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Editorial

## EU Institutional Politics of Secrecy and Transparency in Foreign Affairs

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### Abstract

This thematic issue shows how the interplays of secrecy and transparency have been a salient driver of institutional politics in EU foreign affairs. It offers a critical reading of the most recent developments in EU's international negotiations, an analysis of case law and empirical insights on public and institutional access to information. The Issue provides an interdisciplinary understanding of how information flows affect and are affected by the EU's institutional balance through synergising perspectives from the fields of political science, public administration and law. This editorial outlines the central questions raised in this thematic issue and highlights its main findings.

### Keywords

access to information; European Union, foreign affairs; negotiations; oversight; politicization; secrecy; transparency

### Issue

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### 1. Foreign Affairs and Logics of Secrecy and Transparency

Critique on the EU's foreign affairs has grown more pertinent over the last decade. Agreements like the Anti-Counterfeiting Trade Agreement (ACTA) or the trade negotiations with the US (TTIP) or Canada (CETA) attracted unseen levels of public mobilisation (see also Gheyle & De Ville, 2017). A prominent bone of contention concerns the secretive nature through which many of these initiatives originated and the lack of transparency in their negotiations. Secrecy in the conduct of international relations is not new or unique to the EU context. The norm of secrecy in international negotiations is historically traced back to the time when royal court ambassadors had to be constantly preoccupied by secrecy and find ways to protect their secrets (Colson, 2008). Despite public demands for more transparency, it remains a challenge to accommodate such demands in light of ingrained norms of secrecy in the diplomatic culture (O'Reilly, 2017). Tensions between secrecy and transparency in current foreign affairs hence require closer scholarly attention.

One aspect that makes secrecy compelling in foreign affairs is its protective function. Secrecy creates a space of trust between the parties that maintain the secret and a sense of separation from the outsiders towards whom the secrets must be guarded (Bok, 1982). Removing something from the public view endows it with power. Often the object of secrecy—the information—is less important than the organizational approach to managing access to the created secrets (Simmel, 1906). The latter empowers insiders to decide just how wide the circle of secrecy may expand but also to influence decision-making that involves the less informed outsiders. Hence, a “secret” is a political category, not a natural one. Facts in isolation do not cry out for secrecy; facts within a specific political context do (Chafetz, 2013, p. 86). In institutional practice, secrecy may be used to protect information that should not be shared widely due to legitimate concerns. Information relating to national security or trade negotiating positions may be justifiable reasons to limit information flows. However, from a democratic oversight perspective, secrets should be justified and politically checkable in the broad

sense that they are subordinate to policies that themselves are transparent and politically alterable (Curtin, 2014; Thompson, 1999).

This thematic issue analyses the tension between secrecy and transparency in the EU's foreign affairs. It shows how debates on access to information have been a significant driver of institutional politics and their implications for the EU's institutional balance. Whilst negotiations have a prominent role in this field, foreign affairs also involve issues of public and institutional access to information that are generally critical points of tensions between executive institutions and the public and oversight institutions. The issue focuses on the processes of disclosing and concealing information both among EU institutions as well as between the EU and its citizens. The purpose of this thematic issue is to decipher how information control affects and is affected by the EU's institutional balance. Synergising perspectives from political science, public administration and law, the issue offers a critical reading of the most recent case law on these issues and provides empirical insights on public and institutional access to information.

## 2. Institutional Politics and Information Control

Information is power. This also holds true in a political and administrative context. Secrecy creates a cluster of inside-insiders, i.e., only a limited number of individuals knowing the secret information. This compartmentalization of information implies that actors are involved in an incessant competition, struggling for various stakes and prizes (Kozak & Keagle, 1988, p. 7). In the issue, the contributors focus on three instances where such inter-institutional "competition" over information is particularly salient.

One such relation is that *between the legislature and the executive*. Transparency is an important condition for legislative institutions to fulfil their oversight functions. Administrative procedures governing the disclosure of information have been highlighted as important means for legislative control over the executive (McCubbins, Noll, & Weingast, 1987). Lack of transparency widens the information asymmetry between the "expert" agent (who sits at the negotiating table) and the "dilettante" principal (who can only observe the outcome but not the actions of the agent). Information asymmetry creates the opportunity for the negotiator to deviate from its principal's interests (Adriaensen, 2016; McCubbins & Schwartz, 1984). The observation of such shirking or bureaucratic drift often leads to political and public protest. As information asymmetry decreases, the scope for shirking diminishes, as the principal is able to correct the agent's actions. In short, the balance of power shifts as the agent's privately held information diminishes (Abazi & Adriaensen, 2017; Coremans, 2017).

