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Mysteriousness by Design: the Case of Frontex and the Regulation on Public Access to Documents

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Abstract

The work of the European Border and Coast Guard Agency is characterized by an overall lack of transparency and absence of proper accountability mechanisms, which confer a controversial character to its operations. As a precondition for assessing its liability for human rights violations, the Agency's transparency (or lack thereof) is receiving due attention by scholarship. The present post focuses on the structural weakness created by the extension of Regulation 1049/2001 on access to documents to the Agency, rather than on the implementation by the Agency of its obligations. The authors argue that Regulation 1049/2001 does not suit the particular nature of the European Border and Coast Guard Agency.

1. ***Introduction***

The European Border Coast Guard Agency (EBCGA or Frontex) was founded in 2004 to improve the integrated management of the external borders of the Member States of the EU. It is currently at the center of a heated debate, due to its overall lack of transparency and absence of an effective accountability mechanisms, which led the European Parliament, the European Court of Auditors, the European Ombudsman, and EU Anti-Fraud Office (OLAF) to investigate its activities in relation to violations of fundamental rights. As precondition for assessing any liability, the Agency's lack of transparency has received increased scrutiny. In fact, scholars, researchers and civil society have highlighted how Frontex tends to either fully deny access to the requested documents or sharing unintelligible copies with the most relevant parts fully redacted. This constitutes an established practice, which certainly makes it excessively burdensome, if not impossible, to exercise oversight over its activities.

The Agency received much legislative attention and its Regulation was amended in 2011, in 2016 and then again in 2019. In particular, the new EBCG Regulation in 2016 and its amendment three years later, marked the transition of Frontex to a fully operational agency, now empowered with strong operational tasks and able to deploy its own uniformed standing corps and its own equipment. Nevertheless, the progressive enhancement of the Agency's role, budget and competences, on one hand, and its accountability, on the other, did not proceed at the same pace. The overwhelming allegations of the agency's involvement in fundamental rights violations at the external borders have relaunched the discussion on the lack of effective mechanisms for monitoring, reporting and following up on violations and on transparency. With respect to the latter, the second lawsuit was recently filed (April 2022) before the CJEU to obtain the release of documents relating to Frontex operations (Sea-Watch, FragDenStaat).

The problem of lack of transparency in Frontex operations has been extensively analyzed and several concrete solutions towards openness and transparency have been proposed (see European Parliament Frontex Scrutiny Working Group, Gkliati & Kilpatrick). This post, however, attempts an investigation behind the scenes of these gaps and focuses on the structural flaws inherent in the application of Regulation 1049/2001 regarding public access to documents to the work of the EBCGA. In this sense, it does not analyse the implementation of the Regulation by the agency, but the source of the obligations itself.

2. ***Beyond Decision-Making Institutions: Fit for Purpose?***

The rules governing access to documents of the EU Institutions and bodies are enshrined in Regulation 1049/2001. The first comprehensive piece of legislation on this issue was published in 2001 and reflects the political debate and the concerns expressed by civil society regarding the public's right to information vis-a-vis the EU Institutions.

The political climate preceding the Maastricht revision of the Treaty on the European Union was influenced by an increasingly strong call for openness and transparency of the decision-making process, the democratic legitimacy of which was questioned.
Such a plead culminated in the Treaty of the European Union pronouncing for the first time that 'any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents' (Article 255). On this legal basis, Regulation 1049/2001 was adopted, to include in its scope of application all documents held by European Parliament, Council and Commission, i.e. documents created or received by the institutions or otherwise in their possession, in all areas of activity of the European Union (Article 2(3)). The obligation to allow access to documents was extended with the Lisbon Treaty of 2007 to other Union institutions, bodies, offices and agencies, which are obliged to conduct their work as openly as possible (Article 15(1) TFEU). The new legal basis for this right is offered in Article 15(3) TFEU, which states that Union citizens or residents have a right to access documents of the Union institutions, bodies, offices and agencies. It is further provided that institutions shall ensure transparency in their proceedings.
Moreover, the EBCG Regulation explicitly states that Frontex shall be subject to Regulation 1049/2001 when handling applications for access to documents in its possession (Article 114).

