Crossing the Line

A case study of FRONTEX's mission and mandate

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Abstract

Why has FRONTEX evolved without introducing a mechanism for legal accountability? This case study answers this question by examining relevant treaties and regulations concerning FRONTEX's mandate, as well as previous scholarship in the area – and applying a top down approach to explain the evolution of FRONTEX's development. The study goes beyond focusing on FRONTEX's role as an intelligence agency, and instead applies a neofunctional theoretical framework to account for its evolution in the capacity of an EU Agency. The examination of the material reveals operations and a legal framework with an intertwined character, and how this complicates accountability when the Agency operates on Member State territory. The main findings indicate that a discourse of national competences and sovereignty has been retained throughout interventions as well as in the legal framework that the EU has set for FRONTEX, proving intergovernmental elements in the evolution of EU border management. There has been national reluctance towards the Agency operating on Member State borders. This, in combination with functional spillover of integration and technocratic elements, related to its managerial role, has provided the Agency with an unclear framework that makes it possible to experiment and take over Member States' responsibilities when it comes to border management, without being held accountable for it.

Key words: FRONTEX, European Union, accountability, neofunctionalism, supranationalism, technocracy, migration policy

Words: 8925

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1. Introduction

In February 2012 Italy was held accountable before the European Court of Human Rights (ECHR) for violation of Human Rights. The case concerned the interception of 24 Eritrean and Somali nationals in 2009. The migrants were heading for Italy on the high seas, but stopped in the Maltese Search and Rescue Zone and escorted back to Libya from where they had left for the European Union (EU). The case, known as *Hirsi Jamaa and others v. Italy,* was described by Amnesty International as historical. EU Member States have faced accusations before for pushing back migrants, directly violating the principle of *non-refoulement* established in the Geneva Convention. This, however, is the first case of Member State conviction (Amnesty International, 2012). Nevertheless, Italy was not the only actor involved in the interception. Amnesty fails to mention The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, also known as *FRONTEX*. In fact, the ECHR expressed perplexity in their judgment – about the Agency's role where it participates in operations:

> The Assembly is concerned about the lack of clarity regarding the respective responsibilities of European Union States and FRONTEX and the absence of adequate guarantees for the respect of fundamental rights and international standards in the framework of joint operations coordinated by that agency.
>
> (Hirsi Jamaa and others v. Italy, ECHR)

This statement also reflects the concern that the framework of responsibilities does not ensure Human Rights and respect the Geneva Convention. Human Rights Watch (2009) observed FRONTEX assistance and coordination in some of the interceptions made in the Mediterranean in 2009. However, it was not possible to prove in which operations the Agency was involved. The lack of evidence from humanitarian organizations led to a conviction against Italy solely.

Rejection of accountability and responsibility from FRONTEX's side has upset politicians and public officials seeing the Agency as partially or fully responsible for the operations where it is involved. In 2013 the EU ombudsman Emily O'Reilly demanded the Agency set up an internal mechanism where migrants would be able to file complaints in case of a breach of their rights. The initiative was rejected. Instead, FRONTEX referred to national authorities for legal responsibility (euobserver, 2013).

1.1 Research purpose and questions

It seems paradoxical that EU Member States would want to engage with an EU agency that does not assume legal responsibility for its actions on their own sovereign territory. While FRONTEX-coordinated efforts have so far only led to Member State conviction, the Agency has participated actively with operational personnel. In the light of FRONTEX's active role in the management of EU Member States' external borders, it is necessary to examine what defines its mission and what legal mandate it has been given, to determine how this corresponds to its activities. The aim of this study is that this examination will answer the following question:

Why has FRONTEX evolved without introducing a mechanism for legal accountability?

To answer this question, a categorization of the Agency's activities within a theoretical framework will have to be done. It is the assumption of this study that a top-down approach might be applicable (for further discussion see 4.1.1 *A least likely case*). This leads to the following question:

Can neofunctional theoretical concepts explain why FRONTEX's mandate has evolved without accountability?

1.1.1 Disposition

This thesis is divided into eight chapters. Firstly, definitions of FRONTEX:s work and key terms used in the thesis will be provided. Secondly, a background concerning the area of migration policy within the EU will be presented. In the fourth chapter, I intend to deliberate on Methodology and Material. In the fifth section, a brief overview of earlier research of relevant to this thesis is given. The theoretical framework guiding the investigation is ventilated in the sixth part, upon which the analysis follows in the seventh chapter. The study will finish with a final discussion.

2. Definitions

2.1 Defining FRONTEX's work

In order to answer the guiding research question, FRONTEX's activities need to be classified and categorized. The Agency started in 2005 conducting risk analysis on the external borders of the EU, and the organization describes their own activities as "intelligence-driven", risk analysis being "the starting point for all Frontex activities" (FRONTEX, 2015).

The information the Agency gathers and processes is made publicly available on request, in accordance to Article 4 (1) (a) of Regulation No. 1049/2001 regulating public access to European Parliament, Council and Commission Documents. For the purpose of a pre-investigation, the author requested the material from Joint Operational Plans (JOP's) prepared for the operations carried out in Greece between 2010 and 2014. The JOP's were made available, but information about where and how the operations were planned, as well as which Member States participated, was censored. The censorship finds legal support an exception in the same EU law (EC) 1049/2001 that regulates public access, but in reference to "public security" since the information is believed to be of use to drug smugglers and human traffickers). The secrecy surrounding the risk analysis assembled by the Agency meets the definitions of intelligence introduced by Björn Fägersten (2010). Notwithstanding, FRONTEX also coordinates and participates in border watching operations. The Agency's mandate reaches beyond the production of intelligence, as it is also an operational agency part of the Home Affairs area established in 1992.[1] FRONTEX was established on the initiative of the European Commission, with the objective of ensuring an integrated border management. The Commission deemed insufficient the national authorities in charge of managing the external borders of the EU and Schengen (Commission 3a, 4). The Commission's idea of an integrated border management stretches beyond security. It is a political initiative from the Commission and a theory of how the EU works might be applicable to its development.

