The Right to Transparency in the External Dimension of the EU Migration Policy: Past and Future Secrets

The Right to Transparency in the External Dimension of the EU Migration Policy: Past and Future Secrets

Abstract
Transparency is a democratic principle and a fundamental right in the European Union. The openness of public institutions is expected to foster the participation of citizens in decision-making and to increase the legitimacy of the administration. However, transparency is not always ensured in the external dimension of the EU migration policy. This sector is increasingly characterised by informal 'deals', including nonbinding instruments entered into by EU institutions and arrangements made by the Member States but implemented by the Union. These instruments and the preparatory documents related to them are frequently not published. Moreover, individuals may have difficulty obtaining access to unpublished documents related to migration deals, especially in light of the case law.

Keywords: migration, irregular migration, soft law, arrangement, deal, international agreement, transparency, access to documents, Regulation 1049/2001

1. Introduction

Transparency is among the democratic principles on which the Union is founded.[1] The openness of public institutions is expected to foster the participation of citizens in decision-making and to increase the legitimacy of the administration.[2] Transparency enables the EU institutions to have greater legitimacy and to be more effective and more accountable to EU citizens in a democratic system.[3]
The principle of transparency is implemented through specific obligations of EU institutions and rights of individuals. The Union's institutions, bodies, offices and agencies must conduct their work 'as openly as possible' in order to promote good governance and ensure the participation of civil society (Art. 15(1) TFEU). Decisions must be 'taken as openly and as closely as possible to the citizen' (Art. 10(3) TEU).[4] Any citizen of the Union (and any natural or legal person residing or having its registered office in a Member State) has 'a right of access to documents' of the institutions, bodies, offices and agencies of the Union (Art. 42 of the Charter of Fundamental Rights). EU institutions implemented the right to transparency, in particular, through Regulation 1049/2001, which seeks to give the fullest possible effect to 'the right of public access to documents'.[5]
Transparency, therefore, is both a democratic principle and a fundamental right. Nonetheless, transparency is not always ensured in practice, particularly in the external dimension of the EU migration policy. The European Union can conclude international agreements with third countries regarding migration and, particularly, irregular migration.[6] Like other legal acts adopted by the European Union, these agreements are subject to transparency requirements, such as obligations of publication.[7] However, the external relations of the Union in this area are increasingly managed through informal instruments, which have no precise legal basis in EU Treaties and are concluded through *ad hoc* procedures. Not only are the legal effects of these instruments imprecise, but their authorship is often uncertain, since EU institutions, agencies, and Member States adopt a 'Team

Mauro Gatti, University of Bologna, m.gatti@unibo.it
[1] See Art. 10 and 11 TEU.
[2] Regulation 1049/2001/EC of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31 May 2001, p 43–48, preamble.
[3] Judgment of 21 April 2021, Pech v. Council, T-252/19, EU:T:2021:203, para 26; see also, *inter alia,* judgment of 1 July 2008, Sweden and Turco v. Council, Joined Cases C-39/05 P and C-52/05 P, EU:C:2008:374, paras 45 and 59.
[4] In addition, the institutions must maintain 'an open, transparent and regular dialogue' with representative associations and civil society (Art. 11(2) TEU).
[5] Regulation 1049/2001/EC, cit., preamble.
[6] On the EU's external competences in the migration domain, see Garcia Andrade 2018.
[7] See further below, sections 3-5.

Europe' approach in the field of migration, by 'pooling their financial and human resources, policy leverage and expertise.'[8] Given the uncertain legal nature of these instruments, they are henceforth referred to as migration 'deals'.

Migration deals fall into two main categories: (a) informal instruments expressly entered into by third countries and EU institutions, bodies, or agencies, which do not have binding effects, at least according to the EU (e.g. the EU-Afghanistan 'Joint Declaration on Migration Cooperation' or the EU-Bangladesh 'Standard Operating Procedures');[9] (b) instruments purportedly entered into by one or more Member States, but which contain commitments concerning EU competences or implemented by the EU (this is the case, e.g., of the Italy-Libya Memorandum of 2017 and of the EU-Turkey Statement of 18 March 2016).[10] Despite their (alleged) nonbinding character, migration deals are significant. Nonbinding arrangements are known to influence the internal legislation of the Union and its Member States.[11] Migration deals, in particular, may have effects comparable to international agreements: for instance, the European Commission routinely affirms that both 'readmission agreements and arrangements' in force 'bring benefits in terms of a better level of cooperation and more effective operational flows'.[12]

This chapter investigates the fulfilment of the right to transparency in the conclusion of migration deals with third countries. It is submitted that this right is not adequately ensured at present, in part because current rules do not impose stringent obligations of transparency regarding informal instruments and in part because the EU judiciary does not seem eager to strictly enforce transparency in this ambit. This analysis does not seek to determine the legal nature of the instruments entered into by the Union[13] but highlights how the use of informal deals, instead of international agreements concluded by the Union, reduces transparency. The contribution focuses on the right to transparency of individuals and does not address the democratic control exercised (or not) by the European Parliament on the EU migration policy.[14]

The chapter is divided in two parts. The first addresses the duty to publish EU documents (section 2) and discusses the limited publication of migration deals (section 3) and their preparatory documents (section 4). The second part focuses on the right of access to unpublished documents and the case law regarding access to migration deals (section 5), which is arguably characterised by an extensive interpretation of the exceptions to transparency (section 6) and a narrow understanding of the overriding public interest in disclosure (section 7). It is concluded that opacity is probably deliberate and likely to characterise the EU's policy in the coming years (section 8).

2. The Duty to Publish EU Documents

[8] Informal Videoconference of Foreign Affairs Ministers and Home Affairs Ministers, Joint issues paper on The External Dimension of the EU's Migration Policy under the New Pact on Migration and Asylum, 5 March 2021, Council doc. 6470/21, p 5.

