Access to documents and the EU agency Frontex: growing pains or outright obstruction?

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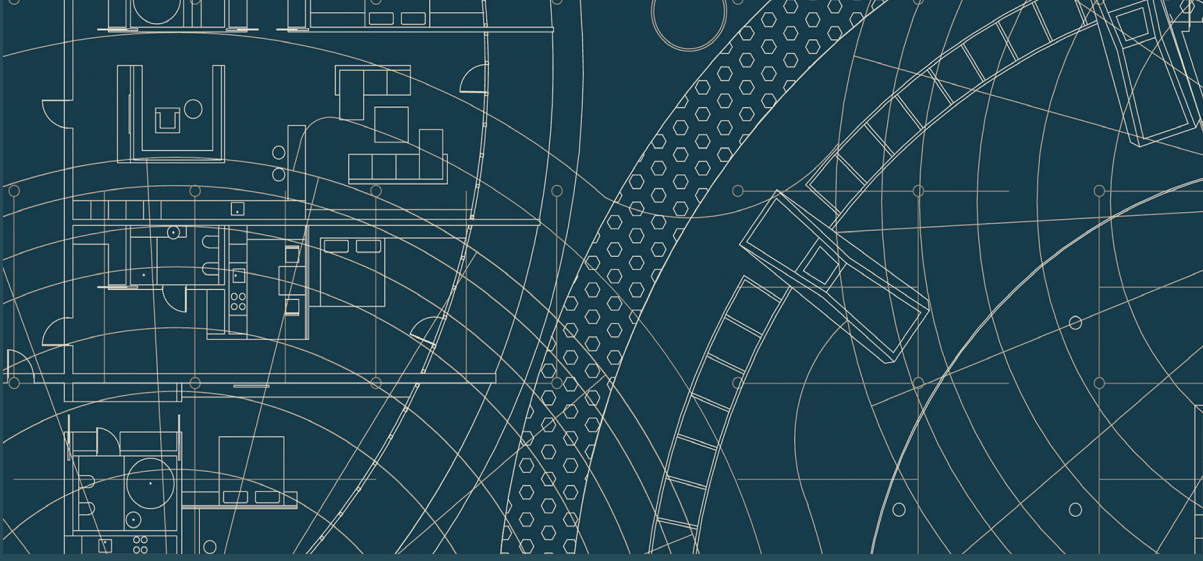

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CRITICAL APPROACHES TO TRANSPARENCY AS AN IDEAL AND A PRACTICE

Edited by
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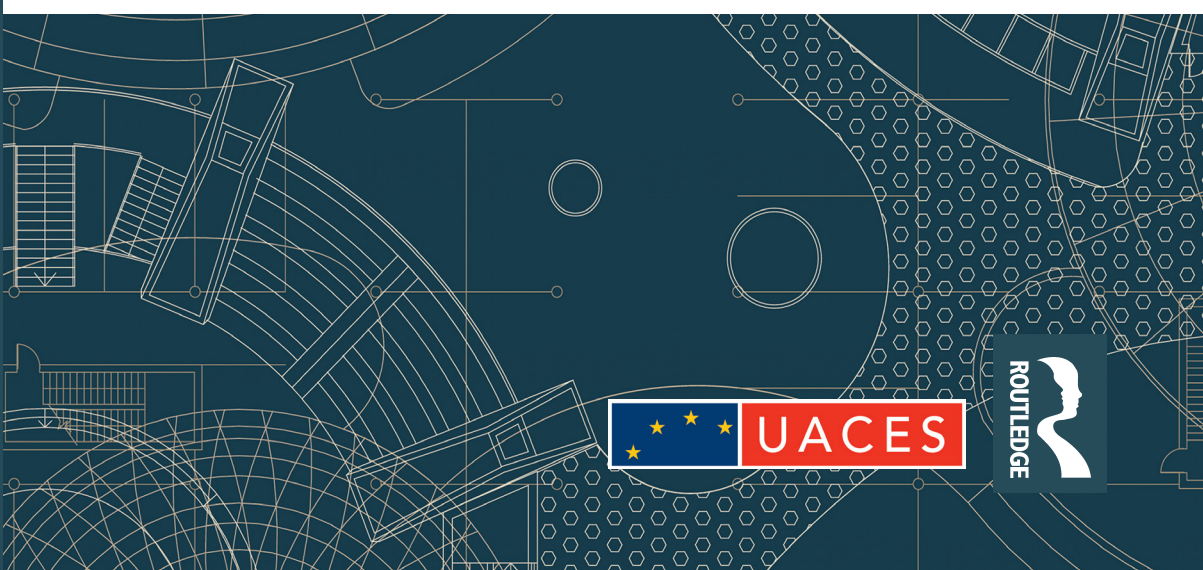

(In)visible European Government

This book questions the theoretical premises and practical applications of transparency, showing both the promises and perils of transparency in a methodologically innovative way and in a cross-section of policy instruments. It scrutinises transparency from three perspectives – methodologically, theoretically, and empirically – both in the specific context of the EU but also in the wider context of modern society in which transparency is embraced as an almost unquestionable virtue. This book examines the ways in which transparency practices can make institutions visible and stands out for its methodological self-reflection: to fully understand the irresistible call for transparency in our governing institutions, we must reflect on our own relationship with it. This book will be of key interest to scholars and students of transparency studies, democratic legitimacy, global governance, governance law, EU studies and law, and public policy more widely.

