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**The EU's External Border
Management in the Context of
the "Migration Crisis"
-Frontex's Evolution from
Coordinating Management of
Operational Cooperation to
Regulatory European Border
and Coast Guards-.**

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List of abbreviations

AFSJ	Area of Freedom, Security and Justice
AH	Agency head
BAC	Banking Advisory Committee
CEBS	Committee of European Banking Supervisors
Commission	European Commission
CEPOL	European Police College
COSI	Standing Committee on Operational Cooperation on Internal Security
Council	Council of the European Union
DG	Directorate-General
EBA	European Banking Authority
EBCG	European Border and Coast Guard
EBM	External border management
ECB	European Central Bank
ECJ	European Court of Justice
ED	Executive director
ECHR	European Convention on Human Rights
ECN	Eurosur Communication Network
EIOPA	European Insurance and and Occupational Pensions Authority
EP	European Parliament
EPP	European People's Party
ERN	European Regulatory Network
ESAs	European Supervisory Authorities
ESMA	European Securities and Markets Authority
EU	European Union
Europol	European Police Office
Eurosur	European Border Surveillance System
Frontex	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU/European Border and Coast Guard Agency
HI	Historical Institutionalism
H1	Hypothesis 1
H2	Hypothesis 2
IBM	Integrated border management
IOM	International Organisation for Migration
JHA	Justice and Home Affairs

MB	Management board
MENA	Middle East and North Africa
MEP	Member of the European Parliament
MMB	Member of the management board
NGO	Non-governmental organisation
NRA	National Regulatory Agency
PA	Principal-agent
PCU	External Border Practitioners Common Unit
PiS	Prawo i Sprawiedliwość
RaBIT	Rapid Border Intervention Team
SBC	Schengen Borders Code
SCIFA	Strategic Committee on Immigration, Frontiers and Asylum
SCIFA+	Strategic Committee on Immigration, Frontiers and Asylum incl. heads of national border guards services
SEM	Schengen Evaluation Mechanism
SI	Sociological Institutionalism
SIS	Schengen Information System
SSM	Single Supervisory Mechanism
SRM	Single Resolution Mechanism
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

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1   Regulation in Times of EU Crises

> "As we all know from the Roman Empire, big empires go down if the external borders are not
> well-protected." (Mark Rutte in November 2015, quoted from Politico 2015a)

Even though Dutch Prime Minister Mark Rutte's invocation of the decline and fall of the Roman Empire is a comparison that indeed "leaves a lot to be desired" (ECFR 2016), it is useful to illustrate the prevailing mood in the European Union (EU) at the height of the so-called "migration" or "refugee crisis". Also from an academic perspective, 2015 is described as the most challenging year that the EU's Area of Freedom, Security, and Justice (AFSJ)[1] has seen in its 16 years of existence (Monar 2016: 134).

In particular, the incompleteness of the EU's border-control governance regime became all too apparent: while free movement is usually guaranteed within the Schengen area, the control of external borders was mostly left in national hands; existing European rules were "inadequate and poorly enforced" (Jones et al. 2016). As a consequence, 1.82 million "irregular" crossings – most of them at the Greek and Italian external borders – were counted in 2015, which is six times the number of detections reported the year before. After some member states had adopted a "wave-through approach" by neglecting rules on the identification, registration, and reception of asylum seekers, six of the 26 Schengen countries have unilaterally reintroduced temporary border controls (European Parliamentary Research Service 2016: 2; Monar 2016: 141). Hence, a commitment-compliance gap lies at the heart of the migration crisis, "which has exacerbated the regulatory deficits of EU governance" (Börzel 2016: 9) in external border management (EBM).[2] Because of its merely coordinating but lacking regulatory powers, this could not be compensated by the "toothless" (Jones et al. 2016) European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU (Frontex).