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[1] Other agencies constituting Home Affairs being: Europol, CEPOL; EMCDDA; EASO and eu-LISA (EC, 2015)

2.2 Definition of key terms

For the purpose of a clear investigation containing terms possible to operationalize, the following key notions needs to be defined:

- *Accountability* – is ”ensuring that officials in public, private and voluntary sector organisations are answerable for their actions and that there is redress when duties and commitments are not met” according to Transparency & Accountability Initiative (2015). It is crucial that it is in some form institutionalized. This could, for instance, be the demand for an internal system in FRONTEX by the EU ombudsman Emily O'Reilly. Thereby, ”one set of people/organisations are held to account (‘accountees’), and another set do the holding (‘accounters’)” (TAI, 2015).

- *Supranationalism* – a clear definition is provided by Roberta Mungianu: “Supranationalisation describes the shift from intergovernmental cooperation to the supranational exercise of power by centralised EU governmental structures on policy areas within the territory of the Member States as a consequence of the conferral of power on the EU by the Member States within those policy areas” (2013: 369).

- *Intergovernmentalism* – negotiations and cooperation that occur between national governments. Also a theory that targets governments as the prime actors in EU negotiations (cf. Rosamond 2000).

- *Technocracy* – is defined by Oxford Dictionaries as “The government or control of society or industry by an elite of technical experts” (OD 2015).

All of the above-mentioned definitions will be employed in the analysis, and further definitions follow in *Theory* (section 6)

- *Integrated border management* (IBM) – Mungianu (2013: 365) defines this broadly as the strategy (as part of Justice and Home affairs) introduced by the EU to integrate ”criminal law, policing, expulsion, customs cooperation and internal security”.

- *Irregular migrants* – migrants who have entered EU territory unlawfully.

- *Push-backs* – when migrants are forced to turn around at the borders an EU Member State without getting the right to file an application for asylum (which violates the Geneva Convention).

3. Setting the context: security and a decrease in migration

Border management is controversial, as it often deals with exposed people fleeing oppression and war. Humanitarian organizations such as Human Rights Watch have reported on migrants trying to get to the EU being pushed back on the high seas before they reach EU territory, thereby being denied the right to a proper visa application. In some operations where the Agency is involved, accusations of using push-backs as a method have been made. Examples of this are the interventions on the Greek border towards Turkey initiated in 2010 (Human Rights Watch, 2011) and the Joint Operation HERA III in 2008 off the West African Coast (Carrera et al. 2013: 345). The same allegations have been made against the on-going *Triton*. The current operation replaced the financially stronger Italian operation *Mare Nostrum*, and *Triton* has been accused of shifting focus from saving migrants to protecting borders. In this, Amnesty International (2014) alleges the operation to "put the lives of thousands of migrants and refugees attempting to reach Europe at risk".

3.1 Securitizing 'Fortress Europe'

Numerous scholars have depicted the evolution of the area of migration policy in the EU as a step in the process of 'securitization', a process which attempts to connect migration to potential threats and risk and thereby characterizing it as a security matter (cf. Huysmans 2000; Neil 2009; Léonard 2009). The area of migration policies in European countries started to become a public concern in the 1960s and 1970s. Migration policies before this had in most European countries been generous when it came to accepting a high degree of flexible labor migration from so called 'third countries' (countries outside the European Community). In this time however, legislation passed that distinguished between how Member State nationals and foreigners of the EU could move within the Union. This was primarily done to open up the internal market to labor from all Member States, thereby linking migration within the EU to economic policy while separating immigrants from non-EU countries from it. It has been argued that this was the first key to establishing what is referred to as 'Fortress Europe' (Huysmans, 2000: 754).

The expression 'Fortress Europe' refers to the political stance the EU with its Member States has taken to limit the legal options as a migrant to reside on EU territory. This includes diminishing internal borders while strengthening external, making it harder to get asylum or to get legal access to the EU job market as a labor migrant (Roos 2013: 10-11). The focus on the external borders of the Member States was consolidated by the establishment of the Schengen agreement in 1995. Abolition of border checks inside the Schengen area made the focus shift towards the external borders of the new Schengen area, and increased control of the outer borders was motivated with a security discourse (EC, 2015). For instance, according to FRONTEX one of the key motivations for its establishment was dealing with "organised crime networks" (FRONTEX, 2014). Schengen establishment and FRONTEX's role in the protection of its borders is part of a bigger picture. Since the 1980s a general discourse has been establishing on EU level that frames migration together with other security issues, such as human trafficking. Jef Huysmans argues that this is part of a 'security discourse' setting its way into European politics, linking migration to among other things transnational crime and terrorism (2000: 756). Parts of public administration – mainly the police in several European countries – were strong advocates of Schengen. Their interest was establishing supranational control over border management. The organized interests from different levels of European society to regulate migration had a profound effect on the European legal framework.

In 1992 the policy area 'Justice and Home Affairs' (JHA) was founded as part of three central 'pillars' of policy in which the EU legislates and forms policy. The priority for everything regarding asylum and refugees, as well as immigration, was transferred to the first pillar of interest in the The Treaty of Amsterdam which entered into force in 1999, replacing the JHA with the area Freedom, Security and Justice (AFSJ) (Huysmans 2000: 755p).

3.2 The EU's material aims in border management

The EU has coordinated efforts mainly in the area of border management focusing on control. This is illustrated by the shape which the Dublin Convention has taken. The Convention makes it impossible to apply for asylum in any other EU country than the one to which the migrant first arrives. Although the process is more definite because of the administration in the Member State only treating the application once, it also makes it harder to be granted asylum since the migrant only has a single chance. Visa policies have also been harmonized between Member States in order to achieve full EU control of who gets asylum and how the conditions set apply in every single case (Huysmans 2000: 756). The Dublin Regulation was introduced to make the asylum application process easier for both migrants as well as Member States (Ibid.; europa.eu, 2015).