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Contents

List of figures *viii*
List of tables *ix*
List of contributors *x*

1 Introduction: European government transparency beyond the slogans 1
PÄIVI LEINO-SANDBERG, MAARTEN HILLEBRANDT, AND IDA KOIVISTO

PART I
How to research transparency? 15

2 Transparency as a critical research agenda: Engaging with the EU institutions on access to documents 17
PÄIVI LEINO-SANDBERG

3 What is the purpose of Regulation 1049/2001? An empirical analysis of Member State positions 37
LIISA LEPPÄVIRTA

4 Interpretive approaches in transparency studies: Gaining new perspectives on old problems 55
MARLEN HEIDE AND SOFIA WICKBERG

5 Learning through rejection: Studying the informalisation of EU readmission policy with access to documents requests 72
MILKA SORMUNEN AND DAVIDE GNES

PART II
Against transparency? Conceptualising the problematic sides of government openness 105

6 The human face of legal transparency? Performance in action 107
IDA KOIVISTO

7 Towards radical transparency 125
CLARE BIRCHALL

8 Escaping the transparency trap: In defence of playacting 142
EMMANUEL ALLOA

9 Algorithms and the open society: New approaches to information, transparency, and accountability 152
ALEX INGRAMS

10 Government transparency: Dispelling the myth 171
DOROTA MOKROSINSKA

PART III
From institutional manifesto to information society? New horizons in the EU's transparency agenda 193

11 Invisible practices: The transparency dilemma in EU institutions 195
STÉPHANIE NOVAK

12 Transparency as enabling citizen participation: The quality of public information on EU decision-making processes 214
ALEXANDER HOPPE

13 Access to documents and the EU agency Frontex: Growing pains or outright obstruction? 235
MELANIE FINK AND MAARTEN HILLEBRANDT

14 The Council Presidency, brought to you by Coca-Cola: Transparency about commercial sponsoring 254
GIJS JAN BRANDSMA

15 EU agencies and lobbying transparency rules: A case study on the islandisation of transparency? 275
EMILIA KORKEA-AHO

16 "Mediated transparency": The Digital Services Act and the legitimisation of platform power 305
MARTA MARONI

17 Epilogue: Against transparency complacency. For engaged publics 327
DEIRDRE CURTIN

Index *334*

13 Access to documents and the EU agency Frontex

Growing pains or outright obstruction?[1]

Melanie Fink and Maarten Hillebrandt

13.1 Introduction

The European Border and Coast Guard Agency, better known under its acronym Frontex, is a Warsaw-based EU agency tasked with supporting the Member States in the area of border management (Regulation 2019/1896, in the following "EBCG Regulation"). Since its establishment in 2004, it rose from a small and relatively unknown agency to a major actor in the EU's border management policy with an ever-increasing budget, competencies, and scope of activities. Its most prominent task is the implementation of large-scale operations at the EU's external land, sea, and air borders, involving personnel of the Member States and its own staff. In that context, Frontex border guards carry out border checks, register arrivals, take fingerprints, and carry out returns of irregularly staying persons. With executive powers on the ground and the right to carry firearms, Frontex border guards represent a prime example of how the EU executive can directly and significantly affect the lives of individuals.

In recent years, Frontex has increasingly come under scrutiny for the human rights impact of its activities. In April 2022, years of allegations of pushbacks in violation of the prohibition of *refoulement* and the conclusion of investigations by the European Anti-Fraud Office, culminated in the resignation of Frontex's Executive Director Fabrice Leggeri (Frontex Management Board, 2022). One recurring criticism concerns the absence or malfunctioning of accountability mechanisms, in part due to a lack of transparency. Indeed, transparency, here understood as public access to a public body's documents, is a precondition to ensure the accountability of any public body (Gkliati, 2021, pp. 108–110). The problem of a lack of transparency in many of the agencies' activities has been underscored by the Frontex Scrutiny Working Group, set up by the European Parliament's LIBE Committee in 2021 to permanently monitor Frontex (European Parliament, 2021b). This chapter shares much of the Working Group's criticism, finding that while Frontex mostly follows the letter of the law, its specific legal interpretation is very restrictive and focused on ensuring that applicants are not granted more rights than the law strictly affords them. Furthermore, existing rules and Frontex's attitude towards the recovery of legal fees reveal

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problematic features that engender the real risk of creating a chilling effect on the public's exercise of its right to access documents pertaining to the agency.

This chapter critically assesses Frontex's implementation of the EU right of public access to documents (PAD), a central pillar of EU bodies' transparency obligations, on the basis of an analysis of relevant regulation and case law as well as incipient evidence of their implementation by the agency. It starts by setting out the legal regime for access to documents (Section 13.2). It then discusses, respectively, Frontex's obligations and practices with respect to proactive (Section 13.3) and request-based (Section 13.4) document disclosure. The chapter thereafter addresses the question of access to justice in access to documents cases (Section 13.5).

13.2 Regulating public access to Frontex documents

13.2.1 The rise to prominence of an EU agency and transparency gaps

Frontex was originally established in 2004 as the European Agency for the Management of Operational Cooperation at the External Borders (Council Regulation (EC) No 2007/2004; on the origins of Frontex see Lehnert, 2014; Neal, 2009; Rijpma, 2017). Its founding regulation was amended and completely overhauled four times (Regulation (CE) 863/2007; Regulation (EU) 1168/2011; Regulation (EU) No. 2016/1624; Regulation (EU) 2019/1896). Today, Frontex has become a prominent EU agency with more tasks, better access to human and technical resources, and more financial means than ever before. This is reflected in a spectacular rise in the agency's budget (Figure 13.1) and the obligation to develop a standing corps of 10,000 border guards, including 3,000 of its own staff, with the right to

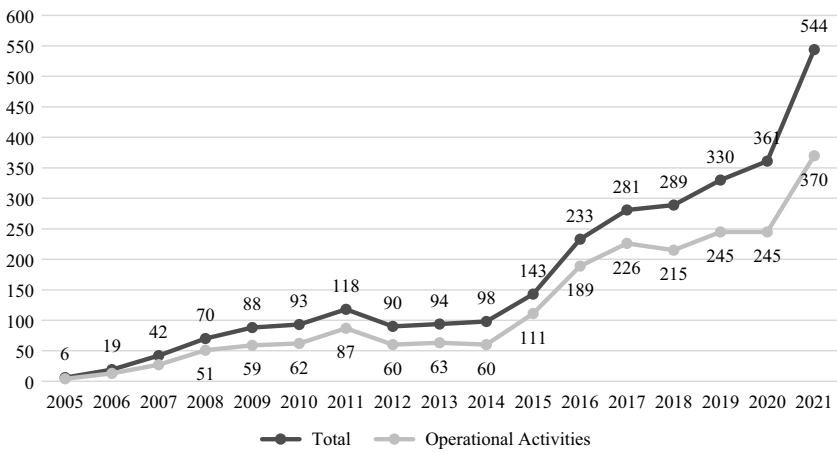

Figure 13.1 Budget development and distribution 2005–2021 (in Mio EUR).