Another relation where contestation over information flows is observed concerns the relation *between (quasi-)legislative institutions*. Tsebelis and Money

(1997) highlight the existence of a "political dimension" of bicameralism. This often occurs in federal systems where each chamber represents a different interest. It is considered *political* as success for one institution often comes at the other institutions' expense. Both chambers are in a continuous struggle to ensure that—ultimately—legislation more closely reflects the interests of the electorate they represent. The EU is a particularly interesting case in this regard as historically the Council and the European Parliament (EP) have not enjoyed equal rights in decision-making. Concurrently, both institutions do not enjoy the same degree of access to information in foreign affairs. In policy areas where the nexus of power remains at the national level, member states retain ownership of sensitive information (rather than European institutions like the Commission or bodies like the European External Action Service (EEAS)). Contributions in this issue study the tensions between the EP and the Council as they seek to expand or maintain their grasp on the EU's foreign policy (Hillebrandt, 2017; Rosén & Stie, 2017).

A third instance where institutional politics affect and are affected by the transparency regime concerns the *intervention by independent bodies*. Because access to information affects the distribution of power between the institutions, it does not come as a surprise that disputes often require mediation by a (quasi-) independent body like the European Ombudsman (EO) or the Court of Justice of the EU. The extent to which such actors are impartial and independent is crucial for their role in the transparency regime. The EO is appointed by and located within the EP. Whether this impedes its independence role is a question addressed in the contribution by Neuhold & Năstase (2017). The Court provides a judicial review ensuring principles of the EU, however in foreign affairs when public access to information is concerned it seems to leave more discretionary space to the executive. Yet the Court seems more interventionist when parliamentary access to information is at stake (Abazi & Adriaensen, 2017). The approaches by the EO and the Court are focused on finding a proportionate balance between the necessities of secrecy and transparency in the EU's foreign policy, but as contributors in this thematic issue show, where to strike the balance is a contentious issue.

In addition to these three instances of *institutional* relations of information flows, important questions arise about the role and position of *public* access to information, debate and participation in foreign affairs. Specifically, this issue examines whether institutional checks and processes of oversight strengthen also public access and participation and how more recent trends of closed parliamentary oversight affect public accountability (Abazi, 2016; Rosén & Stie, 2017). Whilst institutional access to information strengthens the constitutional set balance of powers among EU institutions, the issue scrutinises whether such processes lead to more informed public debate and a wider participation circle for civil society organisations.

### 3. Findings and Reflections

Contributions to this thematic issue show that debates about secrecy and transparency in foreign affairs are intrinsically linked to the EU's institutional balance. Information flows among institutions vary depending on the constitutionally set balance, but they also determine—in institutional practice—how the role of each institution is evolving in the EU's foreign affairs. Five main points emerge from the contributions in this thematic issue.

Firstly, through a theoretical discussion and systematic analysis of case law, contributors challenge the assumption that foreign affairs should have broader legal contours on secrecy than internal legislation in the EU. Leino (2017) shows that the *logics of secrecy and transparency are being applied both in legislation and in foreign policy proper and often the implications of the latter for EU fundamental rights are just as important* as such issues that are addressed in EU legislative acts. Similarly, Gheyle and De Ville (2017) emphasise the growing mobilisation of civil society in trade negotiations due to the regulatory nature of contemporary trade policy. Whilst there is a growing demand for more access to information in foreign affairs issues, participation by civil society is yet only emerging.