Following a *functionalist* line of reasoning, this obvious "mismatch between existing institutional capacities and the growing complexity of policy problems" (Majone 1996: 1632f.) should have led to enhanced regulation. Whenever regulatory deficits deteriorate in the context of serious crises, one would not only expect the delegation of further regulatory tasks – e.g. to a non-majoritarian actor like Frontex – but also more *independent* regulation, since the latter is expected to require a certain degree of independence in order to be carried out effectively

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[1] The AFSJ is "an umbrella term for police and judicial cooperation, border management, asylum and migration, and counter-terrorism" (Kaunert et al. 2013: 273) and can be seen as "as one of the most dynamic policy fields in the European integration" (Kaunert et al. 2013: 274).

[2] Following Rijpma, the term external border management "is understood as the processes and procedures associated with border checks, which take place at authorised crossing points, including airports, and border surveillance, which is carried out on the so-called green (land) borders between authorised crossing points and along the blue (sea) borders." (Rijpma 2009: 121) The legal basis for the EU's EBM is laid down in articles 67 and 77 TFEU; article 80 highlights that the implementation of these policies "shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States." For further details on the legal framework for the EU's integrated border management see 6.1.1.

(Christensen/Nielson 2010: 178). Institutional changes that confirm these functional arguments could be observed in the course of the financial crisis, when banking regulation was tightened and rendered more independent through the creation of the Banking Union (McPhilemy 2014).

Indeed, being transformed into the European Border and Coast Guard (EBCG) Agency[3] in September 2016 (Regulation (EU) No 2016/1624), Frontex's regulatory tasks have been extended significantly.[4] In contrast, the agency's governance structure has remained almost untouched and continues to be "of intergovernmental nature" (De Bruycker 2016: 563). The discrepancy between an expansion of regulatory tasks and the continuity of the governance structure contradicts the functionalist assumption that "the nature of an agent is defined by the function it is supposed to perform [i.e. effective regulation]" (Magnette 2005: 5). This is particularly puzzling because "crises can be strong legitimising forces on their own, giving momentum to previously inconceivable institutional changes." (Boin et al. 2014: 429). Hence, the following question arises: *Why was Frontex granted with further regulatory tasks, but its governance structure not rendered more independent?*

In order to explain this discrepancy between the expansion of Frontex's regulatory tasks and the continuity of the agency's governance structure, I draw on the two most common theoretical approaches from the literature on EU regulatory bodies. The *functional approach* assumes regulatory bodies to be created, designed, and sometimes transformed in order to fulfil certain functions. In contrast, the *political approach* focuses on diverging preferences and bargaining among the relevant actors, investigating how these power struggles shape institutional outcomes. As suggested by Rittberger and Blauberger (2015, 2017), I do not treat these accounts as mutually exclusive, but instead increase their explanatory power by defining their domains of application and using a *combined functional-political approach*. More precisely, I argue that a functional logic is suitable to explain the delegation of new regulatory tasks to Frontex, while I consider the political approach adequate to account for the design of these tasks and the agency's overall governance structure. This combination allows me not only to gain a thorough understanding of Frontex's enhanced role in the regulation of EBM, but also of how the latter is governed.

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[3] More precisely, the new EBCG is comprised of the EBCG Agency (Frontex) and the national border management authorities (Regulation (EU) 2016/1624, recital 5). However, as pointed out by De Bruycker (2016: 568), "the name 'EBCG' proposed by the European Commission is a flag of convenience that is misleading. Is is only a legal fiction made of the addition of the new Agency to the national authorities of Member States that remain mainly responsible for border management." Despite this renaming, the agency's acronym remains "Frontex" (Regulation (EU) 2016/1624, recital 11).

[4] It is not the purpose of this paper to investigate all changes that have been introduced, which is especially at the expense of the strengthening of Frontex's operational role. For an overview of all articles that have been modified see COM(2015) 671 final, Annex 1; for more encompassing – but less in-depth – analyses of these changes see e.g. De Bruycker 2016; Carrera et al. 2017; Ferraro/Capitani 2016; Rosenfeldt 2016. While the agency's additional financial and human resources will not be investigated more closely, it is noteworthy that some observers doubt that they are sufficient to enable Frontex to actually fulfil its new tasks (European Public Affairs 2016).

