

CM2111 Shortcomings in Frontex’s practice on public access to documents

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1. Introduction

In recent years, the European Border and Coast Guard Agency, better known as Frontex, has become increasingly prominent. Whether expressed in terms of budget, legal remit and competencies, or scope of activities, the agency has made a quantum leap over a short period. Today, Frontex represents a relevant example of how the European executive exercises power that directly and significantly affects the lives of individuals, particularly asylum seekers and migrants seeking to enter Union territory.

The human rights impact of Frontex’s activities has long been subject to criticism. One recurring criticism concerns the absence or malfunctioning of accountability mechanisms, in part, due to a lack of transparency. Indeed, transparency is a precondition to ensure the accountability of any public body. This problem has been underscored by the recent establishment of Frontex’s Scrutiny Working Group, set up by the European Parliament’s LIBE Committee to permanently monitor Frontex.¹

This note will address Frontex’s implementation of the EU right of public access to documents, a central pillar of EU bodies’ transparency obligations. It will set out:

- the legal regime for access to documents (Section 2);
- Frontex’s obligations to proactively facilitate access to documents (Section 3);
- Frontex’s practices in dealing with requests for access to documents (Section 4); and
- address the question of access to justice concerning public access to documents decisions (Section 5).

Each section will conclude with several recommendations.

2. Legal regime for access to documents

The public’s right of access to documents is laid down in EU primary law (Article 42 Charter of Fundamental Rights of the EU [CFR], Article 15(3) TFEU), which is implemented in Regulation 1049/2001 and has been in force since December 2001.² While Regulation 1049/2001 itself only refers to the three central institutions, in 2009, Article 15(3) TFEU expanded the scope of the public’s right of access to documents held by “the Union institutions, bodies, offices, and agencies”. While Regulation 1049/2001 has yet not been revised to include agencies in its scope, Article 114 of the European Border and Coast Guard [EBCG] Regulation,

¹ European Parliament, Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations, 14 July 2021,

https://www.europarl.europa.eu/cmsdata/238156/14072021%20Final%20Report%20FSWG_en.pdf.

² Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L145/43.

Frontex's founding Regulation, explicitly binds the agency to Regulation 1049/2001.³ The EBCG Regulation reiterates the public's 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. Moreover, the EBCG Regulation requires that Frontex further specify its access procedure in a separate decision.

The relevant internal procedure is laid down in Management Board Decision No 25/2016 (hereinafter: the Frontex PAD Decision).⁴ 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.

3. Proactively Facilitating Access to Documents

Obligations

Regulation 1049/2001 aims to ensure "the widest possible access to documents" (Article 1(a)). By default, documents should be made available to the public, and exceptions to this rule require specific justification (Article 4). Regulation 1049/2001 contains two specific obligations for EU bodies to proactively facilitate access to documents:

- The obligation to set up and maintain a register of documents (Article 11).
- The obligation 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 are not specified in Regulation 1049/2001. Notably, 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 then goes on to list the documents to be drawn up and made publicly available.

The following sections discuss the shortcomings in Frontex's register and its public access to documents reports.

An Inadequate Document Register

The documents register, which EU bodies are required to maintain, fulfils the dual purpose of being the means through which the public can directly access documents in electronic form while also facilitating the possibility for individuals to request access (i.e., by giving them an overview of documents held by the EU body in question).⁵

³ Regulation (EU) No 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1, 14.11.19 [hereinafter EBCG Regulation], Article 114(1).

⁴ Management Board Decision No 25/2016 of 21 September 2016 adopting practical arrangements regarding public access to the documents held by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (the "Agency").

⁵ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, Articles 11(1), 12(1, 4).

While the Frontex homepage has always made some documents available, the agency has been reluctant to set up a fully-fledged register. Its failure to comply with Regulation 1049/2001 resulted in a complaint brought before the European Ombudsman by the civil society organisation Statewatch in March 2020.⁶ Based on a proposed solution by the European Ombudsman in early 2021, Frontex established a dedicated website for its documents register entitled “Public Access to Documents Registry”.⁷ While documents are still somewhat scattered, with some of them only made available under “Key Documents”, this partial centralisation is an improvement.⁸

Nonetheless, notable gaps remain and Frontex must address them to fulfil its legal obligations. Crucially, the register is incomplete. It consists mainly of policy and budgetary documents, but contains very few documents related to the core area of the agency’s activity: the implementation of joint operations. For instance, there is no mention of or reference to documents such as Operational Plans, joint operations evaluation reports, or otherwise “comprehensive information on past and current joint operations” as expressly required by Article 114(2) EBCG Regulation.