The aim of Regulation 1049/2001 is to ensure that decisions are taken as openly and as closely to the citizen as possible, in order for the administration to enjoy greater legitimacy and be more effective and accountable in a democratic system. Hence, only the Commission, the Parliament and the Council fall under its original scope.
The drafters of the Regulation also remind the connection between openness and respect for fundamental rights (Preambular paras 1 and 2). Regulation 1049/2001 defines the principles, conditions and limits of the right to access to documents, establishing rules to facilitate its enjoyment to the greatest extent possible.
The Regulation only covers documents held by the Institution, drawn up or received by it and in its possession. The notion of 'document' receives a broad definition under Article 3, which includes 'any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within [an EU] institution's sphere of responsibility'. Similarly, Article 15(3) TFEU suggests that the term should be interpreted broadly to include 'documents' whatever their medium. In Patrick Breyer v. European Commission, the CJEU specified that the type and nature of the content of the document, and the size, length, volume or presentation of the content 'have no bearing on the question whether or not it falls' under the definition of Article 3: the only condition is that the 'said content must relate to the policies, activities or decisions falling within the powers of the institution in question'.

A right for EU citizens and residents

From this premise, Regulation 1049/2001 understandably grants the right to access to documents only to those participating in the democratic processes of the Union, legal persons

(Article 2(2)). Frontex offers scrupulous attention to this requirement: as provided in the Management Board Decision No 25/2016 on practical arrangements regarding public access to the documents, 'all initial applications must be accompanied by an identity document or, in the case of legal persons, the proof of registered office along with the proof of the bond between the individual presenting the application and the legal person' (Art. 5) to prove the fulfilment of the nationality criterion.
Taking a teleological approach, interpreting Article 2(1) of the Regulation in light of its purpose and the values and social goals it aims to achieve, we note that accessibility to democratic participation is at the core of the provision. The original purpose of the limited scope to natural or legal persons based in the EU is to allow them to influence the democratic process with informed decisions on the policies and practices of the EU decision-making institutions.
Frontex, however, is not entrusted with decision-making powers, but with operational, organizational and coordinating tasks. Its operational powers can directly and indirectly affect the fundamental rights of a large number of individuals. These individuals are by definition not EU citizens, and have inherent vulnerability. Moreover, since the focus lies on victims of fundamental rights violations in the context of border surveillance and return operations, there are substantial chances that they will not be present on EU territory having been subjected to a pushback or deportation. EU citizens and residents are rarely personally concerned with the activities of the agency, save for the monitoring role of civil society. Thus, based on the personal scope of Regulation 1049/2001, the persons most affected by the conduct of the agency are excluded from a right of access to documents.
The link between access to documents and citizenship and residence was justified in light of the EU legal system of the '90s, when the external dimension of EU law and policy was much less developed and EU law was mostly spreading its effects inside its territorial boundaries. Regulation 1049/2001 was meant to apply internally in the EU, where the Commission, the Council, and the European Parliament traditionally operate. Its extension, however, to an agency with such external vocation as Frontex raises many doubts as to the suitability of the instrument in the new circumstances.

This obvious mismatch on these two fronts, leads us to the conclusion that the personal scope of Regulation 1049/2001 does not fit the scope of operations and factual activity of Frontex. The original purpose of limiting the scope to persons that participate in the democratic processes in the EU at the Union, national or municipal level has lapsed, in light of the nondecision-making mandate of Frontex, as well as its broad impact upon the rights of third country nationals residing outside the EU.

