



Secrecy versus Accountability

Parliamentary Scrutiny of EU Security and Defence Policy

Guri Rosén



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ARENA Centre for European Studies
University of Oslo
P.O.Box 1143, Blindern, N-0318 Oslo

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Abstract

In 2002, the European Parliament and the Council concluded the Inter-institutional Agreement, which provided the EP with access to sensitive Council documents in the area of security and defence policy that the Council decided to withhold from the public. The agreement established an arrangement whereby a special committee, composed of five Members of the EP is allowed to peruse documents, but not share any of the information they gain access to.

This paper assesses this arrangement from an accountability perspective. To what extent has the Interinstitutional Agreement strengthened the EP's ability to hold the Council to account for its foreign policy? The analysis shows that the Council's obligation to inform the EP has clearly improved, and the arrangement also gives the EP an opportunity to interrogate the activities of the Council in the field of security and defence. Thus, the arrangement introduces an element of checks and balances to EU security and defence policy. However, its effect is limited by the restriction on how the members of the special committee are allowed to use the information they acquire and the fact that the EP has few if any means to sanction the Council.

Keywords

Accountability – Common Security and Defence Policy – Democracy – European Parliament – Secrecy – Transparency

Introduction¹

The area of foreign policy has traditionally been an executive playing field in comfortable isolation from involvement by parliaments and publics. Due to the 'special nature' of foreign policy, it has not been subjected to the same democratic procedures as domestic politics. One alleged difference between domestic politics and foreign policy is that the latter requires secrecy to be efficient in serving the interests of the state and to protect national security (Hill 2003, Lord 2008, Thym 2006). At the same time, access to information is vital to the exercise of democratic scrutiny. Without access to relevant information, an actor outside the executive has no way of making a judgement of the latter's actions. In other words, secrecy 'gives those in government exclusive control over certain areas of knowledge and thereby increase their power, making it more difficult [...] to check that power' (Curtin 2003: 102). Thus, access to information becomes a 'precondition for the establishment and maintenance of realistic accountability mechanisms' (Stie 2012: 44).

The European Union (EU), because of its many levels of decision-making, presents a particular challenge to democratic processes. In the area of EU foreign policy, the term 'double democratic deficit' has been used to describe how both the European Parliament (EP) and its national counterparts fall short of being able to scrutinize the EU's foreign policy (Born and Hänggi 2004). Still, it is argued that the European Parliament's access to information is 'widely privileged vis-à-vis their parliamentary counterparts at the national level' (Mittag 2006: 15). In 2002, the European Parliament and the Council agreed to establish an Interinstitutional Agreement (IIA) concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy (European Parliament and Council 2002). This agreement established an arrangement whereby five Members of the European Parliament (MEPs) are allowed to peruse documents that the Council finds necessary to withhold from public access. However, parliamentary involvement cannot automatically be equated with democracy. The quality of the arrangement for access to information established by the IIA determines to what extent it contributes to democratising EU foreign policy (*cf.* Stie 2010). One of the main indicators of democratic quality is accountability, which the extent to which EU-institutions, and in this case the executive, 'can be – and

¹ An earlier version of this paper was presented at the inaugural First Annual Conference of Amsterdam Centre for European Law and Governance on Open Decision-making, in October 2011. I would like to thank Deidre Curtin for the invitation, as well as Mark Bovens, Madalina Busuioc and Paolo Ponzano for constructive and very useful criticism. In particular I would like to thank Helene Sjursen and Anne Elizabeth Stie for their help and input.

are – held to account by democratic forums’ (Bovens et al. 2010: 5). Accountability ‘speaks to a justificatory process that rests of a reason-giving practice, wherein the decision-makers can be held responsible to the citizenry’ (Eriksen 2009: 36). Thus, the subsequent question is whether the IIA has strengthened the EP’s ability to hold the Council to account for its foreign policy?

In what follows, I will present the analytical framework used to answer this question. The third part gives a short description of how the IIA on access to sensitive documents was agreed, after which an assessment of the extent to which the IIA has strengthened the EP’s ability to hold the Council accountable is presented. In the fifth section, I consider how this exercise could be used as a point of departure to evaluate the democratic quality of the EU’s foreign policy. Finally, some conclusions are suggested.

Analytical framework

To what extent has the IIA on access to sensitive documents strengthened the European Parliament’s ability to hold the Council to account for its foreign policy activities? There are two aspects to this question. One could ask whether or not the IIA provides for any accountability at all, or one could go further and ask whether the level of accountability is sufficient from a democratic perspective. In answering the first question, I will use indicators developed by Bovens, Curtin and ‘t Hart (2010), which suggest how one can map accountability arrangements and practices. The authors treat accountability as a social relationship signified by a mechanism that may have positive or negative effects. More specifically, it designates ‘a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences’ (Bovens et al. 2010: 35).