Source: Developed from Fink (2018), p. 46. All data was retrieved from Frontex's annual budget reports.

exercise executive powers on the ground and carry firearms (Regulation 2019/1896: Article 54, Annex I).

The institutional rise of Frontex was fuelled by events that were perceived as threats to the Schengen area, especially the 2015 migration or refugee "crisis" (more broadly see Moreno-Lax, 2017). However, the rise in powers was not accompanied by the development of an effective accountability and human rights protection regime (Guiraudon, 2018). Increasingly, instances of fundamental rights abuses were reported, exposing Frontex's failure to ensure these rights. Recurring and severe criticism concerned compliance with the principle of *non-refoulement* during joint operations, recently especially at the Greek-Turkish border, as well as the agency's handling of the deteriorating detention conditions within a number of front-line Member States (Human Rights Watch, 2011; Mungianu, 2016).

With substantive fundamental rights obligations in place, the major challenge turned out to be how to ensure the accountability of the agency (Fernandez, 2016, 2017; Fink, 2018, 2020a; Majcher 2015). Even where convincing evidence is presented, it is notoriously difficult to hold Frontex to account for failures to meet these obligations. To be sure, operations with multiple participants that span different jurisdictions are unavoidably challenging when it comes to allocating responsibility for wrongdoing. In the case of Frontex, these challenges are compounded by two particular transparency gaps. First, the scattered regulation of roles, powers, and authority within which Frontex operates makes it difficult to assess who played what role in a particular human rights violation, and who was in a position to prevent it. Second, the activities of Frontex are more generally surrounded by secrecy. Information on daily activities is scarce, essential documents to establish responsibility are not publicly available, and material that is shared is "edited" to the point of containing little useful information (Fink, 2020b; Kilpatrick & Gkliati, 2021).

13.2.2 The legal framework for public access to Frontex documents

In light of the transparency gaps in the work of Frontex, ensuring the public's right of access to documents (PAD) is of paramount importance. This right is laid down in Article 42 Charter of Fundamental Rights of the EU (CFR) and Article 15(3) Treaty on the Functioning of the EU (TFEU). It is further developed in Regulation (EC) 1049/2001.[2]

While Regulation 1049/2001 has yet not been aligned with Article 15(3) TFEU to include agencies in its scope, Article 114 EBCG Regulation, Frontex's founding regulation, explicitly binds the agency to Regulation 1049/2001. The EBCG Regulation reiterates the right to request documents in any of the Union's official languages, along with the right to seek external redress against Frontex's access decisions via the European Ombudsman or the Court of Justice, and requires that Frontex further specify its access procedure in a separate decision (see, in parallel, Korkea-aho, this book).

The relevant internal procedure is laid down in Management Board Decision No. 25/2016 (hereinafter: the Frontex PAD Decision) (Frontex Management

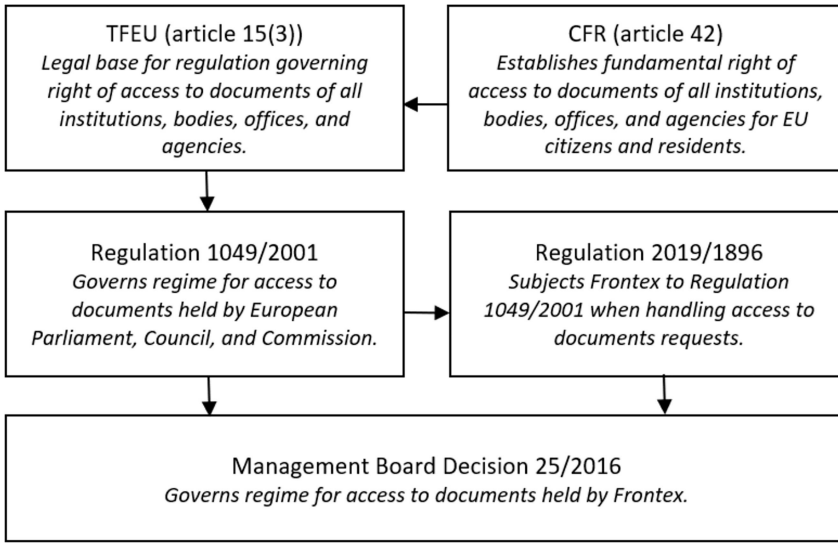

Figure 13.2 Public access to Frontex documents: Legal framework.

Note: Arrows denote the hierarchy of legal norms.

Source: Compiled by the authors.

Board, 2016). This mirrors the provisions in Regulation 1049/2001 concerning pivotal issues, such as the application process, deadlines, appeal routes, third-country originated documents, and in some cases, introducing specifications tailored to the agency's internal organisation. The legal framework governing access to documents held by Frontex is set out in Figure 13.2.

13.3 Proactive disclosure: Empty shelves and buried reports

13.3.1 Legal obligations

Under Regulation 1049/2001, documents should be made available to the public, exceptions to this rule requiring specific justification (Article 4). The regulation further obliges EU bodies to set up and maintain a register of documents (Article 11), and to report annually about access to documents requests from the preceding year (Article 17).

