

Challenging EU Secrecy: The Role of the (Dutch) National Parliament

This brief note elaborates my own thinking with regard to the crucial role that national parliaments need to play in controlling the input of their own government and its administration in the processes (legislative and non legislative) of European integration. This is a wider perspective than looking to the specific information problems which the Dutch parliament now has but it speaks to the problem as well as lines for further debate and resolution. It raises, as part of the discussion on how to move forward, the wider EU constitutional context as well as an overview of the manner in which the European integration process proceeds in practice and incrementally by a wide range of actors and processes and which is wider and deeper than EU legislative processes.

The role of national parliaments is traditionally a vertical one and depends inevitably on the different national political and constitutional cultures. At the same time given the way that the EU has evolved over time (and continues to evolve) their role is also a horizontal one. Together with other national parliaments their task is no less than to assist and facilitate the the public discussion in a timely fashion of crucial instances of EU decision making and of governance.

Below I briefly elaborate what I consider to be five key points for debate and further consideration and on which I am happy to elaborate further in person and to give examples.

First, challenge the Council decision based on the Internal Rules of Procedure of the Council which lays down the system for EUCI (EU classified information, comprising the 'normal' categories of Top Secret, Secret and Confidential as well as the lower level of Restricted) and for unclassified but 'controlled' information (the 'limite' category allegedly containing professional secrets). In my view neither the national parliament nor a Member of Parliament has (any longer) standing to do this directly. The only way is for the national parliament not to apply it fully and then to see if the Commission really will (as threatened in the past) commence infringement proceedings against the Netherlands because of the Dutch parliaments 'failure' to keep secret unclassified documents. If the Commission does follow through then the matter will be highly public, sensitive in the implication that the Commission is trying to silence national parliaments and make them collude in internal practices that have never been properly discussed and debated in public themselves. It will, if it runs its course, end up before the CJEU in Luxembourg. By forcing the issue in this manner the issue is raised of the legality of the limite classification and the scope of the internal rule-making power of the Council in this regard –before a central accountability forum (the CJEU). This is a process that will take at best many years, also in the pre-litigation phases. At the end of the day, the Commission has complete discretion whether it actually starts infringement proceedings against the Netherlands (despite threatening to do so and despite engaging with the pre-litigation process). It may well not want the (extreme) public embarrassment of having to defend low-level secrecy rules that are arguably not justified either in their scope or in their generality.

Second, network with other like –minded and progressive national parliaments (eg the Nordic parliaments, perhaps Germany, not forgetting –for now at least- the House of Commons) for an EU level *Secrecy Law*. There will be much discussion as to the adequate

legal basis for a legislative provision that regulates secrecy and classification issues right across the wide spectrum of EU activities (and not just for the Council). My view is that an adequate legal basis exists. An important issue is the need –and limits to- unclassified but controlled documents and how far obligations of secrecy should stretch in that context. In this context the issue how parliaments can and should treat formally classified documents (of the higher levels requiring security clearances) can be discussed. It must be noted that this will be no easy exercise and entails an initiative of the Commission itself. This could therefore form part of a wider strategy of negotiation with the Commission itself. Politically the signs are not promising given the resistance by both the Council and the Commission to further openness in EU decision making. This resistance (and those of certain Member States) is very apparent in the (stalled) negotiations on the revisions to the Access to Documents Regulation (2001), ongoing since 2008.

Third, start a debate on the need to add a specific Treaty legal basis in the next Treaty amendment process and a legal obligation to adopt legislation. In view of Brexit, this is likely to commence in or before 2019. This is a positive window of opportunity to ensure that the argument that an adequate legal basis does not currently exist for an EU wide Secrecy Law – itself contestable- is finally put to bed. Ensure that this matter is taken up as a priority by the Dutch Government in the forthcoming IGC context.

Fourth, negotiate with the Dutch government for a law or other formal measure on the information to be provided by the Dutch government to the Dutch parliament that is compatible with the Dutch Constitution. Such an EU Information Law would regulate the issue what information the Dutch government and its administration is legally obliged to give to the Dutch parliament. In Germany the far-reaching equivalent Law was not the result of a pro-active stance by the German *Bundestag* but rather following a judgment of the German Constitutional Court that mandated its adoption. This different constitutional context is fortuitous. The resulting law is a model law in terms of the types of documents covered. It was however adopted some four years ago and it would be wise for the Dutch parliament to update it in the light of advancing EU governance practices. This should be formulated in a manner that for example, documents of the Eurogroup or of new gremia that spring up incidentally (eg EU 27) are also covered.

Fifth, develop a strategy of inviting (annually) important EU players to come to the parliament and dialogue with members of the parliament (in committee) on their activities, strategies etc . For example, the President of the ECB, the Director of Europol, the Director of the new Frontex etc. In this way the Dutch parliament could be well informed and lead the way to other national parliaments as to their role in ensuring that EU actors are also accountable to the national level (collectively).

Deirdre Curtin
Professor of European Union Law
European University Institute
Florence, Italy.