Public Security Exception

The limits to the right to public access to documents are set in Article 4 of the Regulation: should a ground for exception arise, 'the institutions shall refuse access' to any requested document. At least on a textual level, institutions are not given discretion to apply a balancing test to weigh the public interest priorities as regards public security, defence and military

matters, international relations, and the financial, monetary or economic policy of the Community of a Member State against the public interest of transparency and openness. An argument for a limited discretion of the institutions to apply such a test can be made on the basis of a deeper analysis of the statutory purpose and the legislative intent of the provision. In fact, the agency's Management Board has decided that, in principle, all documents should be accessible to the public, and only exceptionally restricted.

The most important exceptions concern the protection of public interests, such as public security, defence and military matters, international relations, and monetary and economic policy (Article 4(1)(a)), as well as private interests, such as the protection of the privacy or integrity of individuals (Article 4(1)(b)).

Moreover, access to documents meant for internal purposes or relating to a pending decision shall be refused if their disclosure would seriously undermine the decision-making process, unless there is an 'overriding public interest in disclosure' (Article 4(3)).

Given the nature of the work of the agency, public security is the most common ground used by the agency to deny access. Similarly, to the argument regarding the personal scope of the Regulation, the public security exception was meant for the decision-making Institutions. While only a limited minority of the legislative and policy *corpus* produced by the European Union refers to the matters mentioned in Article 4, a large body of the Agency's activities covers public security, defence and military matters. In fact, since the 2019 revision of the ECBG Regulation, Frontex has the mandate to deploy its own uniformed and arm corps, engaging in activities at the EU external borders, often in highly militarized contexts (see Frontex involvement in Operation Irini, off Libyan coasts; see also Frontex involvement at the Greek-Turkish external border, where it allegedly faced hybrid threats from the Turkish navy).

This exception on the grounds of public policy has become the rule for the agency, when dealing with public access to documents requests. The picture emerging from the Agency's annual reports (2012-2017) shows a negative trend: increasingly less applications receive full access with the lowest percentage being 13.9% in 2017. To put it plainly: 60.2% request received full access to the document requested, 5.9% received a denial and close to 20% were denied.
This is barely surprising as the legislative framework is structured in a way that allows it to do so. The issue is structural and lies on the exceptions themselves. The exceptions, provided under Article 4, are not unjustified *per se*. The incoherence rather lies in applying limitations reflecting residual policy areas, where security concerns would be marginal, to an Agency that by definition operates in sensitive domains.

It is not impossible for security-related authorities to operate in a transparent manner. In fact, even traditional law enforcement authorities operate under a specific mandate on openness and transparency. The legal framework, however, on which Frontex bases its access to documents obligations, seems to not be built for purpose, especially regarding the limitations of these obligations. There is need for transparency safeguards fitting for security bodies,

which safeguards are subject to concrete criteria and procedures, rather than a broad security exception that can be invoked unlimitedly and without grounded justification.

Data Management

Another difference between the work of Frontex and that of the decision-making Institutions concerns data management. Frontex is heavily involved in the management of data of large groups of migrants. The information-sharing aspect of the agency's work has been significantly strengthened over the years along with the creation of new specialised structures and mechanisms.

Already in 2011, the Agency was given the mandate to collect and process personal data related to irregular migration and trans-border criminal activities during all operations. In 2013 Frontex was entrusted with the coordination of EUROSUR, a pan-European surveillance system of the EU's southern and eastern borders, established with Regulation 1052/2013, now replaced by EBCG Regulation 2019), which integrates all maritime surveillance facilities of the member states. The agency's 2016 mandate permitted it to collect, process and share personal data not only for purposes of migration management but also for purposes of law enforcement, including combating terrorism, human trafficking and human smuggling, as well as document fraud.
In the context of its new powers, Frontex can exchange information with EU agencies, including Europol as well as third countries for a variety of different and not clearly delineated purposes ranging from border surveillance to combating terrorism (Article 12(2)). This, combined with the interoperability-related competencies of Frontex, creates a quite broad mandate for the processing and especially the sharing of data both within the EU and outside, involving EU institutions, agencies, and law enforcement authorities.
Most of its extensive data management powers are related to returns in order for the agency to facilitate more efficient returns. In particular, Frontex was mandated to collect from various sources information necessary for issuing return decisions, identifying individuals subject to removal, and other pre-return, return-related and post-arrival and post-return activities. (Article 49(1)(a)(i)). Moreover, it was tasked with developing and operating a centralised return management platform for processing all relevant information (Articles 15(4), 49(1)(d), 50(1)). This platform integrates the existing national and EU-wide return management systems and allows for an automated transfer of data.