The EBCG Regulation contains several provisions regarding reporting duties and proactive disclosure that go beyond those in Regulation 1049/2001. Notably, under the condition that classified and sensitive information remains protected, Article 114(2) EBCG Regulation requires Frontex to ensure "that the public and any interested party are rapidly given objective, detailed, comprehensive, reliable, and easily understandable information regarding its work". It also lists the documents to be drawn up and made publicly available, which includes annual activity reports and work

programmes, strategic risk analyses, and comprehensive information on past and current joint operations, rapid border interventions, and return operations (Article 114(2) EBCG Regulation).

Clearly, the intention behind the aforementioned disclosure provisions is to create a general culture of transparency and institutional and public accountability. However, a closer look into Frontex's practice reveals a number of shortcomings. Of these, the agency's document register and its public access to documents reports stand out in particular.

13.3.2 Frontex's document register

EU bodies' duty to maintain a documents register fulfils the dual purpose of providing the public with the means to directly access documents in electronic form, while also facilitating the possibility for individuals to know which documents an EU body holds but does not proactively disclose (Regulation 1049/2001: Articles 11(1), 12(1, 4)).

In March 2020, Frontex's long-standing failure to comply with the obligation to maintain a register resulted in a complaint brought before the European Ombudsman by the civil society organisation Statewatch (European Ombudsman, 2020). Although Frontex began to take steps towards improving its practice (European Ombudsman, 2021b, para. 12), it was not until March 2022 that the agency set up a fully fledged document register.[3]

Nevertheless, the register remains marked by notable gaps, both practically and legally (Statewatch, 2022). Its most obvious shortcoming is the fact that it is incomplete. For instance, there is no reference to documents such as Operational Plans – covering the agency's core activity – or otherwise "comprehensive information on past and current joint operations".

Given that publication of the above-mentioned documents is expressly required by Article 114(2) EBCG Regulation, Frontex's reference to "the nature of the activity" as a justification for non-disclosure (see, e.g., Frontex, 2021) is legally untenable. Moreover, the information in question is essential to understanding the nature and scope of Frontex's activities along with its responsibilities and accountability, as is the case with certain parts of Operational Plans that contain the precise role and tasks of all staff involved in Frontex joint operations (Regulation 2019/1896: Article 38). In this light, these documents should at least be made partially accessible, not just upon request, but through the public documents register. Failure to do so forms a breach of the agency's founding regulation.

A register of documents should not only contain documents that are fully publicly accessible, but also refer to all documents or types of documents that are not made directly downloadable (European Ombudsman, 2021b, point 8). The only exception concerns officially classified "sensitive" documents, which are recorded in the register only with the originator's consent (Regulation 1049/2001, Article 9(2) and (3)). However, register references are not found for any of the document types mentioned above. This poses a significant obstacle to

those who wish to make use of their rights under Regulation 1049/2001. Knowing what documents exist in the first place, especially due to the general secrecy of Frontex activities, has always been one of the major challenges faced by applicants. Making documents directly and electronically accessible is also in the interest of Frontex, considering this would substantially ease the workload associated with the high number of requests for documents they currently receive (see further Section 13.4.3).

13.3.3 The annual access to documents report

In spite of EU bodies' legal obligation to report annually on how they have handled access to documents requests in the preceding year, Frontex started consistently reporting on access to documents requests only in 2010, six years after its establishment. In the years prior to 2010, it only reported on access to documents requests once, in 2006, but the reported number was 0 (Frontex Management Board, 2006, p. 19). Since 2012, Frontex has dedicated an annex of its Annual Activity Report to its reporting obligation. It typically reports the number of initial and confirmatory requests received, as well as the number of requests for which access was (partially) granted and the number of applications refused, but only at the initial (pre-appeal) stage. Moreover, in recent years, a number of initial applications do not result in a decision, without this situation being precisely accounted for. No reference is still made to the number of sensitive documents not cited on the register. Finally, in contrast to the EU institutions, Frontex lists the exceptions on which its refusals were based, but does so without specifying in how many cases each of them was relied upon (e.g., Frontex Management Board, 2020, Annex 1, p. 103).

In a notable change of policy at the beginning of 2017, Frontex made it significantly more difficult to access the available data concerning its disclosure practices. The document now made available as the "Annual Activity Report" on Frontex's homepage is published without annexes. Therefore, it lacks data concerning the agency's handling of access to documents requests from the prior year. At first sight, the full Annual Activity Reports seems to have disappeared from Frontex's homepage. In reality, these reports now appear as annexes to the relevant management board decisions, where they were adopted under the "Key Documents" page. This practice of burying key information is certainly at odds with the spirit of the reporting obligations set out in Regulation 1049/20010.

13.4 Public access to documents requests: Hurdles and missed opportunities

13.4.1 Legal obligations

With regard to Frontex's obligations related to requests for access to documents, the two exceptions relied on most by Frontex to deny access concern

the protection of public interests regarding public security (Regulation 1049/2001: Article 4(1)(a) first indent) and the protection of privacy and the integrity of the individual (Ibid: Article 4(1)(b)).

In implementing and operationalising this legal framework, Frontex overall takes a restrictive stance. This is particularly visible in the extent to which it grants access to documents to non-resident third-country nationals and its practical handling of requests.

13.4.2 Access to documents for third-country nationals

In principle, under EU law, the right to access documents is limited to Union citizens and third-country nationals residing or having registered offices in the EU. In the case of Frontex, this scope of beneficiaries is narrow, given that its activities directly affect non-resident third-country nationals (specifically, asylum seekers and irregular migrants seeking to enter the EU). Regulation 1049/2001, however, explicitly frames the limitation of the scope of beneficiaries as a *de minimis* provision that EU bodies can expand upon on a voluntary basis (Article 2(2)). The Frontex PAD Decision fulfils some of this potential by extending the right to access documents to nationals of Schengen countries. Beyond this, third-country nationals' requests are treated on a case-by-case basis, without there being a set of explicit criteria according to which these requests are handled (Article 3).