The arrangement for access to sensitive information established by the IIA does not qualify as an accountability arrangement, as it mainly deals with transparency and does not involve a process of scrutiny as such. Nevertheless, access to information is a prerequisite for holding an actor to account. Thus, drawing on the framework of Bovens et al. makes it possible to examine whether the IIA has strengthened the EP’s ability to hold the Council to account for its foreign policy activities. The authors suggest the following indicators for observing accountability (2010: 35-37):

- Has it strengthened the EP in the relationship with the Council, i.e. the EP's role as a principal versus the Council as an agent?
- Has it accentuated the obligation of the Council to render account to the EP?
- Has it strengthened the Council's obligation to inform, explain and justify its conduct to the EP and/or the EP's ability to interrogate or pass judgement on the Council?
- Has it imposed any consequences on the Council, should it fail to respect the IIA?

Due to the particular features of EU foreign policy and in particular of the Common Security and Defence Policy (CSDP), it makes little sense to speak of the European Parliament as a potential principal and the Council as an agent because it entails an element of delegated powers. Moreover, whether the IIA has strengthened the EP in its relationship with the Council is to a large extent captured by the third indicator. The same can be said for the second and the fourth indicator as well. Thus, in this paper I have chosen to collapse the four indicators into one:² Has the IIA strengthened the Council's obligation to inform, explain and justify its conduct to the EP and/or the EP's ability to interrogate and/or pass judgement on the Council. Both the formal arrangement, i.e. the text of the Interinstitutional Agreement, and the practice resulting from the arrangement will be analysed. The data material in the paper consists of official documents such as European Parliament reports, parliamentary debates, minutes from the Conference of Presidents (CoP)³ in charge of the negotiations of the IIA as well as Council working documents and drafts. In addition, I have conducted nine interviews with politicians and officials from the European Parliament, the European External Action Service and the Council. A complete list of these interviews can be found at the end of the paper.

The result of this exercise will tell us whether or not the European Parliament, in the area of security and defence policy, qualifies as an accountability forum, meaning the significant other to which the Council has to render account (Bovens et al. 2010: 35). It will not, however, tell us whether the arrangement resulting from the IIA can be considered democratic. There are two aspects to this question as well. Compared to other policy areas, security and defence policy has traditionally been exempted from demands for openness and democratic scrutiny. As was mentioned in the introduction, there may also be good reasons for keeping some types of information a secret. Member states in

² Thanks to Mark Bovens for making this suggestion.

³ The Conference of Presidents consists of the EP's presidents and the chairmen of the political groups.

the Council are not alone in defending the principle of secrecy. The European Parliament has also on several occasions expressed its support for securing sensitive information, however, one has to strike the right balance with the need for democratic oversight. Thus, it becomes a question of appropriate standards. Is it possible that EU foreign policy can be democratic even if it is subjected to restrictions not common in other policy areas?

Although one could argue that foreign policy should not be excused from democratic insight and scrutiny, when the debate is taken to the European level, the question arises to whom the Council should render account? This cannot be answered without also taking into consideration what the EU is and should be. The standards that are relevant to evaluate whether the EP as an accountability forum is democratic or not, depends on one's vision of the European Union. There are no normative standards that can provide a neutral assessment scheme because there are no neutral renderings of what the EU is, least of all what it should be (Eriksen and Fossum 2011, Sjursen 2011a, 2011b). A comprehensive analysis of to what extent the IIA can be considered a democratic improvement in the area of security and defence policy is beyond the parameters of this paper. However, I will attempt to raise some issues for debate at the end of the paper. First, a brief report of how the IIA came about is presented, as well as a more detailed description of the content of the agreement.

Negotiating the 2002 IIA: Two years of protracted struggle

The Council's Code of Conduct from 1993 on access to documents did not contain any specific provisions on classified documents (Driessen 2008). However, with the development of the European Defence and Security Policy (ESDP), and as a result of the intention to exchange information with NATO, the demand on security regulations came to the fore (Reichard 2006). During the summer of 2000, the Council decided to exempt sensitive documents from the scope of the, yet to be agreed upon, Regulation on public access to EU-documents (European Parliament and the Council of the European Union 2001) and was met with extensive criticism by the European Parliament, civil society groups and several Member States. In March 2001, the Council adopted a set of security regulations that confirmed and elaborated the decision from 2000. As a result, the EP appealed to the European Court of Justice (ECJ) for an annulment. Both events were clear demonstrations of the Council's desire to set its own premises for handling sensitive documents. One argument presented to the EP by the then High Representative, Javier Solana, was that the Member States 'had to be afforded some guarantees' since the area of foreign policy was so 'new and complex'. Otherwise they 'would

refuse to take part in the establishment of a genuine security and defence Europe' (Conference of President (CoP) minutes, 5 October 2000).⁴

Throughout the negotiations on the Regulation on public access to EU-documents, the question of access to sensitive documents was a particularly thorny one (Swedish Ministry of Justice 2001). The issue split the actors into two fractions. On the one side stood the European Parliament and Member States who favoured an open approach, and on the other stood 'states with a strong security interest', whose number one priority was to 'exempt such documents from regulatory rules' (Bjurulf and Elgström 2004: 254). Towards the end of the negotiations on the Regulation, through parallel negotiations with the two institutions, the Swedish presidency used the EP's demands to push reluctant Council members to support a greater transparency initiative (NAT1). At the same time, the EP was informed that some particular issues were non-negotiable (NAT1). Thus, the EP had to accept that sensitive documents had to be protected (Bjurulf and Elgström 2004). As one MEP put it: '[t]hey had to give the secrecy advocates something in order to save the general principles' (quoted in Tallberg 2006: 154).