Frontex justifies non-disclosure of these types of documents due to “the nature of the activity”.⁹ However, this information is essential to understanding the nature and scope of Frontex’s activities along with its responsibilities and accountability. For instance, certain parts of Operational Plans that contain the precise role and tasks of all staff involved in Frontex joint operations are crucial for establishing the extent to which they are responsible for human rights violations occurring in operational contexts.¹⁰ In this light, these documents should at least be made partially accessible, not just upon request, but through the public documents register.

In addition, a register of documents should not only contain documents that are fully publicly accessible but also refer to those documents or types of documents to which access is not granted through the register.¹¹ The only exception concerns documents officially classified as “sensitive”, which are recorded in the register only with the originator’s consent.¹² This is not the case for any of the documents mentioned in the paragraph

⁶ European Ombudsman Case 2273/2019/MIG, opened on 12 March 2020, <https://www.ombudsman.europa.eu/en/case/en/56157>.

⁷ European Ombudsman, Decision in Case 2273/2019/MIG, 3 February 2021, <https://www.ombudsman.europa.eu/en/decision/en/137721>, para 12.

⁸ Currently, most Frontex documents and data are either stored in the Public Access Register, the Key Documents Register, and the eu-LISA database, which can respectively be found here: <https://frontex.europa.eu/accountability/public-access-to-documents/public-access-to-documents-registry/?category=european-integrated-border-management-strategy>, here: <https://frontex.europa.eu/about-frontex/key-documents/> and here: <https://www.eulisa.europa.eu/>. The latter 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”.

⁹ See for instance here: <https://www.ombudsman.europa.eu/pdf/en/141622>.

¹⁰ Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, Article 38.

¹¹ European Ombudsman, Decision in Case 2273/2019/MIG, 3 February 2021, <https://www.ombudsman.europa.eu/en/decision/en/137721>, para 8.

¹² Regulation (EC) No 1049/2001, Articles 9(2) and (3). While Frontex has adopted its own Decision regarding the handling of classified information, decisions related to the disclosure of such information, either proactively or upon request, must be taken in conformity with this provision, which is laid down in a hierarchically superior legislative act.

above. Since knowledge of the existence of a document is a precondition for requesting access to it, an incomplete register 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.

It should be noted that 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 Section 4.3 below).

An Incomplete Annual Access to Documents Report

Under Regulation 1049/2001 (Article 17), EU bodies have to report annually on how they have handled access to documents requests in the preceding year. This includes the duty to report the number of cases in which access was refused, the reasons for refusal, and the number of sensitive documents not recorded in the register.

Frontex started consistently reporting on access to documents requests in 2010, six years after its establishment.¹³ Since 2012, Frontex has dedicated an Annex of its Annual Activity Report to this reporting obligation. It typically reports the number of initial and confirmatory requests received, the number of requests for which access was (partially) granted, and the number of applications refused. In contrast to the European 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.¹⁴

It is noteworthy that beginning in 2017, Frontex changed its practice regarding its reporting. They made it significantly more difficult to access relevant information. 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.¹⁵ At first sight, the full Annual Activity Reports seems to have disappeared from Frontex’s homepage. These Reports can now be found under “Key Documents” as Annexes to the relevant Management Board Decisions where they were adopted. This practice of burying key information is at odds with the spirit of the reporting obligations set out in Regulation 1049/20010. It is certainly not user friendly.

Recommendations

- Fill the document register with more existing documents held by Frontex. Beyond documents that are fully and publicly accessible, this should minimally include references to those documents or types of documents to which access is not granted through the register.
- Make Frontex’s annual report on public access to documents easy to find on the Frontex website.

¹³ In the years prior to 2010, it only reported on access to documents requests once, in 2006, but the reported number was 0. See Frontex, Annual Report 2006, 19.

¹⁴ See, for instance, the 2019 Annual Report, Management Board Decision 14/2020 of 29 June 2020 adopting the annual activity report 2019 and its assessment, Annex 1, 103.

¹⁵ See here: <https://frontex.europa.eu/accountability/public-access-to-documents/public-access-to-documents-registry/?category=consolidated-annual-activity-report> and here: <https://frontex.europa.eu/about-frontex/key-documents/?category=consolidated-annual-activity-report>.

4. Facilitating Passive Access

Obligations

Article 15(3) TFEU, Article 42 CFR, and Article 2(1) Regulation 1049/2001 afford every citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, the right of access to documents held by EU bodies.

EU bodies have to grant access to the documents requested unless one of the exceptions set out in Article 4 Regulation 1049/2001 applies. The two exceptions Frontex relies on most concern the protection of public interests regarding public security (Article 4(1)(a) first indent) and the protection of privacy and the integrity of the individual (Article 4(1)(b)).

