 71615/01, judgment of 11 Dec. 2003, para 27. On the link between publicness and confidence specifically, see ECtHR, *Pretto and Others v. Italy*, Appl. No. 7984/77, judgment of 8 Dec. 1983, para 21.

105. ECtHR, *Diennet v. France*, Appl. No. 18160/91, judgment of 31 Aug. 1995, para 33; ECtHR, *Martinie v. France*, Appl. No. 58675/00, judgment of 12 May 2006, para 39.

information management. On the contrary, Article 105 introduces a general change in policy, which alone is justification for requiring it to be introduced by law and hence pursuant to the same requirements about openness and publicity as other legislative acts. The explicit refusal of the Court to engage with human rights lawyers and experts, and only rely on security-based advice about the management of secrecy in judicial review raises doubt to what extent the rules might carry an implicit bias towards a security-driven approach derived from drafting stages. This in turn is not a conducive process for attaining public trust that the procedural revisions of the GC are justifiable and proportionate.

4. Limited access to justice? Reflections and conclusions

The analysis demonstrates that the closed evidence procedure, introduced with the revision of the General Court's Rules of Procedure in 2015, adversely affects access to justice in the EU. It shows that the EU closed evidence procedure imposes categorical restrictions on the right of access to justice which do not comply with the ECtHR's case law (the essence or gist requirement) or the requirement of minimum disclosure expressed by the ECJ. Furthermore, the EU closed evidence procedure does not reflect an unambiguous choice that openness is the rule and any form of closed procedure must be a strictly interpreted and justifiable exception. Together with other flagged procedural ambiguities, this at least potentially makes infringements possible even where the core of the right of access to justice remains intact. Additionally, it is problematic that the rules on closed evidence were developed and decided behind closed doors with significant influence by the Council Security Committee but without public debate.

The EU closed evidence procedure was mostly motivated by the necessity to allow EU courts access to official secrets in the specific context of legal challenges brought against EU sanctions. The latter are probably *the* EU security policy that has attracted most criticism for not complying with EU fundamental rights and that resulted in the greatest number of judicial challenges.¹⁰⁶ The Council and the Member States, in a number of cases, refused to share relevant information with the Court. As a result the Court annulled the contested measures for lack of evidence. The closed evidence procedure and the Security Rules aim to address the concerns that Member States had expressed as reasons not to share national security materials with the GC. They provide an assurance to the Council and Member States that the

106. Eckes, "The law and practice of EU sanctions" in Blockmans and Koutrakos (Eds.), *Research Handbook on CFSP* (Edgar Elgar 2018) (forthcoming).

Court takes official secrets seriously and has procedures in place to handle confidential information. While the EU closed evidence procedure does not legally oblige the Council and the Member States to share their official secrets, they are of course subject to the principle of sincere cooperation, which requires them to cooperate with other actors within the EU legal order, including with the Court. They also have a strong incentive for sharing information as the Courts will only rule on the basis of the information before it and is otherwise likely to annul the contested measure.

A potential benefit of the closed evidence procedure is that the GC has the authority to decide whether the confidential status of the information is justified and can disagree with the decision of (national) executive authorities on the confidentiality classification. Secrecy, usually justified by security concerns, gives power to executive institutions by vesting them with the discretion to decide whether to disclose information. This discretion makes a judicial check necessary, especially because security measures based on confidential information usually impose serious restrictions on fundamental rights. Yet, two specific concerns arise. First, comparative experience shows that courts often defer to the assessment of security concerns by the executive. Hence, the additional review of the reasonableness of the alleged confidentiality by the Court would not necessarily lead to making the information public or at least available to the applicant. Second, it is open to question how this review authority by the GC may affect the inter-institutional relations and the willingness of the Council and Member States to continue sharing information with the Court. If the GC disagreed in the majority of cases with the classification made, or at least accepted, by the Council, this could undermine the trust in the Council's commitment to openness and ultimately also undermine inter-institutional cooperation with the Court. This would be contrary to the intended objective of the procedural revisions.

The closed evidence procedure introduces a two-tiered level of secrecy: semi-closed and entirely closed evidence. The semi-closed evidence provided for in Article 105(6) weakens access to justice in the EU. It relies on a procedure that is not sufficiently clearly determined. It simply provides that the Court must "weigh" the interest at stake, i.e. between the need for secrecy and the need for openness. It also weakens legal certainty since it provides for a case-by-case approach without clear guidelines. Article 105(8), however, provides for entirely closed evidence and disregards even the option of sharing the gist of the information used against the applicant in a non-confidential summary. This provision is not compatible with the case law of the ECtHR. The incompatibility becomes even more grave, if the measures at stake entail such far-reaching fundamental rights limitations as EU sanctions do. The fact that Article 105(8) does not comply with ECHR standards could place

Member States between a rock and a hard place. Member States are individually bound by the ECHR under public international law. They may infringe their obligations under the Convention if they allow the GC to rule on cases considering “confidential” information without sharing the “gist” with the party opposing the EU measure. *Prima facie*, one may wonder whether the GC’s Rules of Procedure, which are drawn up by the GC itself in an internal confidential procedure, could be seen as an act that cannot be attributed to the Member States.¹⁰⁷ However, these rules, including the closed evidence procedure, are approved by the Council¹⁰⁸ and should ultimately be seen as confirmed by the representatives of the Member States jointly in this capacity. This should as a matter of principle open the door to a responsibility of the Member States under the Convention.

