9. Transparency in the multi-jurisdictional setting of the EU

Anoeska Buijze

1. INTRODUCTION

Transparency is an important tool for controlling the exercise of executive power, both because transparent rules clarify what an agency can and cannot do, and because it is a precondition for many other controlling mechanisms to work. In Section 2, I will first discuss the concept, which, due to its many different uses, can seem a little obscure. In Section 3, I will discuss the role of transparency in controlling the exercise of executive power. It will be shown that transparency is especially important when exercising some public functions, such as rule-making, and that different kinds of transparency obligations are appropriate to control the exercise of different kinds of powers. This means that the transparency obligations that should be in place to enable proper control will differ between agencies with different functions and tasks. In Section 4, I will zoom in on the multi-jurisdictional setting of the EU. Agencies operate in a complex setting, often forming a bridge between EU and Member State authorities. This causes additional challenges for transparency. Finally, in Section 5, I will conclude with a summary of the potential and limits of transparency as a tool for controlling the exercise of power by EU agencies.

2. CONCEPT OF TRANSPARENCY

There is a vast amount of literature on transparency, and the concept is defined in many different ways.[1] Although, occasionally, transparency is defined so broadly that it becomes identical to other notions such as accountability and good governance, in most cases definitions include at least the *core* of transparency: it is always about the availability, accessibility and comprehensibility of information, although it may not be clear what information is being talked

[1] For a discussion, see Anoeska Buijze, *The Principle of Transparency in EU Law* (Utrecht University 2013, dissertation).

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about, or what the source of the information is, or who the recipient is, or even who the sender is.

That lack of clarity need not be of too great a concern for this project. Indeed, it is in the legalization of the concept that it takes on concrete shape and form, especially in EU law. Here can be witnessed the development of a principle of transparency, which entails several concrete obligations to communicate information. Although at first sight these obligations differ so much as to muddy the waters even further, when they are examined more closely, there is a clear logic to them. To discover this logic, it is necessary to zoom in on concrete cases where EU law requires that transparency is practised. There, it can be seen that all transparency obligations take on the same form: there is an actor X that must communicate certain information I to a recipient Y, at moment t, complying with quality standard Q, either actively or passively, subject to a number of exceptions E.[2] The content of the variables is determined to optimize the underlying goal of the transparency obligation. Hence, the most important question becomes: why is transparency required in this situation? If that is known, the shape of the transparency obligation can be determined. There is one caveat: transparency is a legal principle and is therefore not absolute. Thus, there can be competing values that affect the variables as well. An example may clarify this. Transparency is required for EU citizens to effectively exercise their right to challenge an administrative decision adversely affecting them. To facilitate this right, the public body (X) taking the decision must communicate the content of the decision and the reasons for it (I) to its addressee (Y), once the decision has been taken (t), so that the reasons for the decision are clear and the addressee can determine whether he has a chance to successfully challenge the decision (Q). The public authority must make this information public of its own accord since it is well positioned to determine which information is relevant for this purpose. Exceptions (E) to this obligation can be made if communicating the information is, for example, a danger to public safety or the rights of others.

To summarize, EU law requires transparency to the extent that it is necessary to realize a legal value, such as respecting the rights of defence or ensuring a level playing field for economic operators. What all this shows is that defining the meaning of transparency is not necessarily a problem. Rather, it is about acknowledging that transparency is a clear, but very broad, concept that will have different effects depending on how it is operationalized. Thus, asking for more transparency is meaningless, as is demanding transparency because it is necessary to control the exercise of executive power. One must define what kind of transparency is required.

[2] Anoeska Buijze, 'The Six Faces of Transparency' (2013) 9 *Utrecht L. Rev.* 3.

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3. CONTROLLING THE EXERCISE OF EXECUTIVE POWER

3.1 The Rule of Law, Transparency and the Control of Executive Power

Chapter 1 shows the importance of controlling the exercise of executive power to protect the rule of law. There are two aspects of transparency that play a pivotal role in facilitating this control. The first aspect concerns transparency as a means to ensure legal certainty, requiring the existence and accessibility of clear rules that guide decision-making.[3] Such rules limit what public authorities may do and, as such, they provide an instrument for *ex ante* control.[4] The importance of not just having rules, but having rules that are clear and comprehensible, is evident. Unclear rules leave room for interpretation on what authorities may do. It becomes harder to monitor whether authorities are acting within the boundaries of their mandate, and both public authorities and those affected by their decisions may need to resort to court procedures to clarify the range of the authorities' powers. Because of this, effective judicial protection becomes more important when transparent rules about competences are lacking. The reverse does not hold true to the same extent. Although clear rules reduce the need to go to court, when public authorities' mandates are clear, the courts still play a part in ensuring that authorities stay within their mandate.