At the same time, the European Parliament was consistent in its argumentation for access to sensitive documents. It demanded parliamentary access to this category of documents in order to defend 'democracy and transparency within the European Union' (MEP Baron Crespo, CoP-minutes, 7 September 2000). And although most member states agreed that sensitive documents should be exempt from the Regulation on public access to EU-documents, some of them also seemed to perceive of the EP's arguments as sound (NAT1). This does not imply that the Council accepted all the demands of the Parliament, far from it, but it indicates that despite the prominence of the secrecy principle, there was an understanding on both sides of the table that the principle of democracy could not be circumvented. Another of the European Parliament's key arguments was that the arrangement in the IIA should be comparable to 'the most favourable treatment accorded by a government of a Member State to its national parliament' (European Parliament 2000). In the resulting IIA, article 4 reads that the IIA 'should provide the European Parliament with treatment inspired by best practices in Member States'. These are not identical provisions, but the introduction of national arrangements as a yardstick is an indication of the notion that the

⁴ Minutes from the Conference of Presidents were accessed through the EP's Register of Documents, available at: <http://www.europarl.europa.eu/RegistreWeb/search/simple.htm?language=EN> [last accessed 12 February 2014].

European Parliament has a legitimate role in the area of foreign policy, even in security and defence policy (see Rosén 2011).

After two years of negotiation, the Interinstitutional Agreement (IIA) 'concerning access by the European Parliament to sensitive information in the field of security and defence policy' was agreed (European Parliament 2002a). This IIA established an arrangement whereby a special committee from the EP gains access to sensitive documents, i.e. documents classified as Top Secret, Secret or Confidential (Article 1). The committee is led by the Chairman of the Foreign Affairs Committee (AFET), and also comprises four additional MEPs. Documents can be requested by the AFET-chairman or the EP-president, and must subsequently be consulted in camera, at the premises of the Council. The members of this committee must have security clearance and are not allowed to record or share information.

If it is 'appropriate and possible in the light of the nature and content of the information or documents concerned' and if the documents are not classified as Top Secret, documents can be sent to the EP-president, who can then choose between four options. Either to give it to the chairman of AFET, give access to the members of AFET, to allow in camera discussion in AFET, or to censor the secret parts of the document and give access to all MEPs. The choice must be cleared with the Council (Article 3). However, 'the default option of consultation at the Council's premises seems to be preferred' (Driessen 2008: 127). The committee is supposed to meet the High Representative, or his/her representative, every six weeks to discuss confidential information (Brok and Gresch 2004). In practice, the committee has convened on more of an ad hoc basis, at the request of the EP (EP6⁵). Thus, in assessing to what extent the IIA has strengthened the European Parliament's ability to hold the Council to account for its activities in the Common Security and Defence Policy (CSDP), both the text of the agreement and the functioning of the arrangement has to be considered.

A strengthened European Parliament?

When establishing the IIA, the European Parliament itself was clearly split on how far it should take its demands (EP1). According to one interviewee, the question of public versus parliamentary access is subject to permanent discussion in the Parliament. And since the beginning of the negotiations on the Regulation on public access to EU documents and the IIA, the EP realised

⁵ Interviews are labeled using codes such as EP1, COM1, EEAS1 and NAT1. For further clarification on the individual interviews, see list of references.

that 'by combining the two issues, it [could] also gain something as an institution' (EP4). Some MEPs perceived of this as a considerable democratic problem (CoP-minutes, 6 June 2002). In the words of MEP Lagendijk (Greens): 'as I see it a link has been established – and erroneously so – between the rights of parliamentarians and the rights of the public' (EP-plenary, 16 November 2000). However, others had a far more pragmatist attitude and held that: 'we must not [...] go too far at the outset, because this is a very sensitive area and at stake are the security interests of the Member States of the European Union and all of our fellow citizens. That is why everyone, both the Council and Parliament, first needs to learn how to work together and to build confidence, so that the necessary information and control processes can then be set in motion on this basis' (MEP Brok, EP-plenary, 22 October 2002).

After the IIA was concluded in November 2002, many MEPs claimed that the IIA would actually limit the Parliament's access to information. The arguments presented by the critics can be summed up in four points: First, the Council might still decide to withhold documents from the EP. Secondly, it was claimed that 'security' was defined in too broad a manner in the IIA, which might have an effect on the EP's access to documents beyond the second pillar as well. A third criticism was directed against the extensive veto powers given third parties (originator control) and that the definition of third parties is too broad, and a fourth point that was prevalent, was that the arrangement in the IIA gives 'too little information to too few' (Tappert 2003). If these criticisms were corroborated by actual experience it would obviously also affect the ability of the European Parliament to hold the Council accountable for its activities in the CSDP. Thus, in this section of the paper, I will investigate to what extent the arrangement whereby the EP gets access to sensitive CSDP-documents qualifies as an accountability forum. Building on the analytical framework drawn up above, the question is: Has the IIA strengthened the Council's obligation to inform, explain and justify its conduct to the EP and/or the EP's ability to interrogate or pass judgement on the Council?

