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Directorate-General for Internal Policies
Directorate C - Citizens' Rights and Constitutional Affairs

**PRINCIPLES AND PROCEDURES FOR DEALING WITH
EUROPEAN UNION CLASSIFIED INFORMATION IN THE
LIGHT OF THE LISBON TREATY**



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

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DEALING WITH EUROPEAN UNION
CLASSIFIED INFORMATION IN THE
LIGHT OF THE LISBON TREATY

Abstract

The revision of Regulation No 1049/2001 regarding public access to documents coincides with the entry into force of the Lisbon Treaty. It highlights the lack of general regulation of the classification of “sensitive” documents in the EU and the absence of transparency in that field. The needs of a democratic governance call for a modification of this situation, in order to effectively protect citizens’ right of access to documents and to ensure a normal exercise of its prerogatives by the Parliament.

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The handling of classified documents has constituted a source of conflict for EU law for a long time¹. The progress of EU integration in areas known as « sensitive », and particularly the CFSP and international legal assistance, emphasize the issues raised on this point. If the debate coming up with the revision of Regulation No 1049/2001² regarding public access to EU institutions' documents makes it a sensitive question³, it is because it takes place in a deeply renewed context, from which the actors in presence refuse to draw the same consequences.

The Lisbon treaty offers a new enlightening on the status of classified documents in the EU from many points of view : EU citizens' and the institutions' perspectives are changing, with an impact for the European Parliament. The new treaty renovates the functioning of the EU in depth, which, today, is likely to give a new scope to the exercise of administrative transparency, and thus to the right of access to any document. In other words, the relationship desired by the EU with its citizens from now on asks for an obviously new and different governance.

First of all, the disappearance of intergovernmental « pillars » forces the EU to set aside the idea of a multitude of arrangements applicable to classified documents. In this case, efficiency requires to favour coherence rather than the constitution of derogatory statuses. Given the unification movement operated by the Lisbon treaty, it thus seems logical to proceed to a minimal aligning of the status of classified documents on a common model. The challenge for the EU lies in its ability to define it.

Moreover, the institutional upgrade operated by the Lisbon treaty comes with the promotion of the Charter of fundamental rights. The inspiration running the two texts underlines the central role of the democratic issue in EU actions. This affects the question of classified documents, through the issue of transparency from EU citizens' point of view or through the fact that a democratic control has to accompany EU actions.

Lastly, the particular nature of the fields covered by the classification, namely legal assistance and foreign policy, should not be underestimated. More than in any other area, the problem of transparency and democratic control in a Union of law is raised. Eventually, it opens the debate of the parliamentary control operated on intelligence⁴.

The continuation of the works on the modification of Regulation No 1049/2001 under the Lisbon treaty will thus be conducted in terms obviously different from those that were valid towards the end of the last parliamentary legislature ruled by the Amsterdam treaty. Logically, the innovations in the legal framework set by the TEU should then lead to evolutions in its actors' behaviour of the actors in charge of the file. The definition of a balanced interrelation between the institutions in charge of security policies becomes an important aim of its own. The technical nature of the issue of classified documents does not conceal the real political stakes of the debate. As the EU intends to take responsibilities in particularly sensitive areas, it must do so within an institutional framework that respects its values. Since the use of highly political data in its action call for the respect of « State secret », it must find a balance between all the interests in presence. Just like great

¹ For an overview of the law applicable to the right of access, see European Parliament, Public access to EU documents, Briefing Paper, april 2008

² OJ L 145, 31 may 2001 p. 43.

³ See report M. Cashman, 19 february 2009, A6-0077/2009

⁴ For instance, the Select Committees on Intelligence of the US House of Representatives and the US Senate were respectively created in 1976 and 1977. An equivalent organ was created 1979 in the Bundestag and in 1994 in the British Parliament, and, in France, the law of October 9th, 2007, created a parliamentary delegation in charge of intelligence.

democracies, it must conciliate the imperatives of a democratic governance and the needs of an efficient political action. While doing so, a clarification of the status of classified documents and of the role of institutional actors in their access is probably necessary.

1. Principles applicable to classified documents

The existence of a « classified » document is generally entailed by the existence of information known as « sensitive », to which access should be restricted in order to protect it against a use that would be contrary to its owner's objectives. The EU, along with its member states, is aware of that problem. The legal framework of access to this kind of documents was shaped progressively but it is Worth defining first the meaning of the notion.

1.1. The notion of classified document and « sensitive » information

The regulation of access to « sensitive » information is known in all the national legal systems. It obeys common principles that are widely shared in occidental democracies.

