

Cracking AI Secrecy Migration Law & Governance and Beyond

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Nexa Center Lunch Seminar
28 May 2025



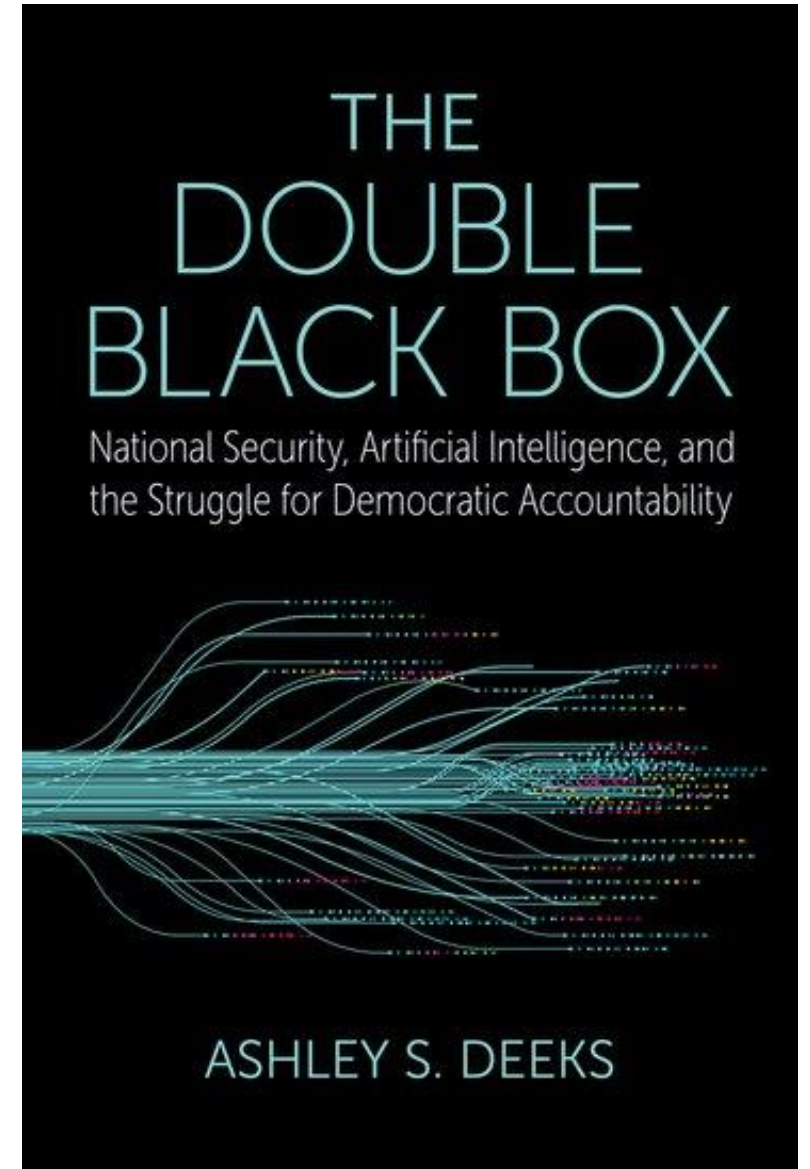


Our presentation: a roadmap

1. The problem
2. Why EU migration governance?
3. (Re-)conceptualising AI secrecy
 - Political secrecy
 - Private secrecy
4. Ways out of the enclosures
 - Towards 'democratic secrecy'?

The problem: Why AI secrecy matters

- AI systems are opaque (Pasquale 2015, Burrell 2016)
- **AI secrecy is a legal architecture that enables public and private actors to keep AI development and deployment under wraps / behind closed doors**
- High stakes: lack of accountability, oversight deficit, restricted reason giving



EU migration as a test case of AI secrecy

- European migration authorities (Frontex, eu-LISA) resort to privately developed AI systems
 - Interoperable databases (EES, SIS II, Eurodac, VIS, CRRS)
 - Drones
- The goal is to create high-tech borders
- AI architecture is **secret**: public actors (migration authorities) and private actors (contractors) rely upon various secrecy regimes to keep AI deployment and design secret



