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The Development of Frontex -In the Light of European Integration

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Summary

This thesis deals with the mapping of scholarship concerned with the development of Frontex. I argue that the scholarship is dispersed and entails several perspectives with different legal implications which contributes to a policy field and agency problematic to develop. By looking at *lex ferenda* proposals in the academic review of Frontex, I seek to highlight the complex settings and clarify the role of Frontex in the integration process within EU.

Three perspectives are used as an analytical tool representing three diverse systems or sub-contexts within the integration debate surrounding Frontex. The integration perspective, the democratic perspective and the human rights perspective demonstrate the complexity in the policy field that surrounds Frontex and affects the perceived and pursued role of Frontex. To reveal the complexity contributes with a greater understanding of the policy field and of Frontex. The perspectives also highlight the struggle of power and control over the border and migration policies and in particular over Frontex; a tug of war between an intergovernmental approach and a supranational approach. A tug of war, which explains why the agency is so difficult to develop and to reform as well as why the Frontex Regulation entails significant shortcomings.

The human rights and democratic perspectives call for an increased legal and democratic accountability which presuppose the involvement and reinforced role of the Parliament and the European Court of Justice and hence a more supranational control and power over Frontex. The integration perspective meets the reluctance of the Member States to transfer competences to the Union in its pursue of an efficient and uniform border management.

The result is an agency, not as integrated as a Union agency may imply but rather a continuation of the intergovernmental predecessors and a deadlock for comprehensive legislative measures. The conclusion is that the struggle between the member States and the EU institutions seems to permeate each *lex ferenda* proposal, hampers the emergence of a comprehensive and balanced legal framework for the integrated border management and delivers legislative measures with rather severe shortcomings regarding Frontex. This logjam will last until the EU institutions and the Member States have settled the question of power and control over Frontex or rather until the Member States allow the Union to exercise its competence and contribute with supranational solutions for Frontex within the field of shared competences regarding management of the external borders.

This would be in line with the subsidiarity principle since it has proven impossible to create a balanced, professional, efficient, legally and democratically accountable agency for management of operational cooperation in a more intergovernmental setting. It is needed a comprehensive supranational approach to achieve a truly integrated management of the external border of the EU.

Sammanfattning

Den här uppsatsen söker att kartlägga doktrin som behandlar utvecklingen av Frontex. Jag hävdar att litteraturen är brokig och innehåller flera perspektiv med olika juridiska implikationer som bidrar till ett policyområde och en gränsbevakningsbyrå som är problematisk att utveckla. Genom att studera lex ferenda förslag i den akademiska granskningen av Frontex, söker jag belysa den komplexa situationen samt klargöra Frontex roll i integrationsprocessen inom EU.

Metoden innebär att tre perspektiv används som analytiskt verktyg och representerar tre olika system eller under-kontexter inom integrationsdebatten kring Frontex. Integrationsperspektivet, demokrati-perspektivet och rättighetsperspektivet visar komplexiteten i det policy område som omger Frontex, påverkar hur dess roll uppfattas och vilken framtida roll som eftersträvas. Att synliggöra den komplexa omgivningen bidrar till en ökad förståelse för policy området och för Frontex. Perspektiven belyser även kampen om makt och kontroll över migrations- och gränspolicy och framförallt över Frontex, en dragkamp mellan ett mellanstatlig och ett överstatligt förhållningssätt. En dragkamp som förklarar varför gränsbevakningsbyrån är så svår att utveckla och reformera samt varför Frontex förordningen innehåller fundamentala brister.

Demokratiperspektivet och rättighetsperspektivet efterlyser ett stärkt legalt och demokratisk ansvar vilket förutsätter större delaktighet samt nya stärkta mandat för Europaparlamentet och EU-domstolen och därmed mer överstatlig kontroll och makt över Frontex. För att kunna uppnå en effektiv och uniform gränsbevakning utmanar integrationsperspektivet medlemsstaternas motvilja att överföra nationella befogenheter till EU-nivå.

Resultatet är en byrå som inte är så integrerad som en EU-byrå antyder, utan snarare en fortsättning på det mellanstatliga samarbete som Frontex föregångare skapade, och ett dödläge för omfattande legislativa åtgärder. Slutsatsen är att maktkampen mellan medlemsstaterna och EUs institutioner infiltrerar varje lex ferenda förslag och hindrar framväxten av en balanserad och heltäckande lag för en integrerad förvaltning av EUs yttre gränser och bidrar till legislativa åtgärder med förhållandevis stora brister gällande Frontex. Dödläget kommer att bestå tills EUs institutioner och medlemsstaterna har avgjort frågan om makt och kontroll över Frontex, eller snarare tills medlemsstaterna *fullständigt* tillåter EU att utöva sin kompetens och bidra med överstatliga lösningar för Frontex i ett område med delad befogenhet, nämligen förvaltningen av de yttre gränserna.

Detta är i enlighet med subsidiaritetsprincipen, eftersom det visat sig omöjligt att skapa en balanserad, professionell och effektiv gränsbevakningsbyrå med rättsligt och demokratiskt ansvar under mellanstatliga förhållanden. Det behövs således ett helhetsgrepp på överstatlig nivå för att uppnå en verklig integrerad förvaltning av EUs yttre gränser.

Preface

This thesis was accomplished with the help of my supervisor, my gratitude to Sanja Bogojevic.

Writing a graduate thesis can seem rather picturesque, at least if you focus on the nearly complete freedom of choice regarding working hours, place and procedure. You imagine yourself on an exotic island with your laptop beside you. Perhaps I was not quite so dreamy but I certainly had trips, dates and weekends scheduled for this semester. So, what happened? Reality happened, and the trips, dates and weekends were cancelled or never booked.

Without those nice activities scheduled it was the company of fellow students that made it a decent period. The coffee breaks made me more human, less stressed and much happier. Thank you guys! You are my thesis saviours. This spring would have been dull without you!

Thank you, Sebastian, for bearing with me although I was dreadful company and a carrier of stress. Thank you for reminding me of the importance of spare time and that everything has an end, even the graduate thesis. I love you.

Lastly, a big loving hug to my family for always being there no matter what. I do not need to say anymore.

Thank you all for believing in me!

Malmö, May 2013

Sofia Smetana

Abbreviations

AFSJ	Area of Security, Freedom and Justice
BM	Border Management
Commission	European Commission
Council	Council of the European Union
ECHR	The Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EP	European Parliament
EU	European Union
FCO	Frontex Coordinating Officer
FRA	European Union Agency for Fundamental Rights
FRO	Fundamental Rights Officer
Frontex	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
IBM	Integrated Border Management
ICC	International Coordination Centre
JCB	Joint Coordinator Board
JHA	Justice and Home Affairs
JO(s)	Join Operation(s)
JRO(s)	Joint Return Operation(s)
The Parliament	The European Parliament
PCU	Practitioners Common Unit
RABIT	Rapid Border Intervention Teams
SBC	Regulation establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)
Scifa	The Strategic Committee on Immigration, Frontiers and Asylum (Council working group)
Scifa+	The Scifa working group plus the heads of Member State border control services.
TEU	Treaty on European Union
TFEU	Treaty on the functioning of the European Union

1 Introduction

1.1 The topic

This thesis is concerned with analysing the European border and migration policies and in particular the European Border Agency (Frontex). The thesis aims to map the scholarship concerning Frontex's role to better understand the agency as well as the way forward both regarding law and policymaking. I argue that the scholarship regarding the development of Frontex's role is dispersed and demonstrates different perspectives, which make Frontex's development problematic and difficult. As expressed by Baldaccini:

While Member States continue to hold differing views on how far this EU agency should be strengthened and what its ultimate role should be, the continuous development of this agency seems to have been taken a life on its own.¹

If we want to understand European migration and border policies we have to recognize the different perspectives, the separate systems they create and their respective impact. The recognition of this complexity contributes with a greater understanding of how to develop policies and regulations regarding European borders, migration and particularly Frontex.

The field of European immigration policies has, despite its highly sensitive character and the Member States' reluctance to transfer sovereignty within the field to the EU, been one of the primary political elements in the European integration process with a high level of policy convergence. This was not generally expected with backdrop of the fact that the right to accept or refuse entry into State territory always has been the exclusive competence of the national State and perhaps the most striking expression of State sovereignty.² This 'Europeanization' also applies to border policies, a process that has evolved dynamically in recent years, especially with the Schengen *acquis*. This process has conveyed fundamental changes in the perception of the relationship between borders and sovereignty.³ As one of many steps towards a common high standard control of the external borders and a common approach to immigration, Frontex was established in 2004 to facilitate and coordinate cooperation between Member States border control

¹ A Baldaccini 'Extraterritorial Immigration Control in the EU: The Role of Frontex in Operations at Sea' in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control* (Ashgate, Leiden 2010) 254 [Baldaccini (2010)].

² S Carrera, 'The impact of the Treaty of Lisbon over EU Policies on Migration, Asylum and Borders: The Struggles over the Ownership of the Stockholm Programme' in E Guild, P Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Martinus Nijhoff Publishers, Leiden 2012) 229 [Carrera (2012)].

³ S Carrera, 'Towards a Common European Border Service?' Centre of European Policy Studies (CEPS) Working Document No 331/June 2010, available at <http://www.ceps.eu> accessed 2 May 2013, 8 [Carrera (2010)].

activities in pursue of uniform implementation of common policies and regulations.⁴

While human rights advocates has denounced Frontex's lack of commitment to comply with international human rights obligations, ie the prohibition of refoulement, EU institutions has declared the importance of Frontex in the combat of *illegal immigration*⁵ and have enhanced its role gradually.⁶ Frontex has been the object of legal, political and interdisciplinary scholarship with different theories, methods and aims. In that regard, another study on the subject may not seem to add any value to the field of research. However, despite the coverage of the subject I argue that there still exists certain confusion due to a struggle over competences between member States and Union institutions.

This thesis focuses on the scholarship concerning how Frontex's role ought to be and should develop. This also demonstrates how the agency and the surrounding European policies are perceived today at the same time as it provides us with a clear *lex ferenda* perspective.

The academic review of how Frontex should develop is a complex setting of various systems composed of opinions, perceptions, arguments, rationales and proposals. The proposed reforms are scattered and would imply effect on different legal regimes. This illustrates confusion concerning the future role of Frontex and confusion on how to perceive the current situation. Difficulties in the development of regulations and policies regarding Frontex are a natural corollary to this confusion.

In this thesis I argue that these various approaches can be visualized and highlighted by using three perspectives to categorize them: the democratic perspective, the integration perspective and the human rights perspective. The perspectives highlight the complexity of the integration of migration and border policies and demonstrate the different legal implications of *lex ferenda* proposals due to the various rationales of the proposals. I argue that the perspectives contribute to an integration analysis in general and an increased understanding of the complexity of the policy field, the Area of

⁴ Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L 349/1 [Frontex Regulation].

⁵ Regarding the notion of *illegal immigrant/immigration* this will only be used when referring to a source where it is used. I will otherwise use the term irregular immigration or undocumented immigrants while these terms more adequately describe the phenomena without negative associations to criminality and suspicion, see E Guild, 'Who is an Irregular Immigrant', in B. Bogusz et al (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Martinus Nihjoff, Leiden 2004) 3-28.

⁶ See NGO's submitted observations to the European Ombudsman's own-initiative inquiry concerning implementation by Frontex of its fundamental rights obligations, available at <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/12022/html.bookmark> accessed 17 February 2013. See also European Council, The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens [2010] OJ C 115/1, 26 [The Stockholm Programme].

Freedom, Security and Justice (AFSJ), in particular.⁷ In this context the perspectives add an increased understanding of the current role of Frontex and a possible and sound way forward.

1.2 Purpose

Mapping the academic review of the reformation of Frontex is one way to better understand the whole European border and immigration policy field in its complex settings of power relations.

The purpose is further to clarify the future role of Frontex and its responsibility by showing the discrepancies in the scholarship, an illustration of how complex and unclear the future role of Frontex still is. By using the perspectives I acknowledge three different views among scholars that create their own system with different legal implications in regard to the reformation of Frontex. The discrepancies in the perspectives hamper the paving of a clear European border and immigration policy especially regarding the role of Frontex.

The three perspectives also give a greater understanding of how the perspectives on the role of Frontex interrelate, hence give us a better understanding of the inherent tensions in the complex policy field and a way forward for policies and regulations regarding Frontex and European immigration.

The purpose is thus two-folded: the thesis demonstrates the complexity of the role of Frontex by applying the three perspectives to the current and future role of Frontex and pursue to clarify the role of Frontex and its reformation in the context of European integration by analysing the relationship and implications of the three different perspectives.

1.3 Research Question

The mapping of the subject entails a categorization of the relevant scholarship concerning the reformation of Frontex. By dividing the scholarship with the application of the perspectives: the democratic perspective, the integration perspective and the human rights perspective, the complexity of perceptions and opinions of the system are illuminated. A comparison of them is used as a tool to understand the various demands on the agency and the regulations, hence to achieve a better understanding of the complexity of Frontex's role and the research field.

Subsequently, I analyse the categories of scholarship and examine which legal regimes they relate to and which implications of the constitutional setting that are due to the proposals and demands regarding Frontex's reformation. The academic review have scattered legal proposals and their rationale is anchored in the three different perspectives. This demonstrates

⁷ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01, Title V: Area of freedom, security and justice, Art. 67-89 [TFEU].

that the legal and political reformation of Frontex is problematic and challenging.

The outcome from the two parts is examined with the aim of highlighting a pattern in the scholarship, which increases our understanding of Frontex's policies and regulations in a *lex ferenda* perspective.

The research questions I pursue to answer are

1. What is the nature and rationale of the scholarly reviews of Frontex's role and responsibilities?
2. Which implications do the different reviews and proposals have?
3. How can this give a better understanding of the existing role of Frontex? Can this understanding contribute to clarify the role and responsibilities of Frontex *lex ferenda*?

1.4 Background

Frontex was created in a turbulent period of shifting competences and powers. The competence to regulate the management of the external border was acquired with the Treaty of Amsterdam when the Schengen *acquis* was incorporated in the Treaty and made Union law.⁸ Policies from the third pillar in the Treaty establishing the European Union was transferred to title IV in the Treaty establishing the European Community.⁹ The transfer of powers within Justice and Home Affairs (JHA) to the first pillar was made partially and progressively, which implied transitional rules for five years (until 1 of May 2004).¹⁰ During the transitional period the European Commission (the Commission) had right of initiative together with the Member States. In addition the Council of the European Union (the Council) decided by voting unanimously after consulting the European Parliament (EP or the Parliament).¹¹ When the period ended the Commission only needed to take into account the Member States proposals to the Council and as of 1 of January 2005 the co-decision procedure applied with majority-decision in the Council and in the Parliament.¹²

The evolution of Frontex is part of a greater policy context that has emerged

⁸ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C 340/01.

⁹ Treaty on European Union (Consolidated Version) [1997] OJ C 340/02 [EU Treaty 1997] and Treaty establishing the European Community (Amsterdam Consolidated Version) [1997] OJ C 340/03 [EC Treaty 1997].

¹⁰ EC Treaty 1997, *supra* note 9, Art 67.

¹¹ *ibid*, Art 67.1.

¹² Council Decision 2004/927/EC providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty [2004] OJ L 396/45. In accordance with Protocol No 35 on Article 67 of the Treaty establishing the European Community [2002] OJ C 325/184, the Council acted as from 1 of May 2004 by qualified majority on a proposal from the Commission and after consulting the Parliament in order to adopt measures referred to in Article 66, that is measures regarding cooperation between Member States' authorities and the Commission and those authorities.

inter alia through three multiannual policy programmes since 1999. The European Union has laid out its agenda for developing migration, border and asylum-related policies in the form of these programs, adopted by the European Council. The programmes set the guidelines for the development of policies in the field of freedom security and justice. The development of an Integrated Border Management (IBM), a framework in which Frontex should be seen, is addressed through these three programmes.

1.4.1 From Tampere to Stockholm (1999-2014)

In the Tampere Programme (1999-2004) the management of the external borders and the protection of the same were appointed the key priority of the policymaking in the Union by the European Council.¹³ Since the accession of the Schengen Convention in 1990 and the following entry into force of the Amsterdam Treaty the EU has gradually set in place a common policy on the management of the external borders of the Schengen area and uniform standards for border control have been adopted as EU legislation. Within the field the concept of border management (BM) and IBM has become an influential concept in policymaking.

During the Finnish presidency efforts were made to consolidate the concept of IBM. Even though it was used as a pre-defined concept, it had a short history and implied various meanings, why the JHA Council found it necessary to define.¹⁴ The definition consists of five elements, which together establishes the conceptual framework. The first element is border control (checks and surveillance) including risk analysis and crime intelligence and secondly, detection and investigation of cross-border crime in cooperation with all competent law enforcement authorities. ‘The four-tier access control model’ is the third element which consists of measures in third countries of origin or transit and cooperation with neighbouring countries, measures on border control at the external borders and control measures within the common area of free movement. Fourthly, inter-agency cooperation in border management including border guards, customs, police, national security and other relevant authorities, and lastly, coordination, cooperation and coherence at the national level and among all bodies and institutions on EU level.¹⁵

IBM is perceived as an integrated part of a European comprehensive approach to migration. According to the Commission, operational activities designed to fight illegal immigration need to be read in a wider context of a

¹³ Tampere European Council, Presidency Conclusions of the 15-16 October 1999, SN 200/99, 1, 4-5.

¹⁴ S Carrera ‘The EU Border Management Strategy: Frontex and the Challenges of Irregular Immigration in the Canary Islands’ Centre for European Policy Studies (CEPS) Working Document no 261/March 2007, available at <http://www.ceps.eu> accessed 2 May 2013, 2-3 [Carrera (2007)].

¹⁵ Council of the European Union, Justice and Home Affairs, 2768th Council Meeting, Brussels, 4-5 December 2006, Press Release, 15801/06, 27.

comprehensive approach to immigration.¹⁶ Frontex is a corollary of the development of IBM and a comprehensive approach to immigration, through which the common rules can be implemented efficiently and operational cooperation coordinated.¹⁷ The mechanism for operational cooperation was expressed as the solution to a need for better cooperation between Member States in the communication from the Commission 2002, and as one of the ‘mutually interdependent components’ in the development of a strong common border management.¹⁸ Another component was the burden-sharing concept, a concept seen as preceding the establishment of a European Corps of Border Guards. Today burden-sharing is at the heart of Frontex, together with the concept of solidarity between Member States. The development of IBM has ever since the beginning had a predominant practical nature, a common legislation was only one of five elements put forward in the Communication 2002 as constituting parts of a common BM.¹⁹ The Council’s action plan²⁰ generally adopted the communication but emphasised the operational features and put less focus on financial burden-sharing, common policies and expressed itself vaguely considering a common corpus of border guards.²¹

The Hague Program (2005-2009) was a major accomplishment for the Dutch Presidency since the issue of migration and asylum had become increasingly political with the enlargement of the Union and the policy negotiations for the future required thorough negotiations. One of the characteristics of the Hague Programme was the emphasis on the threat of terrorism, timely as the terrorist attacks in Madrid and London occurred in 2004-2005. It also stressed the cooperation with third countries, labelled as ‘the external dimension of asylum and migration’.²²

The Stockholm Programme (2010-2014) was adopted in December 2009 by the European Council.²³ Though building upon the Hague and Tampere

¹⁶ Communication from the Commission to the Council, Reinforcing the management of the European Union’s Southern Maritime Borders COM (2006) 733 Final, 13.