Huysmans argues that the security policies (that FRONTEX is a part of) at the borders has motivated EU authorities to prioritize technical expertise. Border guards are a part of a corps of professional security personnel, and their given mission implies the handling of migrants as a potential security threat (2000: 757). The EU's agenda at the external borders aims at reducing irregular migration, which has been policy since the establishment of the Dublin Convention. A primary strategy used is restricting the number of people entering the Union, making it harder to get a visa (Ibid: 756). Another strategy is to externalize the border, by making readmission agreements with third countries (Pollak and Slominski 2009: 916). Both strategies have created further incentives for border guard authorities to force migrants crossing the border to turn back (Ibid.).

3.3 Double mandate for FRONTEX

The establishment of FRONTEX as an overarching EU authority is a result of the European Commission's will for an integrated border management (IBM) along all external border of the Union. The Agency was established in 2004. The policy of an IBM aims at providing a uniform standard of control at all external borders of the Union, independent of which is the Member State. The role of FRONTEX is described in its founding regulation as supportive in ensuring the management of external borders: it serves as an extension of national border management. This is clearly expressed in the 4th paragraph (EC) 2007/2004 where the EC states that "The responsibility for the control and surveillance of external borders lies with the Member States." Is this a paradox? With regard to the EC:s aim of common standards along the external borders, and the establishment of an Agency to ensure this, taking responsibility for what the Agency does could be considered fundamental (cf. Human Rights Watch, 2011).

4. Methodology

4.1 The single case

This study classifies as a theory testing qualitative case study (cf. Esaiasson et al., 2007; Teorell & Svensson 2007). As Esaiasson et al. argues, theory testing case studies have the aim of testing a theoretical framework on a given case, and the theory is central to the entire investigation. Further, the choice of conducting this type of study implies that strong reasons exist for the choices of a specific theoretical framework and the specific case to which it will be applied (2007: 42). In the following section I will explain the underlying hypothesis and assumptions motivating research on the case of FRONTEX and why a neofunctional lens might best account for the case. Single case studies that examine only one unit of analysis are rare. However, this study classifies as one. No segregation will be made between period of time during which FRONTEX has evolved, and the investigation circle around the case as one entity (Esaiasson et al. 2007: 121).

4.1.1 A least likely case

The choice of this case is made on the basis of its extreme character. Border management is the policy area where sovereign states are least likely to give up control to a supranational body (the EU). To control who is allowed to reside on the land controlled by a state is referred to as "one of the key functions" of the exertion of power of a modern state (Roos 2013: 1). This is why the area where states should find hardest to compromise their influence is regarding territorial sovereignty. If sovereignty is compromised here where it is least likely to do so, it might be the case that supranationalism in the form of Europeanization is taking over in other policy areas too (Teorell and Svensson 2007: 154). If it proves to be correct that this will not however be subject to examination in this study.
The unlikelihood of migration policies to be handled primarily by the EU has been further expressed, as these policies also touch upon vital areas such as provision of the welfare sector and access to the labor market (Roos 2013: 10). The EU has launched cooperation and integration in numerous areas where states benefit from it, such as the common market. However, by letting FRONTEX as an EU agency – employing staff from most Member States – operate on its soil, Member States are partially giving up on their sovereignty. Therefore, according to sovereign logic, migration policy which touches on borders and territory should not be an area of EU intervention (Roos 2013; Mungianu 2013).

Yet, is this an important case for anyone else apart from scholars focusing on EU integration? As allegations against FRONTEX for violating Human Rights are frequent and the Agency assumes no legal responsibility, every person interested in the safeguarding of Human Rights should be puzzled by the Agency.

4.1.2 Scope and delimitations

This study cannot be generalized to other empirical cases. The examination of a single case (one Agency) is not applicable to, for instance, the other agencies within Home Affairs. The aim of this study in methodological terms is to *generalize theoretically*. What this means is that the examination does not have the ambition of explaining several cases in the EU where neofunctional elements exist. Rather, the ambition is to tie the case of FRONTEX to the neofunctional theory and thereby connect this case to neofunctional school of thought. If the theory is relevant, connecting it to the material will provide an applied example of empirical support for the theoretical discourse used by neofunctionalists (Teorell and Svensson 2007: 44).

4.1.3 Hypothesis and counterfactual thinking

Focusing on a single organization and single theory risks to make the investigation one-sided and possibly even biased by the material. Therefore, it is of vital importance to keep a counterfactual thinking – to keep focus on what the situation would be like if FRONTEX was not a case of supranational influence (Teorell and Svensson 2007: 236). If this thinking is not sustained, the analysis risks telling "only one side of the story". To be clear about which side of the story this analysis will focus on, it is crucial to have an intersubjective approach to the underlying hypothesis. This also makes it possible to formulate a counterfactual thinking. The theory that will be presented below is about supranational rule. It explains how the supranational organization (EU) takes over governance at the expense of Member States. Building on the line of reasoning established in 4.1.1 about state sovereignty, this study launches with the *hypothesis* that Member States might not have been the most influential actors in decisions about FRONTEX's evolution – establishing its mission and mandate. Therefore neofunctionalism is tested as an explaining theory.

A counterfactual thinking instead places emphasis on the power of Member States' governments. It implies that Member States would have the power to either establish an agency and legislation (1) that takes responsibility for its activities on equal terms as the Member States involved in operations, or (2) that allows for Member States' to be able to circumvent responsibility and thereby avoid accountability as FRONTEX on equal terms as does. This because it does not lie in the interest of Member States to be held accountable when FRONTEX is not. This counterfactual thinking will be kept throughout the analysis.

