

2. GENERAL COURT (EUROPEAN UNION), JUDGEMENT OF 27 NOVEMBER 2019, *IZUZQUIZA AND SEMSROTT V. FRONTEX*, T-31/18, EU:T:2019:815

Sailing through transparent waters? A comparison between cases concerning public access to information related to Search and Rescue operations in the Mediterranean

Eleonora Frasca

A. Facts and ruling

As enshrined in Art. 42 of the Charter of Fundamental Rights of the European Union and in Art. 15 TUE, any EU citizen has the right of access to *documents* of the institutions, bodies, offices and agencies of the Union. [Regulation 1049/2011 regarding public access to the European Parliament, Council and Commission documents](#) is the secondary legislation providing the framework for the exercise of this right. In the ECHR system, the right of access to *information* is derived from the freedom of expression and information under Article 10. The same right is protected at the national level under the same premises, although many countries have adopted this kind of legislation only in recent times; this is the case, for instance, of the [Italian Freedom of Information Act](#).

The General Court *Izuzquiza and Semsrott v. Frontex* judgment shows the limits of Regulation 1049/2011 in allowing access to information of Frontex activities in the Mediterranean. The EU Agency has undergone an unrivaled evolution from its [creation in 2004](#) to its recent [transformation into the European Border Coast Guard in 2016](#) and the [further legislative development occurred in 2019](#). On the one hand, the Agency is the portrait of European inflating law-making in the area of migration and security; on the other hand, Frontex embodies an aspect of informalisation of legal activities and technicism, which can be understood as giving political discretion to agencies without making them fully accountable for their operations.¹ Therefore, it can be argued that the transparency of Frontex activities is a public concern.

This commentary will analyse the potential and challenges of the right to public access, both at the European level (to monitor the activities of Agencies such as Frontex, as in the *Izuzquiza and Semsrott v. Frontex judgment*) as well as at national level to oversee the work of national Governments; the *judgment n° 10202 of 1st August 2019* of the Italian Administrative Tribunal of Lazio Region will be presented as a case study.

1. Facts and circumstances of the case

On 20 January 2018, two freedom of information activists, Luisa Izuzquiza and Arne Semsrott, brought an action under Art. 263 TFEU to the General Court, seeking the annulment of a Frontex decision refusing access to documents containing information related to the Agency Search and Rescue activities in the central Mediterranean under Joint Operation Triton. The latter replaced the Italian naval operation *Mare Nostrum*, began in November 2014 and ended in early 2018, but it was not primarily entrusted with Search and Rescue. By using assets provided by some Member States,

¹ For an appraisal of challenges related to Frontex activities, see L. TSOURDI, *Beyond the 'migration crisis': three key challenges for Frontex and EASO*, 2020, UM Law Blog, 11 February 2020

this naval operation was aimed at improving border surveillance and control in the Central Mediterranean.

Under Art. 6 of [Regulation \(EC\) N° 1049/2001 regarding public access to the European Parliament, Council and Commission documents](#), the two activists requested access the documents containing information on the *name, type and flag* of every vessels which Frontex had deployed between 1 June and 20 August 2017 in the context of operation Triton. [Regulation \(EC\) N° 1049/2001](#) applies to Frontex under Art. 74(1) of [Regulation \(EU\) 2016/1624](#) (now Art. 114 (1) “Transparency and Communication” of the new [Regulation \(EU\) 2019/1896](#)).

Although Frontex still lacks an official public registry of its documents in accordance with Art. 11 (1) of [Regulation \(EC\) N° 1049/2001](#), the Agency should be as transparent as possible about its operations, engaging in communication activities, such as the annual activity reports, and providing the public with rapidly given, objective, comprehensive, reliable and easily understandable information with regard to its work. Frontex refused access to those documents invoking the exception of protection of the public interest as regards to public security, provided for in Art. 4(1)(a) [Regulation \(EC\) N° 1049/2001](#).