The first hypothesis, being derived from the functional approach, assumes that a functional gap in the EU's EBM caused by regulatory deficits was the reason for decision-makers to delegate new regulatory tasks to Frontex. In the empirical analysis, I reveal that the shift from mere coordination to additional regulation indeed occurred due to functional necessities. I describe the increasingly complex policy problems in the context of the migration crisis, which further widened the functional gap in the EU's EBM. More specifically, I demonstrate subsequently that regulatory deficits in EBM could be observed along three dimensions, namely rule setting, monitoring, and enforcement. This was finally recognised by decision-makers, who consequently decided to delegate regulatory tasks to Frontex.

The second hypothesis, which is deduced from the political approach, presumes that inter-institutional power struggles and national sovereignty concerns shaped the design of these regulatory tasks and prevented a change of the governance structure. Moreover, it is to be expected that sovereignty concerns that were asymmetrically distributed across member states led to particular strong efforts to limit regulation and to control decision-making on it. Indeed, the empirical analysis reveals that the design of regulatory tasks was modified during the legislative process. In regard to enforcement, even the scope of regulation was diluted significantly. Besides their effect on the design of regulatory tasks, I also show how power struggles among EU institutions prevented a change of Frontex's governance structure. While most of the political approach's expectations can be confirmed, I point out some peculiarities: for instance, it is particularly challenging to predetermine member states' preferences when bargaining does not revolve around (re)distributional issues.

The contributions I make are fourfold. First, the combined functional-political approach has so far only been applied to the creation and design of European Regulatory Networks (ERNs). By using it to investigate the case of Frontex, I demonstrate that it can account for the transformation of an already existing EU agency as well. Thereby, I contribute to the current debate between advocates of a purely non-functionalist perspective on EU regulatory bodies (Kelemen/Tarrant 2011, 2017), and their opponents who argue in favour of a combined approach (Blauberger/Rittberger 2015, 2017).

Secondly, I analyse a case of tightened regulation in the course of an EU crisis. However, I do not study market regulation, but regulation of external border management.[5] I demonstrate that bargaining on regulation in the policy area of border control, touching upon the very heart of EU member states' sovereignty, is dominated by other issues than mere (re)distribution, and that predetermining actors' preferences is complex.

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[5] Some authors define regulation as mere "supervision and control of *market* actors and behaviour" (Eberlein/ Grande 2005: 107, italics added), which I do not consider to capture the whole phenomenon.

Thirdly, I carry out a theory-driven study that adds to a better understanding of the particular case of Frontex. Even though the latter is one of the best-known and most controversial EU agencies, one can still detect major gaps in its relating research. This bias is confirmed by the analyses that have been published on its most recent transformation: the establishment of the EBCG Agency has so far only been studied by legal scholars (De Bruycker 2016; Ferraro/De Capitani 2016; Rosenfeldt 2016), from a human rights perspective (Fink 2016; Gkliati 2016), and with the aim of making policy recommendations (Carrera et al. 2017). A comprehensive analysis of the changes Frontex's institutional design experienced is still lacking.

Fourthly, Justice and Home Affairs (JHA) agencies' role in the AFSJ is generally under-researched. By making use of the fact that Frontex is the first JHA agency that has been granted a genuinely regulatory role, I provide one of the very few studies that combine the public policy literature on EU agencies and the empirics of agencies operating in the EU's AFSJ. Since the integration of core state powers is a phenomenon of growing importance (Genschel/Jachten-fuchs 2015), other JHA agencies might be afforded an expanded regulatory role in the future. This further increases the relevance of my study.