¹⁷ Frontex website, available at <http://www.frontex.europa.eu/about/mission-and-tasks> accessed 2 May 2013; Regulation (EU) 1169/2011 amending Council Regulation (EC) 2007/2004 establishing a European Agency for the management of operational cooperation at the external borders of the member states of the European Union [2011] OJ L 304/1, Preamble, recitals 2-4 [Frontex Amendment 2011].

¹⁸ Communication from the Commission to the Council and the European Parliament, Towards Integrated Management of the External Borders of the Member States of the European Union. COM (2002) 233 Final, Brussels 7.5.2002, 12.

¹⁹ J Rijpma ‘EU Border Management after the Lisbon Treaty’ (2009) 5 *Croatian Yearbook of European Law and Policies (CYELP)*, 121, 132-133 [Rijpma (2009)].

²⁰ Council of the European Union, ‘Plan for the management of the external borders of the Member States of the European Union’ Council Document 10019/02, Brussels 14.6.2002.

²¹ J Monar ‘The Project of a European Border Guard: Origins, Perspectives and Prospects in the Context of EU’s Integrated External Border Management’ in M Caparini and O Marenin (eds) *Borders and Security Governance: Managing Borders in a Globalised World* (Lit, Münster 2006) 200.

²² European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005] OJ C 53/1, 5.

²³ European Council, Conclusions 10-11 December 2009, EUCO 6/09, Brussels 11.12.09, 9; The Stockholm Programme, *supra* note 6.

Programme it still has its own features, the overarching priority being ‘the interest and needs of the citizens’ and the challenge to ‘ensure respect for fundamental rights and freedoms and integrity of the person while guaranteeing security in Europe’.²⁴ In this programme the European Council clearly demonstrates its view on the relation between a common European Asylum System and IBM when it states that:

in order to maintain credible and sustainable immigration and asylum systems in the Union, it is necessary to prevent, control and combat illegal immigration as the Union faces increasing pressure from illegal migration flows, and particularly the Member States at its external borders, including at its Southern borders.²⁵

1.4.2 The Treaty of Lisbon

The most recent and major change affecting this field is the entry into force of the Treaty of Lisbon. The division of the first and third pillar disappeared when the pillar system was removed and replaced by one AFSJ where the Union and the Member States now have shared competences.²⁶ Member States may thus act in the area to the extent that the Union have not exercised its competences and the Union must act in compliance with the principle of subsidiarity.²⁷ This ‘communitarisation’ also entails the extension of the jurisdiction of the European Court of Justice (ECJ), whose jurisdiction now covers the whole AFSJ. Despite the former exemption all national courts may refer a preliminary question to the ECJ due to the Lisbon treaty.²⁸ There is still an exception of the possibility to review the legality and proportionality of the action taken by law enforcement agencies of the Member States, Art 276 TFEU.

References to the ambitious agenda of Tampere: to develop common policies on asylum, borders and migration, was brought into the Treaty as well as the concept of solidarity, Art 77-80 TFEU. The concept of integrated management system for external borders was also for the first time mentioned by the Treaty.²⁹

The Charter of Fundamental Rights (ChFR) became legally binding and the Union, which now have legal personality, plans an accession of the European Convention on Human Rights (ECHR). These measures can be expected to introduce human rights protection more, eg by imposing clear obligations upon the Union.³⁰ The increased status of fundamental and

²⁴ The Stockholm Programme, *supra* note 6, 3; Carrera (2012), *supra* note 2, 238-239.

²⁵ The Stockholm Programme, *supra* note 6, 5.

²⁶ TFEU, *supra* note 7, Art 4.1 and 4.2 (j).

²⁷ TFEU, *supra* note 7, Art 2.2 and Consolidated version of the Treaty on European Union [2012] OJ C 326/01, Art 5 [TEU].

²⁸ EC Treaty 1997, *supra* note 9, Art 68, compare to TFEU, *supra* note 7, where the exception is deleted.

²⁹ Carrera (2012) *supra* note 2, 245-247.

³⁰ cf E Guild et al 'Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support

human rights can be emphasized as a significant aspect that will improve mutual trust between Member States.³¹

1.5 Method and Theory

1.5.1 Categorization

In the third chapter I present and analyse the different categories of review presented in the debate about Frontex and its development. First of all it is essential to acknowledge that the categorization of the scholarship is constructed and developed as a tool for analysis. My three categories are not intended to cover or represent all views of scholars active within the field of research; it is only a snapshot of scholarly views and *lex ferenda* proposals considering Frontex, used as an instrument for demonstration. As a constructed categorization it reflects my personal perception of the system. When categorizing the scholarship I have had some questions in mind, hoping for a categorization as sufficient as possible:

- What is expressed as the main objective of Frontex?
- What is expressed as the main weakness of Frontex?
- How do the arguments differ between sources?
- Why are they different? Is it because the authors have different perceptions of how the system works? Or is it because they have different opinions on how the system should work?

These questions are a vital part of the demonstration and categorization of the system as a dispersed system since they pursue to acknowledge the rationale behind the variation and sometimes the contradiction in the scholarly debate of the role of Frontex. Consequently, the categorisation by these questions gives us a greater understanding of the possible ways to perceive and conceive European immigration policies and especially Frontex's role.

Firstly, *the integration perspective* represents a view that stresses the fact that AFSJ is one of the main integrating policy areas in the Union.³² This approach uses the rhetoric of solidarity, burden-sharing, enhanced efficiency and protection when promoting European integration while at the same time acknowledging the national prerogatives. The concept of efficiency can be understood as the use of best management practices in terms of controlling borders and irregular migration, labelled administrative efficiency in this thesis. AFSJ is a field where sovereignty traditionally has been unchallenged and remained exclusively with the Member States but where

Office', a study requested by the European Parliament, Policy Department C - Citizens' Rights and Constitutional Affairs, 12, 14 [Guild et al (2011)].

³¹ A Kellerman 'Constitutional Developments since the Lisbon Treaty in the Area of Security, Freedom and Justice at Supranational and National Level' (2011) 87 *Amicus Curiae*, 10.

³² Carrera (2012), *supra* note 2, 229.

policy convergence, common regulations and executive cooperation yet have developed.

Solidarity and responsibility sharing has been in the EU migration and border vocabulary since the beginning of the Europeanization of border control and asylum systems. The risk that responsibility sharing becomes a costly situation for a single State, a situation that creates political tensions and intensifies over time, militates against the idea of solidarity for those States not being States of origin, transit, first asylum or Border States.³³ However, there are various incentives of a responsibility sharing system both regarding the protection and reception of immigrants and border control and surveillance. The main incentive is the promotion of European integration, an overarching goal, which in itself can be perceived to entail stronger external borders, more effective refugee and asylum protection and a distribution of the faced challenges that combats free riding. According to Shuck, this would function as an insurance from huge and sudden migration-flows, which must be valuable, even though to a greater extent for some States than others, for all States within the Schengen area.³⁴ One Member State's migration control and border management have effect, not only in neighbouring States, but all Schengen States.³⁵

Secondly, *the democratic perspective* represents an approach to Frontex that focus on the level of participation of the Parliament and the transparency in the agency. It entails a democratic concern regarding the establishment of Frontex and the decision making process within the agency. But it also implies a concern for the democratic influences or lack of them in the level of policy making. Legitimacy is a keyword and used as a starting point for scholars scrutiny.

Thirdly, *the human rights perspective* is perhaps the easiest to distinguish. The primary focus for this perspective is the protection of the rights and freedoms of the individual human being. The point of departure of this perspective is the international obligations conferred upon Member States through ratification of international instruments such as the 1951 Geneva Convention and ECHR as well as the Charter of Fundamental Rights, now also legally binding upon the EU institutions. The focus rests on the respect, protection and fulfilment of the right of the individual immigrant whose situation is acknowledged to be extra vulnerable, especially if the person is an undocumented immigrant.

The IBM and the asylum *acquis* are not perceived as two European legal systems, but a set of measures analysed in relation to their ability to respect, protect and fulfil the right of refugees and the right to seek asylum.

³³ P Shuck 'Refugee Burden- Sharing: A Modest Proposal' (1997) 22 Yale J. Int'l L. 243, 249.

³⁴ *ibid*, 249-250.

³⁵ K Groenendijk 'Introduction: Migration and Law in Europe' in E Guild and P Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Martinius Nijhoff Publishers, Leiden 2012) 10-11.

1.5.2 Power and Control

This thesis shows that the underlying theme in the scholarly debate on Frontex is the question of power and control. Frontex debates are concerned with regulatory power, that is the competence to regulate about border control. The debates are also concerned with management control, that is how Frontex is operated as an agency.

I argue that the perspectives can, as an analytical tool, demonstrate the inherent struggle between the member States and the EU institutions for regulatory power and management control over the migration and border control and hence over Frontex as an agency. Simultaneously, the perspectives show that the struggle pervades all perceptions of the role of the agency and all policy recommendations, ever so detailed and technical.

1.6 General Delimitations

This thesis is set out to analyse *lex ferenda* proposals in scholarship regarding Frontex's role and responsibilities. The material concerned only with Frontex's current situation will fall outside the scope of this thesis. Usually *lex lata* analyses are followed by some proposals for future policy and law making so this two elements become intertwined in scholarly articles and books. However, the focus of this study will be on the scholarship concerned with *lex ferenda* proposals. The delimitation is relevant because of the need to narrow down the scope. It also corresponds to the problem, presented under subsection 1.1, that Frontex, as an agency established in a certain immigration policy and border control environment, is difficult to develop, reform or transform due to the separate perspectives and systems in the policy field.

Frontex is an agency with broad tasks and competences within several different areas. Its broad mandate has resulted in necessary delimitations in this endeavour. Frontex's data processing competence is one field I have not been able to address, nor its mandate to perform pilot projects aiming at developing second generation IBM, as the recent development of a European border surveillance system (EUROSUR).³⁶

Further delimitations within the human rights perspective are necessary to highlight. Human rights scholars have contributed with many studies about Frontex in which the issues of extraterritorialisation, that is extraterritorial application of human rights and the attributability of wrongful acts to multi-layered actors based on International law. This study cannot include such thorough and in-depth investigations of the legal issues surrounding extraterritorial border management. Neither have my intention been to cover aspects of International law instead I limited this thesis to Union law and policies.

³⁶ Regarding EUROSUR cf Frontex Amendment 2011, *supra* note 17, Art 2.1 (h-i).

1.7 Material

It is fundamental to reiterate that my mapping of the scholarship is obviously not intended to be exhaustive but simply a glimpse of the relevant scholarship. However, the chosen literature has played a significant role in our understanding of the current role and future development of Frontex. It is my hope that it will offer a good understanding of the whole policy field. The lowest common denominator of the chosen literature is the focus on the development of Frontex, that is a *lex ferenda* perspective, which also requires certain attention to the current situation.³⁷

Since the legal basis for Frontex transformed with the entry into force of Lisbon and with the amendment of the Frontex Regulation in 2011, I find my thesis an important contribution in a territory with a scarce amount of updated research. Naturally this also implies specific challenges as a corollary to a virgin territory. I have analysed the material with backdrop of the latest legal developments in hope to contribute with a more updated analysis of Frontex.

1.8 Outline

Chapter one contains an introduction to the subject and a presentation of the purpose of the thesis. Theory and method are explained as well as the delimitations and the material of the essay.

Chapter two provides, as a point of departure, a brief insight into the establishment of Frontex, its *current* mission, mandate and powers. This constitutes the foundation for the further analysis of its *future* role.

Chapter three demonstrates how the academic review of the development of Frontex can be captured and mapped by applying three perspectives. It further proves that the review cannot merely be accommodated in the three perspectives but the categorization also contributes to a greater understanding of the role of Frontex and the legal settings for the development of Frontex. It connects the different *lex ferenda* proposals with political and legal implications in the integration debate.

Chapter four contains an analysis of the three perspectives and their respective recommendations of the evolution of Frontex. It seeks to show that the categorized review and the *lex ferenda* recommendations helps us better understand Frontex's uncertain role by looking at the integration process through the lenses of the three different perspectives, which also can be perceived as three sub-contexts in the integration debate.

³⁷ For further reading on Frontex, not addressed in this thesis, see inter alia the security debate E Guild and S Carrera 'Towards an Internal (In)security Strategy for the EU?' Centre for European Policy Studies (CEPS), Liberty and Security in Europe, January 2011, available at <http://www.ceps.eu> accessed 12 May 2013; V Georgiev 'Towards a Common European Security Policy' (2010) 19 European Security, 255-274; S Léonard 'EU Border Security and Migration into the European Union: Frontex and Securitization through practices' (2010) 19 European Security, 231-254.

2 Frontex

2.1 Establishment and Legal Basis

Following the lack of concrete progress or failure regarding the establishment of a common European corpus of border guards, the Greek Presidency of the European Council revitalized the idea of a common management of the external borders.³⁸ The proposal was adopted by the Commission in November 2003 for transmission to the Parliament, the Council, the Economic and Social Committee and the Committee of the Regions.³⁹ Frontex was established following year, in 2004. The establishment has its legal basis in Article 66 and 62(2)(a) EC Treaty, Art 74 and Art 77(2)(b) and (d) in TFEU. In the original proposal there was no reference to Art 62(2)(a) but the Member States insisted on complementing the proposal with a reference to the article about control and surveillance of the external borders.⁴⁰

The effective implementation of the common rules for border management was perceived to require increased coordination of operational cooperation.⁴¹ The overarching aim of the agency is to improve the integrated management of external borders of the Member States.⁴² Regarding the division of responsibility between Member States and Frontex, the regulation stresses that the responsibility for border control and surveillance lies with the Member States. They may, according to Art 2.2, continue operational cooperation with other States where such measures complement Frontex's action. However, they have an obligation to report such actions taken outside the framework of the agency and to refrain from activities that could jeopardize the objectives of Frontex. The agency should merely facilitate and streamline the application of Community measures in the field of IBM by coordinating Member States action of implementation.⁴³

Frontex's main tasks to accomplish this improvement of border control and promote the concept of solidarity between Member States, are enumerated in Art 2: coordination of operational cooperation, assist Member States with training of border guards, carry out risk analyses, follow up research development on border control, technical and operational assistance in situations requiring extra assistance and to provide necessary support organizing return operations.⁴⁴ Thus, the managerial role of Frontex is

³⁸ Thessaloniki European Council, Presidency Conclusions of 19-20 June 2003, 11638/03, Brussels 1.10.2003, 4; A Neal 'Securitization and Risk at the EU Border: The Origins of Frontex' (2009) 47 J.Com.Mar.St., 333, 342.

³⁹ The European Commission, Minutes from the 1634th meeting held in Brussel 11 November 2003, PV (2003)1634 Final, 13-14.

⁴⁰ V Mitsilegas 'Border Security in the European Union: Towards Centralized Control and Maximum Surveillance' in A Baldaccini, E Guild and H Toner (eds), *Whose Freedom, Security and Justice?* (Hart Publishing, Oxford 2007) 367 [Mitsilegas 2007].

⁴¹ Frontex Regulation, *supra* note 4, Preamble, recital 2.

⁴² *ibid*, Art 1.1.

⁴³ *ibid*, Art 1.2.

⁴⁴ *ibid*, Art 2.

emphasized in the very first articles even though the executive powers of the agency are not excluded in the regulation.⁴⁵ The regulation states that staff of the agency and experts of Member States acting in another Member State shall be subject to the national law of the host State.⁴⁶

Frontex was explicitly given legal personality in the regulation with the intent that it should be independent in technical matters.⁴⁷ The creation of Frontex is often seen as a compromise between the Commission's wish to establish a common European corps of border guards and the Member States' unwillingness to transfer powers to the supranational level in this field. In that regard, Frontex can be said to represent a compromise between supranationalism and intergovernmentalism.

The Schengen Borders Code (SBC), a consolidation and development of the Schengen *acquis*, governs the border control of the external borders of EU and constitutes a common standard on border control and surveillance.⁴⁸ It contains not only provisions on control of persons at border crossing points and surveillance between those points but also analyses of risks and threats to internal security. SBC defines what conditions a third country national that wishes to enter the EU must meet. The code provides harmonization but also a more transparent set of rules regarding crossing the external border of the EU than available before.

The preamble states that the border control shall fully respect human dignity, the principle of proportionality, non-discrimination and is without prejudice to persons seeking international protection, these persons even fall outside the scope of the SBC.⁴⁹ The preamble confirms that operational cooperation between Member States regarding border control shall be managed by Frontex.⁵⁰ SBC was adopted one year after Frontex had become operational and with the entry into force, it can be argued that a clearer framework for Frontex emerged.⁵¹

The first phase of Frontex existence with a pure managerial role and a small budget could not provide sufficient assistance to Member States considering that from time to time, large number of third nationals arrived to Member States to enter their territory illegally. This perception of the situation led to the adoption of a regulation introducing RABIT teams in 2007 (the RABIT Regulation).⁵² The RABIT teams can be deployed on request of a Member

⁴⁵ *ibid*, Art 8 and 10.

⁴⁶ *ibid*, Art 10.

⁴⁷ *ibid*, Art 15.

⁴⁸ Regulation (EC) 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L 105/01.

⁴⁹ *ibid*, Preamble, recital 7 and Art 3(b).

⁵⁰ *ibid*, Preamble, recital 13.

⁵¹ Carrera (2010), *supra* note 3, 8.

⁵² Regulation (EC) 863/2007 of the European Parliament and of the Council establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) 2007/2004 as regards that mechanisms and regulating the tasks and powers of guest officers [2007] OJ L 199/30, Preamble, recital 4 [RABIT Regulation].

State in an urgent and exceptional situation of pressure from irregular migration.⁵³

The mechanism is *inter alia* an answer to the strains on Member States' capacity to perform the initial assessment of especially mixed flows of immigrants at the southern maritime border.⁵⁴ In 2006, the Commission stressed that this situation was one of the biggest challenges to an effective border control and implied a need for manpower, which could be satisfied in a rapid and flexible way through a pool of border guard experts, made available by other Member States.⁵⁵ This mechanism of sharing resources would be an expression of practical solidarity between Member States and the Commission invited the Council to examine the establishment of such mechanism.⁵⁶ According to Art 4.3 RABIT Regulation, Member States shall make border guards available for Frontex, which means that the voluntary basis emphasized by the Commission has been expressed in an imperative language in the final regulation. RABIT teams may be called upon on a five-day notice and may be deployed for a short time period.⁵⁷ The mechanism can be considered significant for developing an 'on call' force of border guards; perhaps a forerunner of a permanent European system of border guards.⁵⁸

In this context one would have to consider the Council Decision 2010/252/EU supplementing the SBC (the Frontex Sea Border Rule).⁵⁹ The rule was adopted in accordance with the procedure referred to in Art 12.5 SBC governing border surveillance. It is specified in the article that the comitology procedure is applicable for additional measures supplementing non-essential elements of the SBC. The rule has been considered an attempt to harmonize interception practices and to give Frontex maritime operations a legal framework.⁶⁰ It entails legally binding norms for conducting border controls at sea and non-binding guidelines regarding search and rescue situations. However, the EP opposed the adoption and filed a complaint to the ECJ, which ruled that the decision considered essential parts of SBC and should therefore be subject to the ordinary co-decision procedure. The rule

⁵³ *ibid*, Art 12.5 (8a).