Depending on their « sensitivity », that is to say the potential seriousness of the consequences of their disclosure, there is a range of classification levels between sensitive documents. This classification will then command the authorisations allowing access to information, and its protection. Here are the different levels, with possible variants:

- Unclassified information : the information does not have a sensitive character, and can thus be generally accessed ;
- Restricted information : its disclosure could be problematic ;
- Confidential information : cannot be disclosed as it could jeopardise national security ;
- Secret information : cannot be disclosed as it could seriously jeopardise national security ;
- Top secret information : its disclosure would have extremely serious consequences for national security and requires the strictest confidentiality level.

As a comparison⁵, within the EU, almost all Member States acknowledge four classification levels for sensitive information (« top secret », « secret », « confidential » and « restricted ») even if France and Belgium prefer to use only three. Outside the EU, in the United States, sensitive information is classified on the basis of three levels, from « confidential » to « secret » and « top secret » but the Freedom of Information Act enacted in 1966 sets the principle of freedom of access as long as the secret is not opposed. The main novelty in this respect was the modification made by Executive Order No 13526 enacted on December 29th, 2009 by President Barack Obama, creating time limits for the classification of documents and establishing a National Declassification Center in the National Archives. In average, a document can now be consulted after 50 years, save for exceptional cases.

1.2. The absence of general regulation of classified documents in the EU

⁵ See annex

As far as the European Union is concerned, paradoxically, there is no general principle applicable to documents containing sensitive information and requiring to be classified as a whole. Only article 9 of Regulation No 1049/2001 punctually tackles the issue of access to such documents. Several factors explain that phenomenon.

There is first a material explanation. Due to the mainly economical dimension of the European Community, the issue was raised rather belatedly for the Union. A historical explanation comes in addition : the creation of the EU and its intergovernmental pillars forced to wonder about the democratic nature of their management and transparency.

The status of documents containing sensitive information was almost accidentally addressed in article 9 of Regulation No 1049/2001⁶. Its first paragraph gives its definition by stating that they are « *documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as 'TRES SECRET/TOP SECRET', 'SECRET' or 'CONFIDENTIEL' in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters.* » They are only registered or issued with the consent of the original authority⁷, which is the most distinguishing consequence of this legal treatment.

There are not many remarks to make about the scope of these classified documents. It is perfectly classic as it covers the protection of the « *essential interests of the European Union* », a very vague expression that will have to be defined in the future, and « *notably public security, defence and military matters* », which are the main matters dealt with in the second and third pillars.

The rules on their access breach the common law established in Regulation No 1049/2001. Requests to access sensitive documents are exclusively dealt with by persons authorised to acquaint themselves with these documents, which specify the references that can appear in the public register regarding them⁸.

These statutory elements are by no means « principles » guiding or framing the institutions' action regarding documents classification. The European executive's simplistic position on that point was summed up by the Commission. In its proposal to modify Regulation No 1049/2001⁹, it considers that it would be logical to extend the right of access to documents while ruling out any reference to classified documents : « *Parliament recommended laying down rules for classification of documents in the Regulation and ensuring parliamentary control over the application of such rules and access to such documents. Classification of documents does not per se exclude them from the public right of access. Therefore, the Commission considers that specific rules on classification and on the handling of classified material should not be laid down in a Regulation on public access.* » However, there is no legal basis allowing to reach that conclusion other than article 15 TFUE.

The status of « sensitive » documents requiring a particular treatment and an appropriate protection is thus not clearly and generally defined in secondary law, which merely addresses the particular dimension of public access to these documents. It refers to the « *concerned institutions* » and to their internal « *rules in force* » to handle the issue comprehensively. In practice, considering the responsibilities carried out in the fields at stake, the Council and the institutions and agencies working in these areas are mainly concerned.

⁶ In order to associate a legal basis to an agreement concluded with NATO that had been remanded to the Court by the Parliament

⁷ Article 9 §3

⁸ Article 9 §2

⁹ COM (2008) 229, May 30th, 2008

Nothing is mentioned in the general EU regulation about the precise justifications basing a document's classification, regarding the concrete modalities of this classification, including its length and a potential control of the grounds justifying this restriction to the right of access. There is no precision either on whether or not the authorities holding the information and deciding upon its classification have a unified approach. A possible « declassification » is not mentioned either. On the contrary, the unilateral definition of the classification modalities is left to the concerned institutions, which are actually, in practice in the Union, the Council alone. The institutions, by virtue of their self-organisation competence, can then adopt internal regulations in order to determine those rules, as it will be detailed later.

The Council has actually decided to proceed to the determination of such rules for several months, in a systematic way. Indeed, it set the principles ruling the conditions of communication of these documents in its rules of procedure, that were just modified. It is currently adopting substantial rules regarding the security of classified information in the EU. Finally, it multiplies initiatives at the international level in order to make this protection coherent with EU partners.