In this thesis, I proceed as follows. In the second chapter, I describe the possible ways in which regulation might or might not be delegated within the EU. Subsequently, I elaborate on the particular case of Frontex and clarify to which degree it can be labelled an EU agency *sui generis*. In the last subsection, I conceptualise the dependent variables regulatory tasks and governance structure. This allows me to assess the empirical variation one can observe in regard to both variables in the third chapter. I conclude the section by elaborating on why the observed evolution is puzzling. Hereafter, in the forth chapter, I present the most commonly used theoretical approaches from the agency literature – the functional and the political approach – as well as a possible combination of both accounts, from which I deduce the above-mentioned hypotheses. Following this, I develop observable implications for the combined approach in regard to the case at hand. In chapter five, I explain how these theoretical assumptions are to be assessed empirically by presenting the methodological approach of a robust congruence case study.

In the empirical analysis, I collectively assess the observable implications that were deduced from the combined functional-political approach by using multiple pieces of evidence without making the study of the underlying causal mechanism explicit. I conclude the sixth chapter by discussing why possible alternative explanations offered by Historical and Sociological Institutionalism cannot adequately explain Frontex's transformation, thereby updating the degree of confidence I have in the combined functional-political approach's validity. In the concluding remarks, I summarise my main empirical findings. Moreover, I flesh out to what extent they complement previous research and suggest possible future studies. Eventually, I raise the question of what we can expect of "newly regulatory" Frontex in terms of effectiveness.

2 The Dependent Variable: EU Agencies' Institutional Design

In the second chapter, I first elaborate on regulation and the role it plays within the EU. I briefly review the case of banking regulation (with a focus on supervision) to illustrate the various ways in which regulation can be carried out and how this institutional set-up might change over time. In this way, I emphasise that the enhanced regulation of EBM is only one of many cases in which transnational crises led to institutional change (2.1). However, JHA agencies – including Frontex – show some distinct features, which I point out in the second subsection. By doing so, I also emphasise my contribution to previous research on EU agencies in general and on Frontex in particular (2.2). In the last part of this chapter, I eventually conceptualise the dependent variables "regulatory tasks" and "governance structure". In order to provide a complete picture, I previously introduce six categories capturing EU agencies' overall institutional design (2.3).

2.1 Regulation in the European Union

Generally, regulation can be defined as "sustained and focused control […] over activities that are valued by a community." (Selznick 1985: 363) This paper is based on a rather broad definition of regulation, which I assume to be "not achieved simply by rule-making; it also requires detailed knowledge of, and intimate involvement with, the regulated activity." (Majone 2000: 280) Stating that "[r]egulatory activities do not necessary [sic] involve the adoption of legal acts" (COM(2005) 59 final: 4), this is also the European Commission's (Commission's) interpretation of the term. Hence, activities such as evaluating the implementation of regulation can be considered "regulatory" as well (COM(2005) 59 final: 4).[6]

While EU politics had focused on legislative processes for a long time, deficient implementation of policies among member states has caused a demand for bureaucratic structures at the EU level that could not be met by the Commission (Groenleer 2009: 98).[7] Today, the consistent application of EU regulations in the member states can be described as one of the most urging problems of European integration (Rittberger/Wonka 2011: 783). In order to meet this challenge, decision-makers can choose between various institutional solutions, ranging from National Regulatory Authorities (NRAs) over ERNs to EU agencies.[8] Moreover, regulation might also be delegated to supranational institutions such as the European Commission. The resulting "diverse set of regulatory structures" (Kelemen/Tarrant 2011: 923) can be understood most accurately as a continuum, showing a variety of combinations of national, intergovernmental, and supranational elements.

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[6] This broad definition of regulation is also reflected in my conceptualisation of regulatory tasks (see 3.1).
[7] For further elaborations on the reasons why these regulatory tasks have not always been delegated to the Commission, see 4.2 and 4.3.
[8] Even though I apply a broad definition of regulation, it is accurate that the term *European regulatory agencies* being used by the Commission is "somewhat of a misnomer" (Busuioc 2013: 23). Hence, the term *EU agencies* will be used in this paper. For further details, see 2.2.