Regulation 1049/2001 sets the time limit for EU bodies to respond to requests at 15 working days, with the possibility to extend it in exceptional cases by another 15 working days. In the event of a total or partial refusal, the applicant can lodge a confirmatory application and ask the EU body to reconsider their decision (Article 7). This final decision regarding access can be challenged before the General Court, with the possibility to appeal to the Court of Justice or the European Ombudsman (Article 8).

Concerning Frontex, access to document requests are managed through a web portal. Once a request is closed, applicants can no longer access the portal or released documents. Nor can an applicant communicate further with Frontex via the portal. These limitations, alongside Frontex's practice of adding a declaration claiming copyright over released documents, culminated in a complaint currently under investigation before the European Ombudsman.

Third-Country Nationals Excluded from the Scope of Beneficiaries

Evaluating Frontex, the question of the scope of potential beneficiaries is a matter of specific interest. While the right to access in Articles 15(3) TFEU, Article 42 CFR, and Article 2(1) Regulation 1049/2001 is limited to Union citizens and third-country nationals residing or having registered offices in the EU, Article 2(2) Regulation 1049/2001 explicitly frames this limitation as a *de minimis* provision that EU bodies can expand upon on a voluntary basis (Article 2). The Frontex PAD Decision fulfils 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 (Article 3).

Frontex does not publicly report on either the number of applications received from third-country nationals or these applicants' success rates. For this reason, it is difficult to externally verify the extent to which requests from third-country nationals are, in practice, admitted. It should also be noted that Article 5(3) of the Frontex PAD Decision 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. This is reiterated once more on the web form where access requests are logged. This suggests that the public access regime is inaccessible to third-country nationals. This inaccessibility, along with the general ignorance of the access

regime, might explain the limited interest among individuals within the affected group that Frontex recently reported to the European Ombudsman.¹⁶

The Meijers Committee points out that, in the case of Frontex, non-resident third-country nationals form a legally vulnerable group that is the primary target of the agency’s policies. Specifically, asylum seekers and irregular migrants seeking to enter the EU form a group that is likely to be directly and significantly affected by the agency’s activities. To protect their fundamental rights, they have a legitimate interest in obtaining access to Frontex documents. For this reason, it is advisable for Frontex to unconditionally include these legally vulnerable groups within the scope of beneficiaries with the right of public access to documents.

The Right to Public Access to Documents in Practice

Frontex’s rapid growth has significantly increased public interest in its activities. This development also affected the number of annual requests the agency had to process. While there were practically no requests until 2010, and only very few in the years that followed, the first increase in applications filed took place in 2015. This coincided with the “refugee crisis”, when 60 requests were reported. Yet the most significant increase in access requests has occurred since then. In 2019, Frontex processed 255 requests (see Table 1 below). This rapid rise in requests posed a challenge to the agency as it was not equipped to deal with the increased interest, and it is still struggling to adapt. The Meijers Committee is aware of this fact and commends Frontex’s efforts to improve its processes.

Table 1: Public Access to Documents Requests 2010-2019

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Total received	13	17	16	26	39	60	79	140	152	255
Full access granted	-	-	11	21	18	12	15	15	8	34
Partial access granted	-	-	4	4	12	32	38	65	58	84
Access refused	-	-	1	1	7	6	10	21	19	21
Confirmatory applications	-	-	0	0	2	6	4	10	19	21

Source: Annual reports on access to documents 2011-2020.

That said, when it comes to Frontex’s compliance with its obligations under Regulation 1049/2001, it must be mentioned that fairly limited evidence is available. Apart from the fact that Frontex’s annual access to documents reports are difficult to locate on its website, they offer scant information about the type of documents successfully and unsuccessfully requested and the legal contents of the agency’s formal replies

¹⁶ <https://frontex.europa.eu/accountability/public-access-to-documents/public-access-to-documents-applications/>.

to these requests. As noted above in Section 3.3, Frontex lists the exceptions on which its refusals were based without specifying in how many cases each of them was relied on.¹⁷ In addition, the statistics on (partial) access granted do not clearly show at which stage (initial or confirmatory) decisions were made. Moreover, Frontex provides no information concerning handling times or the applicants' backgrounds.

This lack of information makes it difficult to fully assess Frontex's practices. More importantly, this type of non-transparent management of a core right creates the danger of inconsistent or even discriminatory practices developing unnoticed. In any case, it does not foster trust in the administration.

Recommendations

- Keep channels of communication open with persons that request access to documents, even once the case is formally closed.
- Allow third-country nationals to lodge public access requests to documents with the agency. Ensure they are aware of the existence of this right.
- Include detailed statistics in Frontex's annual report on public access to documents, including data concerning the frequency of application of each exception to access, the average handling times, and the percentage of requests exceeding statutory deadlines.
- Include statistics on third-country applicants, the rate of successful appeals, and reasons for refusal to grant access in Frontex's annual report on public access to documents.