Finally, it is worth adding that the specific provisions of the TFEU regarding professional secrecy would be likely to be opposed to Parliament's access on the grounds of article 339 TFEU (ex article 287 TEC). They bind the « *members of the institutions of the Union* ». The European Parliament's access to protected information could obviously not be qualified as a form of « *public disclosure* », and this secrecy obligation binds the Parliament but could not be opposed to it.

1.3. Consequences

These deficiencies in EU law emphasize the consequences that should be drawn from this situation. Indeed, the fact that the exercise of a fundamental right is affected calls for a better legislative response. These consequences can be assessed from the EU institutions' and citizens' points of view.

1.3.1. From the citizens' point of view

The existence of classified documents creates a limitation to the principle of the right of access, which raises serious issues for EU citizens.

There is first a general problem of principles, that is faced by all the democracies whenever secrecy conflicts with the necessary transparency of public actions. The fact that this limitation to a fundamental right guaranteed by both the treaty and the Charter is only framed by the institutions', and in this particular case the sole Council's, rules procedure¹⁰, is a serious problem. Any limitation to this right should at least result from a regulatory act legislatively adopted.

In addition and more importantly, there is a justice problem whenever the confidentiality requirements go against the needs of individuals' jurisdictional protection. The problem was characteristically brought before the European Court of Justice in several cases regarding counter-terrorism measures, particularly regarding the registration of individuals on EU anti-terrorist lists. In the *Sison* case¹¹, the Court adopted a restrictive approach by giving priority to confidentiality needs. In this case, the Council's attitude was challenged as it failed to disclose the identity of the States that had proceeded to the registration and their grounds for doing so. The claimant used it as an argument to challenge an abnormal infringement of his right of access to the documents relating to his defence rights.

¹⁰ It was already the case for general access to documents initially depending on Decision 93/731, before it was guaranteed by Regulation 1049/2001.

¹¹ ECJ, February 1st, 2007, Jose Maria Sison v Council, C-266/05 P, Rec. p. I-1233

The Court chose to confirm the Court of First Instance's judgement by rejecting the request. The Court based its analysis on the « *special nature of sensitive documents* » and their « *highly sensitive content* » to consider that, on the grounds of article 9 §3 of Regulation No 1049/2001, « *the originating authority of a sensitive document is empowered to oppose disclosure not only of that document's content but even of its existence* ». That authority « *is thus entitled to require secrecy as regards even the existence of a sensitive document and ... such authority also has the power to prevent disclosure of its own identity in the event that the existence of that document should become known* »¹².

That limitation to the right of access have important consequences for the exercise of jurisdictional protection, but it « *cannot therefore be held to be disproportionate on the ground that it may give rise, for an applicant refused access to a sensitive document, to additional difficulty, or indeed practical impossibility, in identifying the State of origin of that document* »¹³. To be understood with regards to the right of access to documents, the judge's position can be explained : a specific public interest, the efficiency of the fight against terrorism in that particular case, outweighs a general public interest such as transparency. The Court of First Instance did not change this approach in its later judgements, even if it lessened its impact by stating that the failure to declassify and communicate a document on the grounds of which a registration of an EU anti-terrorist list had been established raises a major issue regarding jurisdictional protection : « *the refusal by the Council and the French authorities to communicate, even to the Court alone, the information contained in point 3 a) of the last of the three documents referred to at paragraph 58 above has the consequence that the Court is unable to review the lawfulness of the contested decision* »¹⁴. The judge consequently censured that refusal.

1.3.2. From an institutional point of view

The existence of classified documents required a specific adjustment of the Relationship between EU institutions, regarding the management of these documents, as it will be detailed later¹⁵, but also and mainly regarding the possibility for the institutions to access these documents.

As for other institutions' access to classified documents, there was a need for conciliating both the sensitive nature and content of some highly confidential information and the Council's obligation to provide the Parliament with the information necessary to the exercise of its mission. For that purpose, an interinstitutional agreement between the Parliament and the Council regarding the second pillar was concluded¹⁶ and implemented by a decision of the European Parliament¹⁷.

On that basis, the president of the European Parliament or the president of the Parliament's Committee on Foreign Affairs can ask the Council presidency or the General Secretariat / high representative to provide for information on the developments regarding the European security and defence policy, including sensitive information. In case of crisis or upon request from the president of the European Parliament or the president of the Committee

¹² Points 101 and 102

¹³ Point 103

¹⁴ TPI, December 4th 2008, *People's Mojahedin Organization of Iran v Council*, T-284/08, Rec. 2008 page II-3487 point 76

¹⁵ Point 2.1.