⁵⁴ Communication from the Commission to the Council, Reinforcing the management of the European Union's Southern Maritime Borders, COM (2006) 733 final, Brussels 30.11.2006, 9.

⁵⁵ *ibid*.

⁵⁶ *ibid*.

⁵⁷ RABIT Regulation, *supra* note 52, Art 12.5 (Art 8d.9).

⁵⁸ J Rijppma, 'Hybrid Agencification in the Area of Freedom, Security and Justice and its inherent tensions: the Case of Frontex' in M Busuioc, M Groenleer and J Trondal (eds), *The Agency Phenomenon in the European Union: Emergence, institutionalisation and everyday decision-making* (Manchester University Press, Manchester 2012) 94 [Rijppma (2012)].

⁵⁹ Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2010] OJ L 111/20 [Frontex Sea Border Rule].

⁶⁰ M den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing, Oxford 2012) 200 [den Heijer (2012)].

was annulled but remains in force until the decision has been replaced. The Commission intended to present a new proposal in early 2013.⁶¹

The next legislative development occurred 2011 when amendments to Frontex Regulation were adopted.⁶² The first recital demonstrates one of the objectives of the amendments, the increased concern for human rights. The new recital provided an added context for Frontex and stressed the development of a comprehensive European migration policy based on human rights, solidarity and responsibility as a key objective of the Union.

Formally, the whole amendment was an answer to a call for clarification and enhancement of Frontex's role set out in the Stockholm Programme, a development in line with the objective of the Union to gradually introduce IBM.⁶³ In accordance with this objective the mandate of the agency was strengthened, especially its operational capabilities while ensuring that all measures are proportionate to the pursued objectives, effective and totally respect fundamental rights and the rights of refugees and asylum seekers.⁶⁴

The amendment pursues to address *inter alia* three problems identified and expressed in the impact assessment accompanying the amendment proposal.⁶⁵ Firstly, the operational cooperation was still considered inefficient and insufficient. Secondly, the operational solidarity had proved to be unsatisfactory, which was well illustrated by the actual deployment of equipment. Thirdly, Frontex was not considered to use its potential in the best possible way, in terms of coordination of operational cooperation and support to the Member States in carrying out the border management, due to unclear or insufficient existing legal provisions.⁶⁶ It is noteworthy that the Commission stressed the unclear division of tasks and responsibilities between Frontex and Member States as a part of the overall unclear legal framework, especially in regard to the development of Frontex activities since its inception in 2004.⁶⁷

To strengthen Frontex's operational activity the amendment inserted a compulsory contribution of technical equipment and human resources for Member States. Regarding the technical equipment the amendment introduced the possibility for Frontex to acquire, itself or in co-ownership with Member States, technical equipment so as to safeguard the need for equipment even in rapid interventions.⁶⁸ It introduced a mandatory contribution of a minimum number of equipment by the Member States to a

⁶¹ To my knowledge, no such proposal has been presented (to date, 20 May 2013).

⁶² Frontex Amendment 2011, *supra* note 17.

⁶³ The Stockholm Programme, *supra* note 6, 26.

⁶⁴ Frontex Amendment 2011, *supra* note 17, Preamble, recital 7-9.

⁶⁵ Commission Staff Working Document, Impact Assessment accompanying the proposal for a Regulation (EU) 1169/2011 amending Council Regulation (EC) 2007/2004 establishing a European Agency for the management of operational cooperation at the external borders of the member states of the European Union (FRONTEX), SEC (2010) 149, Brussels, 24.2.2010 [Impact Assessment].

⁶⁶ *ibid*, 11-14.

⁶⁷ *ibid*, 14.

⁶⁸ Frontex Amendment 2011, *supra* note 17, Art 7.

centralized record of technical equipment functioning as a pool of equipment, compared to the previous setting of a voluntary similar system.⁶⁹ The obligatory contribution is negotiated and decided in a bilateral agreement once a year.⁷⁰

The increased human resources and streamlining of joint operations (JO(s)) led to a range of reforms and amendments. European Border Guard Teams replaced the concept of RABITs. The new teams can be deployed during rapid interventions, pilot projects and joint operations.⁷¹ The Frontex Regulation did not govern the use of border guards in JOs before this amendment, only the deployment of RABITs. Frontex has deployed border guards in joint operations despite this silence, so called Frontex Joint Support Teams, but these arrangements had an uncertain legal basis until governed by the amendment.

Member States' contribution of border guards to a border guard pool and the secondment of border guards to the agency were made compulsory unless 'they are faced with an exceptional situation substantially affecting the discharge of national tasks' or it will 'seriously affect the discharge of national tasks'.⁷² The contribution is agreed upon an annual basis.⁷³

The power to initiate and carry out joint operations now lies firmly with the agency since amending the regulation. The expression that Frontex may launch initiatives itself, 'and in agreement with the Member States concerned' is deleted and replaced by 'The Agency may itself initiate and carry out joint operations and pilot projects in cooperation with the Member State(s) concerned and in agreement with the host Member States'.⁷⁴ In addition the amendment gave Frontex use of operational plans a legal basis, specifications on what the plan should cover and how to agree upon it, as well as how to implement it. These detailed provisions could facilitate the planning and the evaluation of operations in relation to the objectives of Frontex notwithstanding their ad hoc nature. They could also facilitate the cooperation while it prevents that officials from Member States and Frontex expect different in terms of the objective of the operation and corresponding *modus operandi*, a problem acknowledged by the Commission in its Impact Assessment.⁷⁵ The Commission concluded that, as a result of the previous lack of legal clarification of Frontex, the efficiency of the cooperation was affected and the role and responsibilities of Frontex were often misunderstood.⁷⁶ To comply with the new provision regarding operational plans the agency would need to address, amongst other, geographical area, planned duration, tasks and instructions for the guest officers, composition

⁶⁹ *ibid*, Art 7.3.

⁷⁰ *ibid*.

⁷¹ *cf ibid*, Art 1a.1a.

⁷² *ibid*, Art 3b.2-3.

⁷³ *ibid*.

⁷⁴ *ibid*, Art 3.1.

⁷⁵ Impact Assessment, *supra* note 65, 13-14.

⁷⁶ *ibid*.

of teams, command and control provisions.⁷⁷

Frontex may now include an evaluation of Member States' border capacities in the risk analyses, a reinforced evaluation mandate, especially in combination with the emphasis on detailed evaluations of joint operations.⁷⁸ A possibility for Frontex to terminate a JO or pilot project is inserted if the conditions for such activity no longer are fulfilled and participating Member States may ask Frontex to terminate a JO or pilot project. An obligation to terminate or suspend such activity if violations of fundamental rights or International law are serious or likely to persist is inserted in the amendments, but only for the Executive Director.⁷⁹

The amended provisions govern the cooperation with third countries compared to the previous Frontex Regulation and stress the compliance with fundamental and human rights. Frontex may conclude working agreements with third countries and the border authority of third countries while respecting the external relations policy of the Union, Union law, International law and while promoting European border management standards, also covering respect for fundamental rights and human dignity. The agency may also deploy Liaison Officers that take part of the local or regional cooperation network; these arrangements may only be engaged in countries that comply with minimum human rights standards.⁸⁰

The emphasis on human rights safeguards is also expressed in several provisions in the Amendment.⁸¹ The agency is obliged to draw up and develop a Fundamental Rights Strategy and as part of the monitoring mechanism there shall be a Consultative Forum and a Fundamental Rights Officer (FRO) with full access to all information on the activities of Frontex.⁸² The FRO shall report on a regular basis directly to the Management Board and the Consultative Forum and thereby contribute to a monitoring mechanism. The role of the Consultative Forum is more of an adviser, it shall assist the Management Board in fundamental rights matters and it shall be consulted when developing and implementing the Fundamental Rights Strategy, Code of Conduct and Common Core Curricula. The Management Board shall decide the composition of the Forum and it must invite external bodies to participate in the Forum.⁸³

⁷⁷ Frontex Amendment 2011, *supra* note 17, Art 3.

⁷⁸ *ibid*, Art 3.3 and 4.

⁷⁹ *ibid*, Art 3.1a.

⁸⁰ *ibid*, Art 14.3.

⁸¹ Even though cooperation agreements with UNHCR and the European Fundamental Rights Agency (FRA) were concluded before the 2011 amendments. See, UNHCRs website, <http://www.unhcr.org/4d948c736.html> and FRA website, http://fra.europa.eu/sites/default/files/fra_uploads/891-Cooperation-Agreement-FRA-Frontex_en.pdf both accessed 21 May 2013.

⁸² Frontex Amendment 2011, *supra* note 17, Art 26a.

⁸³ *ibid*, Art 26a.2.

3 Understanding the Academic Review of Frontex

When discussing Frontex reformation and development the questions of power and control must be addressed. The power struggle over Frontex as an agency is easy to acknowledge as well as the different voices considering who should exercise control functions over the agency. I argue that these two issues are crucial to address to better understand the role and potential of Frontex and a precondition to find a way forward for the common European border management and in particular for Frontex. These unsolved questions are the underlying rationale for the different voices surrounding Frontex with different policy proposals.

Frontex is set in the context of shared Union competence regarding both border management and migration, resulting in fundamental questions regarding the division of competences and the control over specific areas. Shared competence shall be exercised according to the principle of subsidiarity, Art 5.3 TEU. The Union may thus act if the objectives pursued cannot be sufficiently achieved by the Member States on local, regional or central level but can rather be better achieved by the EU. The three perspectives are envisaged to demonstrate the inherent tensions and struggles between sub-contexts within the Frontex integration debate.

Considering this, the evaluation of power and control over Frontex from three different perspectives contributes to the increased understanding of the role of Frontex and hence to a greater understanding of the way forward in law and policies for European Immigration Policies, in particular the European Border Agency.

This chapter presents the three perspectives separately, each subsection divided in an initial presentation of the relevant perspective followed by a presentation of their main concerns. Subsequently, the *lex ferenda* recommendations are elaborated followed by a brief reflection of their implications and finally a sub-analysis.

3.1 From an Integration Perspective

The integration perspective constitutes a view of Frontex in the context of pursued European integration. The role of the agency is scrutinized in the context of promoting a common IBM and the integration of the AFSJ.

The ‘de-pillarisation’ of the EU structure transferred the whole AFSJ into shared competence. However, when it comes to the issue of borders and migration it is remarkable how the principle of sovereignty inherent in these concepts makes the policy field utmost sensitive and affects the Member States’ will to transfer their competence. The competence remains with the Member States as long as it is not transferred to the Union. The supranational power within this policy field will hence be dependent on the

way Member States exercise their national competences in the area and are willing to transfer their competences. The abolition of the pillar structure has been considered a prerequisite for ‘comprehensive, legitimate, efficient, transparent and democratic responses to the dilemmas posed by the Europeanization processes and the creation of a common AFSJ’.⁸⁴ Despite the abolition of the pillar structure, the Lisbon Treaty does not ensure a complete communitarisation of JHA policies. Additionally, even though Frontex is an independent Union agency the features of intergovernmentalism dominate Frontex. According to Curtin, this is a natural corollary to the fact that the powers are not delegated from the Commission but rather a ‘Europeanization’ of the functions of the administrations of the Member States’.⁸⁵ Intertwined with the concepts of citizenship, security and political community it is still a political sensitive area to integrate. It will continue to be ‘equally driven by member states’ preferences as well as by a culture of “intensive intergovernmentalism”’.⁸⁶ Wolff predicts these features to persist since the Union and the Member States have shared competences in the area.⁸⁷

The step forward towards a common European policy on external borders is evaluated in terms of efficiency, improved cooperation, a consistent border policy and implementation and democratic accountability, thus the perceived features of an integrated border management. These four parameters are generally understood as the added value of a European common border policy or an integrated border management.⁸⁸

The main rationale of IBM presented and promoted by the EU institutions can be retrieved from the outline of what integrated border management includes but also from the preamble of the Frontex Regulation, which highlights uniform control and surveillance, efficient implementation and solidarity between Member States.⁸⁹ The democratic accountability has been more of a scholarly concern than that of the legislatures, even though the Commission mentioned it briefly when elaborating the notion of integrated

⁸⁴ S Carrera and E Guild ‘The Hague Programme and The EU’s Agenda on Freedom, Security and Justice: Delivering results for Europe’s citizens?’ Centre for European Policy Studies (CEPS) 2006, available at <http://www.ceps.eu> accessed 7 April 2013, 3 [Carrera and Guild (2006)].

⁸⁵ D Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution* (Oxford University Press, New York 2009) 165.

⁸⁶ S Wolff, ‘EU Integrated Border Management beyond Lisbon: Contrasting policies and practice’ in R Zapata-Barrero (ed.), *Shaping the Normative Contours of the European Union: a Migration-Border Framework* (CIDOB Barcelona Centre for International Affairs, Barcelona 2010) 25 [Wolff (2010)].

⁸⁷ *ibid.*

⁸⁸ H Jorry, ‘Construction of a European Institutional Model for Managing Operational Cooperation at the EU’s External Borders: Is the Frontex Agency a decisive step forward?’ CEPS Challenge Programme, Liberty & Security, Research Paper No 6, March 2007, available at <http://www.ceps.eu> accessed 4 April 2013 [Jorry (2007)].

⁸⁹ Communication from the Commission to the Council and the European Parliament, Towards an Integrated Management of the External Borders of the Member States of the European Union, COM (2002) 233 Final, Brussels 7.5.2002, 12; Frontex Regulation, *supra* note 4, Preamble, recitals 1-2, 5.

border management.⁹⁰ Recently, this has been addressed by the Commission in a communication to the Council and the EP in regard to a perceived need for an increased legislative attention towards regulatory agencies *inter alia* concerning their accountability.⁹¹ The concern of democratic accountability will mostly be addressed under subsection 3.2 since it is more of a subordinate concern for the perspective reviewed in this section.

3.1.1 European Integration

Building upon the cooperation networks, the Strategic Committee on Immigration, Frontiers and Asylum (Scifa) and the External Borders Practitioners Common Unit (PCU), and with the contentious aim of creating a European corps of border guards postponed in the earlier debate, the Thessaloniki European Council called upon the Commission to investigate the feasibility of creating new institutional mechanisms.⁹² The Commission, which had been in favour of a European border police, responded quickly by tabling a proposal for a regulation establishing a European Border Agency.⁹³ The Council reached a swift political agreement on the draft regulation and the tasks allocated to the agency by the Commission. However, the European Council disagreed regarding the composition of the Management Board resulting in a revised provision in the final regulation. Due to the choice of a rapid legislative process, to avoid the co-decision procedure applying after the transitional rules of the Treaty of Amsterdam, as of 1 January 2005, the EP was only consulted in the legislative process.⁹⁴ The proposals of the EP favouring a more centralized agency were hence largely ignored. The proposals regarding the composition of the Management Board demonstrate the three different camps in the struggle of control over the new body. According to the original proposal by the Commission it would consist of twelve members and two representatives of the Commission. However, the Council envisaged the Board as composed of representatives from each Member State plus two from the Commission. The EP considered that six representatives from Member States should be balanced with as many from the Commission, opting for the most centralized agency.⁹⁵

The establishment of Frontex demonstrates how the operational cooperation in border management has been gradually communitarised, similar to the communitarisation of the competences in border management.⁹⁶ Frontex's

⁹⁰ *ibid.*

⁹¹ Communication from the Commission to the European Parliament and the Council, European Agencies: The way forward, COM (2008) 135 Final, Brussels 11.3.2008, 7-8.

⁹² Thessaloniki European Council, Presidency Conclusions of the 19-20 June 2003, 11638/03, Brussels, 1.10.2003, para. 14.

⁹³ Communication from the Commission to the European Parliament and the Council in view of the European Council of Thessaloniki on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents, COM (2003) 323 Final, Brussels 3.6.2003, 6f.

⁹⁴ See EC Treaty 1997, *supra* note 8, Art, 62, 66 and 67.

⁹⁵ S Leonard, 'The Creation of FRONTEX and the Politics of Institutionalisation in the EU External Borders Policy' (2009) 5 *Journal of Contemporary European Research*, 371, 382 [Leonard (2009)].

⁹⁶ Rijpma (2009), *supra* note 19, 132.

predecessor, the Common Unit (Scifa+), consisted of the Council's working group Scifa and the heads of Member State border control services, and was replaced by PCU. If you look at Scifa+ and PCU as purely intergovernmental or partly communitarised, the transfer of operational cooperation to Frontex has entailed a shift of competences from the Member States to the more supranational approach of a Union agency.⁹⁷ A delegation of competences to an agency often denotes a vertical competence transferral rather than, or together with, a horizontal transferral from the Commission to the agency why the delegation should be labelled Europeanization.⁹⁸ The level of the Europeanization can still be subject to debate.

Even though the management of external border falls within the scope of Union regulatory competence, it is questionable whether Union legislation can block Member States' powers considering that the operational activities within border management might be linked to Member States':

national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.⁹⁹

It is further doubtful if operational cooperation unlike legislative measures can limit the institutional autonomy of Member States, ie how implementing powers are exercised and allocated to national authorities.¹⁰⁰

The creation of Frontex was an institutional answer to the task of promoting the principle of solidarity and integrated border management through optimising operational cooperation. The establishment can be seen in the context of the fifth Union enlargement, which caused imbalances between new and old Member States since new States came in charge of a great share of the external border; a challenge to the project of European solidarity.¹⁰¹ Two more rationale for the creation of Frontex can be added, namely the fact that migration has 'generally become an increasingly contentious issue' in Europe since the 1990s and the terror attack on 11 September 2001.¹⁰² In this context, the emergence of IBM and creation of Frontex are subject to three rationales and already in the very beginning part of three different debates: the security debate, the populist and politicized debate and the actual challenge with a scattered external border and Member States with completely different situations and agendas.

One of Frontex's main challenges in regard to trust-building and an efficient and coherent operational cooperation is the fact that 27 (up to date) different

⁹⁷ *ibid.*

⁹⁸ R Dehousse, 'Misfits: EU Law and the Transformation of European Governance' (2002) Jean Monnet Working paper 2/02, New York University School of Law, 12.

⁹⁹ TEU, *supra* note 27, Art 4.2.

¹⁰⁰ Rijpma (2009), *supra* note 19, 135-136.

¹⁰¹ Jorry (2007), *supra* note 88, 2 and 8-9.

¹⁰² Leonard (2009), *supra* note 95, 375.

States and even more authorities are included in the Union. The solidarity concept is thus difficult to implement since the States have completely different preconditions, some with huge parts of external border and some with almost none, as well as different interests, threat perceptions and objectives.¹⁰³ As a result there have been different understandings on how to best handle the borders and the irregular migration.