[9] Joint Declaration on Migration Cooperation, Council doc. 5223/21 ADD 1 of 13 January 2021; EU - Bangladesh Standard Operating Procedures for the Identification and Return of Persons without an Authorisation to Stay, available at https://ec.europa.eu/transparency/regdoc/rep/3/2017/EN/C-2017-6137-F1-EN-ANNEX-1-PART-1.PDF Accessed 16 March 2021.

[10] EU-Turkey Statement, https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/ Accessed 16 March 2021; Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana, http://www.governo.it/sites/governo.it/files/Libia.pdf. On the relationship between these instruments and the EU, see *inter alia* Neframi and Gatti 2020, pp 257-258.

[11] See, *mutatis mutandis,* Judgment of 7 October 2014, Germany v. Council, C-399/12, EU:C:2014:2258, para 63.

[12] European Commission, Communication, Progress report on the Implementation of the European Agenda on Migration COM/2019/481 final, p 15; see also Managing Migration in All its Aspects: Progress under the European Agenda on Migration, COM(2018) 798 final, p 9.

[13] Several studies focus on the nature of the instruments entered into by the Union, see e.g. Ott 2020; Casolari 2018.

[14] On the relationship between the right of access to documents and parliamentary activities, see Flavier 2018.

EU law seeks to ensure the widest possible access to documents of the institutions[15] by enabling individuals to access the documents in possession of Union institutions (including documents that the institutions draw up or receive). For the purpose of this contribution, 'documents' are defined in keeping with Regulation 1049/2011, i.e. 'any content whatever its medium' concerning a matter relating to the policies, activities and decisions falling within EU institutions' sphere of responsibility.[16]

The transparency regime varies, depending on the type of document in possession of EU institutions. One may analytically distinguish between two types of documents.

The first category includes documents that *must be published* in open sources. Primary law imposes the publication in the Official Journal of legislative acts, non-legislative regulations and directives which are addressed to all Member States, as well as decisions which do not specify to whom they are addressed (Art. 297 TFEU). There are no exceptions to the transparency obligation imposed by primary law. Regulation 1049/2001, regarding public access to European Parliament, Council and Commission documents, stipulates that several other documents must be published in the Official Journal, including Commission proposals and international agreements.[17] Documents whose importance is relatively lower must be published, not in the Official Journal, but in electronic form or in a register (so-called 'direct access'). According to Art. 12(2) of Regulation 1049/2001, institutions should make directly accessible 'legislative documents', i.e. 'documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States'.[18] Therefore, the international agreements concluded by the Union, as well as the documents drawn up or received in the course of procedures for the adoption of such agreements, should generally be published. The transparency obligations set by Regulation 1049/2001 may be derogated only in case of exceptional situations, e.g. when disclosure would undermine public interests, such as public security, international relations, or military matters.[19]

The second category of documents includes the instruments whose publication is recommended ('as far as possible')[20] but *not required*. This category is residual, and includes all documents in possession of EU institutions, excluding those belonging to the first category. If an institution decides not to publish a document in its register, individuals may access it by filing a specific request. EU institutions should, in principle, grant access, except in exceptional cases, as shown below (section 5). Migration deals, as well as preliminary documents drawn up in the course of procedures for the adoption of such deals, belong to this second category. Therefore, the proliferation of informal deals in the external dimension of EU migration policy arguably limits the publication of relevant documents in the possession of the Union, including the deals themselves (section 3) and the related preliminary documents (section 4).

3. The Limited Publication of EU Migration Deals

While EU Treaties call for the publication of the most important documents in possession of EU institutions (including international agreements), the use of informal deals allows EU institutions to bypass publication requirements.

---

[15] See *inter alia* Sweden and Turco v Council, cit., para 33; Pech v. Council, T-252/19, para 27; Judgment of 2 September 2013, Besselink v Council, T-331/11, EU:T:2013:419, para 28.

[16] Regulation 1049/2001, cit., Art. 3(a).

[17] See Art. 13(1) of Regulation 1049/2001, cit. The rules of procedure of EU institutions require the publication in the Official Journal for several other documents, e.g., the first reading positions of the Council, See Rules of procedure of the council, OJ L 325, 11.12.2009, p 36–61, Art. 17(1).

[18] It is worth noting that 'legislative documents', for the purpose of Regulation 1049/2001, include documents relating to decision-making procedures that lead to the adoption of binding acts which are not qualified as 'legislative' under primary law (e.g. international agreements).

[19] See Regulation 1049/2011, cit., Art. 4, 9, 11 and 12.

[20] Regulation 1049/2001, cit., Art. 12(1) and (3).

In the first place, the EU's migration deals – unlike binding international agreements – might remain unpublished. EU law does not expressly impose any obligation to publish nonbinding arrangements. At least four readmission deals between the Union and third States seem to be unpublished at present.[21] *A fortiori,* the instruments entered into by the Member States – which are not formally characterized as Union acts and are not subject to EU publication requirements – are likely to remain unpublished. For instance, in 2017 the Italian government concluded a memorandum with Libya without informing either the Italian Parliament or the public[22] and denied access to the text of an agreement it had made with Niger.[23]

Secondly, even when the deals are published, their publication might be delayed, to the point of seriously compromising democratic control. The EU-Afghanistan 'Joint Declaration on Migration Cooperation' (2021) is a case in point.[24] This Declaration extends the effects of the Joint Way Forward on Migration Issues (2016), an instrument 'not intended to create legal rights or obligations under international law', which addresses mainly the return of Afghan nationals who do not fulfil the conditions for staying in the EU.[25] On the EU's side, the Joint Declaration on Migration Cooperation was approved by the Council on 4 February 2021.[26] However, the document is not yet published as of mid-March 2021. It is known because it was leaked to Statewatch.[27]

Thirdly, the publication of migration deals generally does not include relevant information, such as their motivation or their legal basis.[28] While this may seem a technical detail, it has constitutional significance. According to case-law, the choice of the legal bases for an EU act must rest on objective factors amenable to judicial review, which include the aim and the content of that measure.[29] The correct allocation of legal bases ensures that the boundaries of the Union's policies are respected, the correct procedures are followed, and each institution exercises the powers conferred on it, consistently with the principle of institutional balance.[30] The delimitation of EU policies and institutional balance should be respected in the adoption of nonbinding arrangements[31] but it is unclear whether EU migration deals comply with them. For instance, the EU-Afghanistan Joint Declaration on Migration includes a commitment to 'improve the cooperation on accompanying *development* measures in order to contribute to a more sustainable Afghan institutional structure'.[32] One may wonder whether this instrument is related to the EU's development cooperation and, if so, whether it is consistent with the

[21] The seemingly missing arrangements relate to Guinea, Ethiopia, The Gambia, and Côte d'Ivoire, see COM(2018) 798 final, cit., p 9, and Communication COM(2019) 481 final, cit., p 15; see also Poli 2020, pp 78-79.