Information, explanation and justification

In general terms, if one compares the current arrangement with the possibility that the EP would have no access to such documents at all, then the simple answer would be yes. The IIA has given the EP a means of gaining insight into parts of the EU's security and defence policy that would have remained behind closed doors without the agreement. At the time there was no other opportunity to engage with the Council on classified issues (EP6). In the words of Mittag (2006: 15): the IIA 'has been a substantial step forward compared to the current provision of Article 21 in terms of timing, scope and

quality of information'. Although the amount of sensitive documents produced in the EU may not be that impressive, there is still a considerable difference between the number of sensitive documents produced by the Council and those that are listed in the register, as can be seen from the table below.⁶ Considering that a large portion of sensitive Council documents are not even mentioned in the register, the IIA does at least provide an element of transparency in the sense that these documents are accessible, albeit to a restricted group, outside the executive.

Table 1: Sensitive Council documents

	No. of sensitive documents produced by the Council	Confidential documents	Secret documents	Mentioned in the register
2012	386	353	33	332
2011	393	362	32	260
2010	393	362	31	25
2009	445	425	20	157 (1 secret)
2008	751	735	16	152 (2 secret)
2007	350	324	26	64 (3 secret)
2006	409	377	32	79 (1 secret)
2005	294	246	48	50 (1 secret)
2004	226	214	12	76 (1 secret)
2003	399	382	17	136
2002	250	283	12	77

Source: Council annual report on access to documents.

However, some also see classification as a way of making access to documents more difficult even if the content itself may not require it (EP4). Again, the position of the pragmatists was that 'it is only when we know the documents that we can say whether their classifications are justified. If we see that access is not being given to papers that Parliament as a whole is actually meant to be able to see, we can say that they have been wrongly classified, and in this way bring about a change in practice at Council level. If, though, we know nothing about the documents, we can have no criticism to make on this score' (MEP Brok, EP-plenary, 22 October 2002).

According to MEP Neyts-Uyttebroeck, a former member of the special committee, the information provided has been of variable quality: 'Sometimes when a document is stamped 'super-secret' it's not as sexy as you'd imagine. Sometimes it bordered on the ridiculous, like a bad Le Carré novel. We'd have to leave our mobiles and so on before entering the reading chamber. Then you saw a document that was, for example, the mission statement of Eulex, which

⁶ Note that there are no documents classified as Top Secret.

was the same as we already had in the newspapers. [...]. At other times it was really interesting, like the rules of engagement for UN troops in Lebanon. When you are operating in a war zone, there's no need to tell the enemy what your rules of engagement are' (EUObserver, 18 October 2010). According to one interviewee, how much information the EP gets 'depends on the individual parliamentarians involved at the time' (EP1). For example, former French general Phillippe Morillon was for several years a member of the special committee, 'who probably got access to more information than any other MEP would have' (EP1).

Apart from some member states' general attitude that the EP should be kept at arm's length in the area of security and foreign policy, at the time of the negotiations, there was also the 'genuine worry' that the EP would leak documents more easily, and that they would not follow the proper procedures for the treatment of confidential material (NAT1). Thus, in the words of one MEP: '...the way it was done was as they do in national parliaments, you agree to share sensitive information with a very limited number of very senior MEPs [...] and so you have a mechanism for democratic oversight, but only among people you feel you can trust' (EP1). In other words, 'entrusted parliamentarians' get privileged access (NAT1). To establish a relation of trust between the EP and the Council was also a chief objective of MEP Brok. When presenting the IIA to the EP-plenary on the 22 October 2010, he stated that:

[w]e must not [...] go too far at the outset, because this is a very sensitive area and at stake are the security interests of the Member States of the European Union and all of our fellow citizens. That is why everyone, both the Council and Parliament, first needs to learn how to work together and to build confidence, so that the necessary information and control processes can then be set in motion on this basis.

(MEP Brok, EP-plenary, 22 October 2010)

Immediately after the introduction of the IIA, the EP is reported to be confident that its new security regulations 'seems to have made the Parliament effectively watertight against information leakage [...], which has gained the Parliament more and more confidence from the Council in the process' (Reichard 2006: 345). However, according to some of the interviewees there have been some leaks, which have had a negative impact on the level of trust between the two parties. Statistically, they may be irrelevant, but if they are important leaks, the trust goes down (EEAS2). Thus, whenever there is a discussion on whether or not to extend the special committee, there is renewed tension because more people will inevitably increase the risk of leaks. In any event, according to one interviewee 'the Council has a principled

position, they will never share sensitive information with the Parliament on a kind of a free basis that you send it over to the Parliament and they distribute it internally, because you know there is no guarantee' (EEAS1). Although it is important to underline that there are plenty of other sources of leaks, and often leaks can be strategic as well, the 'burden of proof' is placed on the EP. It had to change its security regulations before the IIA was finalised in 2002, and this has also been a one of the Council's conditions for opening negotiations on access to confidential information in the context of international agreements (CoP-minutes, 12 May 2011).