The Member States' move to establish a coordination agency can be perceived as a way, for affected States to find a collective solution, promoted in particular by southern European States with a high financial and political cost in regard to immigration. This resulted in the other Member States opting for the less integrationist solution so as to remain the control over the border management.¹⁰⁴ The explanation is a sound rationale for the intergovernmental and hence political features of the agency. In addition, the Frontex Regulation is a development of the Schengen *acquis*, a highly intergovernmental foundation not meant to restrain the Schengen States or create monitoring mechanisms. Rather it is argued that the Schengen States wanted to escape such control at national level.¹⁰⁵

Lack of trust is also acknowledged within AFSJ as fuelling a certain competition between national authorities when negotiating, adopting and implementing developments. The national authorities still see each other as rivals and the competition hampers the exchange of information at EU and national levels. A proof of this lack of trust is the Prüm Treaty, adopted in 2005 between seven EU Member States to accelerate exchange of information within fields covered by AFSJ. Scholars have argued that the Prüm Treaty not only established a close cooperation between the signatories, but also challenged the political power of the European AFSJ. Arguably, the Prüm Treaty weakened the Union more than it strengthened it by creating a hierarchy within the EU, by competing with the 'principle of availability' and by excluding the Parliament.¹⁰⁶

The external borders policy of the Union is founded upon an assumption that EU effectively can ensure a correct, coherent and consistent application of the EU policies and laws across the Member States of Europe. The assurance is a key element for promoting mutual trust. However, this assumption is contested, while the monitoring and evaluation mechanism is perceived as insufficient to ensure the full and efficient implementation of European border policies and laws or its application through good

¹⁰³ S Wolff, 'Border Management in the Mediterranean: internal, external and ethical challenges' (2008) 21 *Cambridge Review of International Affairs*, 253, 258-260 [Wolff (2008)].

¹⁰⁴ *ibid.*, 260.

¹⁰⁵ Rijpma (2009), *supra* note 19, 133-134 citing V Guiraudon, 'The EU "garbage can": Accounting for policy developments in the immigration domain' Conference of the European Community Studies Association, Madison, 29 May-1 June 2001, 13.

¹⁰⁶ E Guild, S Carrera and T Balzacq 'The Changing Dynamics of Security in an Enlarged Union' in D Bigo et al (eds.) *Europe's 21st Century Challenge: Delivering Liberty* (Ashgate, Farnham, Surrey, England 2010) 36-37.

administration by Member States' national, regional and local authorities.¹⁰⁷ The official discourse within the Union uses expressions like 'coherent and integrated border management' but is alleged to be a false presumption about the coherency and stability of the border because of the diversities in the territorial parts of the external border and the fact that the external border do not correspond to the territorial demarcations of the Union.¹⁰⁸

According to a study performed by Egeberg and Trondal, the question whether Frontex as an EU agency contributes to a transformation towards a more integrated political, administrative and legal order within the Union is depending on the degree of independency.¹⁰⁹ However, the agency does not have to be independent in general but needs to be independent from the Member States in practice. A strong relationship with the Commission was thus not seen as an obstacle. To apply this on Frontex is to examine the actual independence or dependence of the agency.¹¹⁰

In contrast to the first proposal by the Commission, Frontex 'lost' some of the more intergovernmental features due to severe criticism from the Parliament, such as national experts and a distinction between national members of the Management Board and the representatives of the Commission. Instead it gained a more balanced structure, admittedly with one representative from each Member State but with two equal representatives from the Commission and majority decisions. This can be said to denote a rather balanced, professional and autonomous agency, which provides Frontex with an added value for its promotion of solidarity and mutual trust.¹¹¹

During the first years of Frontex the trust from Member States was the crucial element, which determined whether the agency would embody a decisive step forward or not. The structure of the agency is carefully placed partly in the hands of the Member States, which together with the Council's expression of the possibility to extend the competences of the agency at an appropriate time, seemed to imply good conditions for trust building.¹¹²

The independent and professional nature of Frontex has been contested after a glance at some of the operations launched under Frontex coordination. Wolff describes an internal challenge in terms of Member States' divergent interests and states that the common border management is a chaotic process.¹¹³ She demonstrates her thesis by turning to some of the conducted joint maritime operations.¹¹⁴

¹⁰⁷ Carrera (2010), *supra* note 3, 15.

¹⁰⁸ *ibid.*

¹⁰⁹ M Egeberg and J Trondal, 'EU-level agencies: new executive centre formation or vehicles for national control?' (2011) 18 *Journal of European Public Policy*, 868-887.

¹¹⁰ *ibid.*, 882-883.

¹¹¹ Jorry (2007), *supra* note 88, 23.

¹¹² *ibid.*, 25.

¹¹³ Wolff (2008), *supra* note 103, 257-260.

¹¹⁴ *ibid.*

Operations in the Mediterranean have often been launched on a short-term basis in a context of emergency on the call from certain Member States holding, in particular the maritime external border, which opens up for political pressure. Carrera posts the example of Spain and the Canary Islands to show how Spain's national politics transcended to a European level when calls for Frontex operations was used to shift the blame within the political struggles between the Spanish government, the opposition and the government of the Canary Islands. The effect was three JOs based on political pressure and calls for emergency.¹¹⁵

Frontex remains to be based on national servants accountable to national parliaments. Schout and Wolff claim that the establishment of Frontex hardly implied integration since Frontex did not receive an independent role and did not shift the control towards the Union institutions.¹¹⁶ The composition of the management Board is evidential, most of the representatives have been head of the border guard service, but there are also some that come from national ministries. This is a fact that may result in political discussions and considerations within the Board.¹¹⁷

Carrera affirms that Frontex is politicized because of exercising its competences in a very political environment without being immune to the environmental impact.¹¹⁸

Firstly, the dependence on Member States' solidarity is considered to be intertwined with the fundamental mandate given to Frontex, to facilitate the implementation of Union policies through coordination of operational cooperation at the external borders of Member States.¹¹⁹ The principle of sovereignty is naturally still inherent in the field of borders.

Secondly, the Frontex Regulation stresses the responsibility for border control as lying with the Member States. Frontex's name is a reminder of the focus on Member States, 'The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union'.¹²⁰ After negotiations over the proposal for a founding regulation between the Commission and the Council, Art 2.2 was added to clarify the division of competences between Frontex and Member States and to avoid the exclusive competence of the Union. This is evidential of the struggle of the control over Frontex between the Union and the Member States.¹²¹

¹¹⁵ Carrera (2007), *supra* note 14, 12-13.

¹¹⁶ A Schout and S Wolff, 'Frontex: More of the Same' Paper presented at the EUSIM – The Governance of Asylum and Migration in the European Union, University of Salford – Centre for European Security, 26-27 January 2012, 11 [Schout and Wolff (2012)].

¹¹⁷ *ibid.*

¹¹⁸ Carrera (2007), *supra* note 14, 9.

¹¹⁹ *ibid.*

¹²⁰ cf Frontex Regulation, *supra* note 4.

¹²¹ Mitsilegas (2007), *supra* note 40, 370.

Carrera's conclusion is that Member States are still exercising resistance when it comes to shifting powers to the EU level, despite the significant development and progress in the communitarisation process. A glance at the operational decision-making process makes this evident, according to Carrera, who stresses the fact that the Member States are under no obligation to collaborate by providing technical equipment, a main condition for successful joint operations.¹²²

The politicized nature of Frontex has been considered by different authors to have a negative effect on the efficiency of the agency. In addition, it also affects the trust in Frontex, while the situation in that case contravenes with the perception of Frontex as a depoliticised, purely technical and independent regulatory agency. Notwithstanding this, the politicisation can be understood as a natural corollary to the fact that the border management represents a highly political and thereto a politically sensitive area. It would be incorrect to render the operational coordination as a value-neutral and purely technical task when it includes setting political priorities and deploying limited resources.¹²³ The choice of an agency, as part of the focus on operational cooperation within AFSJ, can thus be criticized for not acknowledging the political nature of the cooperation or for screening it as non-political.¹²⁴ However, the labelling of Frontex and their mandate as technical may contribute to a common position between Member States and also work as a blame-shifter from Member States to Frontex.¹²⁵

The 2011 amendments, as a continuation of the RABIT Regulation, can be argued to denote a more balanced and pluralistic authority setting between the EU institutions and the Member States in comparison with the founding regulation. This is an evidence of a certain degree of trust, achieved through the experience of operational cooperation, as the ground for a legislative measure that address some of the legal shortcomings.¹²⁶ The evidence would be the emphasis of human and fundamental rights as well as a more independent agency in regard to technical equipment and human resources.

The CRATE was set up as requested by the Council in October 2006 and envisaged by Article 7 in the Frontex Regulation. It was first intended to be used on a bilateral basis between Member States but could also be used in JOs.¹²⁷ However, the Commission acknowledged, in its evaluation report in 2008, that the participation of Member States was scarce and the record had

¹²² Carrera (2007) *supra* note 14, 9.

¹²³ Rijpma (2012) *supra* note 58, 92.

¹²⁴ Rijpma (2009) *supra* note 19, 134.

¹²⁵ cf J Rijpma 'Frontex: Successful Blame Shifting of the Member States?' (2010) ARI 69 Area: Demography, Population and International Migrations, available at http://www.realinstitutoelcano.org/wps/portal/riecano_eng/Content?WCM_GLOBAL_CO NTEXT=/elcano/elcano_in/zonas_in/demography+population/ari69-2010 accessed 6 May 2013, 3 [Rijpma (2010)].

¹²⁶ cf Rijpma (2009), *supra* note 19, 137.

¹²⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Report on the Evaluation and Future Development of the Frontex Agency, COM (2008) 67 Final, Brussels 13.2.2008, 3-4.

been limitedly used. This affected especially the resource-demanding maritime operations; moreover the EU and Member States had high expectations on the agency's assistance in precisely maritime operations.¹²⁸ Notwithstanding the scarce contributions by the Member States regarding participation, technical equipment and the negative impact on the maritime operations, the Commission declared that the coordination had already 'proved itself the key instrument of the European Union in ensuring operational solidarity between Member States and channelling resources to the sections of the external border with the greatest needs'.¹²⁹ The Commission recommended full exploitation of the potential of the CRATE mechanism. Additionally, the Commission recommended that the availability of resources could be strengthened if Frontex could acquire equipment on its own.¹³⁰

The operational capability of Frontex was certainly strengthened due to the amendments in 2011, in terms of availability of technical equipment. The new situation with a mandatory contribution to the CRATE by the Member States and Frontex's new competence to lease, own or co-own (together with Member States) necessary equipment, helps to ensure the operability and efficiency of the agency.¹³¹ The mandatory contribution of border guards for deployment in Frontex's JOs and pilot projects as well as their contribution with border guards available for secondment shall, according to Art 3b, be planned in annual bilateral agreements. The obligation to make border guards available for deployment is exempted if a Member State 'is faced with an exceptional situation substantially affecting the discharge of national tasks'.¹³² Corresponding exception regarding secondment of border guards as national experts reads, 'unless that would seriously affect the discharge of national tasks'.¹³³ These exceptions can be regarded as loopholes for States reluctant to contribute both with equipment and border guards to the burden-sharing mechanism part of Frontex. However, when Wolff considers the proposed amendments, the Stockholm Programme and the Lisbon Treaty she states that these developments will increase the interoperability and operational cooperation, two elements seen as solutions to the problem of consistent implementation and mutual trust inherent in JHA policies.¹³⁴

The increased operational independency of Frontex results in a more efficient coordination and facilitation of operational cooperation between Member States, hence enhancing cooperation. The mandatory mechanisms for provision of personnel and equipment should generate a greater material solidarity between the States. However, the practical impact is difficult to review since the contribution by each Member State is negotiated and agreed on a bilateral basis and renegotiated every year. Thus, in several

¹²⁸ *ibid.*

¹²⁹ *ibid.*, 10

¹³⁰ *ibid.*, 4 and 7.

¹³¹ Frontex Amendment 2011, *supra* note 17, Art 7.

¹³² *ibid.*, Art 3b.2.

¹³³ *ibid.*, Art 3b.3.

¹³⁴ Wolff (2010), *supra* note 86, 28.

aspects, the 2011 amendments can be considered to be a sound response to the recommendations within the integration perspective. Still the views differ regarding if the recent developments of Frontex role, competences and responsibilities, really constitute or indicate an improvement of the integration process, in particular trust-building, solidarity and increased efficiency.

According to Schout and Wolff, the amendments strengthened mainly the operational planning and ‘not necessarily the design of Frontex as an independent agency’, despite several novelties.¹³⁵ The context of this statement is the comparison of Frontex and the previous cooperation structures Scifa+ and PCU, arguing that the added value of Frontex in terms of independency perhaps falls below the expectations. The Member States still have a large degree of hierarchal control over Frontex and the legal control has not been clarified between Frontex and Member States.¹³⁶ Compared to other policy instruments the professionalism and independence have not improved.¹³⁷ Thus, notwithstanding the 2011 amendments increasing Frontex’s operational powers, the intergovernmental features of EU cooperation still affects the amount of power delegated to Frontex. An example of intergovernmental features within AFSJ is the fact that the Council did not endorse the Commission’s Stockholm Action Plan, indicating that Member States are not accepting any fundamental regime changes.¹³⁸ Member States have been reluctant in transferring powers to Frontex when at the same time southern States have called for assistance in time of urgency at the borders.

3.1.2 Recommendations

Hobbing analyses the developments in the AFSJ between 2000 and 2010 and considers challenges and achievements in the Europeanization of the field. As a result of his recapitulation, he brings forward some recommendations for the coming years regarding border management. One of the main recommendations is that the intergovernmental features should be replaced by more ‘federal’ responsibility; this would be the right step towards the achievement of an effective and uniform implementation of the SBC attaining secure and coherent external borders.¹³⁹ He acknowledges that although significant progress of IBM and Frontex, EU lags behind because of the lack of particular routine features necessary to have full control over the borders. Loosely connected national sections still dominate the overall picture of the border management and the mandatory solidarity still leaves room for reluctant States to escape the contribution of equipment

¹³⁵ Schout and Wolff (2012) *supra* note 116, 11.

¹³⁶ *ibid.*, 13.

¹³⁷ *ibid.*

¹³⁸ Council of the European Union, Justice and Home Affairs, 3008th Council Meeting, Press Release, 8920/10 (Presse 88), Brussels 23 April 2010, 8.

¹³⁹ P Hobbings, ‘The Management of the EU’s External Borders: From the Customs Union to Frontex and E-borders’ in E Guild, S Carrera and A Eggenschwiler (eds), *The Area of Freedom, Security and Justice Ten Years on: Successes and Future Challenges under the Stockholm Programme* (Centre for European Policy Studies (CEPS), Brussels 2010) 71.

and human resources. Hobbing is also concerned over the diverging training and equipment standards. Finally, he concludes that mutual trust is the most precious element of a good working efficient order of the external border.¹⁴⁰

Carrera perceives the external border as a patchwork of entry points with disparate practices in management and makes a similar analysis as Hobbing. The recommendation due to this situation that challenges the efficiency of and mutual trust in the European Border system is improved independent and political accountable evaluations.¹⁴¹

The concern of disparate practices at the external (patchwork) border is linked to a recommendation on how to make border management uniform and coherent, in particular the SBC application. The recommendation consists of a multi-layered border service with border control officers, border monitor officers and fundamental rights supervisors.¹⁴²

Another solution to the disparate borders is to focus on the regulatory role of Frontex instead of focusing merely on the operational competences. As mentioned before, Rijpma understands the need for a more structural enforcement of Frontex operational aspects. He advocates that Frontex should be promoted more as a regulatory agency, since this could contribute to a more uniform application of Union policies and to the deployment of border guards by the Member States. This regulatory role could be reinforced through *inter alia* Frontex's mandate on evaluation and common training of border guards.¹⁴³

The logic in regard to recommendations on strengthened operational competences can be understood as connected to both the objectives of efficiency and solidarity. The operational competences and powers of Frontex are sometimes perceived as too narrow and restrained in regard to the tasks and the potential development of a common and efficient IBM. The restrained powers affect the efficiency of the exercised tasks of the agency. Thus, Frontex should be strengthened in order to achieve efficient migration and border management. This would also make the agency more independent. Both an efficient and independent agency would increase the trust in the agency and hence the cooperation and solidarity between Member States. The solidarity would be significantly improved if Frontex would be a de-politicized agency. Solidarity increases integration or, to put it differently, is a way to perceive integration, an objective in itself.¹⁴⁴

3.1.3 Implications

The struggle between national prerogatives and Union competence is obvious when looking at the legislative processes and the policymaking regarding Frontex. The latest amendments indicate a more balanced view

¹⁴⁰ *ibid*, 67-68.

¹⁴¹ Carrera (2010), *supra* note 3, 15-17.

¹⁴² *ibid*, 27-29.

¹⁴³ Rijpma (2012) *supra* note 58, 98.

¹⁴⁴ TFEU, *supra* note 7, Art 67.2.

on the development of the agency *prima facie* due to the co-decision proceeding. At the same time, it is still obvious who is in control over Frontex. The fundamental issues regarding power and control over the agency have not been clarified or re-negotiated as demonstrated by the operational focus. The political independence was not addressed in the amendments even though the operational independence was.

As a corollary to the perception of strong operational competences as a precondition to an efficient and independent agency, further enhanced mandate and competences of Frontex operational role could be envisaged.¹⁴⁵ The focus on the operational capabilities in the latest amendments has indeed strengthened the practical independence of Frontex, a necessary step for an efficient border management. Any tendency of stagnation in this regard cannot be found, the objective of a common Border Service is not yet disregarded. One has to consider that operational cooperation is the focus of the whole policy area as well as the entire AFSJ.¹⁴⁶

The parallel calls for a strengthened regulatory role of Frontex has however, not yet been observed. The pace and the possibility for comprehensive solutions to achieve an efficient agency and uniform implementation will be set and determined by the Member States' will to transfer competences to the Union. The 2011 amendments were a step in the right direction but the legal implications of the remaining competence struggle, together with the uncertainties in how to achieve a sufficient IBM, would be the lack of comprehensive and depoliticized solutions or proposals and a continuation of a pragmatic policy approach. In other words, Frontex can still be described as experimentalist governance moving between independence and dependence of Member States even though the legal framework has been gradually clarified.

The Commission and Parliaments attempts to create a more integrated agency and IBM, that is supranational solution, have hitherto encountered the miscellany views of reluctant Member States. The agency will remain in the hands of the Member States and can only slowly begin to become more supranational conceiving the objective of a common European Border Guard.

3.1.4 Analysis: National Prerogatives

Considering the hybrid authority of Frontex¹⁴⁷ and the unclear methods of achieving an effective IBM and the Member States' different opinions and traditions in regard to border management, the experimental model of governance has been an alternative approach to integration of borders and migration through Frontex. The intergovernmental features of Frontex have allowed the Member States to safeguard their traditional national prerogatives. However, experimentalist governance often applies to

¹⁴⁵ See Frontex Amendment 2011, *supra* note 17, Preamble, recital 7.

¹⁴⁶ Rijpma (2009), *supra* note 19, 148.