¹⁶ Interinstitutional Agreement governing European Parliament access to sensitive Council information in the sphere of security and defence policy, OJ C 298 of November 30th, 2002 p. 1

¹⁷ Decision of the European Parliament regarding the implementation of the interinstitutional agreement regarding the European Parliament's access to the Council's sensitive information in the field of security and defence policy,, OJ C 298 of November 30th, 2002 p. 4

on Foreign Affairs, such information is provided for as fast as possible. In that framework, the president of the European Parliament as well as a special committee presided by the president of the Committee on Foreign Affairs are informed by the Council presidency or the General Secretariat / high representative of the content of sensitive information whenever it is necessary to allow the European Parliament to exercise its attributions according to the treaty on the European Union, in the field covered by the interinstitutional agreement. The president of the European Parliament and the special committee can ask to consult the documents in question in the Council premises. A special authorisation procedure is foreseen for the members of the European Parliament and the civil servants concerned, who have to respect secrecy¹⁸.

2. The modalities for dealing with classified documents

As EU legislation does not tackle the question, most of the applicable rules are established by the Council. Under its Security Committee's impulse, it openly expressed its concern to review the security rules governing classified information in the EU in order to « *create a more coherent and comprehensive general framework* »¹⁹. This reflection is about to come to an end. In parallel, it multiplied international initiatives on that same point in order to set up a similar coherence.

2.1. From an internal point of view

It is clear that the status of classified documents in the Union is now unilaterally defined by the Council, and that phenomenon unquestionably accelerated within the last few months, during the year 2009. The access to classified documents in the EU is thus dealt with within the framework of the Council's rules of procedure²⁰, as it is the inherent holder of « sensitive » information likely to be classified, since it is in charge of the fields where such information is used. The Council's rules of procedure refer to the provisions of Regulation No 1049/2001 regarding the procedural modalities to access classified documents, but, in practice, other documents regulate all the other aspects of the classification of sensitive information.

Since it holds sensitive information, the Council must handle the question of its relations with the Member sStates but also with the other institutions. Indeed, information security is a condition set by its holder to proceed to its disclosure. The unification of rules governing the protection of sensitive documents thus has a double objective for the Council : to ensure that it is secure but also to facilitate a potential exchange with a partner.

In this respect, the agreement between EU member states, gathered in the Council, regarding the protection of classified information exchanged in the interests of the European Union²¹ constitutes a first working step. It aims at creating a binding framework protecting exchanges of sensitive information in the Union, whether it is information from the Member States or from the EU institutions and agencies, or even from third States and international organisations. By doing so, and by underlining that protection obligation, it hopes to facilitate the exchange process. Indeed, the latter is frequently criticised for being weak and is presented as one of the explanations for the insufficiencies of the fight against serious crime.

Regarding interinstitutional relations, a series of EU actors are involved in order to, once more, manage to create a coherent framework where rules governing the protection and

¹⁸ Articles 7 to 11 of the precited decision.

¹⁹ Doc. 14762/07

²⁰ Rules of procedure of the Council, OJ L 325, December 11th, 2009, p. 36

²¹ Doc 13886/09

exchange of information obey equivalent standards.

Following the same logic as regarding relations between Member States, plans for joint statements between the Council and the Commission are currently being negotiated in order to reaffirm their mutual interest for the creation of such a reference frame and for a cooperation in that field, notably regarding agencies and institutions under their authority²² in all the fields of action, including when exchanges of information take place. Agencies' subordination to these security rules regarding sensitive information is a principle, even if it is logical that some, such as Europol, make it an important preoccupation²³. In the case of Europol, the Europol decision provides that its Management Board is in charge of elaborating the confidentiality rules, which are then submitted to the Council for agreement after a consultation of the European Parliament²⁴. In that case, administrative arrangements allow to set up a reciprocal cooperation and protection framework, in the form of exchanges of letters²⁵.

Annex II to the Council's revised rules of procedure is thus devoted to the « *specific provisions regarding public access to Council documents* » and it is exclusively under the authority of Regulation No 1049/2001. Its article 3 deals with the consultation requests received from other institutions or other Member States, thus paradoxically placed amongst the « public », and to which the General Secretariat answers within 5 working days.

The draft Council Decision currently negotiated, regarding the security rules for the purpose of protection of EU classified information regulates in depth the applicable procedural modalities. It determines its basic principles and the minimum security standards, animated by the concern that each Member State ensures an equivalent level of protection for classified documents. In annex, the operational functioning and the management of this security system are detailed.