Furthermore, national systems have made very different choices with regard to closed evidence.¹⁰⁹ This may make closed evidence a highly explosive issue in the power struggles between the ECJ and national constitutional courts, in which fundamental rights play a central role.¹¹⁰ If the Court of Justice and the GC introduce and use closed evidence in a way that is incompatible with the ECHR, and which (at least some) national systems do not allow, this may very well test the limits of “judicial cooperation” between the EU Courts and the national judiciary. It is also likely to influence the willingness of Member States to cooperate within these new structures. Hence, in addition to difficulties of establishing the necessary trust in the EU context between the Member States, the Council and the Court, serious legal

107. See *supra* note 60 for the *Gasparini/Connolly*-line of cases.

108. Art. 254 TFEU.

109. The use of closed evidence in the UK is to some extent an exception among the Member States. In some Member States e.g. France, Germany, Spain and Sweden, there is no use of closed evidence in trials. For more details see Bigo et al., “National security and secret evidence in legislation before the Courts: Exploring the challenges”, (European Parliament D-G for Internal Policies, 2014).

110. E.g. in Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, EU:C:2013:105, paras 19–21, the ECJ explained that the CFR is applicable to Member States’ actions within the “scope of EU law”. The German Federal Constitutional Court in *Counter-Terrorism Database*, Judgment of 24 April 2013, 1 BvR 1215/07, warned the ECJ not to interpret “scope of EU law” too broadly: sub C, last para: “for the questions ... which only concern German fundamental rights, the European Court of Justice is not the lawful judge according to Art. 101 sec 1 GG. The ECJ’s decision in the case *Åkerberg Fransson* ... does not change this conclusion. (cf BVerfGE 126, 286 <307>). The decision must thus not be understood and applied in such a way that any connection of a provision’s subject-matter to the merely abstract scope of Union law, or merely incidental effects on Union law, would be sufficient for binding the Member States by the Union’s fundamental rights set forth in the EUCFR.” The ECJ confirmed its position in Case C-418/11, *Texdata Software GmbH*, EU:C:2013:588, paras. 72–73. The case of *Taricco II*, Case C-42/17, *M.A.S. & M.B.*, EU:C:2017:936 is the most recent demonstration of the ongoing tensions surrounding the EU law influence on individual (procedural) rights in criminal matters.

implications could follow for the Member States. To ensure the legitimacy of EU governance, it is crucial that the EU respects fundamental rights, both when the EU institutions act or when Member States give effect to EU law.¹¹¹ Ultimately, this may have consequences for the legitimacy and well-functioning of the EU legal order going far beyond closed evidence.

Moreover, the introduction of new rules on closed evidence in the GC begs the question of what happens when closed evidence cases are appealed before the Court of Justice. The jurisdiction of the Court of Justice to review appeals against rulings and orders of the GC is limited to points of law.¹¹² However if the ECJ finds the appeal admissible and well founded, it has the option either to set aside the GC's decision and decide the case itself or to refer the case back to the GC, which is then bound by the ECJ's decision. The ECJ must hence ultimately be in the institutional position to consider both questions of law and fact pertaining to an appealed case, including whether the case was based on closed evidence. The ECJ's new security rules address the organization and management of classified information produced before the General Court.¹¹³ This justifies the conclusion that the ECJ would receive classified information, at least in an appeal case that was based on closed evidence before the GC. However since the Court of Justice itself does not (yet) have new rules of procedure and security rules only address the internal organization and not the position of the applicant, we do not know whether the Court of Justice itself will be able to admit closed evidence. The specific procedures governing closed evidence and the ability of the applicants to access the information remain unclear at this point.

The discussion of closed evidence illustrates the difficulties of a much broader debate on whether and in what contexts the EU Courts can act as human rights courts. The EU Courts play at the same time the role of a domestic and an external review court. Overall, and acknowledging that there are examples to the contrary, domestic judiciaries have demonstrated great deference to the claims by executive actors that certain information must remain confidential, in particular information related to the fight against terrorism.¹¹⁴ The body of case law of the ECtHR on access to justice and closed evidence demonstrates the self-limiting and civilizing effect of being a contracting party to the ECHR. In the EU context this raises the question of

111. See de Burca, "The road not taken: The EU as a global human rights actor", 105 AJIL (2011), 649.

112. See for a full overview of the different means of redress before the GC and the ECJ Art. 19 TEU, Arts. 251–281 TFEU, and Protocol No 3 annexed to the Treaties on the Statute of the Court of Justice of the European Union.

113. Decision 2016/2386, cited *supra* note 45.

114. See e.g. Fabbrini, *op. cit. supra* note 46.

whether the EU Courts, when they take the position of an internal court, as they do in actions for annulment against sanctions measures adopted by the Council, can still exercise the taming effect of EU law on national (executive) excesses.