¹⁴⁷ cf Guild et al (2011), *supra* note 30, 90-91.

operational independent units while Frontex is rather dependent on Member States. This was addressed in the amendments which increased the rapprochement between Member States.¹⁴⁸

The perceived effect of the Europeanization of AFSJ in terms of more Member State control because of an increased overview of retained respectively shared competences is, in my regard, an illusion in this still rather cluttered policy field.¹⁴⁹ The remained confusion is due to the ambiguous Member States in regard to the transfer of sovereignty to Union level. This cluttered and intertwined power division between national and Union level is the result of (some) Member States' reluctance to transfer powers. Operational cooperation facilitated by a coordinating agency with several intergovernmental features has thus been a feasible way towards increased cooperation, solidarity mechanisms and an attempt to streamline and harmonize border management; that is towards European integration. Considering this, the experimentalist governance of Frontex satisfies the need for operational cooperation *and* the reluctance to find comprehensive European policy solutions. However, it fails to provide Member States with the control and overview of the actual transferral of powers to Union level.¹⁵⁰ Perhaps this situation, with lack of overview and control for the Member States over the power transfer, is as unfavourable for their prerogatives as the perceived situation of a comprehensive European policy solution.

Considering the impossibility to reach consensus in detailed and clear policy-making and the fact that a traditional legislative procedure more easily trigger Member States' concerns over sovereignty than other forms of policy cooperation, it is logically that the common policy field has not yet been pushed forward in regard to IBM to the extent the Commission might have hoped for.¹⁵¹ Another rationale is the uncertainty among Member States and EU institutions on how to achieve an IBM.¹⁵² Thus, the integration has taken another path. This equal with less direct supranationalism, as normally within AFSJ, but not necessarily with corresponding lack of integration. The main integration features of the role of Frontex are firstly, notwithstanding the intergovernmental features, about increasing the potential for uniform application of Union legislation and policies, Secondly the role of Frontex could also be envisaged to strengthen the Union input into initial phases of policy making processes.¹⁵³ The

¹⁴⁸ Pollack J and Slominski P, 'Experimentalist but not Accountable Governance? The Role of Frontex in Managing EU's External Borders' (2009) 32 *West European Politics*, 904, 920 [Pollack and Slominski (2009)].

¹⁴⁹ cf Carrera and Guild (2006) *supra* note 84, 3.

¹⁵⁰ cf Rijpma (2009) *supra* note 19, 135.

¹⁵¹ N Walker 'In Search of The Area of Freedom, Security and Justice: A Constitutional Odyssey' in N Walker (ed) *Europe's Area of Freedom, Security and Justice* (Oxford University Press, Oxford 2004) 22.

¹⁵² Pollack and Slominski (2009) *supra* note 148, 907.

¹⁵³ M Egeberg, M Martens and J Trondal, 'Building executive power at the European level: on the role of European Union agencies' in M Busuioc, M Groenleer and J Trondal (eds), *The Agency Phenomenon in the European Union: Emergence, institutionalisation and*

intergovernmental hierarchical control over Frontex hampers this process but still, the current and future influence on policy-making by Frontex cannot be underestimated, in particular considering the redefinition of national problems to common Union problems.¹⁵⁴

3.2 From a Democratic Perspective

Transparency and accountability have often been considered as a two-folded key element of democratic control over executive bodies to prevent the abuse of powers. In addition, these qualities are understood as pre-conditions attaining public trust in political authorities and equals with the perception of a Western democracy.¹⁵⁵

The institutional balance within the Union and the structures of accountability are coupled with the democratic legitimacy of the Union or the lack thereof. In this aspect the democratic perspective encounter the need for legitimacy in the integration perspective. The EP has been known as the locus of the democratic deficit since the Rome Treaty but has gradually increased its role and powers in the legislative process.¹⁵⁶ However, does this imply a corresponding capacity to hold the executives democratically accountable?

Another rationale for review of Frontex, in terms of democratic concerns, is the deficient scrutiny of fundamental rights-sensitive activities as well as democratic accountability for alleged human rights violations, especially since Frontex is dealing with both migration and security issues.¹⁵⁷

3.2.1 Transparency and Democratic Legitimacy

Frontex is a first pillar agency but notwithstanding this, the Member States are in the driver's seat. Frontex is also a hybrid in regard to the accountability structures.¹⁵⁸ After a comparison of Europol and Frontex the derived conclusion is that the most appropriate way to ensure accountability in the rapid evolving supranationalization of AFSJ agencies is to give full control to the EP and the ECJ. National parliamentary scrutiny should hence be secondary.¹⁵⁹

everyday decision-making (Manchester University Press, Manchester 2012) 35 [Egeberg, Martens and Trondal (2012)].

¹⁵⁴ Pollack and Slominski (2009) *supra* note 148, 913.

¹⁵⁵ J Lodge, 'Transparency and Accountability: From Structuro-Procedural Transparency and Institutional Accountability to Communicating (In)Security in Digi-Space' in D Bigo et al (eds) *Europe's 21st Century Challenge: Delivering Liberty* (Ashgate Publishing, Farnham, Surrey, England 2010) 107.

¹⁵⁶ *ibid.*, 109.

¹⁵⁷ S Puntcher Riekman, 'Security, Freedom and Accountability: Europol and Frontex' in E Guild and F Geyer (eds) *Security versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate Publishing, Aldershot, England 2008) 29-30 [Puntcher Riekman (2008)].

¹⁵⁸ *ibid.*

¹⁵⁹ *ibid.*, 32.

The institutional setting within the Union is the first and foremost important factor in evaluating the democracy situation. The Frontex Regulation is a development of the Schengen *acquis* which covered different policy areas both in the first pillar and third pillar.¹⁶⁰ Even though the Treaty of Amsterdam implied a transfer to co-decision on most immigration and border issues (after the transitional periods of five years) and that Frontex is a first pillar agency there were several legislative procedures within the field of immigration and borders with more or less participation of the Parliament.¹⁶¹ In continuation, the merge of the old pillars entailed further extension of the shared Union competence¹⁶² and a strengthened co-decision role for the Parliament, *inter alia* in the ‘Frontex areas’: integrated border management and persons crossing the external border, ie Art 77.2 (b) and (d) TFEU, the legal basis for the Frontex Regulation.¹⁶³ The first co-decision regulation adopted was the SBC and thereafter the RABIT Regulation and the 2011 amendments to the Frontex Regulation. However, Art 74 TFEU is also used as legal basis for the founding regulation, stipulating that the Council shall adopt measures ensuring administrative cooperation between Member States authorities and between these authorities and the Commission after consulting the Parliament.¹⁶⁴ These measures shall be adopted on a proposal of the Commission or on the initiative of a quarter of the States, according to Art 76 TFEU. As founded on both articles the ambiguous role of the EP is not unexpected.

The delegation of powers to Frontex as an independent agency and their exercise of mandate, competences and tasks can be analysed through the theory of experimentalist governance.¹⁶⁵ Experimentalist governance is relevant in policy fields with heterogeneous interests, legal traditions and ideas. The used governance can be described as encompassing four key elements. The first element is the establishment of generally expressed framework objectives and secondly, the power of low-level units, like agencies, to reach these objectives. The third is the obligation to report on their performance as well as take part of peer-review processes regularly and lastly the periodic revision of their operational framework.¹⁶⁶ Considering this, Pollack and Slominski argue that Frontex work can be accommodated in the experimentalist governance but fails in meeting the requirements for accountability including democratic accountability.¹⁶⁷ The experimental feature depends on the ‘ambivalent environment mainly characterised by weak political leadership’ in which Frontex operates, which can be explained by abovementioned heterogeneous preconditions, interests,

¹⁶⁰ Frontex Amendment 2011, *supra* note 17, Preamble, recitals 32-37.

¹⁶¹ See, Consolidated version of the Treaty establishing the European Community [2002] OJ C 325/33, Title IV, Visas, Asylum, Immigration and other policies related to free movement of persons.

¹⁶² TFEU, *supra* note 7, Art 4.2 (j).

¹⁶³ cf EC Treaty 1997, *supra* note 9, Art 62.2 (a).

¹⁶⁴ cf EC Treaty 1997, *supra* note 9, Art 66.

¹⁶⁵ Pollack and Slominski, *supra* note 148, 904-924.

¹⁶⁶ *ibid*, 905

¹⁶⁷ *ibid*, 906, 917- 920.

ideas and legal traditions in the Member States.¹⁶⁸

Evidential of this ambivalent environment is the vague Frontex Regulation mirroring the need to accommodate diverse national views of Frontex role. The labelling of Frontex as an agency concerned with management of operational cooperation, without a definition on management, creates a propensity to draw a conclusion that it is a thin line between managing operational cooperation than being operational.¹⁶⁹

This was exacerbated with the 2011 amendments increasing the agency's operational role. Although the co-decision procedure has strengthened the Parliaments role since the 1 of January 2005, there are many operational aspects not covered in secondary law. In addition, considering the experimental nature of Frontex governance there is a whole array of issues not covered or clarified by secondary law and hence not subject to parliamentary regulatory power or to parliamentary scrutiny of the actual practices of Frontex.¹⁷⁰ An example of this would be exercised intercepting measures at sea, which are scarcely clarified in the Frontex Regulation, the SBC and the Frontex Sea Border Rule.

The role of the Parliament is instead merely concerned with the budget and as Frontex is almost entirely funded by the Union it has significant budgetary power together with the Council.¹⁷¹ In regard to the appointment of an Executive Director the Parliament has little to say. It can only, when already at office, invite the Director to hearings. According to Art 25.2 Frontex Regulation, the Parliament or the Council may invite the Executive Director to report on the exercise of his or hers tasks. When the Council consulted the Parliament during the legislative process, the latter amended the provision from 'may' to 'shall'. The justification of this amendment was the fact that the Parliament found it fundamental that it exercised scrutiny 'as of right, and not simply as an option'.¹⁷² The amendment was not considered in the final draft but in the view of some parliamentarians this does not seem to be a problem anymore because even though Frontex representatives initially did not show up when invited, they now do because of the budgetary authority of the Parliament and the need for them to present their programmes.¹⁷³ This becomes significant when considering the increased budget of Frontex from the first operational years up to today.¹⁷⁴

¹⁶⁸ *ibid*, 905.

¹⁶⁹ Mitsilegas (2007), *supra* note 40, 374.

¹⁷⁰ cf Pollack and Sominski (2009), *supra* note 139, 905-906.

¹⁷¹ Frontex Regulation, *supra* note 4, Art 29.

¹⁷² European Parliament, Report on the proposal on the Proposal for a Council regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders COM (2003) 687 – C5-0613/2003 – 2003/0273(CNS)), Final A5–0093/2004, Amendment 38, Article 23.2.

¹⁷³ House of Lords, European Union Committee, 9th Report of Session 2007-08, Frontex: The EU External Border Agency: Report with evidence (House of Lords Authority, London 2008) 28.

¹⁷⁴ See budget developments, Frontex, General Report 2011, available at http://www.frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_repor

The Management Board shall forward both a General Report on the undertaken activities during the previous year as well as a work programme for the coming year.¹⁷⁵ The 2011 amendments revised Article 25.2 and added that the EP may, in particular, invite the Executive Director to report on the implementation and monitoring of the Fundamental Rights Strategy, the General Report of the previous year and the work programme for the coming year. The new fundamental rights structure within the agency, especially the Fundamental Rights Strategy, provides the Parliament, the ‘traditional fundamental rights champion in the EU’¹⁷⁶, with a tool for scrutinizing and putting pressure on the agency and their practice from a fundamental rights perspective. The actual degree of detailed information on specific operations and practices possessed by the Executive Director is however uncertain, particularly since the operations are organized by Frontex but performed under the authority of the host State.¹⁷⁷ Otherwise, the Parliament is excluded from scrutinizing the Executive Director, which only answers before the Management Board.¹⁷⁸

Indirect democratic control by the national parliaments concerns two groups of people: deployed or seconded border guards and board members representing a Member State. Board members and border guards can be held accountable by a national minister who in turn is accountable before the national parliament; in specific cases the board member is the national minister. Frontex is however not obliged to inform or report to national parliaments and due to lack of information national parliaments rarely scrutinize ministers or officials involved in EU affairs.¹⁷⁹

There is not any form of democratic control or scrutiny of the operational activities of the agency, especially not the extraterritorial implications or the proportionality of operational plans. Nor is there any mechanism for scrutiny of the risk analyses, which should be closely scrutinized while they are justifying the operations and constitute the instrument upon which the operations are planned and conducted.¹⁸⁰

Before Frontex led JOs like Hera¹⁸¹ can take place, it is the responsibility of the host State to conclude a bilateral agreement with relevant third countries. In this particular case the requirements of Senegal in the negotiations were unexpectedly demanding and the whole operation got delayed. The political sensitive content of these bilateral agreements justify that they always are

[t/2011/General_Report_2011.pdf](#) accessed 16 May 2013, 23. The total budget of Frontex (thus, not only Union subsidies) in 2006 was EUR 19.2 million compared to 2011 when the budget reached EUR 118.2 million.

¹⁷⁵ Frontex Regulation, *supra* note 4, Art 20.2 (b) and (c).

¹⁷⁶ Leonard (2009) *supra* note 95, 385.

¹⁷⁷ Pollack and Slominski (2009), *supra* note 148, 917.

¹⁷⁸ Frontex Regulation, *supra* note 4, Art 25.4.

¹⁷⁹ Pollack and Slominski (2009), *supra* note 148, 918.

¹⁸⁰ Carrera (2010), *supra* note 3, 26-27.

¹⁸¹ See Frontex website, Archive of Accomplished Operations: Hera consists of seven different sea operations conducted outside the Canary Islands and in the territory of Senegal and Mauritania, with Spain as a host State. Available at www.frontex.se accessed 20 May 2013.

highly secret and never come under the scrutiny of the EP or even national parliaments, since they often take the form of an Memorandum of Understandings.¹⁸²

Thus, the Parliament is excluded to receive the risk analyses, which on the other hand are forwarded to the Commission and the Council.¹⁸³ The absence of parliamentary scrutiny of risk analyses and operational plans is aggravated, due to the vague legal framework regarding detailed practice for deployed and seconded border guards, but also regarding the more overarching issues eg, jurisdiction, applicable laws, what is considered a safe place and which actor would be responsible for potential claims for asylum in different sorts of operations. The implications of a managerial body of the Union should be subject to democratic control and the agency itself, ie the Executive Director and the Management Board, should be accountable before the Parliament. The characteristics of Frontex praxis, namely their intelligence-driven operations and the use of risk analyses as determining and guiding all operational activity, result in secrecy, lack of transparency and hence also lack of democratic accountability in regard to the operations.¹⁸⁴

3.2.2 Recommendations

For the sake of democratic accountability and the rule of law, Carrera argues that the source legitimizing and founding the operations and activities of Frontex have to be subject to ‘a comprehensive assessment, review and accountability which would greatly benefit from a more direct involvement of the EP.’¹⁸⁵ Before moving ahead with the European integration this vulnerability must be addressed in regard to both the institutional and substantial mechanisms of IBM, notwithstanding this democratic accountability cannot be ensured in IBM and in particular in the activities of Frontex.¹⁸⁶

The 2011 amendments is not capable of completely addressing the dilemma of lack of democratic scrutiny, more measures are needed to fully achieve a high democratic standard on transparency and accountability.¹⁸⁷

A category of monitoring border guards set up under a new body within the EP was a part of the comprehensive recommendation of a Common European Border Service made by Carrera in 2010, glancing at the proposal for the 2010 amendments.¹⁸⁸ These would initiate disciplinary measures against border guards for inappropriate or disproportionate behaviour in the

¹⁸² cf Refugee Council and European Council on Refugees and Exiles (ECRE) joint response to the Select Committee on the European Union Sub-Committee F (Home Affairs): Frontex Inquiry, PP3/09/2007/extPC, 24 September 2007, 6-7.

¹⁸³ Puntischer Riekmann (2008) *supra* note 157, 30.

¹⁸⁴ Carrera (2007), *supra* note 14, 27-28.

¹⁸⁵ *ibid.*

¹⁸⁶ *ibid.*, 28.

¹⁸⁷ Carrera (2010) *supra* note 3, 27.

¹⁸⁸ *ibid.*, 27-29.

application of SBC and work as an intermediary between individuals presenting complaints or appeals and the national authority as well as report of budgetary and proportionality issues to the Parliament. The added value would *inter alia* be a more accountable legitimate and proportionate IBM as well as a reinforced role of the Parliament.¹⁸⁹

Considering that the preconditions for democratic control are openness and transparency, the EP should have access to all documents related to Frontex activities and operations, especially since Frontex was established as an agency to improve transparency and is subject to the rules related to communication of documents and information.¹⁹⁰ The Parliament needs to get access to the follow up of Frontex activities as well as the risk analyses otherwise the border management activities evade democratic scrutiny to a large extent.¹⁹¹ In conclusion a proper democratic control should be ensured as the activities of Frontex is connected to the exercise of public authority and fundamental rights and freedoms.¹⁹²

3.2.3 Implications

The legal implications of the recommendation would be amending the Frontex Regulation by inserting obligations for Frontex to forward risk analyses and threat assessments to the EP to the same extent as to the Commission and Council and submit other relevant operational documents on the initiative of the Parliament. In practice this could be expressed, *inter alia* through amending the current Art 4 of the amended Frontex Regulation regarding risk analyses and Art 11 about information exchange.

Carrera envisages that the monitoring mechanism under the Parliament would facilitate depoliticisation and accountability of border control activity as well as improve legitimacy of the EU immigration and border policy. He argues that Art 77.2 (d) Lisbon Treaty provides a legal basis for the Parliament and the Council to adopt new creative solutions to develop policies for a gradual implementation of IBM and that his recommendation therefore would be possible and legally accommodated by the Treaty.¹⁹³

This would indeed reinforce the position of the Parliament and constitute a significant shift in the control functions over the agency. This would entail a transferral of national prerogatives as perceived by most Member States. However, the counterargument is that the Union already has exercised competence in regard to the establishment of Frontex, at least considering the amendment of the regulation as subject to the co-decision procedure, and hence in prolongation of this, may exercise democratic control on Union level.

¹⁸⁹ *ibid.*

¹⁹⁰ Frontex Regulation, *supra* note 4, Art 28; Jorry (2007), *supra* note 88, 21.

¹⁹¹ *ibid.*, 26-27

¹⁹² *ibid.*, 21.

¹⁹³ *ibid.*

3.2.4 Analysis: Parliamentary Assurances

In the context of the establishment of Frontex, the EP was weak because of the consultation procedure and consequently, the Council did not consider its amendments in the final text. The result is a point of departure where the control mechanism lays firmly in the hands of the main stakeholders, the Member States.¹⁹⁴ Even though the role of the Parliament has been considerably reinforced since then, it now participates in the legislative process together with the Council and got a strengthened role with the 2011 amendments, the democratic control over Frontex activities is still weak.

Despite the fact that Frontex is a first pillar agency it is possible to argue that it is more similar to ‘third pillar’ agencies like Eurojust and Europol considering coordination of operations, executive powers and information exchange.¹⁹⁵ This would also cohere to the scarce control activities outside the hands of the Member States.