At the same time, the fact that the sensitive documents are in the Council's possession gives it the upper hand (Reichard 2006). There is also a potential problem in that the Council may choose not to disclose certain documents to the EP. According to article 2(2) of the IIA, the Presidency or the High Representative shall inform the EP about the content of any sensitive information 'required for the exercise of the powers conferred on the European Parliament by the Treaty on European Union [...] taking into account the public interest in matters relating to the security and defence of the European Union or of one or more of its Member States or military and non-military crisis management'. But in case of a conflict as to which documents are necessary for the exercise of the EP's powers, the IIA says nothing about who will judge in these cases (Reichard 2006). Thus, there are no direct consequences if the Council decided not to respect the IIA.

However, one contributing reason to the Council's decision to give the EP access to sensitive documents was that the Council has to pick its battles, because it also needs a good working relationship with the EP (NAT1). So even if the EP has no sanctioning possibilities according to the IIA, should MEPs be adequately provoked, they could decide to link access to sensitive documents to another policy area or issue where they enjoy substantial powers in order to force the Council to give them access. On the other hand, this would take the conflict to an entirely different level. And because practice has shown that the Council has, to date, not made use of its opportunity not to disclose documents to the EP (EP6), the arrangement has not been fully put to the test. Still, documents are disclosed at the request of the EP, and in order to know which documents to ask for, a list that is also classified has to be consulted at the Council's premises (EP6).

Despite the restrictions of the IIA, it has clearly strengthened the Council's obligation to inform the European Parliament about matters concerning the Common Security and Defence Policy. In consulting documents, the special committee also has the opportunity to ask questions (EP6). Moreover, in

addition to gaining privileged access to sensitive documents, the High Representative also give regular oral briefings to the special committee. This was a practiced that commenced under Javier Solana, and has been continued by the current High Representative, Catherine Ashton. Under Ashton, the members have the opportunity to ask several rounds of questions, and the arrangement is described as 'very interactive', whereby the High Representative engages with the MEPs in answering questions and justifying positions (EP6). In other words, the European Parliament, or more precisely the special committee, is not only informed, the Council via the High Representative, also explains and justifies its activities. Thus, while the wording of the IIA is limited to access to information, in reality the interaction between the special committee and the Council also encompasses what could be called a reason-giving practice (Habermas 1996).

Interrogation and passing judgement

The subsequent question is the extent to which the IIA has increased the EP's ability to interrogate or pass judgement on the Council. On the one hand, the answer is yes; during the oral briefings the MEPs in the special committee may also express their opinions on the Council's activities and positions. Moreover, one could argue that since the EP's special committee can gain further insight into for instance details about EU's operations, it leaves them in a better position to evaluate and judge the EU's considerations and conduct. On the other hand, because all information that is shared with the special committee is secret, there are clear limits on the extent to which the European Parliament's ability to pass judgement on the Council is strengthened. Because of the restrictions surrounding the EP's access to sensitive documents, the question of the balancing between the principles of secrecy and democracy can be framed not only as a matter of parliament versus public access, but also as a matter of a group of elite-parliamentarians versus the body as a whole.

In the words of MEP Neyts-Uyttebroeck, a substitute member of the special committee: 'We can express our opinion on this or that. But we have to resist the temptation to try to substitute ourselves for the rest of AFET. That would not be a good thing' (EUObserver 18 November 2010). The original intention was that the special committee would comprise MEPs from the three largest political groups. However, it is argued that this arrangement does not allow for adequate political representation (EP6), nor does it allow other parliamentary bodies access to documents that they need for their work (EP4). There are several ways of adjusting the current imbalance. One solution could be to include coordinators from all political groups in the special committee (EEAS2). Another suggestion is to compose it institutionally, giving access to

specific parliamentary bodies rather than according to party group affiliation (EP4).

Article 4(3) of the IIA states that the agreement 'shall be reviewed after two years at the request of either of the two institutions in the light of experience gained in implementing it'. But although several MEPs were dissatisfied with the IIA, this provision was not made use of (Tappert 2003). However, a review process is currently underway. First of all, the IIA needs to be updated to correspond to the reality of post-Lisbon. This involves technical adjustments, since it uses terms such as Secretary General/ High Representative (EEAS2). Furthermore, the recent negotiations between the Council and the EP on the establishment of the European External Action Service (EEAS), introduced the need for a review. In the Council decision establishing the organisation and functioning of the EEAS, article 6 states that '[s]pecific arrangements should be made with regard to access for Members of the European Parliament to classified documents and information in the area of [Common Foreign and Security Policy]', until which the IIA of 2002 will apply (Council of the European Union 2010). This article was further elaborated in the High Representative's Declaration on political accountability, which foresaw the review and adjustment of the existing arrangement (European Parliament 2010).

At the time of writing, negotiations on a revising the IIA on access to sensitive documents are still ongoing. However, an available draft introduces several important changes, should they be included in the final agreement.⁷ First of all, there are now three parties to the IIA: the EP, the Council and the EEAS. Secondly, the agreement does not only encompass Common Security and Defence (CSDP) documents, but also Common Foreign and Security Policy (CFSP) documents. The IIA from 2002 has been used on occasion to give MEPs access to CFSP documents, but this was always on an ad hoc basis, and had to be judged case-by-case by the COREPER (EP4, EEAS2). According to the draft, there are however, different rules governing the CFSP and the CSDP. Whereas CSDP documents continue to be accessible only to the members of the special committee, for CFSP documents the scope of EP actors that may be allowed to consult documents is wider; it includes both MEPs – committee chairs and rapporteurs – as well as EP officials.