4.2 Material

How has the material been selected? In analyzing the Agency's path to where it is today, a considerable amount of work has already has been done. These secondary sources themselves rely on tremendous previous investigation. For the purpose of the research field and of this investigation, it is important to work cumulatively.

The extensive work of Carrera & Guild (2010), Carrera et al., (2013), Pollak & Slominski (2009) and Christof Roos (2013) will be used among others. Some of the information from the Treaty on the European Union (TEU) come from Roberta Mungianu (2013). As for other relevant legislation concerning FRONTEX, the following regulations will be analyzed:

- Regulation (EC) No 2007/2004 – establishing FRONTEX

- Regulation (EC) No 863/2007 – creating a mechanism for operational intervention (in the form of Rapid Border Intervention Teams)

- Regulation (EC) No 1168/2011 – giving the Agency the authority to initiate operations

4.3 Operationalization and strategic approach

The expectation of this study is that a combination of the defined key terms (in section 2.2) and the theoretical definitions (in section 5) along with a clear hypothesis and counterfactual thinking (section 4.1.3) will convince the reader that a sound investigation in terms of operationalization is taking place. Operationalization of the concepts mentioned above will lead to the examination of both (1) FRONTEX's allocated legal mandate, and (2) how this corresponds to its actions. The benefit of this intensive single case study is that it gives the researcher the possibility of using a variety of sources to illustrate the evolution of FRONTEX.

The strategy used for this investigation is simple and thereby easy to reproduce from an intersubjective perspective. To analyze legislation is a way of distinguishing (1) which political objectives that are underlying in the creation of legislation, and (2) what legal mandate is given to an authority and how it is delimited. I will use relevant treaties and regulations that regulate FRONTEX and compare them to (1) the empirical cases where FRONTEX has intervened on Member State territory and how this corresponds to its legal mandate, and (2) how the interpretations and implementations of its legal mandate are carried out. This will be complemented with contributions of previous research, which is indispensable for cumulative research.

5. Previous research

Many authors have pointed to the lack of accountability in the FRONTEX authority (cf. Carrera and Guild 2010; Pollak and Slominski 2009; Mungianu 2013). Carrera et al. (2013) have partially examined the legal framework and its ties to the discourse adopted in relation to the Agency's operations. Björn Fägersten (2010) has focused on incentives of EU Member States to cooperate intergovernmentally when it comes to intelligence. Migration policy and its links to sovereignty has been explored by Christof Roos (2013) in his book *The EU and Immigration Policies Cracks in the Walls of Fortress Europe?,* where the difficulties of sovereign states to cooperate due to issues of regulation of internal markets and welfare systems are thoroughly treated. Jef Huysmans (2000) has contributed to the literature on securitization in his article *The European Union and the Securitization of Migration.* All these academics' scholarship has proven useful to this study. The two latter scholars have provided an extensive background to the context in which FRONTEX operates. However, none of the above-mentioned scholars have made an exhaustive examination of the neofunctional frameworks possible links to FRONTEX developments. The scholarship on FRONTEX has made tremendous progress in terms of mapping The Agency's unclear mandate. Nevertheless the cases in which FRONTEX has been involved and the legislation determining their mandate calls for new theoretical framing. This study begins with the assumption there must exist a reason for the unclarity surrounding the Agency's mandate.

6. Theory

As Martin Saeter points out, although the EU with its institutions is a complex and multi-faceted organization, it is an entity, and therefore it would be fruitful to analyze parts of the organization with a comprehensive theory. To understand the development going on in different branches of the bigger EU-tree, a general approach needs to be adopted (1998: 12-13). It is the aim of this chapter to present a theory with the potential of explaining FRONTEX's emergence and development as an EU Agency. Since FRONTEX's mission stretches beyond Björn Fägersten's definition of intelligence and coordinates as well as participates actively in operations, this study suggests looking beyond intelligence theory and look at the Agency's mission with another theoretical understanding. This is done by examining the evolution of its mandate while applying a theory concerned with EU institutional development: neofunctionalism. It does so by explaining EU integration from the top down.

6.1 Neofunctionalism

Neofunctionalism explains the EU's development through its institutions. Although the neofunctionalist theory has been criticized and revised since the first lines were sketched by Ernst Haas in 1958, the central causal theoretical queries have guided many empirical studies of the ECSC, the EEA and finally the EU, and many scholars have contributed to its development. Since the beginning this theory has had generalizing ambitions, and researchers have applied it to empirical cases with the goal of connecting this theory of self-reinforcing integration – to every case of negotiation of sovereignty in the EU (Rosamond, 2000: 54).

6.1.1 Establishment of the supranational level

The central term used by neofunctionalists to depict the EU project is *supranationalism*. What is important to the theory is that the creation of institutions on the EU level generates further integration which decreases the influence of Member States. The creation of common institutions enhances technocracy and spurs spillover motivated with functionality (see 6.1.2, 6.1.3 and 6.1.4 for further elaboration). It describes the EU as an organization that places power in a technocratic elite, ruling Member States from above. These technocrats are Europeanized in interests, in loyalty and thereby also in policy design (Rosamond 2000: 56).
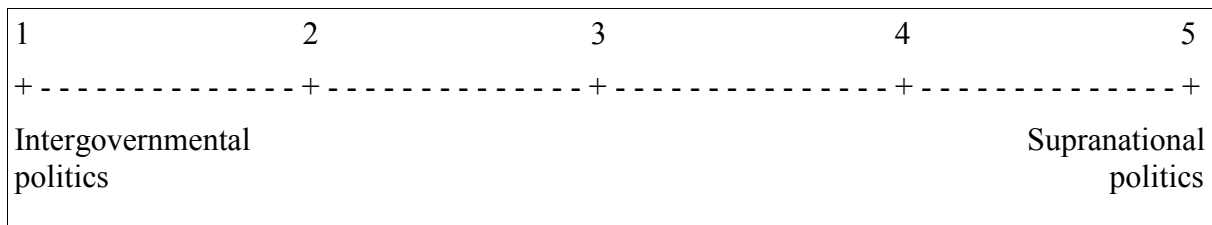
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politics                                                                   politics
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Figure 1. Presented here to illustrate the ontological span between intergovernmental and supranational theories, where neofunctionalism belongs far to the right on the continuum. *Source: Stone Sweet & Sandholtz, 1997: 303.*