On those grounds, the classification of documents would be as follows and would command the corresponding authorisations :

- (a) « EU TOP SECRET » : the unauthorised disclosure of the information and documents could cause an exceptionally serious harm to essential interests of the European Union or of one or several of its Member States ;
- (b) « EU SECRET » : the unauthorised disclosure of the information and documents could seriously harm essential interests of the European Union or of one or several of its Member States ;
- (c) « EU CONFIDENTIAL » : the unauthorised disclosure of the information and documents could harm essential interests of the European Union or of one or several of its Member States ;
- (d) « EU RESTRICTED » : the unauthorised disclosure of the information or documents could damage interests of the European Union or of one or several of its Member States.

Logically, whenever information classified differently are gathered, the classification level that should be implemented is at least as high as that of the information matched with the highest protection level. In any case, a group of information can benefit from a higher classification level than that of any of its parts. The translation of classified documents receives the same classification level as the original document and benefits from the same protection level.

²² Doc. 13646/09

²³ See the draft Council Decision adopting rules regarding the protection of the confidentiality of Europol information, doc. 11047/09

²⁴ Council Decision 2009/371/JHA, April 6th, 2009, articles 40 and 59 §1

²⁵ See for instance the draft administrative arrangement with Frontex about the exchange of classified information, doc. 15077/08

2.2. From an external point of view

The existence of classified documents obviously sets considerable problems since, by nature, the efficiency of the policies at issue imply an exchange and a circulation of the concerned information with third parties, whether they are third States or international organisations. The example of international fight against terrorism is a good illustration of that need.

The EU external action can, at some point, require an adapted framework, which means the conclusion of agreements on the exchange of classified information, conditioned by reciprocity. It is thus important that, on a case by case basis, an appropriate security is ensured, in compliance with their classification regarding the information exchanged with the concerned international bodies or third States. The European Union realises that objective by multiplying the initiatives on that subject, creating a real « spiderweb ». The recent Decision on the release to international organisations and other third parties of EU classified information and documents generated for the purposes of EU missions established by the Council makes the General Secretariat of the Council responsible for passing on such documents, while the future decision establishing the organisation and functioning of the European external action service (EEAS)²⁶ is not in force.

Therefore, from 2003 onwards, and in accordance with articles 24 and 38 TEU, the EU started a series of negotiations with third States in order to conclude agreements on the security procedures applicable to exchanges of classified information. Permanent agreements were thus concluded between the Union and Bosnia²⁷, Norway²⁸, the Former Yugoslavian Republic of Macedonia²⁹, Ukraine³⁰, Iceland³¹, Israel³², Switzerland³³, the United States³⁴, Croatia³⁵, Australia³⁶, and the Russian federation³⁷.

A second level of agreements regards the permanent arrangements signed by the Union with a number of international organisations whose action is supposed to have repercussions in the security field. The EU is consequently linked to NATO³⁸, the European Space Agency³⁹, the European GNSS Supervisory Authority on the security and exchange of classified information⁴⁰ and even the International Criminal Court⁴¹.

Generally, article 300 TEC did not foresee any information or communication procedure to the benefit of the Parliament, except for the application of the principle of sincere cooperation within the Framework agreement concluded between the Parliament and the Commission⁴². Annex 1 to said agreement describes the modalities of transmission of confidential information by the Commission⁴³.

²⁶ Doc. 8463/10

²⁷ OJ L 324, October 27th, 2004, p. 16

²⁸ OJ L 362, December 9th, 2004, p. 29

²⁹ OJ L 94, April 13th, p. 39

³⁰ OJ L 172, July 5th, 2005, p. 84

³¹ OJ L 184, July 6th, 2006, p. 35

³² OJ L 192, July 24th 2009, p. 64

³³ OJ L 181, July 10th, 2008, p. 62

³⁴ OJ L 115, May 3rd, 2007, p. 30

³⁵ OJ L 116, April 29th, 2006, p. 74

³⁶ OJ L 26, January 30th, 2010, p. 31

³⁷ Doc. 15227/09

³⁸ OJ L 80, March 27th, 2003 p. 36

³⁹ OJ L 219, August 14th, 2008, p. 59

⁴⁰ OJ L 306, November 20th, 2009, p. 41

⁴¹ OJ L 115, April 28th, 2006 p. 50

⁴² OJ C 117 E, May 18th 2006 p. 123

⁴³ OJ C117 E, May 18th 2006 p. 131

3. The Lisbon treaty and the legal framework applicable to classified documents

The negotiation regarding the revision of Regulation No 1049/2001 was not achieved before the end of the legislature and the entry into force of the Lisbon treaty. The legal and institutional framework in which that negotiation will start again is significantly renewed from a technical and political point of view. A specific assessment is thus needed.