Although transparent rules regulating agencies' powers constitute an important *ex ante* control over their behaviour, Kleizen and Verhoest show that there are limitations to this approach.[5] The paper reality of regulations and delegated powers may not correspond to what happens in practice. Agencies may have either more or less autonomy than their founding acts suggest. The chapters on EASO and ESMA, the latter to the extent that it covers informal mechanisms of enforcement, show that a lack of delegated powers does not necessarily prevent an agency from using those tools which it deems necessary to fulfil its function.[6] One could read this as a caution against drafting rules that are so precise as to become restrictive. A certain amount of manoeuvring space seems necessary, and too strong an emphasis on transparent rules as a means of *ex ante* control may result in a situation where transparency is lacking. Another

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[3] See Christopher Hood, 'Transparency in Historical Perspective' in Christopher Hood and David Heald (eds), *Transparency: the Key to Better Government?* (Oxford University Press 2006), 5, 14.

[4] See Chapter 1.

[5] See Chapter 3.

[6] Chapters 10 and 15.

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example of this mechanism will be encountered in Section 3.2.1 on the classification of sensitive documents under Regulation 1049/2001.

The second aspect of transparency concerns the accessibility of information about public authorities' actions, both about the content of those actions and the reasons for them. Together with the first aspect discussed above, this ensures that it is possible to monitor whether public authorities comply with the rules applicable to them. In their contribution on accountability, Brandsma and Moser show that, within the EU administration, there are multiple accountability fora, although there is a special relationship between an agency and the institution that founded it.[7] Transparency must be targeted, at the very least, at the relevant accountability fora, and one would expect strong transparency obligations towards the Commission, for Commission agencies, and towards the Council and the Member States, for Council agencies. Without access to relevant information, accountability fora will not be able to judge the behaviour of an actor, nor will they be able to assess whether sanctions are warranted.[8] However, some views on accountability may require transparency for a wider range of actors. Bovens argues that accountability is not only a value in its own right, but an instrument to promote the legitimacy of the EU institutions.[9] As such, accountability requires a transparent environment. If one subscribes to this instrumental reading of accountability as a tool to increase the legitimacy of, in this case, EU agencies, transparency must be practised towards the public in general, not just towards the accountability forum.[10] This reading is supported by the EU's transparency regime, which aims to guarantee that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen.[11]

Some definitions of the rule of law include the right to challenge decisions before independent and impartial courts. This implies that transparency about a decision must be practised towards everyone who has the right to challenge it, as well as towards the courts. Here, transparency is encountered in its aspects of the right to be notified of decisions, the duty to give reasons, and the right

[7] Chapter 4.

[8] Luc Verhey, Monica Claes and Hansko Broeksteeg, 'Political Accountability in the European Union: Conceptual Analysis and Future Prospects' in Luc Verhey, Hansko Broeksteeg and Ilse van den Driessche (eds), *Political Accountability in Europe: Which Way Forward?: A Traditional Concept of Parliamentary Democracy in an EU Context* (Europa Law Publishing 2008), 316.

[9] Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) *European Law Journal* 13(4), 447, 464.

[10] Miroslava Scholten, *The Political Accountability of EU and US Independent Regulatory Agencies* (Martinus Nijhoff Publishers 2014), 38.

[11] Recital 2 of Regulation 1049/2001.

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to access the file.[12] To ensure effective judicial protection,[13] in itself a form of accountability, transparency is a necessary requirement, both towards those who have the right to challenge a decision before the courts, and to the courts themselves. Again, transparency is an important tool, but it does not in itself guarantee effective judicial control. What is more, Craig's contribution on judicial deference shows the inherent impossibility of administrative decisions being fully transparent to the courts, which, even when having access to all the information on which the executive based its decision, do not have the time or the tools to achieve the same level of understanding.[14]

Regarding liability, both aspects of transparency are important. First, if the threat of liability is to prevent wrongdoing, as de Jong argues in Chapter 7 of this volume, it must be clear to the administration what behaviours can trigger liability. Second, if parties affected by such wrongdoing are to hold the EU administration liable, they must have access to information about the action affecting them. They must be aware of whether and how they can hold the EU liable for such actions. Lastly, the courts must have access to the information needed to rule on liability cases as well.

Transparency facilitates not only *ex post* control, but also a second form of *ex ante* control. EU citizens or other third parties can influence the content of decisions before they are made. One example of this is the principle of respect for the right of defence, which gives everyone the right to be heard *before* an adverse decision affecting him or her is taken. This right is enshrined in Article 41 of the Charter of Fundamental Rights of the EU. Such a hearing can improve the quality of administrative decisions and can help mistakes to be avoided at an early stage. To exercise this right effectively, the affected party must be given access to the file: it is difficult to affect the contents of a decision when one does not know the reasons for it. Similar *ex ante* controls over decision-making can be seen where, for instance, a public consultation about proposed legislative measures takes place.