Frontex does not publicly report on either the number of applications received from third-country nationals or these applicants' success rates. In June 2021, Frontex claimed that such requests are, on average, received about once per year. Frontex reiterated a similar claim to the European Ombudsman in a recent inquiry (European Ombudsman, 2020). It is difficult to independently corroborate this figure. However, based on anecdotal evidence, it appears that Frontex underreports the actual number of access requests by third-country nationals (Kilpatrick, 2021). In any case, Frontex's homepage represents EU residency as a hard criterion for making access requests, without any qualifying statement (Frontex, 2021). In addition, Frontex specifically requires persons that request access to documents to submit proof of eligibility in the form of documentation to show they are a Union citizen or resident (Article 5(3) of the Frontex PAD Decision). Both of these aspects create the impression that the public access regime is inaccessible to third-country nationals.

Given the impact of Frontex's activities on non-resident third-country nationals, it would seem advisable for the agency to unconditionally include this group within the scope of beneficiaries of the right to public access to documents. In any event, the obligation under Article 14 Regulation 1049/2001 to actively inform "the public" of its rights seems incompatible with communications that suggest a more limited content of these rights than Frontex's legal framework allows for.

13.4.3 Frontex's practice in handling access to documents requests

Frontex's rapid growth has also affected the number of annual public access to documents requests the agency has to process. The first real increase in applications filed took place in 2015. This coincided with the "refugee crisis", when 60 requests were reported. By 2020, Frontex processed 266 requests (see Table 13.1). This rapid rise in requests posed an organisational challenge to the agency. The agency's internal PAD Decision of 2016 established a "Transparency Office" (Frontex PAD Decision: Article 14), as a result of which the agency is now able to handle 100 percent of access requests within statutory deadlines (European Ombudsman, 2021a).

When it comes to Frontex's practical handling of public access to documents requests, Frontex's annual access to documents reports offers scant information about the types of documents successfully and unsuccessfully requested and the legal contents of the agency's formal replies to these requests. Frontex first began to provide detailed statistics on the handling of the application procedure in 2012. However, in recent years, the clarity of the reported figures has began to deteriorate. Outcomes are no longer separated by decision stage (initial vs confirmatory), although the numbers suggest they reflect only the initial stage. This would represent a breach of Frontex's statutory reporting obligations. Irrespective of the stages covered, the reported figures do not always add up, or add up in a comparable manner. Furthermore, where applications do not result in an access decision, Frontex does not account for what happens to them. Rather, it conflates all procedural steps that amount to a non-decision in a single, incomprehensible, and unverifiable figure.

Notwithstanding these information gaps, evidence has emerged that Frontex systematically fails to process applications in the spirit of the public access to documents regime. A particularly worrying aspect are the *de facto* inequalities in Frontex's access decisions, which causes some applicants to receive more generous access than others. For example, in 2020, when the NGOs Mobile Info Team and Statewatch applied for access to the same documents with just a three-month lag between their requests, the former obtained partial access, while the latter was denied any access, on the argument that "redaction would be disproportionate in relation to the parts that are eligible for disclosure" (Kilpatrick, 2021). To begin with, if the redaction work involved in releasing a document is disproportionate, Frontex has to contact the applicant in search for a reasonable solution, rather than denying access (Regulation 1049/2001, Article 6(3)). More importantly, however, this practice raises questions about the equitable application of exceptions to the right of access. It also imperils the *erga omnes* principle, strongly anchored in the CJEU's case law, by which what is accessible for one, must be accessible for all (Driessen, 2012, pp. 44–45; Rossi & Vinagre e Silva, 2017, p. 138). Problems relating to workload can easily be resolved by automatically publishing already disclosed documents in the public register, thereby making requests for the same document unnecessary.

Table 13.1 Public access to documents requests 2010–2020

	2010	*2011*	*2012*	*2013*	*2014*	*2015*	*2016*	*2017*	*2018*	*2019*	*2020*
Total received	**13**	**17**	**16**	**26**	**37#**	**60#**	**67#**	**140**	**152**	**255**	**266#**
Not processed for procedural reasons∞	–	–	–	–	–	3	12	22	32	42	63
Total initial applications	–	–	**16**	**26**	**37**	**54**	**63**	**108**	**101**	**192**	**174**
Documents not held	–	–	–	–	–	–	–	7	7	24	26
Full access granted	–	–	11	21	18	12	15	15	8	34	12
Partial access granted	–	–	4	4	12	32	38	65	58	84	96
Access refused	–	–	1	1	7	6	10	21	19	21	24
Pending applications	–	–	–	–	–	2*	–	–	–	–	–
Total confirmatory applications	**–**	**–**	**0**	**0**	**2**	**6**	**4**	**10**	**19**	**21**	**19**
Full access granted	–	–	–	–	–	0	1	–	–	–	–
Partial access granted	–	–	–	–	–	3	1	–	–	–	–
Access refused	–	–	–	–	–	1	2	–	–	–	–
Pending applications	–	–	–	–	–	–	–	–	–	–	–

Source: Data compiled by the authors on the basis of annual reports on access to documents 2010–2020.
– = Figures not reported.
∞ = Includes applications outside of scope of Regulation 1049/2001, withdrawn, inadmissible due to lack of proof of identity.
= Numbers reported under "Total received" do not include confirmatory applications (2014) or applications not processed (2015 and 2016), or are entirely unreconstructible figures (2020).
* = Unclear whether this refers to initial, confirmatory, or both stages.