Indeed, the provisions regarding transparency and access to documents are in line with a political and legal atmosphere strongly influenced by the will of the treaty authors to promote what could be called the « administrative democracy ». This will is expressed in several points from its preamble, its content and even the Charter of fundamental rights.

3.1. The Charter of Fundamental Rights

The binding character given to the Charter of Fundamental Rights by the Lisbon Treaty favours the strengthening of the right of access to documents. In addition to article 41 of the Charter regarding the right to good administration, article 42 of the Charter, entitled « *right of access to documents* » provides that « *any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium* ».

In that respect, the explanations⁴⁴ accompanying the Charter underline that this right « *is the right guaranteed by Article 255 of the EC Treaty. In accordance with Article 52(2) of the Charter, it applies under the conditions defined by the Treaty* » in article 15 §3 TFEU. On those grounds, and from the individuals' point of view, the fundamental right to access set in article 15 TFEU is consolidated.

3.2. The Lisbon Treaty

The authors of the treaty emphasise from its preamble the fact that they are « *desiring to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them* »⁴⁵.

This idea is later confirmed by several articles of the treaty on the Union, in the Title II precisely dedicated to the « *provisions on democratic principles* ». Article 10 §3 TEU states that « *every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.* » Article 11 §1 and 2 provides that « *the institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action* » and that they « *shall maintain an open, transparent and regular dialogue with representative associations and civil society* ».

Article 15 of the treaty on the functioning of the Union materialises these general principles by replacing former article 255 TEC that constituted the legal basis for Regulation No

⁴⁴ According to the preamble of the Charter, it « *will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention* », OJ C303, December 14th, 2007, p. 1

⁴⁵ Recital 7 of the Preamble

1049/2001. It first sets the importance of the EU's openness. In that respect its §1 provides that « *in order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible* ».

This contribution of the TFEU, in comparison to the former wording of the Amsterdam treaty, should be underlined. If article 255 TEC merely regulated the right of access to documents and its limits in three paragraphs, article 15 TFEU significantly widens the perspective. Nothing would prevent the Court, in a daring jurisprudence, from extending this emphasis on democratic principles by given them a legal value.

The first contribution made by the TFEU is political. The right of access to documents is no longer confined in the isolated situation it used to have. It is replaced in a context highlighting its meaning and its authority. This right is in line with the « principle of openness » set in article 15 §1 TFEU, which should be respected by EU institutions « *in order to promote good governance* ». The right of access is thus an expression of the principle of openness, which forces each institution, from now on, to « *work as openly as possible* ». Until now, the principle was integrated in the motivation of Regulation No 1049/2001⁴⁶ which repeated the content of the second indent of article 1 TEU⁴⁷, but it now constitutes the keystone of the whole system. Without doubt and even more clearly since the Lisbon treaty entered into force, the right of access lies on a « constitutional provision » and ends here its « protection of the right of access under ever higher norms »⁴⁸.

While the Amsterdam treaty used to guarantee a general and indifferent openness, the Lisbon treaty develops a pragmatic and targeted approach. It organises a voluntary relationship between three related notions : the principle of openness, the transparency principle, and the right of access to documents. On the grounds of article 15 TFEU, it is now clear that the principle of openness requires transparency in institutions' actions to allow the exercise of the fundamental right of access to documents. This development validates the expression used by Advocate General Maduro in his opinion on the case *Sweden v Commission*⁴⁹ : the right of access is « *a fundamental right of constitutional import linked to the principles of democracy and openness* »⁵⁰. The Lisbon treaty therefore strengthens the conditions of exercise of this right.

In these conditions, the ECJ's statement regarding Regulation No 1049/2001 has an even bigger impact : « *its aim is to improve the transparency of the Community decision-making process, since such openness inter alia guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system* »⁵¹.

The second fact strengthening the impact of the right of access to documents is material. While article 255 §1 TEC aimed specifically at « *the documents originating from the European Parliament, the Council and the Commission* », article 15 TFEU considerably extends the list of beneficiaries of the obligations it institutes. Regarding the application of

⁴⁶ Recital 2

⁴⁷ The treaty marks a new step in the process creating an ever closer Union, in which decisions are made as respectfully as possible of the principle of openness and as close as possible to the citizens. Le présent traité marque une nouvelle étape dans le processus créant une union sans cesse plus étroite entre les peuples de l'Europe, dans laquelle les décisions sont prises dans le plus grand respect possible du principe d'ouverture et le plus près possible des

⁴⁸ Conclusions Maduro point 39

⁴⁹ ECJ, December 18th, 2007, Kingdom of Sweden v Commission, C-64/05 P, Rec. 2007 p. I-11389

⁵⁰ Point 42

⁵¹ CJCE aforementioned point 54

the principle of openness in article 15 §1 as well as the right of access to documents in its §2, the treaty aims generally at « *the Union's institutions, organs and bodies* ». The wide scope of this obligations rules out all possible disputes in advance. Article 15 does not formulate any restriction regarding, for instance, the role of these organs and institutions. The explanations accompanying article 42 of the Charter actually confirm this extension. The general character of the wording of article 15 would thus, logically, entail the adoption of a general regulation applicable to classified documents and their management in the EU, whoever their holder is, and would allow to identify general principles.