The creation of a set of independent (from Frontex) monitoring border guards is part of an ambitious multi-layered border service addressing problems with uniform application, fundamental rights compliance and accountability and transparency. In my opinion it would not be the legal base that would hamper the creative idea of a set of both controlling border guards as well as monitoring border guards. Instead it would be the unlikelihood of an agreement between the Member States of such a sovereignty intruding proposal, especially since it, in its comprehensive approach, involve a new institutional mechanism under the Parliament as well as a new monitoring and evaluating mandate for FRA. On the other hand there are some features of this recommendation accommodated in the 2011 amendments, such as the involvement of FRA in the Consultative Forum as well as the Fundamental Rights Strategy as an improved tool for scrutinizing fundamental rights implications when hearing the Executive Director. However, these improvements are weak in comparison to the deficiencies raised by scholars. The amendments contribute with little in regard to democratic control and instead focused on the operational capabilities of Frontex and its operational independence. In contrary, this could exacerbate the lack of democratic control over operational activities as the competences were reinforced by the amendments, excluding national parliaments from a potential (at least in theory) scrutiny.

The call for a strengthened role of the Parliament in regard to access to documents, risk assessments, operational plans, reports and evaluations is, according to me, a necessary evolution of the legal framework surrounding Frontex. Technically the legislative creation would not be a challenge in comparison to the multi-layered border service but this is also a difficult agreement to conclude between the Member States and a power transfer hard to imagine. However, increased access to the activities and operations of Frontex should be ensured by an obligation for Frontex to forward risk

¹⁹⁴ Leonard (2009), *supra* note 95, 383.

¹⁹⁵ Mitsilegas (2007), *supra* note 40, 374-375.

assessments to the EP as it is obligated to do to the Commission and the Council and right of the Parliament to request operational plans.¹⁹⁶ Increased democratic scrutiny is essential for the legitimacy of the agency and the image of the Union as an advocate for democracy.

3.3 Human Rights Perspective

The human rights (HR) perspective is overall a critical perspective with focus on the deficiencies in the respect and fulfilment of refugee and human rights. The perspective put forward several issues in the review of Frontex, of which many concern the extraterritorial application of border management and how the measures and operations affect the safeguards for human and fundamental rights. Extraterritorialisation (sometimes called externalisation, outsourcing, remote control or subcontracting) accommodates both the physical relocation of border controls and the sharing or shift of responsibilities for border management to third States.¹⁹⁷ Extraterritorialisation is not a result of the work of Frontex but is a corollary to the emphasis on pre-border surveillance and cooperation with third countries in migration policies as part of the emerged notion of integrated border management, of which Frontex also is an essential part. These are perceived as necessary tools to achieve an efficient border management, that is migration control, by the European institutions. The proliferation of the externalisation has emerged parallel to the development of the agency, which also lists third country cooperation as an important aspect in fulfilling its mandate.¹⁹⁸ The extraterritorialisation and Frontex can be understood as mutually supportive notions, part of each other's development.

The externalisation of border control measures rises the question to what extent migrants subject to extraterritorial pre-border control measures can rely on the same safeguards applicable to regular border control measures.¹⁹⁹ This question has been the overarching concern for the HR perspective resulting in proposals on how to govern the external dimension in Union law so as to prevent or remedy the gap between legal safeguards and corresponding responsibilities and performed border surveillance.²⁰⁰ Accompanying legal safeguards are perceived as a necessary corollary to the promotion of and emphasis on the externalisation of the border and migration control of the Union.

In addition, the responsibility for violations of human rights are very difficult to attribute to one specific actor when there is a range of multi-

¹⁹⁶ cf Frontex Amendment 2011, *supra* note 17, Art 4.

¹⁹⁷ M den Heijer, 'Europe beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control: Legal Challenges' in B Ryan and V Mitsilegas (eds) *Extraterritorial Immigration Control* (Martinius Nijhoff Publishers, Leiden 2010) 190-191 [den Heijer (2010)].

¹⁹⁸ Frontex website, <http://www.frontex.europa.eu/about/mission-and-tasks> accessed 15 March 2013.

¹⁹⁹ den Heijer (2010), *supra* note 197, 170.

²⁰⁰ *ibid.*

layered authorities involved in operations coordinated by Frontex.²⁰¹ This affects the access to effective legal remedy and the justiciability of individual's rights, a precondition in ensuring and enforcing the implementation of all rights.

Frontex maritime operations in the Mediterranean and in the territory of third States in Africa have attracted most attention within the human rights society, even if Frontex also conducts land and air operations. The praxis of diverting boats with migrants back to the state of departure (origin or transit) has resulted in concerns regarding non-refoulement, access to asylum and access to legal remedies.²⁰²

Frontex's role as a coordinator in joint operations, in which Member States with contested practices of push-back measures participate, has contributed to Frontex's reputation as a highly criticized agency from human rights perspectives. In particular, since the countries questioned by human rights scholars and NGOs often function as the host State for extraterritorial operations led by Frontex.²⁰³ One of the main challenges for these Member States with maritime borders are the fact that boat migrants usually travel in mixed flows, ie persons with protection needs and with intent to seek asylum, travel in the same boat as irregular migrants with no need of protection, not intending to seek asylum.²⁰⁴

The human rights perspective identifies the role and responsibilities of Frontex in the context of individual rights and with the objective that these rights shall be enforceable in a court so as to provide as much practical value as possible. This requires, besides clear material rights, a responsible actor and liability of that actor before a court. It also requires monitoring mechanisms and transparency, in order for the actual scrutiny of Frontex to become implemented in reality. This is the context in which the review of Frontex's role and responsibilities are set in the human rights perspective. It is envisioned from the eyes of an individual boat migrant trying to reach Europe.

The scope of this human rights perspective is thus not the material allegations or evidence of shortage in Frontex's respect for refugee and human rights or lack of safeguards regarding these. Enumerations of several aspects of Frontex's work, especially in extraterritorial immigration

²⁰¹ den Heijer (2012), *supra* note 60, 57-59.

²⁰² den Heijer (2010), *supra* note 197; den Heijer (2012), *supra* note 60; T Demmelhuber, 'The European Union and illegal immigration in the southern Mediterranean: the trap of competing policy concepts' (2011) 15 *The International Journal of Human Rights*, 813-826; L den Hertog, 'Two Boats in the Mediterranean and their Unfortunate Encounters with the Europe's Polices towards People on the Move' (2012) *Centre for European Policy Studies (CEPS), Liberty and Security in Europe*, No 48, available at <http://www.ceps.eu> accessed 15 April 2013.

²⁰³ See inter alia operation HERA (Spain), POSEIDON SEA (Greece) and HERMES (Italy), Frontex website <http://www.frontex.europa.eu/operations/archive-of-accomplished-operations?p=5> accessed 1 April 2013.

²⁰⁴ A recent case of the Strasbourg Court demonstrates the relevant issues: *Hirsi Jamaa and others v. Italy* (GC), App no. 27765/09, Strasbourg 23 February 2012.

controls, at odds with human rights has already been covered by the academia and civil society (in terms of specialised NGOs) and is only to be mentioned shortly in this endeavour.²⁰⁵ Instead, the focus is on the legal accountability of Frontex, including an examination of the mandate and legal competences versus practices, since these concepts are the basis for establishing and distinguishing responsibility. The multiple allegations of human rights violations are brought forward in vain if the role and legal responsibilities of the involved actors are blurred. The blurred mandate, competences and corresponding responsibilities can therefore be argued to create a rights-related accountability gap, which means that individuals are left without access to an effective legal remedy.²⁰⁶ The perceived shortage and the proposed changes within the HR perspective are based on diverse understandings of the unclear role of Frontex.

3.3.1 Hybrid Competences and Tasks

Frontex is often presented as a technical and bureaucratic agency, which is information driven and only mandated with coordination without effect on individuals.²⁰⁷ Despite this description some scholars claim that Frontex is an agency with competences that ‘transform classical understandings of the boundaries of ‘executive and administrative power’ in the EU AFSJ’.²⁰⁸ Baldaccini notes that the responsibility of the external borders still rests firmly upon the Member States, according to the Frontex Regulation. She continues to state that notwithstanding this, Frontex’s mandate, structure and actual activities suggest another less clear division of responsibility.²⁰⁹

Coordination of joint operations is one of the most visible ways through which Frontex is engaged in strengthening the operational cooperation between Member States. The initiative for a JO can be made through a request from a Member State approved by the agency or Frontex may itself initiate a JO in agreement with the host Member State. Frontex competence to initiate JOs was increased by the amendment 2011 where the expression ‘and in agreement with the Member States concerned’ was deleted and replaced by ‘in agreement with the host Member States’.²¹⁰ The wording of the rest of the article is also changed as to express a greater independence in the right to initiate JOs.

The status of border guards of one Member State being deployed in another Member State was not addressed in the founding regulation. The law of the host State was assumed to be applicable, compare Art 10 that states the

²⁰⁵ See *supra* note 202 and inter alia, Human Rights Watch, ‘Pushed back, pushed around: Italy’s Forced Return of Boat Migrants and Asylum Seekers, Libya’s Mistreatment of Migrants and Asylum Seekers’ available at <http://www.hrw.org/reports/2009/09/21/pushed-back-pushed-around-0> accessed 22 May 2013.

²⁰⁶ Guild et al (2011), *supra* note 30, 113.

²⁰⁷ Baldaccini (2010), *supra* note 1, 230.

²⁰⁸ Guild et al (2011), *supra* note 30, 89-90.

²⁰⁹ Baldaccini (2010) *supra* note 1, 230.

²¹⁰ cf Frontex Regulation, *supra* note 4, Art 3.1 with Frontex Amendment 2011, *supra* note 17, Art 3.1.

same principle for Frontex staff. The RABIT Regulation addressed this and equated guest border guards with national border guards and gave them the capacity to exercise all powers for border checks and surveillance in accordance with SBC.²¹¹

The carrying of weapon and use of force is also addressed specifically. The conditions for carrying service weapon are laid down in the national law of the host State. Use of force requires the consent of both the host and the home Member State, the presence of border guards of the host State and shall be exercised in compliance with the law of the host State.²¹²

When exercising their powers, guest border guards have to comply with Union law and the law of the host State. The latest amendment added a reference to International law and fundamental rights as well.²¹³

The scope of Frontex role and activities during JOs is often considered unclear. Which also implies that the ‘demarcation of responsibility between Member States and the Agency in operational activities’ also becomes unclear.²¹⁴ One reason is the dual nature of organisational activities and semi-operational activities within the mandate of Frontex.²¹⁵ Baldaccini continues to demonstrate the contradictions by pointing at the task to carry out risk analysis, which *prima facie* is an ordinary agency task based on information. However, Baldaccini argues that in practice, operations are planned and initiated on the basis of Frontex’s risk analysis, which means that Frontex initiates the operation and then controls the planning and coordinates the actual implementation. This implies that only a fine line distinguishes the managerial and operational (executive) role. In addition, according to the regulation, the measures undertaken outside Frontex coordination have to complement and supplement its activities. Altogether, Baldaccini understands this as a significant shift in the responsibility over the external borders. Parallel, the agency stresses the importance of Member State responsibility and the fact that one rather small Union body cannot replace 27 Member States’ border authorities but are only there to coordinate operational cooperation. Notwithstanding this, Baldaccini suggests that the responsibilities of Frontex arise from its role as planner and coordinator and not as the executer.²¹⁶

Another rationale for uncertainties, regarding the operational role of Frontex, is the lack of legal definition of a JO in the Frontex Regulation and the absence of provisions governing how operations should be prepared and conducted.²¹⁷ However, the amendment inserted new detailed provisions regarding what issues the operational plan must govern and how these shall

²¹¹ RABIT Regulation, *supra* note 52, Chapter II, Art 10.

²¹² *ibid.*

²¹³ Frontex Amendment 2011, *supra* note 17, Art 10.2.

²¹⁴ Baldaccini (2010) *supra* note 1, 233.

²¹⁵ Rijpma (2012), *supra* note 58, 90.

²¹⁶ Baldaccini (2010), *supra* note 1, 234.

²¹⁷ Guild et al (2012), *supra* note 139, 19.

be decided.²¹⁸ According to this provision, the operational plan must govern eg *modus operandi*, command and control provisions as well as tasks and instructions for guest officers. The plan is drafted by the Executive Director, in close cooperation with the participating States, in particular with the host State, and functions as an outline for the whole operation.²¹⁹

The practice of push-back measures, such as interception of boat migrants to stop or deter them from entering European territory, has led joint operations into international waters and territorial waters of third States. Approximately two-thirds of Frontex expenditure is taken up by sea operations.²²⁰ The Frontex Sea Border Rule contains binding preconditions for interception of boats in international waters or other measures aiming at pushing back migrants without prejudice to international protection obligations.²²¹ However, how the actual implementation of the interception provisions shall be performed to comply with fundamental and human rights, is not completely clarified in the rule. Art 14.1 in the amended Frontex Regulation, states that operations taking place in the territory of a third State shall at least comply with Union norms and standards. There is also a requirement for the operational plan to specify legislation, jurisdiction, and geographical area and to refer to International and Union law regarding interception, disembarkation and rescue at sea.²²² According to Frontex's Code of Conduct, all participating actors must comply with International law, European Union law, the national law of both home and host Member States and respect and promote fundamental rights in accordance with all relevant international and European instruments.²²³ All participants must also:

promote, in full compliance with the principle of non refoulement, that persons seeking international protection are recognised, receive adequate assistance, are informed, in an appropriate way, about their rights and relevant procedures and are referred to national authorities responsible for receiving their asylum requests.²²⁴

The Fundamental Rights Strategy declares that Frontex shall take into consideration the special situation of persons seeking international protection as well as assess the implications on fundamental rights when proposing or preparing JOs.²²⁵

²¹⁸ Frontex Amendment 2011, *supra* note 17, Art 3a.

²¹⁹ Rijpma (2010), *supra* note 125, 3.

²²⁰ COWI, External evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Final Report, 15 January 2009, available at <http://www.statewatch.org/news/2009/may/frontex-eval-report-2009.pdf> accessed 20 May 2013, 25.

²²¹ Frontex Sea Border Rule, *supra* note 59, part 1, para. 2.

²²² Frontex Amendment 2011, *supra* note 17, Art 3a.1(j) and 14.

²²³ Frontex, Code of Conduct, Art 3-5, available at <http://www.frontex.europa.eu/publications/?p=2> accessed 20 May 2013.

²²⁴ *ibid*, Art 5.a).

²²⁵ Frontex, Fundamental Rights Strategy, para. 14, available at <http://www.frontex.europa.eu/publications/> accessed 20 May 2013.

Frontex may enter into working agreements with authorities of third States (usually law enforcement authorities responsible for operational border control) but lacks the competence to conclude bilateral agreements with third countries to allow joint operations on their territory.²²⁶ These extraterritorial JOs are instead built on bilateral arrangements concluded between participating Member States and third States. Provisions about the role and competence of Frontex, especially executive powers of the teams deployed by Frontex, may be included in a bilateral agreement, according to Art 14.4 of the Frontex Amendment 2011. This implies that the role of Frontex and corresponding executive powers of the teams deployed by the agency will be decided on an *ad-hoc* basis in some JOs.

In the context of maritime operations, an International Coordination Centre (ICC) is established in the host-State with an officer from the host-State in charge of the ICC. That coordinator officer is also head of the Joint Coordinator Board (JCB), a board comprised of one national officer from each participating State, Frontex experts and a risk analyst. The ICC implements the operational decisions of the JCB. This can be argued to imply that the control of the assets participating in the operation is in the hands of the Member States through the national officers in the JCB, who have the possibility to consult their superiors before giving directions. Rijpma continues to conclude that the tactical command is in the hands of each specific unit or vessel or as directed by the national officers in the JCB.²²⁷ Another evident of the host State command is that the Frontex Coordinating Officer (FCO) may, in all Frontex operations, communicate the view of the agency to the host State when the latter instructs the European Border Guard Teams.²²⁸ The host State shall take the view of the agency into consideration but are not obligated to comply with it.

The fact that both the operational plan and bilateral agreements governs fundamental issues about jurisdiction, legislation and division of powers between the participants exacerbates the vague contours of Frontex role, competences and responsibilities, since these documents are not made public. Despite Rijpma's clear view on operational control, contentions about the exact scope of Frontex's coordinating role still exists, one reason being the shifting role of Frontex in different operations. Baldaccini states that:

The lack of clarity and transparency regarding the exact scope of Frontex's coordinating role, and the way in which Frontex operations are conducted make it difficult to establish which authority can ultimately be held responsible by an individual.²²⁹

Frontex initiative of, or involvement in, JOs based on bilateral agreements in third States has, in addition, been highly criticized in regard to the fact that these bilateral arrangements often are concluded through non-public

²²⁶ Frontex Amendment 2011, *supra* note 17, Art 14.2 and Art 14.7; Frontex website, available at <http://www.frontex.europa.eu/partners/third-countries> accessed 21 May 2013.

²²⁷ Rijpma (2010), *supra* note 125, 3.

²²⁸ Frontex Amendment 2011, *supra* note 17, Art 3b.5 and 3c. 1-3.

²²⁹ Baldaccini (2010), *supra* note 1, 230.

memorandum of understandings and therefore lacks transparency and democratic control.²³⁰ The risk brought forward is that Frontex cooperates with and undertakes JOs in third States that do not respect refugee and human rights.²³¹ Frontex involvement in these operations taking place in third States was without a legal framework until the amendments in 2011. Since 2011 a new paragraph has been inserted stating that when Frontex cooperates with third States on their territory, it has to comply with norms and standards at least equivalent to Union legislation.²³² This rather imprecise provision is the only legal framework for activities in territories of third States.

Another of Frontex operational tasks expressed in the founding regulation was to *assist* Member States in Joint Return Operations (JRO), eg through identifying best practices on the acquisition of travel documents and removal of illegally present third-country nationals (TCN).²³³ The Commission observed that Frontex had engaged in more than assistance in JRO and instead exercised a coordinating role successfully. Hence, the Commission acknowledged a mismatch between the legal basis and Frontex actual activities, which resulted in a proposal of a reinforced article concerning Frontex mandate and competence in JROs.²³⁴ As a result, the Frontex Amendment 2011 states that Frontex shall provide necessary assistance and ensure coordination or organisation. In the end of the paragraph, the financial support is made conditional upon Member States' full respect for the ChFR.²³⁵ The Commission observed, in its Impact Assessment, that the Member States called for even stronger support from Frontex, if this implies further increased competences to be expected in new amendments remains to be seen.²³⁶

A provision stating that the first evaluation following the entry into force of the amendment shall include an evaluation of the need of increased coordination, that is increased competences, and the feasibility of the creation of a European system of border Guards. A clear demonstration of the fact that the objective of a European Border Guard has not been abandoned; instead one can envisage more operational competences being transferred to Frontex.

3.3.2 Legal Accountability *lex lata*

As discussed above,²³⁷ there is a widespread view according to which Frontex and similar agencies are not 'operational' in the sense that they are

²³⁰ Refugee Council and European Council on Refugees and Exiles (ECRE) joint response to the Select Committee on the European Union Sub-Committee F (Home Affairs): Frontex Inquiry, PP3/09/2007/extPC, 24 September 2007, 6-7.