According to the Agency, by combining the information contained in the requested documents with information publicly available on maritime traffic websites, the current position of the vessels would be available. If that information were public, criminal networks involved in migrants smuggling and trafficking in human beings would be aware of patrolling areas and schedules of law enforcement vessels; they could therefore circumvent border surveillance, cross the external border and irregularly access the territory of an EU Member State (contested decision as cited in §17 of the judgment).

Frontex confirmed the refusal to disclose the documents with a decision on 10 November 2017 claiming that that the “disclosure of details related to technical equipment deployed in the current and ongoing operations would undermine public security” (§16). The applicants ask the General Court to annul the contested decision and, in support of their action, they rely on five pleas in law claiming that Frontex committed manifest errors of assessment and did not satisfy the duty to state reason. Certain pleas concern the way Frontex carried out the examination of the document request (1st plea in law), two relate to alleged Frontex manifest errors of assessment in the use of the public security exception (2nd and 3rd plea) and two relate to the exception as regard to partial access to information already available (4th plea) and the time period cover by the request (5th plea).

2. Judgement and reasoning of the General Court

The General Court rejects all five pleas in law as unfounded and declares the action dismissed. Just like other EU institutions and bodies, Frontex enjoys a wide margin of discretion to refuse access to documents on the basis of public interest exceptions provided for in Art. 4(1) of the [Regulation on public access to EU institutions documents](#). Those exceptions are absolute and mandatory: even if a public interest in disclosure of documents falling within the exception exists, that public interest cannot be weighed against the harm that might result to the competing interest protected by the exception (in the case at comment: public security).

By way of corollary, the review by the General Court of the legality of a decision refusing access to a document on the basis of the exceptions under Art. 4(1) is limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated and whether there has been a manifest error of assessment or a misuse of powers (§65).

- ***Is Frontex decision based on manifestly inaccurate facts?***

The applicants claim that Frontex decision of refusing access to information is based on manifestly inaccurate facts and that the reasons given to justify the application of the exception are mostly incorrect (2nd plea). They challenge Frontex reasoning that the information disclosed will be used by third parties to become aware on the position of vessels during patrolling mission. According to the applicants, vessels cannot be tracked by publicly accessible means because they do not transmit their identification data when they are on mission; they do so precisely in order to avoid making themselves detectable.

Underling that adopting a decision to refuse access to documents is a complex and delicate exercise, the Court does not engage with the actual verification of the credibility of Frontex claims and settles for Frontex's explanation: the information requested is sufficient to locate and then monitor a vessel when combined with low-tech surveillance methods, such as observing the movement of boats from the coast, and high-tech surveillance methods, such as the use of drones. According to the General Court, ultimately, the assertions made by Frontex "remain plausible and demonstrate that there is a foreseeable risk to public security which justify the use of the exception" (§74).

- ***Did Frontex commit any manifest error of assessment?***

The applicants claim that they only requested information on vessels deployed in the past and that disclosure of such information does not automatically produce adverse effects for border surveillance (3rd plea). Moreover, according to the applicants, Frontex did not consider that *part* of the requested information was already published on Twitter as regard to some vessels deployed in 2017 and that comparable information about Operation Triton in 2016 was already published (4th plea).

The Court finds that, although the period covered by the information requested had expired, Triton joint operation was still ongoing and the risk that such information, if disclosed, would be used by criminals in order to locate vessels continued to exist. The request was made on 1 September 2018 for the period between 1 June 2017 and 30 August 2017, while the operation only ended on 31 January 2018. Moreover, the fact that Frontex published on Twitter certain selected information about vessels deployed as part of its communication obligation "cannot be regarded as setting a precedent that would require to communicate information which it believes put public security at risk" (§93).

According to the applicants, Frontex could have given partial access to information under Art 4 (6), which permits to release the part of the requested document not covered by any of the exceptions. They allege that the *type* and *flag* of the vessels deployed cannot be used to identify them on marine traffics website, as it is the case for the *name* (5th plea). The Court states that, besides the monitoring of boats on maritime traffic websites, their type and flag can be used to monitoring the traffic through

other means (e.g. simple observations or drones), so it is legitimate that Frontex refused access to the information related to flag and type of vessels deployed.