Some authors consider such *ex ante* controls essential to the rule of law. Curtin et al. argue that openness and participation are required based on the Treaty.[15] Because facilitating participation is a legal requirement, compliance with the rule of law requires transparency towards EU citizens at an early enough stage to facilitate participation.

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[12] Buijze (note 2 above), 4.
[13] See Chapter 5.
[14] Chapter 6.
[15] Deirdre Curtin, Herwig Hofmann and Joana Mendes, 'Constitutionalising EU Executive Rule□Making Procedures: A Research Agenda' (2013) 19 *ELJ*, 17–18.

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3.2 Operationalization of the Concept in Law and Practice

As argued above, transparency becomes concrete when one looks at the actual obligations contained in EU law. These can be found in the Treaties and the Charter as well as in secondary legislation and case law. For this project, the founding regulations of agencies are also relevant.

3.2.1 Public access to information

Article 15(3) Treaty on the Functioning of the European Union (TFEU) and Article 42 of the Charter give a right to access documents held by the EU institutions. This right is elaborated upon in Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents. The Regulation aims to allow citizens to participate more closely in the decision-making process, and guarantees, allegedly, that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.[16]

Regulation 1049/2001 does not apply to agencies directly. However, its application is extended to agencies in their founding regulations. Individual agencies then adopt internal rules to ensure its implementation. This means there are variations in the interpretation of the rules between agencies. An example is the duty to actively make information available to the general public. Regulation 1049/2001 contains few rules on which documents are to be made available. Some agencies practise great transparency towards the general public. In this volume, EFSA stands out as an example.[17] On the other hand, there is the SRB, which feels that the sensitive nature of its task justifies a rather large measure of opacity. As will be seen below, this difference between agencies in the active provision of information may well be justified by their different functions and is in itself no reason for concern. Indeed, when agencies make information available of their own accord, they are obliged to take the grounds of refusal in Article 4 Regulation 1049/2001 into account. If, for example, disclosure of a document threatens public security, or the financial, monetary or economic policy of the Community or a Member State, an agency cannot make that document public through its register.

Another area where differences between agencies can occur is the classification of sensitive documents. Regulation 1049/2001 contains a special regime for sensitive documents but does not determine which documents should be classified as such. Instead, each institution must draft its own rules on how

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[16] Recital 2.

[17] See Ellen Vos, 'Reforming the European Commission: What Role to Play for EU Agencies?' (2005) 37 *CMLR* 5, 1113, 1126, for other positive examples.

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documents are classified, which must then be made public. Galloway points out that the lack of general rules in this regard is not a policy choice, but the result of a lack of competence to adopt generally binding rules in this area.[18] In the absence of binding rules, the Council has resorted to alternative means to ensure the coherence of the system of classification,[19] including the building of a network of security professionals where peer pressure leads to equivalent practices within different institutions.[20] Nevertheless, the lack of uniform rules regarding classified information has been criticized severely. Curtin and Leino-Sandberg argue that it leads to an unnecessary amount of secrecy amongst EU institutions.[21] Other authors argue that because classifying a document is a cumbersome process, the risk of over-classification is quite small.[22]

Classification as such is not necessarily problematic. Internal rules restricting access to sensitive information can safeguard the public interest and may help ensure that the Member States are willing to trust the EU with sensitive information.[23] However, the fact there are no universal rules on classifying documents leads to a lack of transparency on how this process takes place and, as a consequence, it is more difficult to assess whether the system is being abused. What is encountered here is another instance of the problem defined in Section 3.1. The EU institutions are bound by rules limiting their competences. In theory, this leads to transparency about what they can and cannot do. In practice, the need to protect sensitive documents and the fact that there is clearly no competence to adopt generally binding rules on this subject leads to a lack of transparency and to problems in controlling EU agencies.

An additional issue with agency-specific rules about access to information is revealed in Chapter 16 on the SRB, where Timmermans and Chamon discuss the ruling of the Appeal Panel in Case 43/17. This case centres on Article 90 of Regulation 806/2014 (the SRMR), entitled ‘access to documents’. Article 90(1) SRMR declares that Regulation 1049/2001 is applicable to documents held by the SRB. Decisions to allow or refuse access can be challenged before the Appeal Panel. After the internal appeal procedure, one can start proceedings before the Court of Justice of the EU. Article 90(4) contains a more

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[18] D. Galloway, ‘Classifying Secrets in the EU’ (2014) 52 *JCMS* 3, 668, 675.

[19] ‘Policy on Creating EU Classified Information’, Council document 10872/11, 30 May 2011.

[20] Galloway (note 18 above), 677.