Secondly, the *Council shows significant resistance towards transparency in foreign affairs both in terms of public and institutional access to information*. Hillebrandt (2017) shows that public access to documents in foreign affairs has been a contentious issue for the Council and partly this is due to its overlapping diplomatic and legislative functions. While there has been more case law clarifying the limits of confidentiality for the Council in foreign affairs, the Council continues to argue that a diplomatic setting is more appropriate for its decision-making, a setting where secrecy norms are given more space. Rosén & Stie (2017) take the debate forward by looking at institutional access to information and in particular showing some of the information “battles” over access to information between the EP and the Council. The EP has now in place a legal framework that facilitates access to sensitive information in foreign policy, but this has not necessarily resulted in more straightforward practice of access to information. In this light, Abazi and Adriaensen (2017) show that the Council's handling of information is not only questioned by the EP, but that the Commission and the Council too disagree on the need for public disclosure of important negotiating documents, as was the case with the TTIP mandate. They also find that the *traditional divide between executive and legislative actors preferences on transparency may at times be proven to be misleading* and that the Commission has been showing an increased support for public access to information as far as trade negotiations are concerned.

Thirdly, the contributors address the role of democratic oversight in foreign affairs and how information flows affect it. The main finding in this regard is that the mere access to information in foreign affairs does not

lead to better oversight. *Institutions' attention is often focused on obtaining access rather than the substantive checks that follow in an oversight process*. Rosén & Stie (2017) question whether the EP's pursuit to be informed by the Council is contributing to public deliberation and better parliamentary oversight in EU foreign affairs. With respect to public access to documents, Gheyle & De Ville (2017) argue that disagreements between the civil society organisations and the Commission on the level of transparency is partly explained by the *definitions of transparency applied*. While for the civil society organisation transparency is important as a stepping stone to participation, the Commission implements transparency policies merely to inform the institutions and the public. It is clear, however, that the publication of documents without granting CSOs a place at the table will not be sufficient to stifle the critiques. Naurin (2017) echoes similar views in his commentary.

Fourthly, contributors find that *information flows between the institutions are often more successful through informal information sharing*. Coremans (2017) shows that the Commission has made significant efforts to share information with the EP through informal means. Several of such practices were informed by the EO's push for greater openness. The EO, as shown by Neuhold and Năstase (2017), has made important moves for more transparency through the strategic use of own initiatives as well as through decisions in cases of public access requests for information. Whether informality continues to develop and how it will affect information flows is an important aspect of transparency in EU foreign policy to keep on examining more closely.

Fifthly and lastly, contributions focusing on different dimensions of EU foreign policy laid bare several interesting paths for comparative research. Trade negotiations as an exclusive competency put the emphasis on the Commission to provide transparency (Coremans, 2017; Gheyle & De Ville, 2017), whereas negotiations in areas of mixed competences involve both Commission and Council. This inevitably affects the need for information exchange between Council and EP (Rosén & Stie, 2017). Hence, *the division of competencies in the EU affect both the applicable institutional design as well as the institutions access to information*.

These findings lead to some further reflections and open questions that merit more attention and (future) research. One main such reflection is to what extent we continue to see the *politicisation of access to information* and institutional “battles” around access to information. While due to many recent cases and developments, it seems the legal contours of secrecy and transparency are becoming more defined in the EU's foreign affairs, information flows will remain an inherent part of institutional politics as information asymmetries are structurally ingrained in foreign policy. The thematic issue clarifies that demands for transparency have increased and solidified (both for public and institutional access), and in fact the supply of transparency too has witnessed shifts as noted

regarding TTIP. But *the concern regarding transparency in foreign policy remains mostly with public access to information, with public debate, with public participation*. In fact, even in cases where civil society is active and there is a high demand for more information, in practice, such efforts do not seem to always translate into more meaningful participation and debate.

This thematic issue has taken stock of secrecy and transparency in the EU's foreign affairs with the hope to provide more clarity on how information control is affecting the EU's institutional politics but also to what extent the arena of international negotiations is closed for public debate and participation. Currently, the EU is undergoing one of the most consequential negotiations in its history: a member state exiting the Union. The Brexit negotiations are to some extent unique in the EU (legal) context when taking into account the specifics of the legal procedure they invoke, the role EU institutions and member states play, and of course their political implications. Yet, the Brexit negotiations share many of the features that are common in negotiation in foreign affairs, not least of which are the dynamics of secrecy and transparency as documented by the contribution of the European Ombudsman (O'Reilly, 2017). Do parliaments receive information on a timely basis of what has been discussed behind closed doors? How do bureaucracies exert influence on negotiations through the use of secrecy? Does secrecy help negotiators to exchange views in candour? Through this thematic issue we hope to inform these debates and provide more insights towards these answers.

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### Conflict of Interests

The authors declare no conflict of interests.

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