5. Access to Justice: The Question of Designating Costs

Case T-31/18 DEP: Legal Costs as a Stifling Mechanism

In Case T-31/18 *Izuzquiza and Semsrott v. Frontex*, the first public access to documents case brought against Frontex before the CJEU, the applicants challenged Frontex's refusal to release documents that contained details about vessels that had served under Frontex's Joint Operation Triton in 2017.¹⁸ The Court, largely confirming the application of its prior case law on the public security exception for Frontex, ruled against the applicants. The aftermath of this judgement is particularly 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 €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 2020.¹⁹

The follow-up judgment was solely concerned with assigning of legal costs.²⁰ In its court application, Frontex lowered the initially requested amount (now €19,048) for services provided by its own staff, an external legal counsel, and an expert advisor. The applicants countered that the sum was exaggerated and unsubstantiated.

¹⁷ See also above Section 3.3.

¹⁸ Case T-31/18 *Luisa Izuzquiza and Arne Semsrott v Frontex* of 29 November 2019 (ECLI:EU:T:2019:815)

¹⁹ See <https://euobserver.com/migration/150241>, 20 December 2020.

²⁰ Case T-31/18 DEP, *Frontex v Luisa Izuzquiza and Arne Semsrott*.

They argued that a considerably lower sum (€6,606) would be reasonable. The court eventually settled the matter by lowering the costs that Frontex was allowed to charge to €10,520.

This case reveals the agency's willingness to mobilise its resources in what seems like a deliberate attempt to discourage applicants from mobilising their right of access to documents. Frontex's approach also raises general questions regarding access to justice in the context of public interest litigation in the EU, which will be discussed in the following two sections.

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".²¹ Therefore, following a strict reading of its Rules of Procedure, the Court cannot choose to order each party to bear their own litigation costs.²²

The opposite is true for the *actual amount* of costs the unsuccessful party is required to pay. While Article 144 specifies that "recoverable costs" include the costs necessarily incurred by the parties, such as travel expenses or the remuneration of agents, advisers or lawyers, 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), 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 upon in-house lawyers. The reason being, in the Court's view, the salaries of in-house lawyers do not qualify as "recoverable", whereas the fees paid to external lawyers do qualify.²³ Although EU institutions could claim travel and subsistence costs related to their agents, even when only relying on in-house expertise, these costs are usually too low to make it worthwhile to claim. As such, when an EU institution chooses to make use of external lawyers, this has enormous financial consequences for their opponents should they lose. What's more, 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.

²¹ RoP, Article 139.

²² This is only possible in cases where "each party succeeds on some and fails on other heads", see RoP, Article 138(3).

²³ See, for instance, Case T-264/07 DEP CSL Behring v Commission and EMA in particular at pp.15-16.

Should a dispute regarding the costs billed arise, 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 the 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.

Legal Proceedings Costs & Access to Justice

The existing framework for the allocation of costs raises several challenges concerning access to justice. The Court currently lacks the possibility to order the successful party to bear their own costs, which can create obstacles for persons without financial means to pursue a case in front of the Court of Justice. This can 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.²⁴ 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. In its case law on Article 13 ECHR, which guarantees the right to an effective remedy in the ECHR context, the European Court of Human Rights has considered the regime on legal costs relevant in determining the accessibility of the remedy.²⁵

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 €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”.²⁶ 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.

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

²⁴ As has been communicated to us by the representatives of various NGOs who have previously litigated in access to documents cases under Regulation 1049/2001.

²⁵ See for instance ECtHR, *Scordino v. Italy* (no.1) [GC], Application no. 36813/97, 29 March 2006, para 201.

²⁶ See https://www.europarl.europa.eu/doceo/document/TA-9-2021-0191_EN.html, point 44.

costs in cases where they are entitled. Again, this option would have to be pursued with caution and only after 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 modestly resourced individuals and/or civil society organisations. This fact is likely to apply *a fortiori* to such litigation in the context of Frontex. Frontex should take all steps within its power to safeguard the public's right of access to documents, including access to justice to challenge non-disclosures.

Recommendations

- Refrain from presenting litigants in public access to documents cases with legal costs that may be considered arbitrary or excessive.
- When deciding upon the recovery of legal costs, take into account the interests pursued by access litigants, as well as their legal status and financial situation.
- When deciding upon costs, the Court may consider interpreting its own Rules of Procedure in light of Article 47 CFR, taking into greater account factors like an applicant's means and interests.