[21] Deirdre Curtin and Päivi Leino-Sandberg, ‘Openness, Transparency and the Right of Access to Documents in the EU. In-Depth Analysis’ (2016) *Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS* 63.

[22] B. Driessen, ‘The Council of the European Union and Access to Documents’ (2005) 30 *ELR*, 5, 675, 693. See also Galloway (note 18 above), 674.

[23] Galloway (note 18 above), 670.

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specific right, for persons who are the subject of the SRB's decisions. They are entitled to have access to the SRB's file but, importantly, this right does not extend to confidential information or internal preparatory documents of the SRB. In essence, Article 90(4) contains the right of access to the file, which is not part of Regulation 1049/2001. This leads to a challenging situation for the Appeal Panel which, in recital 27, holds that 'Regulation 1049/2001 and the Public Access Decision must be interpreted taking into account also the special limitations set out in Article 90(4) SRMR in such a manner that they do not make each other devoid of purpose'. Thus, Regulation 1049/2001 and the Public Access Decision cannot grant access to documents for which access is expressly excluded by Article 90(4) SRMR. So, although the Appeal Panel insists that the internal rules adopted based on Article 90(2) SRMR cannot add exceptions to Regulation 1049/2001,[24] the SRMR itself can. Article 90(4) seems to create an absolute exception for internal documents which is at odds with the text of Regulation 1049/2001: access to a document drawn up by an institution for internal use must be refused if (1) disclosure of the document would seriously undermine the institution's decision-making process, unless (2) there is an overriding public interest in disclosure. Although one can argue that, in the case of the SRB, the release of such documents always poses a serious risk to the institution's decision-making process, even in that case, Regulation 1049/2001 still demands that there is a balancing of interests where an overriding public interest in disclosure can necessitate the publication of the document even if there is a risk to the decision-making process.

3.2.2 Individualized access to information

It is important to note that supplying information to the general public based on Regulation 1049/2001 is not sufficient to comply with the rule of law which, as has been seen, requires at a minimum the existence and publication of clear rules that public authorities must abide by, and transparency about public authorities' actions. These obligations are enshrined in EU law as well but they are scattered throughout secondary legislation or are derived from written or unwritten principles of EU law.

Vesterdorf argued, at the very first stages of the development of the principle of transparency in EU law, that it comprised access to information as well as the right to a statement of reasons for a decision, the right to be heard before a decision is taken, and a party's right of access to the file.[25] These procedural rights ensure that parties can exercise their rights vis-à-vis the administration,

[24] Recital 26 of Case 43/17.

[25] B. Vesterdorf, 'Transparency, Not Just a Vogue Word' (1998) 22 *Fordham Int'l LJ.* 3, 902, 903.

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can influence decision-making procedures that will impact them, and can rely on judicial accountability mechanisms where needed. Prechal and De Leeuw argue that transparency is a necessary element of legal certainty, which requires *ex ante* controls demarcating the competences of agencies, sound administration and equality.[26]

3.3 Agencies, Transparency and Agency Functions

Agencies have some peculiarities when it comes to transparency. In some respects, they function as ordinary parts of the administration. Agencies fall under the jurisdiction of the CJEU and their decisions can be reviewed for legality.[27] They are subject to the principle of transparency and must respect the constitutional right of citizens to pose questions and receive answers in their own language.[28] They must maintain an open, efficient and independent administration.[29]

Vos argues that decentralizing government to independent agencies can contribute to greater transparency because a clearly identifiable task is carried out by a clearly identifiable agency.[30] For this effect to occur, transparency is a precondition. This is the legal requirement found in the *Meroni* judgment:[31] only clearly defined executive powers can be delegated, and the Commission must supervise the exercise of such powers. Complying with the *Meroni* judgment requires transparency of agencies towards the Commission, as well as transparency about what powers are delegated to agencies. As discussed in Section 3.1 there are limits to this approach, and Part II of this volume shows that in practice the Meroni doctrine is hard to work with as the practicalities of administrating the EU seem to demand a rather large degree of discretionary freedom for the agencies.[32]

Next, the need for transparency can differ between agencies. EU agencies show large differences in terms of the powers attributed to them, their functions and the reason why their tasks were delegated to them. These aspects impact the transparency obligations to which one would expect them to be

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[26] A. Prechal and M. De Leeuw, 'Dimensions of Transparency: the Building Blocks of a New Legal Principle' (2007) 0 *REAL* 1, 51.

[27] Ellen Vos and Michelle Everson, 'European Agencies: What about the Institutional Balance?' (2014) *Maastricht Faculty of Law Working Paper* 4, 15.

[28] Ibid.

[29] Ibid.

[30] Vos (note 17 above), 1119.

[31] Case 9/56 *Meroni* [1958] ECR *Ciarán Toland v European Parliament* [2011] ECR 133.