²³¹ Guild et al (2011), *supra* note 30, 64.

²³² Frontex Amendment 2011, *supra* note 17, Art 14.1.

²³³ Frontex Regulation, *supra* note 4, Art 9.

²³⁴ Impact Assessment, *supra* note 65, 16.

²³⁵ Frontex Amendment 2011, *supra* note 17, Art 9.1.

²³⁶ Impact Assessment, *supra* note 65, 16

²³⁷ See subsection 3.1.1.

taking decisions and exercise executive powers that result in responsibilities regarding fundamental rights violations.²³⁸ Their facilitating and coordinating role do not, according to this view, amount to an operational responsibility, instead the responsibility rests exclusively with the Member States. This implies that international and European human and fundamental rights obligations fall upon the Member States and not Frontex.²³⁹ Baldaccini continues to note that even though the Member States cannot avoid their responsibility, there is not enough information given by Frontex or the Member States ensuring that the participating States comply with all obligations under human rights and refugee law. At the opposite there are many concerns about practices used by countries as Spain, Italy and Greece.²⁴⁰ Even though Frontex awareness of fundamental rights has been increased, it is still impossible to monitor the situation where migrants encounter border guards in different push-back measures at sea.²⁴¹

The legal accountability builds upon the contested assumption of an agency not in contact with, and whose actions do not give legal effect to, individuals. The national border guards instead perform these tasks.

The host State is liable for the conduct of deployed border guards, according to national law of the host State. Only if the conduct is caused by gross negligence the host State may approach the home State with claims of reimbursement.²⁴² Regarding criminal liability, the border guards shall be treated, according to national law, as if they were national border guards of the host State.²⁴³ These rules govern the relation between Member States in case of claims for damages or criminal offenses; they do not particularly address human rights claims.²⁴⁴ Outside this context, general rules on attributability govern the imputability of border guards participating in operations. Due to the operational structure laid down in the Frontex Regulation, actions seems to be attributable to the host State at whose disposal the guest officers are placed.²⁴⁵ The applicant would thus bring a claim against the responsible national authority in the national court.

The practical implementations of this statement is however not as clear as theory. The questions remain how this accountability is ensured during complicated joint operations with multi-layered actors scattered in *inter alia*

²³⁸ Guild et al (2011), *supra* note 30, 92.

²³⁹ Baldaccini (2010) *supra* note 1, 243 citing a statement from Col. Laitinen, Executive Director of Frontex, in evidence to the House of Lords European Union Committee, 32nd Report of Session 2005-06, Illegal Migrants: Proposals for a Common EU Returns Policy, Q 592.

²⁴⁰ *ibid*, 243-244 citing Reports by the Commissioner for Human Rights of the Council of Europe following his visits to the Republic of Cyprus on 7-10 July 2008, Italy on 19-20 June 2008 and 13-15 January 2009, and Greece on 8-10 December 2008.

²⁴¹ *ibid*, 244.

²⁴² RABIT Regulation, *supra* note 52, Amendment, Art 10b.

²⁴³ *ibid*, Art 10c.

²⁴⁴ den Heijer (2012), *supra* note 60, 255.

²⁴⁵ *ibid*; RABIT Regulation, *supra* note 52, Amendment, Art 10.2-3.

a significant area of international waters and territorial waters.²⁴⁶ The actual availability to a legal remedy depends thus on the degree of commitment of the host State to good administration and compliance to the safeguards in the Union policies regarding asylum, migration and border control. However, den Heijer does not exclude a certain positive obligation of the home Member States in refraining from participating with border guards in doubtful operations and practices.²⁴⁷ In addition to the national level, the ECtHR contributes as a last resort when national remedies have been exhausted or have not been available.²⁴⁸

Regarding the accountability of Frontex as a Union agency, ECJ can review the legality of acts of European bodies and agencies on the initiative of a natural or legal person but only if the act produces legal effect vis-à-vis the applicant.²⁴⁹ There is no exhaustive list on what can constitute an act with legal effect but the ECJ ruled that the form is immaterial as long as it brings about a distinct change in the legal position of the applicant.²⁵⁰ However, due to the coordinating and organisational role of Frontex the practical possibility for an individual migrant to show that a Frontex act or measure has produced legal effect for him or her is rather low. The requisite requires that the act leave no discretion to the Member States in their implementation but instead directly concern the applicant.

According to Guild et al, it is not impossible that ECJ might denote actions of agencies, such as operational plans, as acts producing legal effect, keeping in mind the Court's flexible approach in previous case law. In particular if the document is expressed in an imperative way and affects Charter rights of an individual. The more Frontex operational capabilities are increased the more likely it gets that Frontex actions qualify as a legal effect-producing act.²⁵¹ Rijpma notes that an operational plan constituting *modus operandi* for an operation could, at least in theory, be challenged with Article 263 TFEU as basis. Notwithstanding the fact that the Article envisages actions and measures by agencies with decision-making powers, something Frontex lacks.²⁵²

One way of addressing indirect accountability for Frontex in a national court is through the preliminary reference procedure in Article 267 TFEU. The applicant would bring a claim against a national authority before the

²⁴⁶ Regarding the question of extraterritorial application of fundamental and human rights, a field not considered in this study but thoroughly addressed in other endeavours, see, den Heijer 2012, *supra* note 58; B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinius Nijhoff Publishers, Leiden 2010).

²⁴⁷ den Heijer (2012), *supra* note 60, 256.

²⁴⁸ cf *Hirsi Jamaa among others v. Italy* (GC), App No 27765/09, Strasbourg 23 February 2012. Italy did not provide the opportunity to challenge or appeal the return to Libya to the applicants.

²⁴⁹ TFEU, *supra* note 7, Art 263.

²⁵⁰ ECJ Case 60/81, *IBM v. Commission* [1981] ECR 2639, 2651. See also ECJ Case T-3/93, *Air France v Commission* [1994] ECR II-121 where an oral statement by a spokesman for a Commissioner was ruled to constitute an action in terms of Art 173.

²⁵¹ *ibid*, 83-84.

²⁵² Rijpma (2009), *supra* note 19, 138, footnote 82.

national court. To the extent the relevant event was connected to Frontex, the court could submit a question to ECJ about the interpretation of eg the operational plan or other instructions from Frontex. The applicant would still be subject to the discretion of the Member State in whether the court would choose to submit a question to ECJ or not.²⁵³

Another possible procedure in order to seek redress before ECJ, is the compensation for damage procedure in Article 340 TFEU. The Union shall compensate damage caused by its institutions or its servants. In the Frontex Regulation ECJ is explicitly given jurisdiction over non-contractual liability of Frontex.²⁵⁴ Even though Article 340 does not mention agencies, Frontex staff could be accommodated by the expression of Union's servants.²⁵⁵

In order to succeed with a claim, one has to show a sufficiently serious breach of an obligation and a 'direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties'.²⁵⁶ The difficulties in showing that the action of the agency is causal to the damage of the individual remain as in the annulment procedure.

3.3.3 Policy Recommendations

The Stockholm Programme warrants a further expansion of Frontex's mandate and denotes a direction towards a European Corps of Border Guards, notwithstanding an explicit expression making it a long-term goal.²⁵⁷ This direction is implemented in the amendment's enhanced mandate and competences of Frontex and in the explicit request of an evaluation of the feasibility of establishing a European system of border guards.²⁵⁸

Regarding fundamental rights, Carrera stresses several issues of contention relevant for Frontex operations and activity: their effect on the principle of non-refoulement, human dignity, access to asylum, the lack of clear rules of engagement for joint operations and the disembarkation of rescued persons at sea and finally, the lack of evidence concerning practical implementation of the guarantees in the SBC and the tensions of Frontex's activities with the non-discrimination principle.²⁵⁹

Guild et al argue that by putting the technocratic label on Frontex, discussions about fundamental rights violation are avoided and an attempt to depoliticize the agency to avoid legal, democratic and public accountability are made. They bring forward a view which implies that Frontex's initiation,

²⁵³ *ibid*, 82.

²⁵⁴ Frontex Regulation, *supra* note 4, Art 19.

²⁵⁵ Guild et al (2011), *supra* note 30, 84-85.

²⁵⁶ ECJ Case C- 352/98 P [2000] ECR 5291, 5324; ECJ Case *Brasserie du Pêcheur* C-46/93 [1996] ECR I-1029.

²⁵⁷ The Stockholm Programme, *supra* note 6, 26; Rijpma (2012) *supra* note 58, 98.

²⁵⁸ Frontex Amendment 2011, *supra* note 17, Art 33.2a.

²⁵⁹ Carrera (2010), *supra* note 3, 18.

coordination and supervision of joint border control operations, especially push-back operations at sea, creates legal effects for the status and fundamental rights of persons on the move. The authors continue to suggest that this situation is not at odds with the statement in Art 1.2, a mostly political provision that demonstrates the sensitiveness of the area and raises questions about definitions of executive and coercive powers. Notwithstanding this, the legal effects and responsibilities for fundamental rights violations remain in the scope of Frontex's activities. In line with the previous, Guild et al proposes that the concept management describes the role of Frontex more accurate than facilitator or coordinator as it reveals the level of responsibility in case of alleged violations of International or Union law.²⁶⁰

Carrera presents a proposal containing three levels of European border officials of whom one level aims at improve the compliance with fundamental rights.²⁶¹ He recommends a set of officials functioning as fundamental rights supervisors established under an expanded evaluating mandate of the Fundamental Rights Agency (FRA). The officials would be competent to undertake evaluations and inspections on the spot with focus on the compliance with fundamental rights. They would assess and support national, regional and local authorities handling complaints about fundamental rights and advice in proceedings before relevant courts and judicial bodies. The competence of these officials would be ensuring that the remedies and guarantees of SBC were made effective together with another set of officials, the border monitor officials. Beside this category of officials, he proposes a category of border control officials set up under Frontex and only mandated to ensure the correct application of SBC. Their mandate would only be within the scope of SBC and they would not hold any police or asylum competences. Carrera seems to limit rather than extend the operational competences of Frontex in this policy proposal. The added value would be the safeguards put in place to ensure the respect of fundamental rights and administrative and procedural guarantees in all border control activities. The recommendation also facilitates autonomy from national governments and accountability of border practices.²⁶²

Rijpma also expresses a restrained view on the call for an enhanced operational role of Frontex and calls for a more structured development of Frontex in the future. Before the entry into force of the amendment, he recommended a development of Frontex's more regulatory role instead of its operational role. His perceived rationale is the absence of a sound framework for the constitutional issues regarding rights and freedoms raised by the operational coordination of Frontex. Conversely, he notes that the latest proposal focused once more on reinforcing Frontex's operational role. Rijpma presents an alternative development of Frontex by focusing on 'facilitating improved training, exchange of information and interoperability of technical means, as well as a more frequent and binding evaluation of

²⁶⁰ Guild et al (2011), *supra* note 30, 93.

²⁶¹ Carrera (2010), *supra* note 3, 27-30.

²⁶² *ibid.*

member states' implementation of the Schengen border *acquis*'.²⁶³ This could contribute to a more uniform implementation of SBC without requiring the deployment of national border guards in other Member States.²⁶⁴

Baldaccini is also critical to the repeated call for an enhanced operational agency and recommends that Frontex's activities must be monitored and scrutinized so to prevent that national authorities increase their autonomy 'at the expense of political, legal and institutional constraints on policymaking' in this area.²⁶⁵ The situation calls for the development of a proper framework for Frontex's accountability including legal accountability, which restores the gaps in the protection of the affected individuals.²⁶⁶

ECJ has ruled that where national rules fall within the scope of Union law these national implementing rules have to be compatible with fundamental rights.²⁶⁷ Rijpma presents this principle as a possible analogy also accommodating the operational activities of Member States. Another possible scrutiny of the Member States' activities within the framework of Frontex is the procedure in Article 258 TFEU on the initiative of the Commission. ECJ could, in line with this provision, have a right to review the operational activities of Member States whether or not they participate in a Frontex led operation.²⁶⁸

Considering the dual nature of Frontex, semi assisting and semi operational, Rijpma also seems to suggest that even though the coordinating activities of Frontex are non-binding vis-à-vis third parties and guest border guards, ie potential violations are impossible to attribute to Frontex, the coordination of Member States' operations engaged in violations of migrants rights will make Frontex an accomplice. Frontex should therefore be held accountable for its complicity.²⁶⁹ As a result, Member States and the European institutions should be able to use Art 263 TFEU to challenge Frontex's decision to participate or initiate operations or if Frontex refrains from terminate an operation in which questionable practices take place.²⁷⁰ Guild et al also holds the possibility of operational plans and other 'technical' documents being reviewed under Article 263 TFEU. A flexible approach can be envisaged towards the admissibility criteria for individuals bringing claims. This would not be the first time ECJ makes a dynamic interpretation in regard to its jurisdiction to ensure legal remedies. Guild et al refer to the case of *Sogelma* when ECJ extended its jurisdiction under current Art 263 to accommodate agency acts even though it was not foreseen in the Treaty.²⁷¹

²⁶³ Rijpma (2012), *supra* note 58, 99.

²⁶⁴ *ibid.*

²⁶⁵ Baldaccini (2010), *supra* note 1, 255.

²⁶⁶ *ibid.*

²⁶⁷ ECJ Case ERT C-260/89 [1989] ECR-I 2925.

²⁶⁸ Rijpma (2012), *supra* note 58, 97.

²⁶⁹ *ibid.*

²⁷⁰ *ibid.*

²⁷¹ ECJ Case T-411/06, *Sogelma v. EAR* [2008] ECR II-2771, para. 37; Guild et al (2011),

The possibility for the EP to step forward and take an active role as fundamental rights litigator should hence be highlighted.²⁷² This could be an efficient complement to a flexible and reinforced possibility for individuals to bring a claim against Frontex before ECJ. Particularly, since the EU institutions are privileged applicants and do not need to fulfil the admissibility criteria laid down for natural and legal persons.²⁷³

One could also argue that Frontex has a positive obligation to ensure that all participating States respect fundamental rights, especially since they are enshrined in the ChFR and are at the heart of the values of the Union.²⁷⁴ The corollary of not arguing for such an obligation of Frontex is that the EU will fund, facilitate and coordinate operations in breach of Union law and International law and in that way become an accomplice.²⁷⁵

The stronger and more independent role of Frontex in terms of coordination and organisation, in particular the role of the FCO, due to the amendments in 2011, could facilitate Frontex's role as a monitoring and evaluating agency and create the basis for establishing such liability before the ECJ.²⁷⁶ The Executive Director has currently an obligation to terminate or suspend operations when there are serious violations of fundamental rights or if they are likely to persist as well as when the conditions to conduct an operation no longer are fulfilled.²⁷⁷ Elaborating this monitoring and evaluating mandate could also result in more legitimacy, fundamental rights sensitive operations and create a basis for liability.

A more comprehensive proposal is recommending a specific mechanism within ECJ to deal with the challenges of the legal effects created by Frontex to improve access to justice and effective legal remedies for individuals subject to Frontex's actions, regardless of nationality or location.²⁷⁸ This special branch of ECJ, named an 'Agencies Tribunal', would receive admissibility claims and claims of a legal and administrative nature against agencies like Frontex. The tribunal would apply a special procedure for joint liability so the claimant was relieved from the burden to clearly identify who, Frontex or participating Member States, has committed the alleged violation, leaving the burden of proof with Frontex and participating Member States. A new piece of secondary law regarding TCNs access to rights and legal remedies in situation of pre-border control, including extraterritorial pre-border control, should be adopted and the tasks, competences and allocation of responsibilities of EU Home Affairs

supra note 30, 84.

²⁷² Guild et al (2011) *supra* note 30, 83-84.

²⁷³ cf TFEU, *supra* note 7, Art 263.2 and 263.4.

²⁷⁴ Rijpma (2012), *supra* note 58, 97.

²⁷⁵ *ibid.*

²⁷⁶ cf S Carrera, M de Somer and B Petkova, 'The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice' Centre of European Policy Studies (CEPS) Papers in Liberty and Security No 49, 2012, available at <http://www.ceps.eu> accessed 22 April 2013, 4 [Carrera, Somer and Petkova (2012)].

²⁷⁷ Frontex Amendment 2011, *supra* note 17, Art 3.1a.

²⁷⁸ Guild et al (2011), *supra* note 30, 113-114.

agencies should also be clarified in law. No actions falling outside the legal mandate should be tolerated, according to the authors.²⁷⁹

The lack of information on how Frontex works and how the Member States implement SBC have been criticized.²⁸⁰ This shortage, contributes to the responsibility gap while it is difficult if not impossible to gather information about what happens when migrants encounter border guard officials in joint operations at sea. Thus, the accountability must be ensured through an independent monitoring system. Bruin proposes that independent observers should be present on board every vessel, deployed in extraterritorial border control activities, with potential interception activities.²⁸¹ Guild, Gronendijk and Carrera recommends that an EU Border Monitor post should be established with two main competences: first, to ensure that EU border controls are consistent with Union law and the Charter of Fundamental Rights, second, to monitor the situation in which expulsions take place in the framework of the Return Directive.²⁸²

In 2010, Rijpma opposed the unilateral criticism towards Frontex and concluded that the failure to take appropriate measures to fully respect international rules regarding international protection in border management, especially in maritime border controls, is a political decision and the focus of criticism should therefore be on the Member States and the political institutions of the Union and consequently not on Frontex.²⁸³ However, Rijpma continued to state that this did not mean that Frontex should not be scrutinized at all but there should be an awareness of which actors bear the responsibility, competence and powers to ensure the operations' compliance with international protection standards, namely the Member States and the EU institutions not Frontex.²⁸⁴

Rijpma stated that the Union should speak out against such practices of Member States, even if this is a very sensitive political issue. He further implied that even though Frontex is a weak actor it has a certain responsibility as a Union body and should play a role in improving the sensitivity towards protection issues rather than accept the practices of the Member States. Rijpma concluded that, if EU is committed to human rights, it should re-examine its cooperation with third countries questionable in a human rights perspective and reflect on how it can ensure the safeguards in the SBC also in extraterritorial activities of border control.²⁸⁵

Carrera holds that the AFSJ constitutes a crucial test case for the practical

²⁷⁹ *ibid.*

²⁸⁰ R Bruin 'Border Control: Not a Transparent Reality' in F A N J Goudappel and H S Raulus (eds), *The Future of Asylum in the European Union: Problems, Proposals and Human Rights* (TMC Asser Press, Hague 2011).

²⁸¹ *ibid.*, 42.

²⁸² E Guild, K Gronendijk and S Carrera, 'Ten Recommendations on Freedom, Security and Justice for the European Parliament Elections' CEPS Policy Briefs, No. 173, 2 October 2008.

²⁸³ Rijpma (2010), *supra* note 125, 5.

²⁸⁴ *ibid.*, 4.