In practice, Frontex does the opposite, imposing dissemination limitations on documents disclosed to individual requesters. More specifically, upon being granted access to documents, applicants are warned that they are not allowed to further disseminate these documents (Kilpatrick & Gkliati, 2021). In defence of this practice, Frontex raises two arguments. First, it insists that its obligations under Regulation 1049/2001 only consist of providing applicants with requested documents, rather than releasing the requested material publicly. This justification is legally questionable, and certainly contrary to the spirit of the law. As was discussed above (Section 13.3.1), a duty is incumbent on Frontex to maintain an access to documents register, on which it must make reference to "*each* document" it holds, while it must "*as far as possible* make documents directly accessible *to the public*" (Regulation 1049/2001, respectively Articles 11 and 12(1), italics added). Where Frontex determines that one member of the public is to be granted access to a document, it is hard to plausibly maintain that the document cannot be made accessible to the public at large (*erga omnes* principle) (cf. Korkea-aho & Leino-Sandberg, 2017, pp. 1083–1084). The second reason Frontex advances to justify its dissemination limitation of previously disclosed documents is based on copyright protection (European Ombudsman, 2021a, point e). Frontex's disclosures contain a standard copyright disclaimer, prohibiting applicants from further sharing the received materials without prior authorisation. Frontex argues that its position corresponds to that of the European Commission. However, Commission Decision 2011/833/EU (12 December 2011) on the reuse of Commission documents makes no reference to copyright at all.

There are a number of reasons that cast doubt on the legal plausibility of Frontex's copyright claim. First, it is unclear what the legal basis for this claim is. The relevant EU copyright law is harmonised in directives, thus only addressed to the Member States, not EU bodies. Second, it is questionable whether all, or even the majority of the documents subject to this claim are actually protected by copyright. This is essential because facts and descriptions do not constitute "original" works amenable to copyright protection. The current interpretation of the CJEU of originality requires that the work is "the author's own intellectual creation", meaning *inter alia* that the author must make personal creative choices that are expressed in the subject matter (CJEU (2019), Case C-683/17 *Cofemel*, paras 29–35). It is important to note that the inclusion of an original element in a document does not extend protection to the entire document. Practically speaking, Frontex could simply remove or redact the original parts, such as logos. Third, in the access to documents case law, the court identified only a limited relationship between the regimes for copyright protection and public access to documents. In 2014, the European Chemicals Agency (ECHA) invoked an argument pertaining to the commercial secrecy of requested information similar to that of Frontex. This argument involved Article 16 of Regulation 1049/2001, by which the regulation is "without prejudice to any existing rules on copyright". The court

interpreted this clause restrictively, finding that it covered disclosures diminishing the commercial value of the requested information (General Court, 2017, Case T-189/14 *Deza*, paras. 119–120). It would be difficult to imagine what commercial value for Frontex would be damaged by disclosure (Korkea-aho & Leino-Sandberg, 2017, p. 1084).

In addition to these systemic shortcomings in Frontex's access to documents practice, different applicants have also flagged obstacles to the exercise of their right. One complaint raised in front of the European Ombudsman relates to Frontex's requirement that all access applicants submit a digital copy of an ID document in order to prove their identity. Previously, the Ombudsman had found in the context of the Commission that a blanket requirement to hand over personal data was "disrespectful of citizens and their fundamental rights under the EU charter", arguing that a case-by-case assessment on the need to verify an applicant's identity would be more proportionate (European Ombudsman, 2014, point 9). However, the Ombudsman did not reiterate this point in the context of Frontex (European Ombudsman, 2020).

Under Regulation 1049/2001 nothing in principle prevents EU organs from verifying eligibility through request of private data. Practices on the point of identification differ from one body to another, ranging from a mandatory (e.g., Commission, European Parliament, European Chemicals Agency) and non-mandatory request for applicants' address details (Council), to a request for the Member State of residence (European Medicines Agency and Europol), to no verification at all (European Environmental Agency). To our knowledge, beyond Frontex no other EU agency requires the submission of a copy of an identity document. It would seem reasonable to provide the applicant with the possibility to demonstrate their eligibility for the access right with their evidence of choice, or to refrain altogether from doing so.

Another obstacle raised in a pending complaint to the European Ombudsman is the fact that Frontex refuses to accept access requests via email or other channels, requiring applicants to address the agency via its password-protected requests portal (European Ombudsman, 2021a, point a). This portal allows Frontex to limit the site of communication with applicants to a private environment, which becomes inaccessible 15 days after Frontex issues its access decision. The requests portal has certain favourable aspects to it, including the fact that the full correspondence is organised and kept in one place. That said, it also forms a restriction of the exercise of the right of access to documents, especially due to the inaccessibility of communications in the portal as soon as the request is closed. Beyond this, it is a missed opportunity to implement the *erga omnes* principle by making all correspondence publicly available.

A final, serious impediment to the right of access described by applicants is that Frontex appears to claim that documents do not exist when in fact they do. This has been reported in the NGO community (Kilpatrick, 2021), but also experienced by one of this chapter's authors. Meanwhile, the reported

number of requests in which documents were *actually* not held is relatively small (see Table 13.1). Even when such mistakes result from human error and are subsequently amended, their frequency suggests that improvements in Frontex's internal information archiving systems are needed in order to remedy this situation.

13.5 Judicial remedies against Frontex access decisions: Taking an incalculable risk?

13.5.1 Avenues to challenge public access to documents decisions

EU bodies' obligation to justify refusals to grant (partial) access on the basis of formal legal arguments enables the applicant to take further steps to challenge the decision and the court to exercise its power of review (TFEU: Article 296; CFR: Article 41(2)(c)). Unsuccessful applicants have two possible avenues. First, the final decision can be challenged before the European Ombudsman. Transparency inquiries, including access to documents complaints, are a core aspect of the European Ombudsman's work, making up around a quarter of all inquiries per year European Ombudsman (2021d, p. 32). Since persons seeking access to documents usually need them for a specific purpose and thus as soon as possible, the European Ombudsman in 2018 introduced a fast-track procedure for dealing with access to documents complaints, promising to resolve a case within 40 working days (for more detail on this procedure, see European Ombudsman, 2021c).