In the wake of the Declaration on political accountability (European Parliament 2010), the EP seems to have been more successful in applying for

⁷ For the complete draft, see: <<http://database.statewatch.org/article.asp?aid=31959>>, [last accessed 12 February 2014].

MEPs that are not members of the special committee to take part in briefings that also encompass access to sensitive documents (EP6), perhaps anticipating the coming review, which opens up to the link between access on a need-to-know basis. This principle was also referred to in the Declaration, stating that '[t]he HR can also provide access to other documents in the CFSP area on a need to know basis to other MEPs'. By contrast, the situation before meant that the MEP working as a rapporteur on a dossier did not have access to all the relevant information, and the members of the special committee could not share with her or him what they had found out because they were bound by secrecy (EP6).

The special committee is able to interrogate the Council and convey their evaluation in camera, but should they choose to do so in public, they could 'be the subject of judicial proceedings pursuant to the relevant legislation in force', according to the EP's own security regulations (European Parliament 2002b). Thus, the extent to which the IIA has strengthened the EP's ability to pass judgement on the Council, is limited by the restriction on how the MEPs in the special committee are allowed to use the information in the documents they have access to. Following the draft referred to above, these restrictions will continue to apply. At the same time, whether this should be considered problematic, or how much of a problem it constitutes, depends on one's standards of assessment.

A more democratic foreign policy?

The issue of accountability invariably also raises the question of democracy, where policy-makers have to defend their choices to the ones on whose behalf they are making choices. Although there are different ways of institutionalising democracy, it could be argued that any organisational form aspiring to democracy must abide by two basic principles, that of autonomy and accountability (Eriksen 2009, Eriksen and Fossum 2011). Autonomy pertains to the right of citizens to be the authors of the laws to which they are subjected, whereas accountability concerns the relationship between the citizens and the decision-makers where the latter are obliged to give reasons for their activities to the former, which in turn may sanction them (Eriksen 2009). This implies that accountability is instilled with a clear democratic purpose, and also that the process of giving account is intimately linked to the exercise of autonomy (*ibid.*). In that decision-makers inform and justify their activities, the citizens may hold them responsible, which at the same time makes it possible to judge the extent to which decisions are based on citizens' authorisation.

However, and as mentioned above, foreign policy has traditionally been different in this respect, often uninhibited by open democratic processes familiar to other policy areas. As described above, this lack of openness is exacerbated when foreign policy is made at the EU level. This situation raises two principled questions. First of all, can EU foreign policy be democratic despite its many restrictions? Secondly, what kind of role should the European Parliament have?

With regard to the first question, the definition of sensitive documents in Article 9 of the Regulation 1049/2001 encompasses information that protects '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'. One argument is that the term 'notably' is like saying that 'anything goes. It is very open-ended and it could be misused' (EP4). But again, there seems to be an acceptance within the Parliament that this restrictive model *can* be justified for CFSP and defence, but not for other fields (EP2). In the words of MEP Brok, who negotiated the IIA for the Parliament in 2002: 'we must work closely together over the next few days in order to guarantee and secure the necessary secrecy of certain documents. On the other hand, though, we must also guarantee the same level of transparency and control that the public expects from national governments and national parliaments' (EP-plenary, 5 September 2000). The problem is to strike the right balance.

The quote illustrates the central dilemma in the discussion about openness in foreign policy. All sensitive documents should not be accessible, as some information may seriously undermine the security of the EU and its member states, and even mean that lives are put at risk. However, this is not necessarily an argument for avoiding democratic scrutiny altogether. Most national parliaments have particular provisions and procedures that protect sensitive information. A recent study conducted for the European Parliament clearly demonstrates that access to documents pertaining to national security is subject to a long list of restrictions (Wills et al. 2011). These include access only to some levels of classification, only by special committees or in some cases also particular individuals, vetting procedures and originator control. Only five⁸ out of the 27 national parliaments had no restrictions on access to information, but also in these countries special procedures for gaining access apply. Moreover, EU-members that are also NATO-members are all parties to the NATO Security Agreement of 1997, which sets down common security

⁸ These five national parliaments are those of Finland, Hungary, Lithuania, Slovakia and Sweden (Wills et al. 2011).

standards among its member states (FCO 2000), meaning in practice that they are all subjected to the originator principle (Reichard 2006). In other words, the European Parliament is not alone in having restricted access to sensitive documents, nor is the European Union alone in having firm security of information rules. But the question remains: Has the IIA nevertheless contributed in making the CSDP more democratic?