[22] Associazione per gli studi giuridici sull'immigrazione, Nota tecnica in ordine al ricorso per conflitto di attribuzione tra poteri dello Stato presentato dinanzi alla Corte costituzionale dai deputati onorevoli Brignone, Civati, Maestri, Marcon, https://www.asgi.it/wp-content/uploads/2018/02/2018_2_27_ASGI_Libia_Italia_scheda-tecnica.pdf, Accessed 16 March 2021.

[23] Tribunale Amministrativo Regionale per il Lazio, Fachile v Ministry of Foreign Affairs, 16 November 2018, case 5606/2018, https://www.asgi.it/wp-content/uploads/2018/11/sentenza-16-novembre-niger-foia.pdf Accessed 16 March 2021.

[24] Council doc. 5223/21 ADD 1 of 13 January 2021, cit.

[25] Joint Way Forward on migration issues between Afghanistan and the EU, 2016, available at https://eeas.europa.eu.

[26] See Council doc. 1559/21 of 4 February 2021.

[27] Statewatch, EU-Afghanistan informal deportation agreement - full text of the new 'Joint Declaration', https://www.statewatch.org/news/2021/february/eu-afghanistan-informal-deportation-agreement-full-text-of-the-new-joint-declaration/ Accessed 16 March 2021.

[28] See also Molinari 2019.

[29] See, inter alia, judgment of 4 September 2018, Commission v Council, C-244/17, EU:C:2018:662, para 36.

[30] Judgment of 14 June 2016, Parliament v Council, C-263/14, EU:C:2016:435, para 42; see further Opinion of AG Kokott of 28 October 2015, Parliament v Council, C-263/14, EU:C:2015:729, para 4; opinion of AG Bot of 30 January 2014, Parliament v Council, C-658/11, EU:C:2014:41, para 4.

[31] See judgment of 28 July 2016, Council v Commission, C-660/13, EU:C:2016:616, para 39; judgment of 23 March 2004, France v Commission, C-233/02, EU:C:2004:173, para 40; see further, Wessel 2021, p 82; García Andrade 2018, p 192; Warin and Zhekova 2017, p 154.

[32] Council 5223/21 ADD 1, 13 January 2021, Part I, para 7 (emphasis added).

overarching objective of this policy (i.e. eradication of poverty, Art. 208(1) TFEU).[33] Furthermore, it might be wondered whether the Joint Declaration is related to the Common Foreign and Security Policy (CFSP). This instrument was negotiated jointly by the Commission and the EEAS,[34] a solution typically employed in the negotiation of agreements that concern both non-CFSP issues (such as migration) and the CFSP.[35] The absence of express legal bases in the documents regarding the Joint Declaration does not assist in clarifying these points.
If the publication of migration deals is often late or incomplete, the publication of their preparatory documents is even more unlikely.

4. The Publication of Preliminary Documents Related to Migration Deals

The conclusion of international arrangements is a complex procedure, that includes the adoption of several preliminary documents: to fulfil the right to transparency, the EU should arguably publish at least some of these documents.
The preliminary documents relating to *binding* international agreements are often (though not always) published. The negotiations of international agreements are conducted according to directives proposed by the Commission and adopted by the Council. The institutions are not required to systematically publish these directives, because they might disclose the EU's negotiating position,[36] but sometimes publish them 'to enhance legitimacy and public trust'.[37] Once the negotiations are concluded, the Commission must publish the text of the draft agreement, at the latest, as an annex to the proposal regarding the conclusion of the agreement.[38] This proposal (including the draft text of the agreement) is indeed a 'legislative document' for the purpose of Regulation 1049/2001.[39] The public can access the text of the agreement before it is approved. For instance, the text of the EU-Belarus readmission agreement was published as an annex to the Commission proposal to conclude the agreement (August 2019), approved by the Council the following year (May 2020).[40]
In the case of *nonbinding* instruments (including migration deals), there are no such obligations of transparency. The procedure for the adoption of soft law arrangements is not regulated expressly by primary law but must simply respect the principle of institutional balance.[41] Nonbinding arrangements should be proposed and negotiated by the Commission; the Council authorizes the opening of negotiations and the signing of nonbinding instruments.[42] This procedure is reminiscent of Art. 218 TFEU but without the (limited) transparency that characterizes the conclusion of international agreements. For example, in 2020, the Commission (together with the EEAS) negotiated the