Second, applicants can seek to have the final decision annulled before the General Court. Decisions of the General Court can in turn be appealed before the Court of Justice. This avenue is costly and time-consuming and requires considerably more expertise on the part of the applicant or his/her legal representation. Consequently, in 2020, a total of 24 access to documents cases were considered by the General Court, compared to just under 100 complaints taken up by the Ombudsman (CJEU, 2021, p. 61; European Ombudsman (2021d), p. 32).

To date, only one public access to documents case has been brought before the General Court against Frontex. In *Izuzquiza and Semsrott v. Frontex*, the applicants, two fundamental rights activists, challenged Frontex's refusal to release documents that contained details about vessels that had served under Frontex's Joint Operation Triton in 2017 (General Court, 2019, Case T-31/18 *Luisa Izuzquiza and Arne Semsrott v Frontex*). The Court, largely confirming the application of its prior case law on the public security exception for Frontex, ruled against the applicants.

From an access to justice perspective, it is particularly the aftermath of this judgement that is noteworthy. When the applicants in *Izuzquiza and Semsrott v. Frontex* lost their case, the Court ordered them to pay the costs the agency incurred in defending the case. Frontex charged the applicants a bill for legal fees of EUR 23,700, an extraordinarily large sum compared to previous public interest litigation cases in the area of access to documents. When the

applicants refused to pay, Frontex took them to court at the end of 2020 (Euobserver, 2020). This follow-up judgment was solely concerned with the assigning of legal costs (General Court, 2021, Case T-31/18 DEP, *Frontex v Luisa Izuzquiza and Arne Semsrott*). In its court application, Frontex lowered the initially requested amount to EUR 19,048 for services provided by its own staff, an external legal counsel, and an expert advisor. The applicants, in turn, argued that only a considerably lower sum, EUR 6,606, would be reasonable. The Court eventually settled the matter by lowering the costs that Frontex was allowed to charge to EUR 10,520.

The case reveals the agency's willingness to mobilise its resources in what seems like a deliberate attempt to discourage applicants from using their right of access to documents. However, this seemingly overbearing decision reminiscent of SLAPP (Strategic Lawsuit against Public Participation) action seems to have backfired on Frontex, triggering criticism from the European Parliament and negative media coverage (Open Government in the EU Blog, 2021).

Beyond the immediate personal and political stakes of the *Izuzquiza and Semsrott* episode, Frontex's approach also raises wider, systemic questions regarding access to justice in the context of public interest litigation in the EU.

13.5.2 Framework for costs of legal proceedings before the Court of Justice

Chapter 6 of the Rules of Procedure of the Court of Justice regulates the allocation of the costs incurred by the parties. Article 138 stipulates that the unsuccessful party "shall be ordered to pay the costs if they have been applied for in the successful party's pleadings". The only explicit exception to this general rule is the possibility for the Court to order the successful party to pay those costs it "unreasonably or vexatiously caused the opposite party to incur" (CJEU, 2012: Article 139). Therefore, following a strict reading of its Rules of Procedure, the Court can only choose to order each party to bear their own litigation costs, where "each party succeeds on some and fails on other heads" (CJEU, 2012: Article 138(3)). Interestingly, the Rules of Procedure of the General Court do include the possibility for the Court to decide that an unsuccessful party only pay their own costs "[i]f equity so requires" (CJEU, 2015: Article 135(1)).

In terms of the *actual amount* of costs the unsuccessful party is required to pay, while Article 144 specifies what qualifies as "recoverable costs", there is no indication regarding the maximum of what is considered reasonable. In particular, there are no fee scales that would set a ceiling to the maximum remuneration of lawyers, a common practice in the national laws of many Member States. Therefore, it is primarily left to the parties to bill their opponent if afforded the costs.

It is common practice for EU institutions and the Member States not to claim costs from each other. When it comes to private parties, in principle, EU institutions do claim their costs. This is regardless of the nature (i.e., company, individual, NGO), motivation (i.e., economic, personal, societal,

strategic), and financial situation of the opponent, or the subject matter and relevance of the case. Importantly, it appears that the Commission only claims its costs from private parties when it relies on external lawyers, but not when it relies on in-house lawyers. The reason is that in the Court's view, the salaries of in-house lawyers do not qualify as "recoverable", whereas the fees paid to external lawyers do (see, e.g., General Court, 2012, Case T-264/07 *DEP CSL Behring v Commission and EMA*, in particular at paras. 15–16). As such, when an EU body chooses to make use of external lawyers, as Frontex did, this has enormous financial consequences for their opponents, should they lose. These financial risks cannot be assessed beforehand and taken into consideration when deciding to litigate because the EU body's choice to rely on in-house or external expertise will only become known once the proceedings have started.

When a dispute regarding the costs billed arise as was the case in the *Izuzquiza and Semsrott* case, the Court – in the course of so-called *taxation of costs* proceedings – assesses and formally determines the amount to be borne by the losing party. In the absence of any guiding rules in its Rules of Procedure, the Court has adopted a pragmatic approach by developing its own "common-sense" fairness criteria. This takes into account the purpose and nature of the proceedings; their significance (from the point of view of EU law); the difficulties presented by the case; the extent of the work generated by the dispute for the agents or advisers involved; and the financial interest held by the parties involved in the proceedings.