[32] Marta Simoncini, *Administrative Regulation Beyond the Non-Delegation Doctrine – A Study on EU Agencies* (Hart Publishing 2018).

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subject. I will first discuss the impact of the reason for agency creation and then continue to discuss which functions warrant what kind of transparency obligations.

3.3.1 Increasing administrative capacity

Many agencies are created to reduce the increasing workload of the Commission, allowing it to focus on its core tasks. They expand the capacity of the administration, and function as an agent for the Commission, which functions as their principal.[33] One would expect such agencies to be transparent to the Commission, with the Commission having full access to all that is going on in these agencies, if it so desires. It fits with this relationship that the Commission can exercise *ex ante* control over decision-making within these agencies, so transparency should not be limited to *ex post* reporting obligations, but should include *ex ante* access to agendas, preparatory files, etc. In theory, these agencies have a less politicized role than the Commission. This implies that democratic influence on the decision-making process is not as essential and that transparency obligations that facilitate this are not necessary. However, to allow the public to ascertain that the Commission–Agency tandem is functioning well, *ex post* transparency is essential. Hence, one would expect strong transparency obligations towards the Commission, and less so to other institutions. *Ex ante* transparency towards the general public can be somewhat limited, reflected in the internal decision-making exception in Regulation 1049/2001, whereas *ex post* transparency should be firmly in place.

There are, however, more political reasons for establishing Commission agencies as well, with the Member States resisting the exercise of power by the Commission.[34] Agencies are created as a compromise between a function being performed by the Commission and it being performed by the Member States themselves. For these agencies, one would expect the importance of transparency to the Commission to be reduced, and hence also the Commission's ability to affect decision-making within the agency. Ideally, this is countered by additional transparency obligations towards other institutions, in particular the Member States.

3.3.2 Independence as a reason for creating an agency

Another reason to create an agency is to increase the credibility of EU policy by placing it at arm's length from the day-to-day political decision-making.[35]

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[33] Chapter 4.

[34] See, e.g., Madalina Busuioc, *European Agencies: Law and Practices of Accountability* (OUP 2013), 20–21.

[35] G. Majone, 'The Credibility Crisis of Community Regulation' (2000) 38 *J. Com. Mar. St.*, 2, 273.

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If the agency is free from outside pressure to take a specific decision, the desire to protect it from political influences is in itself not an argument against transparency. However, even when there are no formal instruments to exercise control, in practice the Commission may still be quite capable of affecting the workings of an agency.[36] *Ex ante* transparency may facilitate the use of these informal means of exercising control, and hence a reduced level of transparency may be necessary to safeguard the independence of an agency.

This argument does not apply to *ex post transparency*, which will allow outsiders to assess whether or not an agency has acted within its mandate. Indeed, *ex post* transparency will be especially important for this type of agency because its independence and relatively secretive decision-making processes run the risk of sowing distrust. With this type of agency, one would expect to see few transparency obligations towards the principal, and a rather heavy reliance on the internal decision-making exception in Regulation 1049/2001. Indeed, for the SRB, this exception has turned into a de facto absolute ground to refuse access to documents. However, it is a lack of *ex post* transparency that would pose a real problem in controlling this type of agency.

3.3.3 Promoting participation

Another reason to create an agency may be a desire to involve a wider range of actors in the decision-making process.[37] To facilitate this, agencies will have to practise transparency to the stakeholders that are to be involved in decision-making. It has been noted elsewhere that stakeholder participation can have a negative impact on the perceived legitimacy of decision-making: stakeholders are not subject to the same controls and standards as the agencies themselves, and their impact on the decision-making process may lead the general public to question the contents of decisions.[38] Hence, transparency to stakeholders should be accompanied by transparency to the general public about how decisions are made, and who has had what influence during the decision-making process.[39]

In addition to the reasons for its creation, an agency's tasks also affect what transparency obligations should be in place. Transparency towards the general public is especially important for those agencies involved in rule-making processes, whereas enforcement-type agencies should have strong transparency obligations towards the parties affected by their decisions. Agencies with

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[36] Chapter 3.

[37] Busuioc (note 34 above), 19.

[38] J. Greenwood, 'Organized Civil Society and Democratic Legitimacy in the European Union' (2007) 37 *Brit. J. Pol. Sci.* 2, 333.

[39] This mechanism is illustrated in Chapter 11 on EFSA, although EFSA does its best to prevent this.

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a coordinating or cooperation-providing role face their own challenges, which are strongly intertwined with the nature of the EU as a multi-jurisdictional legal order.