[33] It should be noted, at any rate, that the Court of Justice interprets the objectives of development cooperation in an extensive manner, see judgment of 11 June 2014, Commission v Council, C-377/12, EU:C:2014:1903.
[34] See Council 5223/21, 13 January 2021, p 2.
[35] See further Gatti 2016, pp 259-260.
[36] See *inter alia* Judgment of 19 March 2020, ClientEarth v. Commission, C-612/18 P, EU:C:2020:223, paras 36-37; judgment of 3 July 2014, Council v In 't Veld, C-350/12 P, EU:C:2014:2039, paras 65-67; judgment of 4 May 2012, In 't Veld v Council, T-529/09, EU:T:2012:215, paras 57-59; judgment of 19 March 2013, in 't Veld v Commission, T-301/10, EU:T:2013:135, para 125. See also Regulation 1049/2011, Art. 4 and 9, Art. 11 and 12.
[37] Commission, Transparency Policy in DG TRADE, https://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157486.pdf Accessed 23 June 2021; See e.g. Negotiating directives for a Free Trade Agreement with Australia, Council doc. 7663/18, 25 June 2018.
[38] The text of the agreement might also be annexed to the proposal for a Council decision authorising the signing of the agreement.
[39] i.e. a document drawn up in the course of procedures for the adoption of an act that is legally binding for the Member States, see Art. 2(4) of Regulation 1049/2001, cit.
[40] Commission proposal on the conclusion of the EU-Belarus Readmission Agreement, COM (2019) 401, 30 August 2019; see also Council Decision (EU) 2020/751 of 27 May 2020, OJ L 181, 9.6.2020, p 1–2.
[41] See Council v Commission, C-660/13, cit., para 39.
[42] Assuming that these instruments require an assessment to be made of the Union's interests, as in the context of migration deals. More 'technical' arrangements may be concluded through simpler procedures; see Council v Commission, C-660/13, cit., paras 38-46.

aforementioned EU-Afghanistan Joint Declaration on Migration Cooperation[43] and subsequently proposed to the Council the adoption of a decision authorizing the signing of this instrument.[44] The Council adopted this decision in early February 2021.[45] As the Joint Declaration is purportedly a soft law instrument, it is applied from the moment that it has been signed[46] (in other words, a conclusion decision was not necessary). Had the Joint Declaration been a binding agreement, the Commission would have had to publish its proposal to conclude the Joint Declaration, including the text of this instrument. Since the Joint Declaration is allegedly not binding, neither the Commission proposal nor the Council decision have been published by EU institutions.

A superficial reading of Regulation 1049/2001 might perhaps suggest that the limited publication of migration deals and the related preliminary documents might be compensated by the possibility to apply for access to documents. However, this is not the case, because individuals may be unaware of the existence of such deals and, consequently, may be incapable of making any requests in this respect. Moreover, an application for access to a document may not allow individuals to obtain such access in a timely manner. In principle, institutions should grant (or deny) access to documents within 30 working days.[47] This time framework might be insufficient to allow individuals to access migration deals after they are finalized but before they are approved – that is, in a way that ensures meaningful democratic scrutiny. For instance, the text of the Joint Declaration on Migration Cooperation was finalized on 13 January 2021.[48] The following day, an individual submitted a request for access to documents; the Council responded on 5 February – the day *after* the Joint Declaration was approved.[49] More generally, the abstract possibility to apply for access to documents does not ensure their disclosure, since EU institutions may invoke the exceptions to transparency set in Regulation 1049/2001. When it comes to migration deals, EU political institutions, as well as EU courts, arguably interpret such exceptions extensively.

5. The Right to Apply for Access to the Documents of EU Institutions

Regulation 1049/2001 confers an extensive right of access to the documents of EU institutions:[50] EU citizens, and any natural or legal person residing or having its registered office in a Member State, in principle, have a right of access to almost all documents of Union institutions.[51] Art. 4 of Regulation 1049/2001 contemplates a few 'exceptions' to the right of access to documents. The principal exceptions are contained in its paragraphs 1-3.

On the one hand, paragraph 1 of Article 4 lists the so-called 'mandatory' exceptions: EU institutions must refuse access to a document where disclosure would undermine the protection of the privacy of individuals or the 'public interest', as regards public security, defence, economic policy, and 'international relations'. There is no need, in such a case, to balance the requirements connected to the protection of those interests against the interest in transparency.[52] On the other hand, paragraphs

[43] See Council doc. 9233/20 of 3 July 2020.
[44] Council doc. 5223/21 of 13 January 2021, cit.
[45] Council doc. CM 1559 2021 INIT, of 4 April 2021; see further Council doc. 5287/21 of 22 January 2021.
[46] See Joint Declaration on Migration Cooperation between Afghanistan and the EU, Council doc. 5223/21 ADD 1, 13 January 2021, Part VIII.
[47] See Regulation 1049/2001, cit., Art. 7(1). The 15 days deadline imposed by this provision may be extended by further 15 days in exceptional cases (see Art. 7(3)).
[48] See Council doc. 5223/21 of 13 January 2021, cit.
[49] See the request by Arne Semsrott (Open Knowledge Foundation Deutschland e.V.) and the Council's response on the website of FragDenStaat, https://fragdenstaat.de/a/208729 Accessed 24 june 2021; see also Council doc. 5223/21, 13 January 2021, p 2.
[50] Judgment of 29 October 2020, Intercept Pharma, C-576/19 P, EU:C:2020:873, para 29; judgment of 26 January 2010, Internationaler Hilfsfonds v Commission, C-362/08 P, EU:C:2010:40, para 56.
[51] Regulation 1049/2001, cit., Art. 2 and 3.
[52] Judgment of 1 February 2007, Sison v Council, C-266/05 P, EU:C:2007:75, para 46; judgment of 27 February 2018, CEE Bankwatch Network v Commission, T-307/16, EU:T:2018:97, para 81.

2 and 3 contemplate the 'discretionary' exceptions to disclosure. According to paragraph 2, EU institutions can refuse access to a document where disclosure would undermine the protection of (a) commercial interests, (b) inspections, investigations and audits, and (c) 'court proceedings and legal advice'. Pursuant to paragraph 3, EU institutions can refuse disclosure of a document if that would seriously undermine the institution's decision-making process. Unlike the mandatory exceptions of paragraph 1, however, the exceptions of paragraphs 2 and 3 do not apply if there is 'an overriding public interest in disclosure'.

In any event, the exceptions set out in Art. 4 of Regulation 1049/2001 are quite imprecise.[53] For instance, the Regulation does not define either 'international relations' or the 'undermining' thereof. The Regulation, moreover, does not provide guidance for the balancing, in a specific case, of the right to transparency with the 'overriding public interest in disclosure'. Therefore, the practical application of the Regulation – and the extent of the right of access to documents in practice – depends on how the provision is interpreted in practice.