- ***Does Frontex decision satisfy the duty to state reason?***

Any refusal to access documents has to be duly justified. The applicants claim that Frontex should have indicated *how* the required information could have been used to determinate the likely future location of the vessels taking part in Operation Triton (1st plea). The General Court declares that that the contested decision satisfies the duty to state reason: the explanation given by Frontex to justify its refusal on the ground of public security sufficiently discloses “in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable, on the one hand, the applicants concerned to ascertain the reasons for the measures, on the other hand, the Court having jurisdiction to exercise its power of review” (§107).

B. Discussion: Frontex activities between opacity and transparency

The fundamental right to access documents is closely linked to the principle of institutional transparency. Public access to documents can be seen as an application of the democratic principle. In the EU legal order, there is a general presumption of openness of EU documents, which guarantees that the Institutions and Agencies “enjoys greater legitimacy and are more effective and more accountable to the citizen in a democratic system” (second whereas of [Regulation \(EC\) N° 1049/2001](#)). The right to public access to documents shall, in principle, be given the fullest possible effect, although there are exceptions to disclosure that allow the Institutions, as in the present case, to keep documents secret.

Next to Frontex obligation to communicate and ensure transparency as well as its duty to “provide the public with accurate, detailed, timely and comprehensive information about its activities” (Art. 10(2) [EBCG 2019 Regulation](#)), it is stated that “such communication in particular shall not reveal operational information which, if made public, would jeopardise attainment of the objective of operations” (*Ibidem*). The non-disclosure of the “operational information”, which could put at risk the attainment of the objectives of Frontex operations, set therefore the limit to public access to information in this field.

Following the [Izuzquiza and Semsrott vs Frontex caselaw](#), the exception of public interest in the field of public security could be used by Frontex to deny access to similar documents in the future. However, the caselaw offers an opportunity to carry out a broad reflection on the legal remedy represented by the public access to documents, both in judicial and non-judicial forms, in relation to Search and Rescue operations in the Mediterranean.

1. Judicial and extra-judicial remedies to Frontex opacity

Until this judgement, similar European Court of Justice’s case-law about Frontex did not exist². Extra-judicial control has been performed by the European Ombudsman, whose role is to monitor and

² The rare cases involving Frontex are related to public procurement actions brought to the Civil Service Tribunal (e.g.: Order of the General Court of 11 January 2017, [Wahlström v. Frontex](#), Case T-653/13 P, ECLI:EU:T:2017:12 and Order of the Civil Service Tribunal of 18 July 2016, Case F-68/15 [Possanzini v Frontex](#), EU:F:2016:150)). There is also a judgment indirectly

promote good administration in the EU.³ So far there have been five decisions relating to transparency issues in Frontex activities (in cases where Frontex denied access to documents), although none of them concluded in the sense of maladministration by the Agency.⁴

By way of example, in the [case 1767/2017KM](#) of 31 October 2017, the Ombudsman concluded that there was no maladministration by Frontex on how it handled a request for access to documents. In this case, the applicants were seeking information on *where* vessels taking part in Operation Triton had intercepted boats transporting migrants. In this case too, Frontex refused access to protect public security, as releasing the documents would hamper the ongoing Triton operation missions by depriving them of “any element of surprise during border surveillance” (Frontex’s reasoning as cited by the European Ombudsman in the decision).

2. The case of domestic public access to information related to Search and Rescue operations (an example from Italy)

By way of comparison, it is interesting to analyse the recent [judgement n. 10202/2019](#) of the Italian Administrative Tribunal of the Lazio Region, which deals with a request of public access made under the domestic [freedom of information act](#). The judgement has recently been the object of appeal and the Italian Council of State, with [judgement n° 1121 of 12 February 2020](#), has overturned the decision of the Lazio TAR.⁵

The Ministry of Infrastructure and Transport denied access to information related to Search and Rescue operations requested by individual applicant. To justify the refusal, the Ministry claimed that the Search and Rescue operation information requested pertains to “documents concerning programming, planning and implementation of NATO and national operations NATO, including Search and Rescue operations”, which will fall into the scope of the exceptions to public access. The applicants claim, instead, that Search and Rescue operations are civilian operations.