There are good reasons why some forms of information need to be kept secret, be it in terms of efficiency or security. Thus, restraints in themselves need not be incompatible with democratic principles. However, this is dependent on at least two factors. First, the reasons for secrecy are in need of scrutiny and justification (Chambers 2005: 389). 'As long as the principles and guidelines for secrecy are publicly debated and regulated, actors may operate, within given parameters, in secrecy without violating democratic norms' (Eriksen 2011: 1174). Thus, procedural arrangements may sustain the balance between secrecy and democracy. By agreeing an IIA that has gone through the parliamentary decision-making process and in the last instance has been presented to debate and vote in the EP-plenary, one could say that the IIA at least approximates this standard.⁹ Moreover, the review clause in the agreement could also be seen as an opportunity to continue this process of justification. On the other hand, the fact that this clause has not been used, and that the IIA itself has not been put through a new EP-process, is questionable.

Secondly, some interviewees argue that over-classification is becoming a problem (EP4).¹⁰ If such a practice is widespread, for whatever reasons, it undermines the terms on which secrecy can be accepted in the first place. According to a recent study, in the EU there is 'virtually no substantive internal control to combat over-classification' (Curtin 2013: 456). Moreover, regulation of classified documents has developed 'in a largely non-public fashion' (Curtin 2013: 424). In the current review of the Regulation on public access to EU-documents, the EP has been put under pressure to drop its resolve to create explicit rules of classification (COM1). While the process to review the Regulation began in 2008, it is still awaiting the Council's first

⁹ This does not mean that the process through which the IIA was negotiated is beyond criticism.

¹⁰ Furthermore, the European Parliament has had to enter into new negotiations with the Council on specific issues (EP1). The IIA only covers sensitive documents in the area of security and defence, i.e. top secret, secret and confidential documents. However, in practice, the agreement also covers restricted documents (Driessen 2008). Restricted documents make up a far larger portion than the sensitive ones. For instance, in 2009, there were over 2000 restricted documents (Council Annual Report 2009).

reading¹¹. In the latest debate in the EP-plenary, MEPs were not in agreement over whether classified documents would be sufficiently protected in the new Regulation. But some also argued that whereas confidentiality may be justified, 'we cannot simply claim that confidentiality is justified in a particular case. We cannot just classify something as 'confidential'; there needs to be a proper procedure for this. Where there is disagreement and doubts exist, it must be possible for this to be decided by the court. That is fitting for a modern, democratic society and an approach that follows the rule of law.' (MEP Häfner, 14 December 2011).

Furthermore, the arrangement with the special committee is potentially problematic.¹² A procedure can provide accountability while being undemocratic itself. Elite-accountability is important in areas that for different reasons cannot and should not be made public. Thus, the EP special committee provides an element of checks and balances into the field of security and defence (see Stie 2012: 142–143). However, very little is known about what takes place once the special committee gathers, and no internal evaluation of its operation has been undertaken (Curtin 2013). One thing is that the information conveyed is kept secret, but one could argue that general facts about the practices of the arrangement should be regularly discussed and evaluated in public to make sure that the committee is kept constantly aware of the broader political context. Given that the special committee is also used by the HR to give oral briefings to the EP, it is of particular importance that one makes sure that the discussion of broader policy issues takes place in public and not behind closed doors.

At the same time, while there may be good grounds for keeping some information secret, there are also ways of combining the protection the secrecy of information with parliamentary involvement (Lord 2011). The reasons for having ex ante processes behind closed doors may be valid enough, the ex post processes may be more open to allow for the practice of accountability to take place in a public setting. Although the special committee has privileged information that it cannot use directly, if it holds that for instance a mandate for a particular operation is not reasonably justified, there is no stopping them

¹¹ For the current status of the process, see: <<http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2008/0090%28COD%29&l=en#tab-0>>, [last accessed 22 January 2014].

¹² The present analysis has mainly dealt with access to sensitive documents in the area of security and defence, whereas the situation for documents of similar status in foreign policy has been based on the ad hoc application of the special committee arrangement. With the new IIA, it looks like CFSP documents will be subject to a more open procedure than CSDP documents.

from demanding public justification from the member states. But again, in order for the EP as an accountability forum to qualify as democratic, the practice of justification has to take place in public at some point; otherwise the link to the autonomy of citizens, those who are subjected to the executive decisions, is lost.

Further still, it is difficult to assess the democratic quality of the EU's security and defence policy without a clear standard about what the EU is or should be. The European Parliament's role in EU foreign policy is contested, and even if one might agree that there are no principled reasons why the CSDP should not be subjected to democratic scrutiny, it does not follow that more power to the EP is the proper remedy. There are many different renderings of what the EU is, and this in turn determines the democratic procedures that are relevant to use as benchmarks. Thus, in order to evaluate what the IIA can tell us about the democratic quality of the EU's foreign policy, it is necessary to start from an understanding of what kind of polity the EU is and what is characteristic of its foreign policy (Bovens et al. 2010, Eriksen and Fossum 2007, Sjursen 2011a, 2011b).