EU executive institutions tend to interpret broadly the exceptions to transparency. For instance, in February 2021 the Council refused to disclose the text of the EU-Afghanistan Joint Declaration on Migration Cooperation, claiming it contained confidential information, whose disclosure would have affected international relations between the EU and Afghanistan.[54] Remarkably, such refusal was communicated long after the conclusion of negotiations between the parties and even after the approval of the Joint Declaration by the Council.

The EU judiciary has often been sensitive to the concern for secrecy of the executive. In principle, individuals have a right of access to documents; institutions must motivate any denial of disclosure. Nonetheless, EU courts perform a limited review of legality in light of Art. 4(1) of Regulation 1049/2001: when the 'international relations' exception has been invoked, EU courts have allowed limited transparency in the past.[55] This is understandable, up to a point, given the need to preserve confidential information pertaining to international relations and, particularly, international negotiations.[56] EU courts' approach to the exceptions of Art. 4(2) and (3) of Regulation 1049/2001 is even more problematic. Documents covered by one of those exceptions (e.g. 'court proceedings and legal advice') can be disclosed if 'there is an overriding public interest in disclosure'. According to the Court of Justice, the existence of such an overriding public interest must be demonstrated by the applicants. 'General considerations' are not sufficient: applicants must rely on 'specific circumstances' to show that there is an overriding public interest to justify the disclosure of the documents concerned.[57] It would seem that, by placing the onus upon the applicant, the Court of Justice has essentially stated that that party must have specific knowledge of the document that they are requesting.[58]

The General Court demonstrated even greater *favor* for secrecy in a case concerning access to documents relating to a migration 'deal': *Access Info Europe v. Commission* (2018).[59] Since this case concerns the EU-Turkey statements of 8 and 18 March 2016 (hereafter, the Statements), it can be better understood by briefly introducing the Statements themselves and the famous *NF, NG,* and *NM*

[53] Cf. CEE Bankwatch Network, T-307/16, cit., para 78; judgments of 1 February 2007 in Sison v Council, C-266/05 P, para 36.
[54] See above, footnote 49.
[55] See *inter alia* Mendes 2020; Leino 2018.
[56] See further Flavier 2018, p 272.
[57] Judgment of 14 November 2013, LPN and Finland v Commission, C-514/11 P and C-605/11 P, EU:C:2013:738, paras 93-94; see also judgment of 29 June 2010, Commission v Technische Glaswerke Ilmenau, C-139/07 P, EU:C:2010:376; judgment of 21 September 2010, Sweden and Others v. API and Commission, C-514/07 P, EU:C:2010:541.
[58] Wyatt 2020, p 696; Molinari 2018, p 970; Rossi et al 2017, p 161.
[59] Judgments of 7 February 2018, Access Info Europe v. Commission, T-851/16, EU:T:2018:69 ; Access Info Europe v. Commission, T-852/16, EU:T:2018:71.

cases that concern it[60] – not least because *Access Info Europe* and *NF, NG,* and *NM* were decided by the same Chamber of the General Court (First Chamber) and had the same rapporteur (judge Svenningsen).

As is well known, through the Statements of March 2016, the EU and Turkey 'agreed' upon several 'action points'.[61] Turkey committed, in particular, to readmit 'new irregular migrants crossing from Turkey into Greek islands'; in exchange, the EU promised 6 billion euros to Turkey. Three asylum-seekers (NF, NG, and NM) brought annulment proceedings against the 18 March Statement, but the General Court dismissed the actions on the grounds of its lack of jurisdiction. According to the General Court, the EU-Turkey Statement was adopted by the Member States and, consequently, is not an EU act.[62] One may note, at any rate, that the Statement was adopted within the European Council, published on the Council website, and expressly refers to commitments entered into by the 'European Union'.[63] These issues were raised by the applicants in their appeals against the General Court's order. However, the Court of Justice found the appeals 'manifestly inadmissible' because they were allegedly 'incoherent' and did not indicate with precision 'the contested elements in the orders under appeal or the legal arguments specifically advanced in support of the application for annulment'.[64] This argument is disputable, since the appellants had identified in their appeals several errors of law of the General Court, such as its disregard for 'the plain wording of the Challenged Agreement'.[65] Arguably, the orders of EU courts in *NF, NG,* and *NM* are affected by 'judicial passivism'.[66] Through a 'selective' reading of the law (and the facts, in the case of the General Court), EU courts managed not to take a position on the substance of the Statement of 18 March 2016 and on a hotly debated issue such as migration.

The same 'judicial passivism' inspires the judgment *Access Info Europe v Commission*. The applicant, a non-governmental organisation, requested (in March and April 2016) access to 'all documents' in possession of the Commission relating to 'legal advice and/or analysis of the legality of the actions' to be carried out by the EU and its Member States in implementing the Statements.[67] The Commission identified the documents, but refused access to most of them, through two decisions.[68] According to the Commission, the disclosure of the documents would have affected the Union's international relations and its ability to obtain frank legal advice from its services. Access Info Europe brought an annulment action against the Commission decisions, alleging a violation of Regulation 1049/2001. However, the General Court ruled in favour of the Commission, by adopting two similar judgments.[69] In its judgments, the General Court adopted an expansive interpretation of the exception regarding international relations (discussed below, in section 6) and downplayed the overriding public interest in disclosure (as shown in section 7). Since the applicant did not lodge appeals against the judgments of the General Court, this case was not brought to the attention of the Court of Justice.

6. The Overemphasis on the 'International Relations' Exception

[60] Orders of 27 February 2017, NF v European Council, T-192/16, EU:T:2017:128 ; NG v European Council, T-193/16, EU:T:2017:129; NM v European Council, T-257/16, EU:T:2017:130; order of 12 September 2018, NF and Others v European Council, Joined Cases C-208/17 P to C-210/17 P, ECLI:EU:C:2018:705.

[61] EU-Turkey Statement, cit.

[62] See e.g. NF v European Council, T-192/16, cit.

[63] See further Gatti and Ott 2019; De Vittor 2018, p 218.