The domestic Article related to “security, national defence, military matters and international relations” exceptions (Art. 5-*bis* of [Legislative decree n° 33/2013](#)) partially mirrors the exceptions

related to Frontex which concerns the legislative procedure rules and specifically the lack of involvement of the European Union legislature when conferring powers of public authority to Frontex. In that case, the Court found that the Council decision object of the annulment exceeded the limits of implementing power of the Schengen Borders Code (comitology procedure) (CJUE (Grand Chamber) Judgment of 5 September 2012, [European Parliament v Council of the European Union](#), Case C-355/10.: ECLI:EU:C:2012:516).

³ The most important decisions of the European Ombudsman, however, relate to Frontex and fundamental rights, see for instance: J. J. RIJPM, *External Migration and Asylum Management: Accountability for Executive Action Outside EU-territory*, 2019, European Paper, Issue 2, Volume 2, pp. 571-596

⁴ Cases related to maladministration in handling public access request are, by large, the most common brought to the attention of the Ombudsman. Compared to actions for annulment brought at the General Court by citizens, failing a complaint about maladministration to the Ombudsman (in this case, of alleged maladministration in the way Frontex handles request for access to documents) is faster, as the Ombudsman has a fast track procedure for access to documents complaints, and is free of cost, as compared to the time and resources needed for a judicial procedure with uncertain outcomes.

⁵ For the purpose of this analysis, the reforming judgment will not be examined in this case-law commentary. However, it must be clarified that the Council of State wrongfully interprets the domestic legislation on public access as not creating an individual right of access, but rather a *claim* that is instrumental to the protection of a public interest. Domestic legislation clearly establishes that the right of access to public information is *regardless* of the purpose for obtaining the required information.

under Art. 4(1) of the European Regulation. The Ministry also based its refusal on the absolute exception to access information under Art. 1048 (1) of [President of the Republic Decree n° 90 of 15 March 2010](#), which concerns documents related to security, national defence and international relations.

The Tribunal rejects such arguments and clarifies that “the core activity about which the applicant seeks access to information is the implementation of the SAR Convention through the Italian Maritime Rescue and Coordination Centre”. It also states that “those cannot be assimilated to military activities, even if military vessels are deployed.” The purpose of public access is the “full accessibility of data and documents held by public authorities, in order to protect citizens rights, promoting their participation to administrative activity and enabling widespread forms of control over the pursuit of institutional functions and the use of public resources” (Tribunal recalling Art. 1 of [Legislative decree n° 33/2013](#)).

The Tribunal explains that “the relevance and frequency of Search and Rescue operations in the Mediterranean, as well as the nature of fundamental rights of migrants at stake (right to life, prohibition of *refoulement*, etc) hinder the denial of public access to the applicant and therefore fall into the application of the transparency principle”. It also underlines the public interest to access detailed information related to search and rescue is in application of the transparency principle, which is, nowadays, on the spotlight and it is a public concern largely covered by mass media. The Tribunal has, therefore, ordered the Ministry to give access to the requested documents, with the option of redacting the parts who might undermine public interest, such as military defence or combating criminal offences (partial access).

3. The potential of the overriding public interest to disclosure

[Dahlberg and Wyatt](#) underline how the European Courts have different approaches to the assessment of the “public interest” associated with an individual’s request for information falling within *relative* exceptions to disclosure. The authors argue that the ECtHR defines “public interest” broadly as relating “to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life in the community” (ECtHR, [Magyar Helsinki Bizottsag v. Hungary](#), Application No. 18030/11, Judgment of 8 November 2016 §162). Public interest is linked to matters which are “capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about” (*Ibidem* §162).