6.1.2 Spillover

A central idea to neofunctionalism is that the process of cooperation can by itself generate further and enhanced cooperation. This suggests that institutions themselves create a spurring force, called spillover. Once cooperation has been established in an institution, the institutionalization leads cooperation to deepen (Fägersten, 2010: 93). Theory focusing on spillover in the organization exists far from rationalist theories on the ontological spectrum. Rather than considering the decisions and actors related to intergovernmental cooperation, the institutions and authorities where cooperation happens are targeted and the social arena where cooperation in an organization takes place is given importance. This theoretical approach is based on an assumption of automaticity. As Fägersten puts it: "solutions in one policy area require additional action in an adjacent policy area" (2010: 94).

According to this line of thought, the coordinating role of FRONTEX where Member States' efforts and personnel are gathered will automatically demand more active cooperation where the Agency works: analysis related to intelligence and coordination of operations at the external borders. This is closely linked to the concept of functionality or functional spillover. It suggests that the fulfillment of a goal will require cooperation to spread to more policy areas,

making it a necessity related to the functioning of the organization and its objectives (Ibid.). What drives integration in the EU economy and policy is consequently common institutions. This dynamic has two aspects: functionality and political will.

6.1.3 Functionality

Functionality is what *motivates* institutions to deepen their cooperation and widen the scope of their activities. As different sectors and policy areas (such as migration policies) are interconnected and institutionalized (in the case of FRONTEX), neofunctionalists argue that institutions will want to engage in more cooperation within their policy area to increase their capabilities. This has been the case with the common inner market in the EU, where trade barriers have gradually been removed to assure the market's prosperity. It is part of the spillover effect, since the first institutional establishments will generate an increasing mandate. Evidently, the theory focuses more on directly supranational institutions and their powers of initiation, the European Commission being the best example as it is an agenda-setting institution without any dependence on Member States' interests (Rosamond 2000: 60-61). The most important element in integration on the supranational level is independent institutions with the powers of initiation. In this, institutions such as the EC must be powerful enough to be able to bypass the preferences of Member States that might prove averse to integration in some policy areas. Or as Haas puts it:

> There is no dependable, cumulative process of precedent formation leading to ever more community-oriented organizational behavior, unless the task assigned to the institution is inherently expansive, thus capable of overcoming the built-in autonomy of functional contexts and of surviving changes in the policy aims of the Member States
>
> (in Rosamond 2000: 62)

This means that an institution or authority within the EU can, if given a task that implies broadening the scope of its activities, do so by itself. For that to happen however, a political will is needed that provides a goal. In the case of the EU, this goal has been more supranational control over more policy areas. To assure this goal cooperation is required and thereby the EU authority motivates further cooperation as a means to assure the functioning of the idea. Institutions and authorities are occupied with the general goal of gaining more power in their respective policy areas. By creating supranational bodies working for the greater good of the EU as a whole, the high authority becomes independent in the sense that it operates independently of national preferences. Supranational institutions equal independent supranational political will, which sees to the interests of the EU as a whole, which is vital (Ibid). Thereby, national power and state-centrism turns obsolete when EU institutions are given influence (Rosamond 2000: 77).

6.1.4 Technocracy

Do functional arguments in any sense replace the ideological debate regarding how the EU should develop? Neofunctional theory suggests that it does, and that this is partly because of increased technocratic influence over politics. The creation of a European Union, is argued to be more about the guarantee of material needs than about ideology. National and EU issues such as foreign policy are issues that are best handled by public officials: the technocrats. This inspires the entire construction of the EU with its institutions and authorities (Rosamond 2000: 57).

6.1.5 Treaties pushing integration

The goals that are set up in the economic and political spheres of the EU come from Member States as well as the European Council and European Commission. These actors all have different preferences and motives for the outcomes of policy-making. However, according to P.C. Schmitter, when goals are not shared, the only development that the institutionalized EU framework will lead to is further integration. This can happen either by increasing the scope in the number of sectors where cooperation takes place, or an intensification of cooperation in the existing sectors (in Rosamond 2000: 63). The enlargement of the number of participating countries at the same time as deepening of EU integration is something that has by some been considered as opposing trends (Chopin, 2007). In the neofunctionalist account they are only considered complementary to each other. The treaties signed by Member States for European cooperation are also of a definitive nature. Once a Treaty is signed, actors in the economic and political field adapt to the new institutions, or new areas of influence assigned to old institutions. This prevents incentives that Member States might have to keep the cooperation from interfering too much with their powers (Stone Sweet and Sandholtz 1997: 312-313).

7. The Agency's evolution

The following analysis will be organized according to five different themes. As this study considers the invention of and changes in FRONTEX and its capabilities, the analysis will follow these changes and analyze their implications, without following a strict chronology, instead, the causality in the evolution of FRONTEX's mandate will be reflected by the division into themes. The material has been analyzed according to potential relevance for the neofunctional framework and for a counterfactual outcome. With these theoretical concepts in mind, the purpose is answering the question: Why has FRONTEX evolved without introducing a mechanism for legal accountability?