[64] See NF and Others v European Council, Joined Cases C-208/17 P to C-210/17 P, cit., para 16.

[65] Appeal brought on the 21st April 2017 by NF residing on the Island of Lesbos (Greece) against the Order of the General Court (First Chamber, extended composition) delivered (and served on the Appellant) on the 28th February 2017 in Case T-192/16 NF v. European Council, para 8 (hereafter, NF appeal), para 8. The document is on file with the author.

[66] Goldner Lang 2021; see also, among others, Simon 2017.

[67] Access Info Europe v Commission, T-851/16, cit., para 6.

[68] Commission decision C(2016) 6029 final, 19 September 2016; Commission decision C(2016) 6030 final, 19 September 2016. Both decisions are published at https://www.asktheeu.org/ Accessed 16 March 2021.

[69] Given the similarity between the judgments, only one (Access Info Europe v Commission, T-851/16, cit.) is referred to below.

To justify its decisions denying disclosure of the documents requested by Access Info Europe, the Commission succinctly referred to the protection of EU's international relations (Art. 4(1) of Regulation 104/2001): 'the EU-Turkey Statement and its implementation by the various actors involved is of utmost political importance for the EU's international relations with Turkey.'[70] Therefore, divulgation of the legal analysis contained in several of the requested documents 'would present a concrete risk of complicating the EU's position in the dialogue with Turkey and thereby undermine the EU's international relations.'[71] Notwithstanding the vagueness of these explanations, the General Court found that the Commission made no manifest error of assessment in justifying its refusal to discuss six documents (out of a total of 11) on the ground that such disclosure 'carries a specific risk of complicating the European Union's position in the dialogue with the Republic of Turkey'.[72]

The General Court's *Access Info Europe* judgments appears to confirm the deference to the executive that arguably characterises *NF, NG and NM* (see above, section 5). According to case law, it is not necessary for an institution's reasoning to go into all the relevant facts and points of law to justify a non-disclosure decision.[73] Nonetheless, EU institutions must always disclose in a clear and unequivocal fashion the reasoning they followed; they should identify, in particular, the specific elements on which it might be concluded that disclosure of their documents would undermine a public interest.[74] The case law indicates, in particular, that merely noting the existence of a risk does not in itself satisfy the requirement whereby the institution concerned must establish, 'specifically and actually', the existence of a threat to EU international relations.[75] Therefore, the Commission should have provided the requisite explanations in its decisions and 'established the existence of a reasonably foreseeable risk, which was not purely hypothetical'.[76] By contrast, the Commission was vague in its decisions denying disclosure, as it simply alleged that the EU-Turkey Statement was 'of utmost political importance' and, consequently, its disclosure would bring about the 'concrete risk of creating tensions between the EU and Turkey'.[77] Regrettably, the General Court did not assess whether the Commission's brief explanations established a reasonably foreseeable risk for EU public interests.

The General Court was so deferent to the executive power that it accepted, in two different cases, two inconsistent descriptions of the EU-Turkey Statement of 18 March 2016. In the *NF, NG and NM* orders, the General Court argued that the EU-Turkey Statement of 18 March 2016 was entered into by EU *Member States* (see above, section 5). In *Access Info Europe,* the General Court found that the disclosure of documents related to the EU-Turkey Statement could affect the *European Union*'s dialogue with the Republic of Turkey. Two of the Commission's documents, in particular, could not be revealed because they allegedly contained 'the European Union's own negotiating positions'[78] or because their disclosure could affect 'the climate of confidence in the negotiations' between the Union and Turkey.[79] According to the General Court, the EU-Turkey Statement is, at the same time, part of negotiations between the *Union* and Turkey and concluded by the *Member States* and Turkey. Because of its deference, the General Court ruled that the non-disclosure of six documents in possession of the Commission was compatible with the international relations exception of Art. 4(1) of Regulation 1049/2001. The non-disclosure of other five documents was justified on the basis of the exception regarding court proceedings and legal advice (Art. 4(2) of Regulation 1049/2001).

---

[70] Commission decision C(2016) 6029 final, cit., p 10; Commission decision C(2016) 6030 final, cit., p 7.
[71] *ibid.*
[72] Access Info Europe v Commission, T-851/16, cit., para 57,
[73] CEE Bankwatch Network, T-307/16, cit., para 80; Sison v Council, C-266/05 P, cit., para 80.
[74] See, to that effect, Besselink v Council, T-331/11, cit., para 60.
[75] Council v in 't Veld, C-350/12 P, cit., para 66; in 't Veld v Commission, T-301/10, cit., para 41; see also, *inter alia,* judgment of 27 November 2019, Izuzquiza and Semsrott v Frontex, T-31/18, EU:T:2019:815, para 62.
[76] Judgment of 19 March 2020, ClientEarth v. Commission, C-612/18 P, EU:C:2020:223, para 39, italics added.
[77] See above.
[78] Access Info Europe v Commission, T-851/16, cit., para 48.
[79] *ibid.,* paras 43-44.

7. The Disregard for the Overriding Public Interest in Disclosure

According to the Commission, the disclosure of the documents at issue in *Access Info Europe* would have had serious repercussions on the possibility of obtaining 'frank, objective and comprehensive' legal advice.[80] The risk of such repercussions, according to the General Court, was reasonably foreseeable, as the requested documents were intended to assist members of the Commission in their meetings with representatives of Greece and Turkey to discuss the implementation of the EU-Turkey Statements.[81] In view of the 'certain high political sensitivity' of the subject, the authors of the documents would have found it difficult to give 'frank, objective and comprehensive' advice if they had known that these opinions could have been disclosed to the public.[82]

The General Court's interpretation appears *prima facie* reasonable. The documents at issue probably contain sensitive assessments of the immigration law of the Union and its Member States. It is possible that these documents contain opinions regarding the situation of migrants' rights in Greece and Turkey, as well as information concerning the legal nature of the arrangements between Turkey and the European Union. One can imagine that the Commission services would find it difficult to express themselves frankly on such sensitive subjects if they knew that their opinions could become public. Therefore, the Commission could reasonably claim that the refusal of access to documents protected 'legal advice' within the meaning of Article 4(2) of Regulation 2001.