Given the amount of public attention and political salience that migration in general, and Search and Rescue in particular, have gained in recent times, it could be argued that the public security exception used by Institutions and Agencies such Frontex should be balanced against the competing public interest in disclosure. In frontline countries, migration is one of the issues most covered by the press and one of the most debated in times of elections. At the EU level, not only migration became a top priority of the EU agenda, but it is also attracting an increasing amount of institutional, political and

economic resources. The importance of migration as a matter of great public interest is also witnessed by a case recently ruled by the ECtHR⁶.

The Italian Tribunal can refer to a “general interest in disclosure” because the same exceptions that are *absolute* in the [European legislation](#) under Art. 4(1), are *relative* under the Italian freedom of information legislation (Art. 5-bis [Legislative decree n° 33/2013](#)) and because partial access was asked, with the exclusion of the parts of information that might undermine public interest. Although the overriding public interest “test” is not explicitly requested by the Italian legislation, the judge used it to reinforce their argument against the exclusion of access.

As a matter of fact, Luisa Izuziquiza and Arne Semsrott have not attempted to pursue a plea as regard to the argument of an “overriding public interest in disclosure” because the exception under Art. 4 (1) [Regulation](#) are absolute. This argument could only be used towards discretionary exceptions under Art. 4 (2), (3) and (4) of the [Regulation](#). The applicants could only put forward pleas related to manifest errors of assessment and the duty to state reason. Attempts to amend [Regulation \(EC\) N° 1049/2011 regarding public access to the European Parliament, Council and Commission documents](#), have been put forward by the European Commission in 2009 and in 2011. While negotiating the reform, the European Parliament has repeatedly stressed the need for reconsidering that the mandatory exceptions are not balanced, in some way, against public interest.

Conclusion

In the General Court’s case, in application of European legislation, applicants were seeking access to *documents*, and very limited and precise information (name, type and flag of vessels). The exception of European public security can be raised against public interest in knowing how Frontex operational assistance in the support of Search and Rescue operations at sea. In the Italian case, the applicant was seeking access to *information* on Search and Rescue operations, namely any distress calls received between 3 and 12 October 2017 and 5 and 7 November 2019 and which actions were undertaken following those calls.

Search and Rescue activities in the Mediterranean have faced a growing number of obstacles such as the EU-backed Search and Rescue obstructive strategy adopted by Italy, based on the fueling of a cloud of [suspicion against NGO-led operations](#), the [criminalisation of solidarity towards migrants](#), the so-called “closed-door” practice and [increasing cooperation with Libya](#).

This caselaw commentary shows that, both at the European and the domestic level, there is growing public interest in addressing, through the instrument of public access as an exercise of democratic

⁶ In the case [Szurovecz v. Hungary](#), Judgment of 8 October 2019, App. n. 15428/16, the ECtHR has ruled that refusing journalist access to a reception centre in Hungary was in breach of the right to freedom of expression protected under Article 10 ECHR. According to the Court, journalistic research and newsgathering is an essential component of investigative journalism and thus an inherent and protected part of press freedom. The “watchdog” role of the media is crucial and take on even more importance in matters of great public interest, such as the treatment of asylum seekers in Europe. For a caselaw commentary of this judgement see: F.L. Gatta, “[Can I see it ? No you can’t ! Refusal to grant journalist access to Hungarian Reception Centre for asylum seekers contrary to the right to freedom of expression](#)”, Cahiers de l’EDEM, November 2019

control, the crucial issue of the lack of a fully-functioning EU-wide Search and Rescue system, which negatively contributes to migrants death toll in the Mediterranean.

C. Suggested Reading

To read the case :

Judgment of the General Court, 27 November 2019, *Izuzquiza and Semsrott v. Frontex*, Case T-31/18, EU:T:2019:815.