13.5.3 Costs of legal proceedings and its effect on access to justice

Frontex's approach in the *Izuzquiza and Semsrott* case exposes some of the effects of the existing cost allocation framework on access to justice. The Court currently lacks the possibility to order the successful party to bear their own costs. Obstacles this may create for persons without financial means to pursue a case in front of the Court of Justice can to some degree be addressed through legal aid frameworks. For those who will have to bear the costs, however, the decision to litigate may depend upon their exposure to financial risk (private communication by representatives of various NGOs who were previously part of Regulation 1049/2001-based litigation). Seen in this light, the Court of Justice's costs framework creates uncertainty that may discourage public interest litigation. There are two main avenues to address this problem, each of which requires further reflection regarding their overall consequences and desirability.

First, Article 47 CFR guarantees the right to an effective remedy for everyone whose rights under EU law are violated. The right of access to documents is explicitly enshrined as a fundamental right in Article 42 CFR. Consequently, EU law must ensure an effective remedy for any violations. This point has also been emphasised by the European Parliament when it expressed "deep concern" about Frontex's decision to recover legal fees worth over EUR

23,700 in a public access to documents. The European Parliament noted that this "undermines [the applicants'] right to an effective remedy under Article 47 of the Charter" (European Parliament, 2021a, point 44). Against this backdrop, the Court may consider interpreting its own Rules of Procedure in light of Article 47 CFR to bring more flexibility into the regime. This would also allow the Court, when deciding costs, to consider factors like an applicant's means and interests to a greater degree, similar to the possibilities of the General Court under Article 135(1) of its Rules of Procedure.

Second, putting aside any changes to the costs framework, EU institutions and agencies can decide to take the access to justice dimension into account when deciding on the recovery of legal fees. In practice, this could involve adding public interest litigants to the list of opponents from whom costs are, as a matter of policy, not recovered. It should be noted, however, that pursuing this avenue raises a range of challenges that would require careful consideration. These challenges include the danger of arbitrariness in recovering legal costs, and the fact that EU bodies have budgetary obligations that may require them to recuperate their costs in cases where they are entitled. For this reason, this option would have to be pursued with caution and requires further reflection.

The challenges and potential solutions mentioned above go beyond Frontex or, indeed, litigation on public access to documents. Despite this, the public's right of access to documents is an area specifically prone to public-interest litigation, especially by individuals and/or civil society organisations. In this light, the framework in place for costs of proceedings before the Court of Justice should be carefully considered in light of Article 47 CFR.

13.6 Conclusion: The access to documents regime as a "canary down the coal mine"

This chapter described how Frontex implements the EU's public access to documents regime with a view to characterising its practices and identify shortcomings. The analysis developed along three dimensions: proactive disclosure of documents, handling of access to documents requests, and access to justice. While Frontex mostly follows the letter of the law, its specific legal interpretation is very restrictive and focused on ensuring that applicants are not granted more rights than the law strictly affords them. This approach is particularly manifest in the agency's narrow interpretation of the scope of beneficiaries, its unsatisfactory efforts to proactively publish documents (or allow others to do so), and its patchy annual reporting. Finally, the dimension of access to justice regarding transparency is much less firmly anchored in law than the access to documents regime itself. The uncertainty surrounding the financial risks involved in such litigation may represent a significant practical hurdle for private applicants or NGOs with limited funds. It is worth, in this light, to critically rethink the costs regime before the Court of Justice on the basis of further research into the regime as such and the larger consequences of, for example, privileging public interest litigation.

Frontex's policy vis-à-vis access requesters is occasionally so reluctant that it might be qualified as actively obstructive. This is, for example, the case where the agency insists on the non-existence of documents that have been proven to exist, where it relies on a blanket copyright claim to limit further distribution of documents made accessible to applicants, and in its aggressive approach to the recovery of litigation costs. Especially in light of the further growth Frontex is envisaged to undergo within the coming years, it is of crucial importance that its implementation of the public access documents regime is brought into full compliance, not just with the letter, but also the spirit, of the law.

Frontex's access to documents regime must be seen in the context of the agency's fast transition to a large, prominent, and very well-funded agency. In this sense, Frontex's struggle to mobilise resources and creativity to deal with increased public attention could be characterised as "growing pains", in a way that is partially echoed in the EU's wider "agencification turn" of recent decades. Frontex struggles with the amount of requests per year, citing, for example, the disproportionate workload involved in redacting a document to deny access. At the same time, the agency refuses to substantially increase the number of documents proactively published on the website and limits the possibility for successful applicants to distribute documents further, thereby increasing the public's need to file individual access requests. A further professionalisation of Frontex's access regime would both overcome many of the agency's capacity problems, and benefit applicants.

Overall, Frontex's implementation of the public access to documents regime fits into a larger picture of an agency over which it is notoriously difficult to exercise both public and political control. Compared to the wider accountability framework Frontex is subject to, the public access to documents regime is anchored in law with significantly more detail and precision. It may thus fulfil the function of the proverbial "canary down the coal mine", triggering wider scrutiny and control of the EU's exercise of "hard" power once firmly established within the agency's practices and organisational culture.

Notes

1 This chapter originates from and elaborates on a note the authors drafted in their capacity as members of the Meijers Committee. See CM2111 "Shortcomings in Frontex's practice on public access to documents", available here: https://www.commissie-meijers.nl/wp-content/uploads/2021/10/CM2111_Frontex-and-Public-Access-to-Documents.pdf

2 On Regulation 1049/2001, see Chapter 1.

3 Beyond the public register of documents, additional information can be found in the eu-LISA database, which can be found here: https://www.eulisa.europa.eu/. EU-LISA is a separately established agency in charge of "[providing] long-term solution for the operational management of large-scale IT systems, which are essential instruments in the implementation of the asylum, border management and migration policies of the EU". Furthermore, it appears that the agency intends to keep its previous, incomplete, Public Access to Documents Registry online: https://frontex.europa.eu/accountability/public-access-to-documents/public-access-to-documents-registry/?category=european-integrated-border-management-strategy

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