However, the protection of legal opinions is subject to a condition: according to Article 4(2) of Regulation 1049/2001, EU institutions may not refuse access to a document where there is an 'overriding public interest' in disclosure.

According to case law, it is for the party requesting access to refer to specific circumstances to establish an overriding public interest which justifies disclosure of the documents concerned.[83] In *Access Info Europe*, the General Court found that the applicant had put forward only 'general considerations' relating to the principle of transparency, which were not 'especially pressing' in that particular case and capable of prevailing over the grounds justifying the refusal to disclose the documents at issue.[84]

The General Court arguably underestimated the 'overriding public interest' in disclosure in this case. In the first place, the General Court did not sufficiently emphasise the connection between the documents at issue and EU decision-making. The case law of the Court of Justice suggests that the obligations of transparency are particularly strong in the context of legislative procedures; for instance, the opinions of a legal service relating to a legislative process should, in principle, be accessible, as they could strengthen the democratic rights of EU citizens.[85] The General Court excluded the existence of an overriding public interest' in disclosure in *Access Info Europe* because 'the documents at issue are not legal advice relating to a specific legislative proposal', but rather constitute preparatory and internal documents 'drawn up for the purpose of political dialogue' with a third state.[86] The General Court's approach is unconvincing: according to case law, the considerations regarding democratic participation 'cannot be ruled out in international affairs', especially in the case of a legal opinion regarding negotiations of 'an international agreement which may have an impact on an area of the European Union's legislative activity.'[87] The documents at issue in *Access Info*

[80] *ibid*., para 85. The Commission invoked also the protection of court proceedings in this case; for the sake of brevity, this exception is not discussed here. See further, in this respect, Molinari 2018.

[81] Access Info Europe v Commission, T-851/16, cit., para 92; see also Sweden and Turco v. Council, Joined Cases C-39/05 P and C-52/05 P, cit., paras 42-43.

[82] Access Info Europe v Commission, T-851/16, cit., para 94.

[83] *ibid.*, para 103.

[84] *ibid*., paras 107-109 and 112.

[85] Sweden and Turco v. Council, Joined Cases C-39/05 P and C-52/05 P, cit., paras 67-68.

[86] Access Info Europe v Commission, T-851/16, cit., para 90.

[87] Judgment of 4 May 2012, In 't Veld v Council, T-529/09, EU:T:2012:215, para 89; see also judgment of 3 July 2014, Council v In 't Veld, C-350/12 P, EU:C:2014:2039, paras 103-107.

Europe constitute precisely legal analyses regarding negotiations of international commitments that have an impact on an area of the EU's activity: as noted by the very General Court, these documents assisted Commission agents in their 'meetings' with Greek and Turkish representatives regarding 'the measures the latter were to adopt as part of the implementation of the commitments undertaken in the EU-Turkey statements'.[88]

Secondly, the General Court did not take into sufficient account the connection between the documents at issue and the protection of fundamental rights. According to the applicant, disclosure of the documents was important because they may shed light on the 'actions that can be legally conducted in order to act efficiently to address the [migration] crisis'.[89] The EU-Turkey Statements have indeed an obvious impact on fundamental rights, as they concern the return of asylum seekers to a third state. The case law has already acknowledged the relevance of fundamental rights in the application of Art. 4(2) of Regulation 1049/2001. In the case of instruments concerning the protection of personal data, the General Court held that the Council 'was obliged to take into account the area affected by the agreement in question' in its assessment of the overriding public interest in public disclosure.[90] The area affected by EU-Turkey Statement – the rights of asylum seekers – is even more sensitive: arguably, the General Court should have taken it into greater account.

Thirdly, the General Court did not properly acknowledge the public interest in obtaining clarifications about the legal nature of the EU-Turkey Statements. According to the General Court, the documents at issue 'did not examine the division of competences between the European Union and its Member States'[91]. This argument seems puzzling. As acknowledged by the General Court, one of the documents discusses the possibility that an 'explanatory memorandum' between Greece and Turkey, concerning the implementation of the EU-Turkey Statement of 18 March 2016, 'may come within the competences of the European Union' and thus involve the Union's participation in that memorandum.[92] If a memorandum that implements the EU-Turkey Statement may come within the competences of the Union, the Statement itself should come, at least in part, within the EU's competences, too. In that case, the Union would inevitably be the author of the Statement, contrary to what the General Court claimed in *NF, NG* and *NM*.[93]

Given the impact of the EU-Turkey Statements on EU decision-making and human rights, as well the uncertain division of competences in this case, it is regrettable that the General did not recognise the existence of an overriding public interest in disclosure in *Access Info Europe*, which would have warranted a different balancing of interests.

8. Conclusion

Transparency is a fundamental right and a democratic principle of the European Union. EU institutions generally ensure a relative high standard of transparency: the most relevant documents are published in open sources and the others are normally accessible at the request of individuals.

---

[88] Access Info Europe v Commission, T-851/16, cit., para 92.

[89] Decision C(2016) 6029, cit., p 12.

[90] In 't Veld v Council, T-529/09, cit., para 92. See also, to that effect, judgment of 22 March 2018, T-540/15, De Capitani v. Parliament, EU:T:2018:167, para 90.

EU:T:2018:167, point 90

[91] Access Info Europe v Commission, T-851/16, cit., para 110.

[92] *ibid.,* para 111.

[93] In the *ERTA* case, the Court of Justice held that the contested act had been adopted by the Council, since it 'dealt with a matter falling within the power of the Community', judgment of 31 March 1971, Commission v Council, Case 22-70, ECLI:EU:C:1971:32, para 52; later, in *EDF,* the Court found that the determination of the author of an international convention 'depends on an interpretation of the Convention and on *how in Community law powers are distributed* between the Community and its Member States', judgment of 2 March 1994, Parliament v Council, C-316/91, ECLI:EU:C:1994:76 (emphasis added). On EU competences and the EU-Turkey Statement of 18 March 2016, see García Andrade 2018, pp 194-195.