Case law :

- Council of State (Italy), judgement n° 1121/20 of 12 February 2020, *Ministry of Infrastructure and Transports v. Giulia Crescini*
- Administrative Tribunal of the Lazio Region (Italy), judgment n° 10202/19 of 1 August 2019, *Giulia Crescini v. Ministry of Infrastructure and Transports*
- ECtHR, *Magyar Helsinki Bizottság v. Hungary*, Application No. 18030/11, Judgment of 8 November 2016

Literature :

- M. DAHLBERG and D. WYATT, *Is there a public interest in knowing what is going on in society? A comparative study of the European Courts*, Maastricht Journal of European and Comparative Law, 2019, Vol. 26(5), DOI : 10.1177/1023263X19865839
- M. INGLESE, *EU Agencies' External Activities and the European Ombudsman*, 2019, in *The External Dimension of EU Agencies and Bodies Law and Policy*, H.C.H. Hofmann, E. Vos, M. Chamon (Eds), Edward Elgar, pp. 164-181

To cite this contribution : E. FRASCA, "Sailing through transparent waters? A comparison between cases concerning public access to information related to Search and Rescue operations in the Mediterranean", *Cahiers de l'EDEM*, February 2020.

3. COUR D'APPEL DE MONS, 15 OCTOBRE 2019, N° 2016/RG/172, *SERVICE FEDERAL DES PENSIONS CONTRE X*

Nationalité et résidence dans l'accès à la pension de retraite coloniale

Trésor Maheshe Musole

A. Arrêt

Le requérant, de nationalité belge et résident en Belgique, réclame sa pension de retraite coloniale pour les services prestés de 1947 à 1960 au sein de l'administration d'Afrique. À cette époque, le requérant ne possédait pas la nationalité belge, mais il était « Belge de statut congolais ». Il fonde sa requête, d'une part, sur les articles 10 et 11 de la Constitution belge et, d'autre part, sur les articles 9, § 2, et 10 des lois relatives au personnel d'Afrique coordonnées par l'arrêté royal du 21 mai 1964.

Par quatre décisions successives, le Service fédéral des pensions lui dénie le droit d'accès à la pension de retraite coloniale. Selon ce service, de 1947 à 1960, le requérant ne remplissait pas la condition de nationalité prévue par l'article 1^{er} des lois relatives au personnel d'Afrique coordonnées par l'arrêté royal du 21 mai 1964. Selon cette disposition,

« Le présent chapitre s'applique aux personnes de nationalité belge ou luxembourgeoise qui ont été nommées comme membres du personnel de carrière des cadres d'Afrique avant le 30 juin 1960 ».

Après avoir saisi la Cour constitutionnelle par voie de question préjudicielle au sujet de la conformité de cette disposition aux articles 10 et 11 de la Constitution belge, la Cour d'appel de Mons lui reconnaît le droit à la pension de retraite coloniale en se fondant sur l'[arrêt n° 137/2018](#). A cette occasion, la Cour d'appel de Mons reprend la motivation de la Cour constitutionnelle selon laquelle

« L'article 1^{er} des lois relatives au personnel d'Afrique coordonnées le 21 mai 1964, interprété comme excluant de la pension de retraite prévue par les articles 9, § 2, et 10 des mêmes lois les Belges de statut congolais nommés comme membres du personnel de carrière des cadres d'Afrique, viole les articles 10 et 11 de la Constitution ».

Sur cette base, la Cour d'appel de Mons lui reconnaît la pension de retraite « pour éviter toute discrimination entre Belges et personnes belges de statut congolais » (p. 4). Par conséquent, la Cour d'appel de Mons dit que « le requérant a droit à une pension de retraite pour les services prestés de 1947 à 1960 dans l'administration d'Afrique » (p. 4).

B. Éclairage

Le raisonnement de la Cour d'appel de Mons repose essentiellement sur l'[arrêt n° 137/2018](#) de la Cour constitutionnelle de Belgique¹. À partir de la lecture combinée de ces deux arrêts, deux observations se dégagent. Elles sont relatives, d'une part, à la nationalité et, d'autre part, à la résidence.

¹ Pour un commentaire de cet arrêt, voy. T. Maheshe Musole, « Nationalité et sous nationalité dans l'accès à la pension de retraite coloniale : le cas des Belges de statut congolais », *Cahiers de l'EDEM*, octobre 2018.