²⁸⁵ *ibid.*, 5-6.

implementation of fundamental rights in a post-Lisbon context for ECJ. He continues to list some of the reasons for this challenge, namely divergences among Member States on Fundamental rights standards, accountability gaps and responsibility shifts in migration and border control measures.²⁸⁶ He recommends an increased and strengthened role of third party interveners and the introduction of interim relief measures after a comparison with the ECtHR and its long experience as human rights tribunal in Europe.²⁸⁷

3.3.4 Implications

The legal implications of the presented recommendations would involve a huge shift of control towards the European institutions. A strong hierarchical control would emerge if the legal accountability of Frontex were safeguarded by the scrutiny of ECJ and if Frontex was given extended mandate to evaluate Member States practice and capabilities. The review of Frontex would be in the hands of ECJ and the review of Member States would rest in the hands of Frontex.

The recommendations on a more regulatory approach of Frontex instead of enhanced operational competences also entail a more fundamental question of power relations. To give Frontex mandate to evaluate the Member States' ability to manage the external border efficiently and in compliance with the safeguards set up by Union law, in terms of international protection, non-refoulement and other rights of refugees and asylum-seekers, is also a marked debate about national prerogatives. The recommendation of a reinforced training focus could be a feasible way of ensuring uniform implementation of Union policies since it does not entail competence issues.

Some scholars promote *inter alia* a flexible approach to the admissibility criteria from the ECJ to accommodate acts of Frontex and a Parliament stepping up to defend fundamental rights by taking the role as a litigator. This could be achieved through a precedent from the court. However, in the context of shared competences this could be understood to exceed the competence of ECJ and surpass the Lisbon Treaty by the Member States.

Rijpma's critique of the unilateral criticism towards Frontex is interesting since it entails an analysis about the actors and the struggle of power and control. It acknowledges the possibility of holding Frontex accountable and steer the agency in another direction legally but the political will is missing due to the sensitive issue.

²⁸⁶ Carrera, Somer and Petkova (2012), *supra* note 276.

²⁸⁷ One look at the case *Hirsi Jamaa among others v. Italy* (GC), App No 27765/09, Strasbourg 23 February 2012, demonstrates the importance of the third party intervener's role in the proceedings before the ECtHR, particularly in regard to rights and freedoms touched upon by Frontex activities. In the Hirsi Case the United Nations High Commissioner for Human Rights played a significant role in the proceedings.

3.3.5 Analysis: Operational Capabilities and Legal Accountability

Operations led by Frontex are, notwithstanding the recent increased operational competences of Frontex, still in the hands of the Member States, due to the actual exercise of border control. In other words, the responsibility for the external borders of the Member States still rests on the Member States. The reverse would be unthinkable in the current situation. Therefore it is important for the European institutions to acknowledge this and speak out against practises in breach of international and Union standards. Frontex can be a tool to use in this sensitive political area.

Frontex is thus not responsible for external borders of Member States but is responsible for the role it is playing in the border management through its coordination, facilitation and organisation. The question is what responsibilities are incumbent upon Frontex. It is not clear what the managerial role accommodate and hence in what activities Frontex must comply with international obligations and fundamental rights. This confusion is the fundamental ground for the unclear demarcations of responsibilities and accountabilities between Member States and Frontex. The more operational Frontex gets the more vague the boundaries between the executer and the coordinator becomes.

The HR scholars have acknowledged these vague demarcations of responsibilities as a huge hazard to the accountability of Frontex and Member States as well as to the right to an effective remedy as stipulated in Art 47 ChFR. As the operational nature of Frontex is reinforced, the semi-managerial and semi-executive activities of Frontex *not* subject to sufficient scrutiny and legal accountability increases. The crucial point is the admissibility criteria requiring legal effect vis-à-vis a natural or legal person for having the right to institute a proceeding against Frontex before the ECJ.²⁸⁸

The two directions envisaged by scholars is the extended possibilities for an individual to bring a claim against Frontex before ECJ and that the Union institutions step forward and function as fundamental rights litigators and put pressure on Frontex, who in turn monitor and compel the Member States to comply with fundamental rights and international protection standards. The incentive for the Member states would be the necessary financial and organisational help from the Union, available through Frontex.

Unfortunately, I cannot envisage a comprehensive solution, such as a new agencies tribunal within ECJ with individual right to institute proceedings, to the accountability gap but rather a pragmatic cautious and gradual improvement and evolution of several different aspects regarding accountability. The rational for this cautious development is the struggle within the Union itself in particular within a sensitive area with traditional

²⁸⁸ TFEU, *supra* note 7, Art 263.4.

national prerogatives, such as borders and migration.

Regarding the further development of Frontex I agree with the scholarly view that it would be preferable with a careful development of the operational aspects of Frontex. Instead of only focusing on the operational capabilities and trying to make the agency independent through strengthened operational competences, the Commission and the Council should acknowledge other valuable aspects of Frontex's role in the IBM. Of particular interest is the monitoring and evaluating mandate as well as the mandate regarding border guard training and a common core curriculum. As part of this, the provision regarding the obligation to terminate or suspend a JO could be elaborated and reinforced.

I hold big expectations on the Parliament in hope of a stronger position for the Parliament and a better accountability for Frontex activities. The Parliament should step forward and exploit its role as a privileged applicant before the ECJ in relation to bringing claims against Frontex based on Art 263 TFEU when its practices are alleged to breach fundamental rights. This could imply a new reinforced role for the Parliament in regard to AFSJ agencies and a new role for the ECJ as a fundamental rights tribunal. The proceedings would put pressure on the management by Frontex and could use the improved monitor and evaluation mandate of the agency as a basis for establishing liability. The problem of transparency should also be addressed in the next development of Frontex, in particular regarding the EP, a precondition for the Parliament as a litigator.

As a complement, the ECJ could and should continue its tradition of dynamic interpretations of its jurisdiction in case law and apply a more flexible approach in regard to the admissibility criteria for individuals when initiating an annulment proceeding before the ECJ. The requirement of legal effect of the Frontex action vis-à-vis the applicant should be loosened up to attain a, in practice achievable, scrutiny of the activities of a Union agency which clearly have impact on the fundamental rights and freedoms of individuals. It must be considered a continuation of the situation in which the ECJ argued, 'it cannot be acceptable, in a community based on the rule of law, that such acts escape judicial review'.²⁸⁹ Making the ChFR legally binding was one step and other steps are envisaged, as the ECJ are to find its new role in a post-Lisbon context, of which this development could be one.

²⁸⁹ ECJ Case T-411/06, *Sogelma v. EAR* [2008] ECR II-2771, para. 37.

4 Analysis

4.1 One Agency –three Perspectives

The context of this contribution is the phenomenon of shared competences between EU and the Member States as the constitutional order of the policy field of European management of the external borders. The European Union was founded as a market union but currently references are often made to human rights, rule of law and democracy as founding values of the Union; evidential of the use of these concepts as legitimizing factors for promoting the Europeanization and the development towards a more rights-centred Union. However, one should keep in mind which values or objectives that actually founded the Union: that is economy. The core objectives in the beginning were a single market free of internal custom as a way of integrating Europe. The development of EU is not linear, from economy to human rights, but multi-layered and so is the integration debate. There are sub-contexts within the multi-layered integration debate creating a more complex setting. My three perspectives represent three of these sub-contexts: integration, democracy and human rights. The first, labelled integration can be contested as a sub-context but focuses on the pursue of an integrated border management in order to achieve administrative efficiency in European border management and a uniform implementation and application of Union policies as well as it considers the Member States and their transferral of competences as conditions for integration.

In this thesis I argue that the struggle of power and control over Frontex between EU institutions and Member States affects all policy recommendations with aims as improving fundamental rights sensitivity, transparency, efficiency, democratic and legal accountability. The effect of the unsettled power and control issue is a logjam in policy and law-making resulting in a legal framework with several huge shortcomings in essential aspects of Union values.

Additionally, I argue that these can be visualized through my categorization of scholarship into three perspectives. These perspectives demonstrate that policy recommendations on different levels of detail all have the tensions from the struggle inherent. The tension is between an intergovernmental approach and a supranational approach to external border management and in particular to Frontex, but also between the EU institutions.

The scholarly review can be differentiated in three perspectives to demonstrate three different natures and rationales within the Frontex debate. The perspectives is constructed, scholars cannot be strictly divided into the different perspectives neither are the perspectives by no means single regimes in the sense that they are completely demarcated from each other. Rather the opposite since I have presented and analysed views from the same author within two or all three of the perspectives.

The integration perspective demonstrates a call for a more supranational agency in order to achieve an efficient and uniform border management, as well as the acceptance of the conditions in the integration process, in particular in the AFSJ. This entails accepting that the control and power over Frontex is mostly placed in the hands of the Member States. It also accommodates the ambiguous relation between the member States and the development of Frontex, the calls for more operational competence and the fear of a comprehensive common border guard solution. The condition of the integration perspective is the everlasting balancing between the calls for a truly integrated border management and Member States' reluctance to transfer power necessary for such solution. The result is an agency which does not fully exploit its efficiency and could contribute with consistency to a larger degree if some intergovernmental features were watered down. Then, Frontex could be truly fostered as a professional Union body.

The democratic perspective entails a call for democratic scrutiny as a necessary and legitimizing element of a European Union promoting and exporting a constitutional order built on democracy and rule of law. The lack of parliamentary scrutiny of Frontex's activities, especially the tasks possibly affecting the rights and freedoms of others, creates a vacuum in the accountability of the agency. However, increased involvement of the Parliament in Frontex activities would seriously impede on the Member States' influence over Frontex and corresponding discretion.

The human rights perspective generally foster a more independent agency with own fundamental and human rights responsibilities scrutinized by ECJ and challengeable by individuals, this entails a significant shift in control over the agency. The introduction of external accountability and scrutiny over Frontex activities would empower the ECJ and hence the Union as well as minimize the applicable discretion of Member States' influence on Frontex.

The human rights policy recommendations affect the Union's competence not only in regard to Frontex but also in regard to operational activities of Member States within Union policy areas in general. These activities can be understood as connected to the execution of border management tasks by national competent authorities, which would concern the interpretation of Union competence in regard to Art 4.2 TEU and affect the institutional autonomy of Member States.

4.2 Contradiction in Objectives

When I first envisaged this thesis I wanted to disentangle perspectives inherent in the objective of an IBM and in particular in the development of Frontex. I perceived the perspectives to exist in tension and contradiction with each other whereas a presentation of the perspectives also would demonstrate the intrinsic tensions within policymaking and increase the understanding of Frontex and its development. However, the perspectives were not as contradictory as anticipated and not as easy to disentangle, they were instead intertwined and functioned simultaneously as cause and effect.

The democracy perspective and human rights perspective is admittedly focusing on different objectives as their highest priority. Still, they have many common objectives and those differing are not contrary but are instead mutually supportive and only hampered by the political and institutional settings in the shared competences between Member States and the Union. Both necessitate transparency, monitoring mechanisms and accountability before the Parliament respectively the ECJ. Both human and fundamental rights as well as democracy function as legitimizing the whole integration process. Fundamental rights form an area with legitimizing effect for the Europeanization processes, especially within the sensitive field of freedom, security and justice. Evidently, fundamental rights have certainly become a fundamental value for the Union; they are often referred to as the founding values of the Union.²⁹⁰ It is noteworthy that the founding Frontex Regulation did not pay any significant attention to fundamental or human rights, which *inter alia* can be explained by the exclusion of the Parliament, the guardian of fundamental rights, in the legislative process. A fact that have created massive attention from scholars and NGOs and definitely hampered the trust towards Frontex from society. In continuation, the increased fundamental rights focus could be explained by the corresponding increased role of the Parliament.

In contrast, the integration perspective has the administrative efficiency of European border management and uniform implementation of Union policies as an objective for the IBM. Moreover, it has to consider the sensitive character of the field and constantly balance between intergovernmental features to gain trust from Member States as well as find a way forward without ending up in a logjam in the development of the border management and Frontex. In this perspective the intergovernmental features have been crucial for attaining some integration, but unfortunately unfitted together with the choice of an agency and the experimental character of Frontex governance.

The reluctance of engaging in traditional law and policymaking stem from the fact that these negotiations trigger the Member States concern for their national prerogatives, the solution within almost the entire AFSJ has been a focus on operational cooperation. The choice of an agency implies independence, bureaucracy, that is, independent experts handling technical depoliticized matters. However, the management of the external borders are far away from depoliticized, rather it is very sensitive in its political nature. The fact that Frontex is politicized is hence a rather natural corollary to this. The fact that this Union body was established in form of an agency is thus the inconsistent momentum. This has been acknowledged as a political attempt to try and depoliticize an area. Why was this done? The favourable vacuum of democratic and legal scrutiny creates a large amount of discretionary power of the Member States and provide, at the same time, some of the advantages with a Union body, that is financial means and a highly developed infrastructure for management.

²⁹⁰ TEU, *supra* note 27, Art 2-3, 6.

Yet, one could hardly anticipate a completely supranational delegation to a Union body, agency or not, since the competence of management of operational cooperation cannot be attributed to the Commission and not from single Member States either. I would argue that only the collective transferral from all Member States could accommodate this competence, since a single Member State cannot be said to have the competence of management of operational cooperation at the external borders of Member States. The setting of Frontex as a hybrid agency, make sense in the prolongation of this logic but also reveals the lack of traditional integration in this area.

The experimental character of Frontex governance is due to the fact that how to achieve an IBM is still debatable and the lack of detailed and clear regulations, impossible to achieve within an area subject to political deadlocks as described in this contribution. The deadlocks in the area are not remarkable since it was not long ago a purely national issue and is now rephrased into a Union issue.

These two features, the intergovernmental and politicized governance in the form of an independent agency and the experimental governance exacerbate the lack of democratic and legal scrutiny since it creates a possible arena for decisions and measures of both political and technical nature to escape both political and legal scrutiny. It is in this context the integration perspective opposes the perspectives of human rights and democracy. Their calls for scrutiny, monitoring, accountability and transparency challenge the sensitive character of Frontex as a Union body in the hands of Member States. This is the core of the tension in the policy recommendations and development of Frontex.

4.3 Future Tensions and Compromises

The Europeanization and transformation of AFSJ has resulted in a new institutional setting in the EU. On the one hand, the Commission has behaved like the main ‘motor’ of the European integration process and on the other hand, the Parliament has become an increasingly involved and authoritative player in EU cooperation in these areas, especially the first pillar areas like parts of external border management.²⁹¹ This development can also be seen in regard to Frontex, the Commission plays a vital role in the promotion of a more integrated Frontex and the role of the EP was reinforced in the latest amendments. The evolution is welcomed taken in regard to the envisaged need for a plurality of views within the AFSJ and in particular in an agency like Frontex.²⁹² Notwithstanding this development, it is difficult to detect the result of this envisaged plurality. It is only since the latest amendments in 2011 the involvement of the Parliament actually can be seen in regard to emphasis on fundamental rights. And with regard to the

²⁹¹ E Guild, S Carrera and T Balzacq, ‘The Changing Dynamics of Security in an Enlarged European Union’ in D Bigo et al (eds), *Europe’s 21st Century Challenge: Delivering Liberty* (Ashgate, Farnham, Surrey, England 2010) 45.

²⁹² Carrera and Guild (2006), *supra* note 84.

intergovernmental features of Frontex the Commission's call for a more supranational agency have been neglected, even though the 2011 amendments increased the operational independence of Frontex vis-à-vis Member States. To summarize, the plurality of views in regard to Frontex, as a former first pillar agency, has not been as impressive as one prima facie could envisage.

However, in many ways, the degree of integration in the area of border management is remarkable and innovative. The struggle between intergovernmental features and centralizing objectives within the border policy area denotes the main reason for the diverged role and vague contours of Frontex today. To create separate 'executive' bodies (agencies) seems to be the 'hard case' of institution-building when legislative harmonization is impassable, since it enables real action capacity at the EU level and strengthens the uniform application of Union policies.²⁹³ Such institution-building is thus about increasing the supranational input into the European policy process at an initial stage and finding a way forward for integration even in areas without consensus.²⁹⁴ Considering this, I claim that it is questionable whether Member States are fully aware of the degree of integration possible through Frontex with regard to the reluctance they hold against more comprehensive integration solutions.

The two amendments of the initial Frontex Regulation have had a huge impact on the agency, the amendments are not changing details but each time shaping a new agency with new competences and giving de facto competences a legal basis. The RABIT Regulation resolved the perceived problem with a limited competence with regard to human resources in the context of the Member States' need for additional border guards in exceptional situations. That was an apparent strengthening of the agency exactly like the second amendment was, with an accompanying emphasis on fundamental rights as a balancing factor.

The focus on the operational capabilities has indeed strengthened the independence of Frontex, a necessary step according to me. However, it is not favourable in terms of integration to keep focusing on reinforcing the agency in this regard if it does not entail a more all-encompassing view of integration. This view should foster a balanced agency in terms of fundamental rights, a reinforced focus on regulatory tasks as evaluation and training and democratic and legal scrutiny.

The calls for more focus on Frontex as a regulatory agency might be heeded in the future but this will not be done until the struggle for Frontex is settled, or rather until the Member States completely allow the Union to exercise its competence and provide supranational solutions for Frontex within the field of shared competences regarding management of the external borders. This would be in line with the subsidiarity principle since it has proven impossible to create a balanced, professional, efficient, legally and

²⁹³ Egeberg, Martens and Trondal (2012), *supra* note 153.

²⁹⁴ *ibid.*

democratically accountable agency for coordination of operational cooperation in a more intergovernmental setting. It is needed a comprehensive supranational approach to achieve a truly integrated border management of the external border of the European Union.

Frontex is likely to slowly and gradually move towards a regulatory agency along with a progressive centralizing motion of the policy field, a panacea for the addressed shortcomings is not anticipated nor envisaged.

For every year of operational cooperation the Member States and Frontex gain mutual trust and the EU institutions are also more and more involved in the agency. If looking at AFSJ policy and law-making it demonstrates that legislative measures always follow the operational cooperation and perhaps it is equally true that a comprehensive legal framework follows years of experience. This would imply a positive view of the possibilities for a sound legal framework for Frontex in the future. However, while the development of an all-encompassing legal framework for border management and in particular for Frontex follow the struggle of powers and the transfer of competences from member States to the Union, I still envisage a rather slow centralizing motion. Until then we have to be satisfied with a pragmatic development and a scattered legal situation for Frontex.

4.4 Final Remarks

To conclude, the struggle for regulatory power and management control over Frontex pervades all *lex ferenda* proposals and create a deadlock in regard to a comprehensive legal framework for Frontex. The deadlock can therefore not be remedied with a superior proposal or negotiation about technical legislative matters. It is a matter of competence transferral that ought to materialize. There is no other solution to the acute shortcomings in the Frontex Regulation, such as the lack of democratic involvement and scrutiny as well as legal accountability for human rights impact.

This thesis did not pursue a *lex ferenda* proposal but provided a general overview of the policy field and the legal and institutional settings for the debate concerned with the evolvement of Frontex and the objective of a truly integrated management of the external border. It is part of a developing area of law since the legal framework and institutional settings have changed continuously in recent years.

For further scholarly review, I consider it still relevant to examine, in depth, the objective of a European common corps of border guards considering the practical implementation of the amendments in 2011 and the current reality of the European integration. My study could then contribute as a backdrop to a more narrow and thorough practical integration analysis.

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