7.1 Gradual evolution of mandate

Several Member States have all along the development of the integrated border strategy been reluctant to the measures of its implementation. Implementation requires EU involvement on state territory, with the risk of clashing with the principle of subsidiarity which supports state sovereignty. Subsidiarity assumes that Member States' should handle every matter that is not better handled on EU level (Carrera & Guild 2010: 12). FRONTEX has circumvented this principle by active experimentation in areas beyond the Agency's legal mandate. In the two areas where FRONTEX primarily operates: (1) operational activities, and (2) risk analysis, the Agency has expanded their competences single-handedly. For instance, before FRONTEX got the legal approval of implementing Joint Return Operations (today a regular activity of the Agency which conducts a few dozen deportations per year) they were already coordinating the operations (Ibid.).

The same goes for the collection and processing of personal data regarding migrants (Carrera et al. 2013: 347), which FRONTEX since then has developed their own procedure for handling (FRONTEX, 2014). The principle of gradually introducing an integrated border management seems to have been followed without legislative backing from the European Parliament. The EP, as the only directly publicly elected body within the Union, reacted sharply to the initiatives of FRONTEX. Firstly, the quantity of data processing was believed by the EP to increase risks of leakage. Secondly, they classified the type of data gathering FRONTEX involves in as personal intrusion (EP, 2014).

The Treaty of Lisbon (2009), that entered into force the year prior to the first rapid border intervention in Greece, envisaged an integrated border management at all external borders of the EU. The treaty consolidated the *Treaty on the functioning of the European Union* (1958) and the *Treaty on the European*

Union (1993). The treaty introduces the idea that border management shall gradually grow as an area dealt with on a supranational level. Roberta Mungianu (2013: 365) brings up the legal framing of the common border management strategy: Article 77 of the Treaty of Lisbon states (under the 1st paragraph) that: "The Union shall develop a policy with a view to (...) the *gradual* introduction of an integrated management system for external borders." [Emphasis added] (2013: 365). This defines the goal of the common border policy for the Union. Following in the 2nd paragraph it is stated that "any measure necessary [will be taken] for the gradual establishment of an integrated management system for external borders" (Ibid). The treaty of Lisbon embodies the political will for full integration of border management. FRONTEX has taken agency measures to exercise more control over border management (through their initiatives concerning joint operations and processing of personal data). Thereby the Agency has taken its own measures to assure the overarching goal in the Treaty of Lisbon. This corresponds to how neofunctionalism sees the gradual spillover of competence within the EU. As Haas argues (in Rosamond 2000: 62), tasks assigned to an institution (in this case authority) needs to be inherently expansive for spillover to occur. The treaty of Lisbon has introduced the overarching goal of an integrated border management, which in itself is a general mission assigned to actors within the EU dealing with border management (such as FRONTEX). In this it has overcome the opposition of Member States refusing a widening of its mandate, thus proving a high degree of inventiveness. What remains unclear is how the Agency has been able to bypass the legal framework.

7.2 Incentives and voids within the legal framework

The concept of integrated border management has lacked a clear definition as to which national and supranational authorities should be involved and to what extent (Mungianu 2013: 366). It has lead to initiatives from FRONTEX's side to expand the scope of their own activities. Functionality (Rosamond 2000: 57) assumes that a corps of technocrats will eventually take over more of the ideological work of politicians. Politics will according to Haas become more a matter of "managerial" tasks, political aims disappearing in favor of a strategy aimed at maximizing material needs in every policy sector. For instance, it could be striving for a single market by economic integration, or reducing irregular migration in the migration policy. Which method is more effective in providing for these needs is best known by experts and technocrats, not ideologues (Ibid.). This reasoning that forms one of the bases of neofunctionalist theory is applicable to how FRONTEX's mandate has evolved. Pollak and Slominski explain how the Agency has side-cut national political will and used the legal void that unclear legislation provides to expand their own governing of migration policy in a technocratic fashion, without having to face the scrutiny from either national or EU politicians (2009: 916). The material aims are in this case to decrease the

number of unwanted migrants that would put pressure on EU economies and welfare systems (cf. Roos 2013).

How can it be possible, that FRONTEX governs and initiates its own activities without a prior legal review from the EU? The main explanatory factor is that the legislation which could restrain the Agency is obscure and open to interpretation. Although FRONTEX operates deploying personnel on the field, their missions are still phrased as being of an assisting and coordinating character. This study initially asked why FRONTEX has evolved without introducing a mechanism for accountability. A key to the answer lies in the limited mandate the Agency considers itself to have. FRONTEX points to how the expertise and technical equipment they are using complements in addition to Member States efforts. Since "regular border control is the exclusive responsibility of the Member States" (FRONTEX, 2015), the Agency has despite its participation pointed to the sovereign state as the main actor in operations.[2] This discourse is having concrete results when it comes to accountability. When migrants' rights are disrespected, the actor held accountable is the Member State hosting a FRONTEX coordinated operation (Carrera et al. 2013: 352, 353). More exactly, FRONTEX officers in Joint Operations must respect national law, while also implementing the Agency's Operational Plan. Hence, this has become an argument to refer complaints of illegal deportations and push-backs to hosting Member States, for example in the case of the deployment of Rapid Border Intervention Teams in Greece in 2010 (BBC 2010), or the Joint Operation HERA I, II and III off the Canary Islands (Human Rights Watch 2011).

It seems as if the FRONTEX administration consisting of public officials and experts have taken over governance of the organization. This is a shift from an ideologically driven policy from the Union towards a technocratically driven aim implemented by experts (Rosamond 2000: 56), striving for reduced migration. However, neofunctionalism also acknowledges the need for a political will within EU institutions to push integration in different policy areas (Ibid: 61-62). The Treaty of Lisbon establishes an integrated border management as the general goal for common border policies. Can EU institutions push integration without the consent of Member States? In that case, it would have to be done with the creation of an agency that in some way bypasses both the authority of the EU level and the national level: since none of these actors have the power within the EU framework (due to the sovereignty of Member States being intact) to delegate supreme control over border management to an EU Agency. Pollak & Slominski holds that a short cut has been taken by FRONTEX, without a concrete transfer of authority from neither Member States nor the EU. Instead, a new form of administrative governance has been established with the aid of the unclear legislation (2009: 905). The Agency has acted independently of legislation and EU directives, but the legislation giving FRONTEX its autonomous position is written by the EU. The laws concerning the Agency have an imprecise and vague character because of the inadequate ability of EU legislators to provide a clear framework (Ibid.). With the undefined legal framework as a basis and a budget

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[2] See *3 Setting the context: security and a decrease in migration* for underlying discussion

that has strikingly quadrupled from 2006 to 2008 (Ibid: 909), FRONTEX has been given the flexibility and the financial means to be an experimental actor in terms of activities.