However, like other democratic principles, transparency seems weakened in the area of migration, particularly in respect of informal deals with third States.

Opacity surrounds the entire decision-making process related to migration deals. Preparatory documents related to these arrangements seem inaccessible to individuals. Since the deals are informal, there is no need to publish documents drafted in the course of their decision-making procedures. Individuals may apply for access to preparatory documents, but such an application is unlikely to succeed, not least because of the EU judiciary's sympathy for the secrecy concerns of EU executives. The public seems not to be able to exercise their right to access migration deals before they are applied: migration arrangements are likely to be published with delay and, in any case, only after they are signed – that is, once they are already in application.

The opacity of migration deals is probably deliberate. By keeping the public in the dark, informal deals allow EU executives (the European Council, the Council, the Commission and the governments of the Member States) to escape democratic control. Executive bodies are not new to this kind of approach.[94] The sympathy of the judiciary for the secrecy concerns of the executive is perhaps more surprising. Most puzzling of all is the attitude of the European Parliament, which has not challenged the systematic use of informal deals with third countries – even though those deals are approved through opaque procedures that prevent any meaningful democratic control.

The possibility for citizens to exercise their right to transparency is a precondition for the effective functioning of democracy.[95] In the recent past, however, the exercise of the right to transparency with respect to migration deals appeared severely restrained. Given the secretive approach of EU executives and the weakness of parliamentary and judicial control, opacity is likely to characterise migration deals also in the future.

References

Aust A (2000) Modern Treaty Law and Practice. CUP, Cambridge

Cannizzaro E (2018) Fundamental Values and Fundamental Disagreement in Europe, European Papers 3: 469- 473

Casolari F (2018) La crisi siriana, l'esodo dei rifugiati e la Dichiarazione UE-Turchia. In: Ronzitti N and Sciso E (eds) I conflitti in Siria e Libia: possibili equilibri e le sfide al diritto internazionale. Giappichelli, Torino, pp 219-242

De Vittor F (2018) Responsabilità degli Stati e dell'Unione europea nella conclusione e nell'esecuzione di "accordi" per il controllo extraterritoriale della migrazione. In: Nesi G (ed) Migrazioni e diritto internazionale: verso il superamento dell'emergenza?. Editoriale scientifica, Naples

Flavier H (2018), Réflexions sur la Démocratisation des Relations Extérieures à l'Aune du Contentieux de l'Accès aux Documents. In Neframi E., Gatti M (eds), Constitutional Issue of EU External Relations Law. Nomos, Baden-Baden, pp 257-285

García Andrade P (2018) EU external competences in the field of migration: How to act externally when thinking internally, Common Market Law Review 55: 157-200

Gatti M (2016) European External Action Service: Promoting Coherence Through Autonomy and Coordination. Brill, Leiden

[94] On confidentiality and nonbinding international arrangements, see Aust 2000, pp 35-37.

[95] See, *inter alia,* Pech v Council, T-252/19, cit., para. 59; Sweden and Turco v. Council, Joined Cases C-39/05 P and C-52/05 P, cit., para 46.

Gatti M, Ott A (2019) The EU-Turkey statement: legal nature and compatibility with EU institutional law. In Carrera S. et al. (eds) Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Edward Elgar, Cheltenham, pp 175-200

Goldner Lang I (2021), Towards 'Judicial Passivism' in EU Migration and Asylum Law?. In Ćapeta T et al (eds) The Changing European Union: A Critical View on the Role of Law and Courts. Hart Publishing, Oxford

Guérin A (2019) Déclaration UE-Turquie du 18 mars 2016 : la CJUE ou les singes de la sagesse' *Revue des droits de l'homme* 16

Leino P. (2018) The Principle of Transparency in EU External Relations Law. In: Cremona M. (ed) Structural Principles in EU External Relations Law. OUP, pp 201-223

Mendes J (2020) The Principle of Transparency and Access to Documents in the EU: for what, for whom and of what?, Law Working Paper Series 2020-004, University of Luxembourg

Molinari C (2018) The General Court's Judgments in the Cases Access Info Europe v. Commission (T-851/16 and T-852/16): A Transparency Paradox?, European Papers 3: 961-972

Molinari C (2019) The EU and its Perilous Journey through the Migration Crisis: Informalisation of the EU Return Policy and Rule of Law Concerns, European Law Review 44: 824-840

Neframi E, Gatti M (2020) Externalisation de la politique migratoire et identité de l'Union européenne. In: Benlolo M (ed) L'Union européenne et les migrations. Bruylant, Bruxelles, pp 245-269

Ott A (2020) Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges, Yearbook of European Law: 1-33

Poli S (2020) The Integration of Migration Concerns into EU External Policies: Instruments, Techniques and Legal Problems, European Papers 5: 71-94

Rossi L (2017) Public Access to Documents in the EU. Bloomsbury, London

Simon D (2017) Les ambiguïtés juridiques relatives à la déclaration UE/Turquie sur les migrants du 18 mars 2016: la double nature des réunions du Conseil européen et ses répercussions contentieuses, *Europe*

Tovo C (2019) The Role of National Parliaments in the Negotiation and Conclusion of EU Free Trade Agreements. In: Bosse-Platière I and Rapoport C (eds) The Conclusion and Implementation of EU Free Trade Agreements: Constitutional Challenges. Edward Elgar, Cheltenham, pp 125-141

Warin C, Zhekova Z (2017) The Joint Way Forward on Migration Issues Between Afghanistan and the EU: EU External Policy and the Recourse to Non- Binding Law, Cambridge International Law Journal 6: 143-158

Wessel R. A. (2021) Normative transformations in EU external relations: the phenomenon of 'soft' international agreements, West European Politics 44: 72-92

Wyatt D (2020) The Anaemic Existence of the Overriding Public Interest in Disclosure in the EU's Access to Documents Regime, German Law Journal 21: 686-701