3.3. The impact on the classification of documents

The whole construction of the Lisbon treaty undoubtedly strengthens people's right to access documents. Initially introduced like an exception, the rise of the fundamental right of access to documents, initiated in Amsterdam, was continued and achieved at its peak in Lisbon. Secrecy and refusal of access to documents are now an exception strictly controlled by the judge. It is now up to the legislator to modify Regulation No 1049/2001 accordingly. This added value in terms of fundamental rights raises even more the institutional issue. Indeed, it would be paradoxical to observe that individuals have more prerogatives to access documents than the Parliament... In other words, was the progress noted for individuals accompanied by an equivalent progress in the relations between the institutions regarding administrative secrecy and classified documents protecting it ?

It is hard to find a legal answer to that question. If the individual right to access documents is now guaranteed, it only benefits people and not the institutions, in the words of article 15 §3 TFEU. The institutions do not seem to be the direct beneficiaries of article 15, and even less of the Charter's article 42.

However, notably regarding the European Parliament, access to classified documentation remains a central issue, both for the legislator and his understanding of issues at stake, and for the elements essential to establish its democratic control. A parliamentary access to classified documents is, besides, undoubtedly justified by the new wording of article 15 and the links made with the principles of openness and democracy. Citizens' democratic representation justifies such an access in order to legislate but also to control, and the protection of citizens' prerogatives is still at stake. However, article 15 is a weaker legal basis to operate this upgrade than the conclusion of an interinstitutional agreement.

As a consequence, from an institutional point of view, the issue remains. However, in the current legal situation, the principles and the modalities of exercise of documents' classification are an exclusive prerogative of the Council. There is hardly any justification to that supremacy, including in the eyes of article 15 TFEU. In the second indent of its §3, this article provides that « *general principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure* ». The main question is thus to know whether the regulation of classified documents falls under the scope of the definition of the « *general principles* » and « *limitations* » of access to documents.

The Council answers negatively to that question in its legal service's opinion⁵². It states that the question of the security rules justifying sensitive documents' classification does not fall under the scope of article 255 TEC. But is this where the problem lies ? The issue here might not be the sole protection of security but the definition of the conditions under which a classification can limit the right of access, no matter what the grounds for it are. The « *Union's essential interests* » justifying that classification can go beyond security problems...

⁵² Doc. 6865/09

In other words, the definition of general conditions under which the classification is done, implemented and eventually ends by a declassification can legally be made *in abstracto* without any interference of the security issues. The wording of the third indent of article 15 §3 TFEU would then be logical as it specifies that « *each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph*⁵³ ».

In addition, the conclusion of international agreements by the Union is a specific issue as they frequently contain confidential information. The new wording of article 300 TEC in the new article 218 TFEU is worth commenting. Article 218 §10 TFEU provides that « *the European Parliament shall be immediately and fully informed at all stages of the procedure* », and that formulation is wider than the original wording of article 300 §2 TEC. It requires that the Parliament is informed before and during the negotiation of the draft agreement. The Parliament thus has a complete access to sensitive information, and the insertion of restrictions specific to confidentiality was not deemed useful by the authors of the treaty.

As a consequence, the Union needs to define the conditions of exercise of parliamentary access to sensitive information. This principle is set by primary law and could not be infringed by secondary law or institutional practices, as reminded by the ECJ because « *the rules regarding the manner in which the Community institutions arrive at their decisions are laid down in the Treaty and are not at the disposal of the Member States or of the institutions themselves (see United Kingdom v Council, paragraph 38)* »⁵⁴.

There is an additional difficulty : third States would have to give their consent for the Parliament to access their information, on the grounds of the 2002 interinstitutional agreement, which logically repeats the exception formulated in article 9 §3 of Regulation No 1049/2001. However, these secondary law provisions conflict with the principle of « complete » and « immediate » access formulated in article 218 of the treaty.