3.3.4 Rule-making

I must start by observing that rule-making is traditionally not practised by the administration, but by the legislature. When this changes, the notion of rule-based government loses relevance and other modes of control must be found. Improving democratic control through openness, participation and transparency is one method of achieving this control. If this method is to be implemented, the traditional rule of law transparency about applicable rules and administrative actions, aimed at facilitating *ex post* control of whether the administration acts in accordance with the rules, is insufficient. Instead, transparency must be practised *at an earlier stage, to a wider range of actors* to facilitate *ex ante* democratic control of administrative rule-making.[40] The importance of transparent rule-making is reflected in the case law of the courts[41] as well as in the literature. Such transparency must be offered to the general public and includes the requirement that the general public has access to the information that legislative decisions are based on, and to information about who contributed what to the legislative process.

Many agencies have no rule-making authority themselves but instead adopt non-binding instruments. The non-binding nature does not provide an argument against the applicability of the same transparency obligations that pertain to law-making where, in practice, these non-binding instruments have the value of law.[42]

Although at first sight agencies that merely provide the Commission with information or advice do not seem to face the same problems, a closer look reveals similar problems. Mustert concludes that EASA's influence on the legislative process is 'not problematic, because the EU aviation safety rules are adopted through the EU legislative machinery'.[43] However, the factual impact of agencies' advice can be large, and providing scientific advice is not a policy-neutral activity.[44] Nevertheless, an agency with specific technical expertise may see its advice adopted without much discussion as the Commission and other EU institutions lack the expertise to challenge its findings. Judicial review at a later stage may not bring relief. The CJEU accepts

40 Curtin, Hofmann and Mendes (note 15 above), 17–18.
41 E.g. Case T-471/08 *Ciarán Toland v European Parliament* [2011] ECR II-02717; Joined Cases C-39/05 P and C-52/05 P *Turco* [2008] ECR I-4723.
42 See Chapter 14 on EASA with regard to technical standards.
43 Ibid.
44 Vos (note 17 above), 1120.

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agencies' technical assessments and performs only a marginal review.[45] The Court, like the Commission, lacks the expertise to judge the scientific merits of the advice or to recognize the normative choices implicit in it. Again, one could argue the solution to this lack of control is to provide transparency to a wider range of actors.

EFSA seems to be very aware of this issue, practising great transparency towards the general public to ensure the public of the agency's independence and impartiality. Yet, the case study also shows the limitations of this approach. For a layman, all the information in the world may not be enough to convince him that a UN report that supports his convictions is insufficient to set aside EFSA's conclusions. This problem is exacerbated when parties with an interest in a particular outcome contest the knowledge base of a decision. Although transparency towards the general public can be an important tool to ensure control of agencies that have specific technical expertise, it is not a guaranteed method to ensure their legitimacy.

3.3.5 Enforcement and supervision

Enforcement and supervision are more traditional administrative tasks and should pose less of a problem in terms of control. Individual decisions are usually not subject to direct democratic control, and political accountability fora will usually have little interest in the day-to-day enforcement and supervision. Control is exercised through rules describing the supervision and enforcement powers residing with an agency as well as the procedures they must follow. *Ex post*, control is exercised through judicial review, instigated by the addressee of a decision. Thus, transparency should primarily be aimed at those affected by a decision. Despite this rather simple observation, in practice this appears to be problematic. Van Rijsbergen and Simoncini conclude that, for ESMA, the procedural guarantees for those subjected to enforcement decisions are underdeveloped. Timmermans and Chamon describe how parties involved with the SRB rely on Regulation 1049/2001 to acquire the documents which they need to exercise their right to effective judicial protection because, although the SRMR provides a right of access to the file in Article 90(4), the Appeal Panel is not competent to rule on that.

The exercise of this function is complicated by the multi-jurisdictional nature of the EU legal order, which presents additional problems in terms of transparency. This will be discussed in Section 4 below.

[45] See Chapters 14 and 15.

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3.3.6 Coordination and cooperation

The EU legal order has another type of agency that functions as a bridge between different authorities in the complex, multi-jurisdictional order that is the EU. These agencies promote cooperation between Member State authorities, advise on the interpretation of EU law, or coordinate action. Vos argues that such agencies can encourage the uniform interpretation and implementation of EU law, increasing transparency, because in doing so they promote the clarity and comprehensibility of law.[46]

Hatzopoulos, on the other hand, cautions against coordination as an administrative strategy. His objections, although raised in the context of the open method of coordination, are relevant to agencies and the networks in which they cooperate as well. Hatzopoulos points out that (soft) rule-making by such networks is at risk of capture by the regulated parties. Rule-making can be outsourced, he fears, to the private sector. In addition, the outcome of coordination processes in networks of agencies is not subject to control by the Court of Justice.[47] Again, one sees a lack of traditional controls which, combined with a lack of transparency towards the general public, raises questions about the compatibility of coordinating agencies with the rule of law. Again, implementing additional means of control may require more transparency, in particular towards the general public.