As shown by the account above, Frontex's data collection and exchange concern predominantly third country nationals. Given the extent of the agency's data processing and sharing powers, such activities cannot be left to the sole scrutiny of the European Data Protection Supervisor (Article 1(3) Regulation 2018/1725). Social accountability to civil society can only be possible with a strong right to access to documents, afforded especially to the persons affected by the data processing, namely third country nationals not residing in the EU. The scope of Regulation 1049/2001 was adequate when covering the work of the three EU Institutions, which are not involved is such extensive data processing. Putting the Regulation in perspective of the contemporary work of Frontex, it seems insufficient to afford the

necessary openness and accountability. The Agency needs, instead, to be covered by a Regulation that includes concrete safeguards, mechanisms, and due diligence procedures.

3. *Conclusion*

Going beyond the criticisms of Frontex for the implementation of its access to documents obligations, this contribution has delved into the source of these obligations. It evaluates the suitability of Regulation 1049/2001 in relation to the work of the Agency and identifies the shortcomings of a system that seems partly outdated and ill-fitting to the particular characteristics of the work of a Border and Coast Guard Agency. It has been shown that Regulation 1049/2001 has limited effectiveness for improving transparency into Frontex operations. Gaps are identified with respect to its personal scope of application, its wide exceptions to the right of public access to documents, and its broad formulation lacking concrete and enforceable safeguards.

Currently, we rely on the scrutiny of the CJEU and the EU Ombudsman to address the "culture of secrecy" developed by Frontex. In this blog we argue that the source of the problem is, in fact, at the legislative level, as Regulation 1049/2001 seems to be giving ample space to the agency to control information in an obstructive and secretive manner. We suggest, thus, that the solution also comes from the legislator.

As the legislative history of Regulation 1049/2001 shows, it was designed to offer a solution to a very specific transparency issue, namely to address allegations of democratic deficit directed at the decision-making institutions. Its extension to any transparency matter regarding any other Institution, body or agency fails to acknowledge the inherent differences underlying the organic structure of the EU and its policy areas. As it is often the case with Frontex, also the (mis)implementation of Regulation 1049/2001 is not counterbalanced by proper safeguards. Existing ones, the effectiveness of which is questionable, should be abreast of the technological developments whose deployment constitutes now the core of Frontex activity.

While the EU has taken efforts to address the question of its openness and transparency, the solution should be differentiated, considering the particular characteristics of different bodies and agencies. It seems that the drafters of the Lisbon Treaty have foreseen this need. Article 15(2) and (3) TFEU, which extend the freedom of information obligations to all institutions, bodies, offices and agencies, suggests that this should be governed by regulations, which should be set up in accordance with the ordinary legislative procedure. It is obvious that the drafters of the Lisbon Treaty, signed six years after the adoption of Regulation 1049/2001, did not feel content with the legislative framework when they extended the right to public access to documents beyond the three decision-making Institutions.

More than a decade later and in light of intense criticisms regarding the lack of transparency by Frontex, it is high time to call upon the Commission to take another look at our legal

framework and effectively extend the right to all institutions, bodies, offices, and agencies of the Union. Such examination can conclude the need for a separate Frontex transparency Regulation. Such a proposal should further be evaluated on the basis of its feasibility and desirability and examine whether an amendment of the existing Regulation could still allow it to be a freedom of information model, which can also cover the character of the European Border and Coast Guard.

FURTHER READINGS

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