Following a traditional, intergovernmental model, one would expect the member states to remain in full control of the EU's foreign policy, and it would primarily be the task of national parliament to scrutinize their governments' foreign policy activity, also at the European level (Sjursen 2011b). An alternative would be to depict the EU as a federal polity. Then, one would expect executive functions in foreign policy to be uploaded to the European level. As a consequence, the European Parliament would be expected to play a direct role in legitimating the EU's foreign policy (*ibid.*).¹³ The empirical findings indicate certain democratic problems regardless of the democratic model applied. More specifically, several democratic inconsistencies can be identified. After the Solana decision in 2000, the British parliament criticised its government for failing to consult the parliament properly before agreeing to the decision. Nor was it satisfied with the government's justification for why it had not taken the time to present the decision to parliament (House of Lords 2001). Previous studies on the involvement of national parliaments in EU's security policy have pointed out that they rarely have 'direct access to information on European operations from the European level' (Peters et al. 2008: 13). And even the ones who do have the right to access CSDP-documents, have in practice not been given

¹³ There are obviously also other potential polity models that might be relevant to mention here, but the intergovernmental and federal models have traditionally been the most dominant.

access (Bono 2006: 441). In addition, national parliaments also do not have adequate information about what their governments are doing at the European level, which makes it harder to hold them to account (Bono 2006, Gourlay 2004).

Thus, national parliaments are less involved than one would expect from an intergovernmental model. Consequently, one of the justifications for why the European Parliament needs access to sensitive Council document is that there is and should be a division of labour between the European Parliament and the national parliament when it comes to foreign and security policy, but also that one has to avoid a situation where European foreign, security and defence policy means less transparency and democracy' (MEP Brok, EP-plenary, 5 September 2000). The EP seems to be in a better position to supervise the member states in their collective activities, because it is situated at the European level where decisions are made, but also because of arrangements such as the IIA on access to sensitive documents and the oral briefings of the special committee.

However, the EP is far from the primary source of parliamentary legitimacy in EU foreign policy, which is expected from a federal model of the EU. Compared to national parliaments, the EP has fewer possibilities of formally sanctioning the Council in the area of foreign policy. Thus, the result, if one accepts that foreign policy should not be entirely exempt from parliamentary scrutiny, is democratic inconsistency. The EP has access to information, but has very few possibilities for sanctioning decision-makers since the CSDP is governed by the rules of the second pillar where the involvement of supranational institutions is marginalised. At the same time, national parliaments have the opportunity to sanction their governments, but because they have difficulties gaining access to information, they are unable to make qualified assessments of the EU's security and defence policy. Thus, the current level of democratic oversight in EU foreign policy falls short of the democratic expectations of both an intergovernmental and a federal model.

Conclusion

The analysis demonstrated that the Interinstitutional Agreement on access to sensitive documents from 2002 paved the way for an elite-accountability arrangement in the area of EU security and defence policy. Moreover, the study of the actual practice showed that this went beyond the formal procedures of the agreement through the establishment of the oral briefings of the Special Committee. In other words, the EP can be considered an accountability forum, but with rather extensive limitations, especially when it

comes to pass judgement. To what extent are these restrictions problematic? In all countries there are constraints on access to documents and information pertaining to the area of security and defence. Despite criticism from several sources, the IIA does not stand out as being particularly less transparent compared to many other countries. One can of course still argue that the rules of transparency in these countries are also problematic. Foreign policy, and certainly security and defence policy, has been exempt from democratic scrutiny for various reasons that are highly debatable. However, there is now a 'generally reduced sense that foreign policy is a reserved domain, protected from normal politics and with its own distinctive (a)moral ambience' (Hill 2003: 282). As a consequence, a reassessment of the relationship between foreign policy and democratic politics is needed' (ibid: 43). This leads to the issue of standards. What benchmarks do we use to assess the democratic quality of the accountability forum instituted by the IIA?

A systematic evaluation of the whether or not the IIA has increased the democratic quality of the CSDP is beyond the parameters of this paper. Nevertheless, some key issues have been highlighted by the above analysis. First of all, an arrangement such as the IIA can provide accountability without being democratic. Although the EP has few possibilities of sanctioning the Council, the special committee provides an element of checks and balances in that the Council's activities are put under scrutiny. The practice of the oral briefings shows that the MEPs are not only informed, but also ask question and receive justified answers. What makes the special committee potentially problematic from a democratic perspective is not necessarily the fact that it operates in secret, but primarily that there is too little oversight of the security and defence policy in other, public fora. Because of the particular decision-making structure of the Common Security and Defence Policy, the Council is not formally obliged to render account to the European Parliament. As a result, the only process of accountability taking place at the EU level is elite-accountability.

Secondly, regardless of whether one holds that the European Parliament or the national parliaments should be the main counterpart of the Council, the current practices in the EU do not conform to either of these ideals. The EP has access to information but few opportunities to sanction decision-makers, while the national parliaments have sanctioning powers, but problems accessing information. This confirms the observation that the main democratic problem of the EU's security and defence policy is of a systemic nature (see Stie 2010). Some types of information need to be kept secret, but the special committee must not be made a substitute, for the Foreign Affairs Committee or the EP plenary. The current review of the IIA could enable a thorough discussion of

the premises of the arrangements for access to sensitive information. Still, the core of the democratic dilemma remains that neither the EP nor the national parliaments are sufficiently equipped to control the EU's security and defence policy. Thus, security and defence policy continues to be led in comfortable isolation from the public on whose behalf it is made.

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