4. EUROPEANIZATION AND TRANSPARENCY

The impact of Europeanization on the concept of transparency has been immense. Isolated transparency obligations are part and parcel of national laws. However, in the EU one sees the emergence of a principle of transparency that allows a pattern to be discerned in these obligations. At the same time, the nature of the EU legal order poses some problems for transparency.

4.1 The EU Administration

Within the EU legal order, one is dealing with a composite administration, where the relationships between Member State authorities and the EU institutions can get complicated. Prechal and Widdershoven note that in composite or mixed administrative procedures, it is difficult to determine where responsibility for decisions lies. The institutional complexity and fragmentation which the authors outline can lead to a loss of transparency and

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[46] Vos (note 17 above), 1119.

[47] Vassilis Hatzopoulos, 'Why the Open Method of Coordination Is Bad For You: A Letter to the EU' (2007) 13 *ELJ* 3, 309, 326.

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accountability as it becomes unclear which institution is to be held accountable for a specific issue.[48] Their description of the problems resulting from shared decision-making suggests that, to ensure effective judicial protection, transparency towards an interested party about how to challenge a decision is paramount, as is transparency about which institution is responsible for what part of the decision-making process.

4.2 Jurisdictional Issues

The nature of the European legal order results in the situation where information will often reside with several different public authorities, which may be subject to different access-to-information regimes. This situation occurs in two basic forms.

First, documents originating from the Member States may reside with the EU institutions. This means that the documents fall under the scope of Regulation 1049/2001. Article 4(5) provides that, in this case, a Member State may request the institution not to disclose the document originating from the Member State without its prior agreement. More generally, Article 4(4) provides that the institutions will consult a third party about the applicability of exceptions before they disclose a document. This does not mean that the Member States can veto disclosure, but that the EU institutions must take their objections into account when deciding upon a request.[49]

Second, documents originating from EU institutions may reside with Member State authorities. This means that they may fall under the scope of national freedom of information legislation. Article 5 provides that, in this case, the Member State must consult with the institution concerned in order to take a decision that does not jeopardize the attainment of the objectives of the Regulation, unless it is clear that the document must or must not be disclosed. Alternatively, the Member State may refer the request to the institution.

National and EU access-to-information legislation has thus become intertwined. Some Member States took this as an opportunity to become less open. Poland interpreted Regulation 1049/2001 to mean that it could refuse access to documents related to EU issues even if its national legislation did not allow for a refusal, and even if those documents did not originate with the EU

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[48] A risk previously noted by Vos (note 17 above), 1120.

[49] Case C-64/05 P *IFAW* [2007] ECR I-11389; see also A.P.W. Duijkersloot, 'European Restrictions on the Application of National Provisions Concerning Access to Documents in Cases With a European Dimension' (2010) *Review of European Administrative Law* 3(1), 113–127; A.P.W. Duijkersloot, 'Public Access to Documents in the European Composite Administration' in O. Jansen and B. Schöndorf-Haubold (eds), *The European Composite Administration* (Intersentia 2011).

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institutions, but merely resided with them. The CJEU recently ruled that this interpretation was incorrect,[50] but it shows the danger that the least favourable regime can be applied in cases where there is an EU dimension. On the other hand, there is Sweden, where journalists were worried that the accession to the EU would lead to a reduced level of transparency. They requested access to a set of documents relating to Europol, both based on the Swedish Freedom of Information Act and on Regulation 1049/2001. They received all but two documents from the Swedish government, but the Council refused access to most of the documents. In the ensuing case before the Court of First Instance, the Council accused Sweden of violating EU law because it had not consulted on the disclosure of the documents.[51] Of course, based on Regulation 1049/2001, such consultation is not needed if it is clear that the documents should be disclosed.

Since agencies have their own rules implementing Regulation 1049/2001, and their founding acts may contain additional articles on access to information, the possibilities for even more complex jurisdictional issues between the agencies and Member State authorities are very real.

4.3 Language Issues

With regard to transparency, the EU faces a problem that many Member States simply do not. To ensure that information is understandable to its recipient, it must be communicated in a language he knows. EU law regulates this issue in Article 20(2)d TFEU, but there have been problems for agencies in particular, which must balance the need for efficiency with the need to communicate in the official languages of the EU.[52] Article 20 allows exceptions to the right to address EU institutions in one's own language and to receive a reply in that same language. However, depending on the function of the agency, limiting the number of working languages may be at odds with its function. This is especially true for information-providing agencies, whose very task it is to provide recipients with information which they can process,[53] and to a lesser extent for those agencies taking decisions that affect EU citizens, because the effective exercise of their rights vis-à-vis the agency depends on their ability to understand the information communicated to them. If one accepts the line of reasoning that traditional controls do not suffice in the EU context, and that

[50] Case T-264/15 *Gameart v Commission* [2017] OJ C 195 19.06.2017, p. 18.
[51] Case T-174/95 *Svenska Journalistforbundet v Council* [1998] ECR II-2293.
[52] Vos (note 17 above), 1128.
[53] Ibid.

