



Analysis

Europe's secret international negotiations violate EU law

Professor Deirdre Curtin

Professor of European Law | Director of Amsterdam Centre for European Law and Governance |
University of Amsterdam

In his State of the Union speech to the European Parliament on Wednesday this week, President Barroso spoke about the centrality of the institutions of the European Union to the future of Europe, especially existing and future plans for economic government. The European institutions are however already very central to other forms of supranational government, including a very powerful role in the international arena, one they exercise behind closed doors even where what is being negotiated affects the rights and interests of citizens. Examples abound, from accession by the EU to the European Convention on Human Rights to a string of specific international agreements with the US including on the exchange of personal data in general and also with regard to passenger name records (PNR).

One of the most significant new powers given to the European Parliament (EP) in the Lisbon Treaty is the power to veto the conclusion of international agreements negotiated on behalf of the EU by the executive power (a combination of the Council and the Commission or in some cases the High Representative). Moreover it is explicitly provided that the EP is to be "immediately and fully informed at all stages of the (negotiating) procedure." In this way some democratic oversight has finally been introduced over what was hitherto a matter purely of closed diplomatic negotiations at the European level.

Given the highly political type of issues that the EU is currently negotiating with third states or other international organisations this is a timely and much needed oversight. It is also the only parliamentary oversight possible where the agreements fall under the exclusive competence of the EU since national parliaments are then inevitably sidelined. But even with the new Treaty provisions the EP has experienced considerable difficulties in getting timely access to classified documents.

The executive institutions argue that strict secrecy is required because otherwise their negotiation strategies with the third country would be undermined. Moreover by invoking NATO standards the Council and the Commission have opposed to the EP what is commonly known as the principle of "originator control ". This principle gives the possibility to the third country concerned the right to oppose the diffusion to the EP of classified information. It is not a mandatory part of European law as it stands and it is extremely surprising that the EP has actively agreed to be limited by its application in the context of classified information supplied by the Commission in an inter-institutional agreement agreed in secret last year. This means that a very significant part of EU classified information will never be seen by the European Parliament.

Another inter-institutional agreement is being negotiated at the moment by the Council on the access of the EP to classified information held by the Council. The latest (secret) draft extends the principle of originator control very far: even to other EU institutions, offices, bodies or agencies as well as to EU Member States, third States and international organisations. This is an extremely dangerous development and should be vigorously opposed by the parliament itself as well as by civil society. It is also constitutionally very questionable, a secret internal inter-institutional agreement attempting to limit the scope of fundamental Treaty provisions, including Article 1 of the Lisbon Treaty that the Union takes decisions "as openly as possible."

The problem is that a longstanding culture of secrecy breeds systematic overclassification. We don't have the exact figures on the EU, but with the application of the principles of derivative classification and of originator control

within the EU, this can be expected to be just as big a problem as it is in the US where reliable calculations indicate overclassification to the tune of 80%. In such circumstances the only way to obtain empirical evidence of 'over classification' is through leaked documents. Leaking of course has a symbiotic relationship with secrecy. Dissatisfied 'Insiders' may leak documents for a variety of reasons, including concern at the fact that far-reaching decision-making is taking place in secret.

This happened recently with regard to the 'negotiation mandate' for the (still ongoing) negotiation of an international agreement between the EU and the US on the protection of personal data when transferred and processed by "the competent authorities of the EU and its Member States and the US for the purpose of preventing, investigating or prosecuting crime, including terrorism". The negotiation mandate was placed on line late last year by Statewatch, a UK based civil liberties NGO. The Dutch Senate subsequently included this document in its own online database as it was already in the public domain. As a result the Commission –rather extraordinarily- explicitly threatened the Netherlands with infringement proceedings for breach of European law (the document in question was eventually removed from the Senate web site, allegedly because it was no longer up-to-date). The letter by the Minister for Safety and Justice to the President of the Senate was very explicit on the Commission's threat to sue the Netherlands as a result of the action by the Senate. It proves just how seriously the Commission -and the other institutions-take their own internal classification rules and their binding legal effect. Yet if one examines this negotiation mandate in terms of substance it is clear that it is in fact quite an innocuous document. The description given in the negotiation mandate is not operational at all in terms of negotiation "strategy", and merely outlines in very general terms a reasonably large number of fairly obvious points for experts that need to be addressed.

The classification level of negotiation mandates is "restricted", yet this level is not mentioned in the specific provisions in the access to documents law from 2001 (currently under revision). This classification level is introduced in the internal rules

of the institutions themselves and is applied to “information and material the unauthorised disclosure of which could be *disadvantageous* to the interests of the Union or of one or more of the Member States”. It is not at all clear what would be “disadvantageous to the interests of the Union” in making public the actual ‘negotiation mandate’ other than to the interest of the institutions in having their own space to negotiate ‘diplomatically’ as they are used to doing freed up from the constraints of publicity. The interest of the citizens of the EU who will see their rights and interests directly affected by the subject matter under negotiation does not seem to be factored into the notion of “the interests of the Union.” This is the case even where what is being negotiated has a constitutional nature and could change the existing rules of the game.

Given the way that the EU is rapidly evolving in institutional and political terms the time has come for the issue of classified information in the EU to be confronted head on. The EU needs a general law on classification of documents applying to all the institutions and organs of the EU and adopted according to the normal legislative procedure. Moreover horizontal provision can be made for declassification over time and for classification oversight by a special (new?) oversight body –something that is entirely lacking at present.

October 2011