To conclude, and with regards to the Lisbon treaty, the stakes for the modification of Regulation No 1049/2001 are considerable. This revision could lead to a regulation of general principles and conditions allowing access to « sensitive » documents. This change should then include a number of amendments from the Cashman report. Otherwise, and if the actors of the negotiation do not reach an agreement, saving the EU legislator's prerogatives would imply, at least, an upgrade that could hardly regard the sole « international » aspect of sensitive information.

⁵³ This was not specified in article 255 TEC

⁵⁴ ECJ, February 23rd, 1998, United Kingdom v Council, 68/86, Rec. p. 8556 ; ECJ, May 6th, 2008, European Parliament v Council, C-133/06, Rec. page I-3189 §54

ANNEX : Equivalence of security classification

EU Classification	TRES SECRET UE	SECRET UE	CONFIDENTIEL UE	RESTREINT UE
Belgium	Très Secret (Loi 11.12.1998) Zeer Geheim (Wet 11.12.1998)	Secret (Loi 11.12.1998) Geheim (Wet 11.12.1998)	Confidentiel (Loi 11.12.1998) Vertrouwelijk (Wet 11.12.1998)	<i>nota⁵⁵ below</i>
Bulgaria	Строго секретно	Секретно	Поверително	За служебно ползване
Czech Republic	Přísně tajné	Tajné	Důvěrné	Vyhrazené
Denmark	Yderst hemmeligt	Hemmeligt	Fortroligt	Til tjenestebrug
Germany	Streng geheim	Geheim	VS ⁵⁶ — Vertraulich	VS — Nur für den Dienstgebrauch
Estonia	Täiesti salajane	Salajane	Konfidentsiaalne	Piiratud
Greece	Άκρως Απόρρητο Abr: ΑΑΠ	Απόρρητο Abr: (ΑΠ)	Εμπιστευτικό Abr: (ΕΜ)	Περιορισμένης Χρήσης Abr: (ΠΧ)
Spain	Secreto	Reservado	Confidencial	Difusión Limitada
France	Très Secret Défense	Secret Défense	Confidentiel Défense	<i>nota⁵⁷ below</i>
Ireland	Top Secret	Secret	Confidential	Restricted
Italy	Segretissimo	Segreto	Riservatissimo	Riservato
Cyprus	Άκρως Απόρρητο Abr: (ΑΑΠ)	Απόρρητο Abr: (ΑΠ)	Εμπιστευτικό Abr: (ΕΜ)	Περιορισμένης Χρήσης Abr: (ΠΧ)
Latvia	Sevišķi slepeni	Slepeni	Konfidenciali	Dienesta vajadzībām
Lithuania	Visiškai slaptai	Slaptai	Konfidencialiai	Riboto naudojimo
Luxembourg	Très Secret Lux	Secret Lux	Confidentiel Lux	Restreint Lux
Hungary	Szigorúan titkos!	Titkos!	Bizalmas!	Korlátozott terjesztésű!
Malta	L-Oghla Segretezza	Sigriet	Kunfidenzjali	Ristrett
Netherlands	Stg ZEER GEHEIM	Stg GEHEIM	Stg CONFIDENTIEEL	Dep VERTROUWELIJK
Austria	Streng Geheim	Geheim	Vertraulich	Eingeschränkt
Poland	Ścisłe Tajne	Tajne	Poufne	Zastrzeżone
Portugal	Muito Secreto	Secreto	Confidencial	Reservado
Romania	Strict secret de importanță deosebită	Strict secret	Secret	Secret de serviciu
Slovenia	Strogo tajno	Tajno	Zaupno	Interno
Slovakia	Prísne tajné	Tajné	Dôverné	Vyhrazené
Finland	ERITTÄIN SALAINEN	SALAINEN	LUOTTAMUKSELLINEN	KÄYTTÖ RAJOITETTU
Sweden ⁵⁸	Hemlig/Top secret Hemlig av synnerlig betydelse för rikets säkerhet	Hemlig/Secret Hemlig	Hemlig/Confidential Hemlig	Hemlig/Restricted Hemlig
United Kingdom	Top Secret	Secret	Confidential	Restricted

⁵⁵ Diffusion Restreinte / Beperkte Verspreiding is not a security classification in Belgium. Belgium handles and protects "RESTREINT UE" information in a manner no less stringent than the standards and procedures described in the security rules of the Council of the European Union.

⁵⁶ Germany: VS = Verschlussache.

⁵⁷ France does not use the classification "RESTREINT" in its national system. France handles and protects "RESTREINT UE" information in a manner no less stringent than the standards and procedures described in the security rules of the Council of the European Union.

⁵⁸ Sweden: the security classification markings in the top row are used by the defence authorities and the markings in the bottom row by other authorities.