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transparency towards citizens is required to remedy that, the problem becomes even more salient.

5. POSSIBILITIES AND LIMITS OF TRANSPARENCY

We have seen that transparency plays an important role in controlling the exercise of executive power. Rules must be transparent: their existence must be known, their content clear and their application foreseeable. The tasks carried out by the agency should be clearly defined in advance, its competences clearly demarcated. Indeed, this is the legal requirement found in the *Meroni* judgment: only clearly defined executive powers can be delegated. The Commission must supervise the exercise of such powers. Complying with the *Meroni* judgment requires transparency of agencies towards the Commission, as well as transparency about what powers are delegated to agencies.

However, there are limits to this doctrine. First, the Meroni doctrine suggests that rule-making power cannot be delegated to agencies, and that agencies cannot take autonomous decisions. In practice, this leads to procedures where agencies draw up draft rules that are subsequently rubber-stamped by the Commission, which lacks the expertise and the administrative capacity to perform any real review of the agency's input. Timmermans and Chamon go so far as to conclude that the de facto rule-making power resides with the SRB, and the Commission and the Council are merely the de jure actors. Here, rather than leading to a transparent allocation of competences, complying with the Meroni doctrine worsens the lack of transparency that is inherent in a complex administration such as the EU.

Second, agencies may exercise power even when this is not formally delegated to them. Agencies may take up tasks that were never attributed or delegated to them, as EASO did. They may use informal instruments where this is better suited to the institutional context in which they must operate, as ESMA does. Thus, a too restrictive description of agency powers may be too limiting in practice. It may lead to less transparency and the exercise of power becoming uncontrollable. From a practical perspective, it may be better not to be too restrictive when delegating power to agencies, but rather to give clear guidelines about what conditions the exercise of power must meet, in terms of procedural safeguards and clear descriptions of agencies' tasks and functions, so that when agencies use informal tools, it can be established whether they are using them in line with their mandate and respecting procedural safeguards.

Ex ante control of administrative power through rule-based administration may therefore be insufficient. It has been seen, though, that transparency facilitates an alternative way to exercise *ex ante* control, where other actors can see what is going on within an agency and can try to influence the decision-making

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process. Where agencies necessarily have broad discretionary powers, have rule-making powers or have a substantial impact on the rule-making process, this type of transparency is needed to safeguard the democratic nature of decision-making which the Treaties require.

Transparency is essential for *ex post* control as well. It is a precondition for all forms of accountability, including political and administrative accountability, judicial accountability, and liability. Accountability mechanisms function best in a transparent environment, which means that transparency should not be exclusively aimed at the accountability forum. Nevertheless, the transparency obligations that should be in place are tightly linked to the specific accountability mechanisms that are in place: agencies that function as an extension of the Commission should be transparent towards the Commission, agencies that take decisions that affect individuals should be transparent towards the affected individuals and agencies that aim to promote the involvement of stakeholders in decision-making should be transparent towards those stakeholders.

From Part II of the volume it is clear that ensuring transparency from agencies towards individuals affected by their decisions is a bit of a struggle. That is problematic, because for those types of decisions political and administrative accountability are typically weak. Neither the Commission nor the Council nor the European Parliament typically monitors the content of individual decisions. Judicial accountability is the primary mechanism of control and for this to function individuals need to be well informed.

Although transparency can make a large positive contribution to controlling the exercise of power by EU agencies, it is not a one-size-fits-all solution. Transparency may pose risks to other values, such as security, privacy or commercial interests. These other values inspire the grounds for exception in Regulation 1049/2001 and impose limits on other transparency obligations as well. Indeed, the need for secrecy may seriously hamper transparency as a facilitator of public control, much to the chagrin of authors like Curtin, who value transparency because of that very function. For certain agencies, the field in which they operate may mean that they rely more heavily on these exceptions, and this fact may be reflected in their founding regulations. However, where administrative and political accountability are weak, as is the case for independent agencies such as the SRB, such a lack of transparency makes controlling these agencies difficult. Here, one sees a reliance on alternatives such as professional ethics and peer pressure to ensure that agencies stay within their mandate.[54] However, these alternative mechanisms can make agencies vulnerable to legitimacy and trust issues. Therefore, it is important to

[54] Buijze (note 2 above), p. 61, citing Susan S. Shapiro, 'Agency Theory' (2005) 31 *Annual Review of Sociology*, 263, 272, 276, 277.

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allow *ex post* transparency as soon as the threat to a protected interest expires, and to ensure that information that does not pose a threat to protected interests is released. Thus, blanket exceptions to access to information rules for those agencies dealing with sensitive issues are hard to justify.

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