7.3 Spillover effect widening FRONTEX's mandate

A clear linearity in EU migration policy integration appears when analyzing the 2007 amendment to the FRONTEX Regulation. It was amended to give the Agency the authority to deploy Rapid Border Intervention Teams (RABITs) (EC No 863/2007). The aim of common standards in border management remains. The Regulation (Ibid.) states that standardization is needed in order to assure another goal, which is already integrated as a common EU political project: the Area of Freedom, Security and Justice (hereinafter AFSJ) (Ibid.). The AFSJ is in turn one of the three main pillars of EU cooperation incorporated into the Treaty on the European Union (TEU) established in 1992. Operational cooperation is needed to achieve a secure AFSJ which requires standardized border management. Spillover is defined by neofunctionalists as "a situation in which a given action [standardization of border management], related to a specific goal [a secure AFSJ], creates a situation in which the original goal can be assured only by taking further actions [operational cooperation], which in turn create a further condition and a need for more action and so forth" [author's input] (Lindberg in Rosamond 2000: 60). It is by the same logic that FRONTEX was founded, motivated by referring to the common rules adopted to secure the AFSJ (EC) (2) No 2007/2004. It is also following the same logic that the Agency got the power to initiate operations in the 2011 amendment to the regulation (EC) No 1168/2011. This shows how the expansions of the Agency's mandate are motivated in reference to overarching goals established in EU treaties.

For spillover to occur, there also needs to be a prior interdependence in the given policy area (Rosamond 2000: 60), such as established by the creation of an AFSJ in the EU where the norms established for security and border management relies on every country's successful implementation thereof. The power of operational cooperation (which will result in the setting up of RABITs) is motivated in terms of internal security for the entire AFSJ. In the EC Regulation 863/2007 of 2007 as a means to achieve the common goal of internal security: "Effective management of the external borders through checks and surveillance helps to combat illegal immigration and trafficking in human beings and to prevent any threat to the internal security, public policy, public health and international relations of the Member States. Border control is in the interests not only of the Member State at whose external borders it is carried out *but of all Member States which have abolished internal border control*" [emphasis added] (EC (3) 863/2007). The Agency has become operational with the motivation of securing the AFSJ, creating a spillover that extends and deepens the Agency's mandate.

7.4 Member State interests and losses

The responsibility and accountability is indeed held by Member States, firstly because Member States need to request the assistance of FRONTEX in the case of a RABIT intervention (Carrera & Guild 2010: 3), secondly since only Member States can be held accountable in practice in the case of human rights breaches as in the case of *Hirsi Jamaa and others v. Italy*. The latter is due to the fact that Member States personnel are employed in the field during Joint Operations, and therefore it is hard to direct any accusations of law-breaking past them towards the Agency (Carrera et al. 2013: 352). Some Member States have been accused more often than others for breaching human rights when it comes to implementing the EU's common standards, such as Italy and Greece (BBC 2006; Statewatch 2013). Could the expansion of the FRONTEX mandate, with regard to a counterfactual approach, be seen as a way for certain Member States to evade responsibility to the EU for Human Rights breaches, while still achieving a decrease in incoming migrants to the Union? As Andrew Moravcsik argues: "the primary source of integration lies in the interests of the states themselves and the relative power each brings to Brussels" (in Rosamond 2000: 136). One of the most powerful Member States, France, has formerly had to face scrutiny due to their inaction in face of a boat in distress in the Mediterranean – holding migrants bound for the EU. France could be held accountable because national legislation applied to the case (Carrera et al. 2013: 354). Conversely, in the case of FRONTEX, this study has shown that the legal framework and official discourse denies responsibility in their operations – legislation cannot hold the Agency accountable. This proves intergovernmental ideas wrong, in the sense that even powerful states cannot dodge the responsibility to FRONTEX.

7.5 State sovereignty compromised

Cooperation in the immigration policy area experienced a stalemate throughout the 1990s and the early 2000s. Dead-locks were characterizing the negotiations, explained by the difficulty of handling the area of migration between sovereign states, in charge of their respective welfare systems and labor markets and therefore unwilling to let supranational power decide on border policies (Roos 2013: 10). As Carrera et al. (2013: 343) argues, there has been an intergovernmental element of harmonization in EU migration policies, i.e., national governments have been partially reluctant to delegate power in the area of Freedom, Security and Justice in which FRONTEX operates. These difficulties reappeared when the idea to create an Agency to achieve integrated border management was first discussed. While the European Commission argued for an independent authority with the power to operate, most of the Member States were