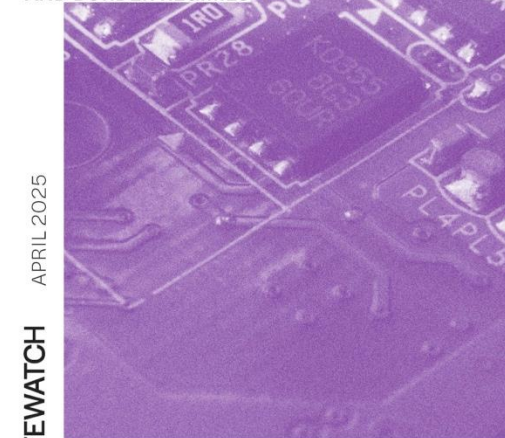
AI-driven ‘migration markets’

- **Entry-Exit System (EES)** was awarded to IBM Belgium BVBA, Atos Belgium NV and Leonardo S.p.a. consortium for 142 million euros
- **SIS II** and **Eurodac** have been respectively procured from Atos, Accenture and HP, and from Bull Atos Technologies, Sopra Steria and Gemalto
- Frontex and eu-LISA jointly commissioned a range of contractors (such as Leonardo and Unisys Belgium SA) under a sweeping **Transversal Engineering Framework** (‘TEF’) worth 181 million euros to design, support, maintain and test core business systems as well as interoperability components and infrastructure for new EU-wide systems
- The first lot of the TEF (allotted to Unisys Belgium NV/SA, Unisystems Luxembourg SARL and Wavestone SA) involves the study, development and implementation of AI techniques to infer patterns from travellers data stored in the **Central Repository for Reporting and Statistics** (‘**CRRS**’)
- Frontex concluded in late 2024 several contracts to supply commanded aerial devices (**drones**) for operations related to its tasks and mandate



AUTOMATING AUTHORITY

ARTIFICIAL INTELLIGENCE IN EUROPEAN POLICE AND BORDER REGIMES



APRIL 2025

STATEWATCH

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SUPPORTED BY:
European
Artificial Intelligence
& Society Fund

(Re-)conceptualising AI secrecy: A multilayered structure



Political secrecy

a public authority (migration authority) puts it in place

Public security exception to Access Regulation

ETIAS Regulation

AI Act (arts 111, 49, 78)



Private secrecy

a private actor (contractor) puts it in place

Trade Secret Directive

Contractual secrecy (in procurement)

Commercial interests exception to Access Regulation



Deep secrecy

existence of AI is unknown
(*unknown unknown*)

the public (citizens, researchers, NGOs) does not have the slightest idea that a public body or agency has been using an AI system that affects their position in some way of another



Shallow secrecy

AI development and use is known, workings are not (*known unknown*)

the public (citizens, researchers, NGOs) is aware of AI being developed and used, but doesn't know how it works or how it impacts them

Political secrecy

Both **deep** and **shallow** forms of secrecy.

Migration authorities can leverage a secrecy claim to avoid disclosing information about AI to the public (NGOs, researchers, citizens, TCNs).

Sources:

- **Public security exception in the Access Regulation (art 4(1))**
- **ETIAS Regulation (art 33(1))**
- **AI Act**
 - Art 2(3): material exclusion (AI systems used for military, defence and national security)
 - Art 111: delayed compliance (2030)
 - Art 49(4): non-public section of AI register
 - Art 78: obligation to respect confidentiality for ‘any other natural or legal person involved in the application of this Regulation’

How about the right to explanation of individual decision-making (art 86)?

Private secrecy

Mostly **shallow** form of secrecy (but it is deep when procurement contract is kept secret).

AI providers can self-allocate a secrecy claim over AI-related information.

Sources:

- **Trade secrecy** (Directive (EU) 2016/943)
 - Low threshold of protection requirements
 - Trade secret (over-)assertion
- **Contractual secrecy in procurement procedures** (factual secrecy, confidentiality clauses in contracts)
- **Commercial interests exception** in the Access Regulation

How about the transparency requirements in the **GDPR** (arts 15 and 22, see *SCHUFA* and *Dun & Bradstreet Austria* cases) and in the **AIA** (recital 27, art 13)?

- Courts push back on secrecy overclaiming (see *SCHUFA*)
- Limitations: NGOs excluded, access hard to enforce

Ways out of the enclosures

Some recommendations:

- Limiting AI secrecy 'to begin with'
- Empowering civil society in decision making forums like Frontex's
 - Consultative Forum
 - Frontex Industry Days
 - Transparency register
- Towards 'democratic secrecy'?

FRONTEX I-DAYS

**FRONTEX VIRTUAL INDUSTRY
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Thank you for your attention!

Questions?

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