reluctant and wanted to limit the Agency's mission to coordination and assistance only (Pollak & Slominski 2009: 907, 908). Roos holds that "Member States' positions towards common EU immigration policies often tend towards measures that do not compromise their absolute sovereignty over the issue" (2013: 30). Haas explains that Member States in intergovernmental negotiations will strive for the lowest common denominator when it comes to cooperation (in Rosamond 2000: 61). While these are valid claims, an overview of (1) The Agency's Regulation and amendments made to it, (2) The relevant treaties signed by Member States and, (3) information from joint operations coordinated by FRONTEX and hosted by Member States all point to a common denominator. The material suggests that Member States have kept their sovereignty only in the sense where it comes to taking responsibility for the human rights breaches occurring in operations at the external borders. Is there a choice? EU legislation (TEU) makes it impossible for Member States to coordinate border management intergovernmentally. Rather, they must always turn to the supranational authority FRONTEX in the case of an inflow of migrants that exceeds their own capacity (Mungianu 2013: 371). A clear example of this is the RABIT intervention in Greece in 2010 – 2011. Although the formal decision to ask for support at the external borders was for Greek authorities to make, they were encouraged by the European Commission to file a request to receive FRONTEX assistance (Human Rights Watch 2013). The formal decisions and responsibility for what happens at the borders thus remain with Member States, as in cases when migrants are ill-treated (euobserver 2013). The treaties, that are signed by national governments, have assured some influence on EU legislation whereby it has kept some sovereignty with Member States, but FRONTEX as an Agency has been able to either bypass the legislated sovereignty, or use it in its defense. If Member States had expanded the mission of FRONTEX as a way to dodge responsibility to the EU for Human Rights breaches, it has not succeeded.

Securitization of the policy area of migration has helped FRONTEX to define their mission as less politicized and more a matter of security (cf. Huysmans 2000). For example this was the discourse adopted at the Hellenic border with regard to the RABIT intervention in 2010 – 2011 and in the case *Hirsii Jamaa v. Italy*. This is explained by neofunctionalists to be a sign of a foreign policy that is less political and more 'managerial' in its attributes, i.e. that when this area is depoliticized, it becomes a question of material and security aims (Rosamond 2000: 57), such as reducing migration. A response that is framed as security does not have to deal with the political issues of sovereignty and who should have access to the nation – inherent in political debates about migration.

8. Final discussion

This study initially asked the question: Why has FRONTEX evolved without introducing a mechanism for legal accountability? To answer this imminent question, a neofunctional theoretical framework has been employed. The concepts introduced by neofunctionalists: supranational (EU) power resulting in spillover and technocracy which is motivated by functionality have been explained and applied. Hence, can neofunctional theoretical concepts explain why FRONTEX's mandate has evolved without accountability?

The analysis has shown Member States' reluctance towards a fully integrated border management. This since an agency that has full responsibility for border management would naturally inflict upon state sovereignty. Since Member States have actively opposed FRONTEX to become fully operational, it has lead to the establishment of an agency regulated with an unclear legal framework. This legal framework has been used by the Agency to experiment beyond its legal mandate, widening the scope of existing tasks. However, as the analysis has also shown, this is part of the imminent strategy of the EU to gradually introduce an integrated border management. This idea of graduality (as introduced in the Treaty of Lisbon and Treaty on the European Union) has partially been implemented in practice by the Agency itself by introducing new competences. Thereby, the Agency has in their operational activities kept an official discourse of referring to Member States' legal mechanisms for accountability. Member state sovereignty and hence responsibility is kept in terms of discourse, but in practice FRONTEX has expanded to become a chief actor when it comes to the management of external borders (and the allegations of human rights breaches that follow).

This context makes it possible to understand why FRONTEX rejected the EU ombudsman Emily O'Reilly's demand in 2013 for an internal complaint mechanism. National resistance towards a fully operational agency has sanctioned the creation of an unclear legislation and the experimental mandate that follows. Neofunctionalism points out how the EU is mainly characterized by its technocracy since its aims are often material, and how public officials will prove efficient in assuring its material aims. The security discourse around the AFSJ and especially around border management has motivated the response to be highly material (reducing the number of irregular migrants). Firstly, FRONTEX has experimented in risk analysis and operational activities to assure this. This implies a public management with a strong power of initiation. The regulations that have followed to expand the Agency's mandate, has done so with arguments of functionality, creating a spillover effect widening the Agency's mandate. Generally this implies supranationality in border management (as defined in section 2.2 and in the neofunctional account). Specifically the indications of the

analysis are more complex. Firstly, it implies that the technocratic elements of the EU has served FRONTEX which incarnates a managerial approach to border management, whereby it has been possible to bypass concerns of Member States of interference with sovereignty. Thereby, this study has shown that the key to explaining FRONTEX's lack of accountability, lies in the supranational power the EU institutions have been allocated. However, secondly, a key to understanding this power also lies with the Member States, since they are the signatories of the treaties containing the imminent goals and the legislation which is unclear. The power of the EU lies rather in that the unclear mandate given to FRONTEX has been able to bypass legislation to reach the imminent goals. The EU has clearly stated objectives in the Treaty on the European Union (TEU). What is not defined in the treaty was how and under what conditions an integrated border management will be implemented. The same lack of clarity beams through the Regulation deciding on FRONTEX's competences. Why the supranational organization (EU) is argued to be stronger is by the power of initiation and agenda-setting it has (through institutions such as the European Commission) which has led the Union to extend the Agency's mandate at the expense of Member States – which are consistently held accountable when operations are discovered to breach human rights.

This study has presented a clear example of how an EU agency with a high degree of technocracy and experimentation has evolved within a legal void and sometimes directly bypassing its legal mandate. It is clear that legal voids exist within the Unions treaties that are taken advantage of by at least one experimental agency. Nevertheless, it is necessary to ask what the technocratic fashion in which FRONTEX has evolved tell us about the EU? The support given to the neofunctional framework deserves further investigation. Further research could be conducted on other EU Agencies to establish whether neofunctional elements can be found elsewhere in the EU tree of institutions, Agencies and intergovernmental arrangements.

9. References

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1.1.2 Legislation

REGULATION (EC) No 1049/2001 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 30 May 2001 regarding public access to European Parliament, Council and Commission documents

COUNCIL REGULATION (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

REGULATION (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers

REGULATION (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

1.1.3 Legal authorities

CASE OF HIRSI JAMAA AND OTHERS v. ITALY, European Court of Human Rights, Strasbourg, 23 February 2012, *Application no. 27765/09*