At the same time, these regulatory structures are everything but stable: the above-mentioned commitment-compliance gap continues to grow and lies at the heart of many transnational or "transboundary" crises that the EU has experienced in recent years, which has caused various institutional changes. Since they have questioned the ability of single states to individually cope with them, such crises have been identified as an "important reason behind agency creation and a veritable driver of agencification" (Busuioc 2013: 32). One of many examples is the creation of the European Food Safety Authority, which was established in reaction to the BSE and the dioxin crises. Many authors consider the initial creation of Frontex to be part of this phenomenon. However, crises have not only triggered the creation of new agencies, they have also caused amendments of existing agencies' mandates (Busuioc 2013: 33). Frontex's most recent transformation is one of these cases. [9]

As stated by Boin et al. (2014: 419), "the reactions to the financial crisis provide telling illustrations" of policy-makers' efforts to manage crises by reforming EU regulation. Moreover, the financial sector is a suitable example to depict the different ways in which regulation can be executed in the EU. Whereas the first attempts of European financial integration, such as the creation of the *Groupe de Contact*, date back to the 1970s, they only implied informal dialogue and information sharing between national supervisors from the six European Economic Community states. Another informal group established in this decade was the Banking Advisory Committee (BAC), which was endowed with monitoring tasks, but did not possess any legally binding powers (McPhilemy 2014: 1478f.).

After the introduction of the common currency had made the issue of banking regulation more pressing, the Lamfalussy process finally led to the creation of the Committee of European Banking Supervisors (CEBS) in 2004. Consisting of representatives from national supervisory authorities, the CEBS suffered the typical weaknesses of an ERN: while regulatory authority in fact remained in the hands of national regulators, the CEBS was a merely loose, advisory network enabling them to cooperate and only tasked with producing non-binding guidelines, recommendations and standards. The CEBS's ability to act was further weakened by its consensus culture (Kelemen/Tarrant 2011: 923, 931; McPhilemy 2014: 1480; Jones et al. 2015: 12).

Consequently, this network turned out to be unable to increase convergence in EU banking. This was confirmed by the 2007 review of the Lamfalussy system, which revealed that supervision hugely varied across member states (McPhilemy 2014: 1480). In the same year, the global financial crisis started to unfold, eventually leading to bail-outs of European banks by national governments. Accordingly, the Commission tasked an expert group with developing possible measures to tackle this problem. The 2009 Larosière Report criticised the lack of wil-

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[9] Legally, the new regulation did not amend but repealed previous legislation on Frontex. However, the agency kept its legal personality (Frontex 2017), "with full continuity in all its activities and procedures." (Regulation (EU) 2016/1624, recital 11)

lingness to cooperate and exchange information by national supervisors (De Larosière 2009: 41), and recommended to further supranationalise banking regulation (De Larosière 2009: 42-48).

This led to the CEBS's conversion into an EU agency in 2011. The European Banking Authority (EBA) was granted more powers than its predecessor: inter alia, it was mandated with drafting technical standards (McPhilemy 2014: 1484) and imposing binding decisions to individual banks when EU law was violated by national authorities. In emergency situations, the agency was allowed to replace national authorities. However, the Council maintained the right to decide on whether or not an emergency situation is present, and supervision by national regulators was only coordinated in a more formal way, but "remained intergovernmental for all practical purposes." (Kudrna 2016: 255) Hence, the EBA's "work on supervisory convergence remain[ed] at an early stage." (McPhilemy 2014: 1484) Nevertheless, the creation of the European Supervisory Authorities (ESAs)[10] was described as a qualitative shift, "potentially ushering in a new age of agencification." (Busuioc 2013: 15)

However, the deficits in supervision became visible when the stress tests conducted by the EBA in 2009 and 2011 were not able to calm the markets (Kudrna 2016: 255). As the situation kept worsening after the EBA's creation and the financial crisis even transformed into a sovereign debt crisis, EU member states agreed on the Single Supervisory Mechanism (SSM) in 2013. By doing so, they delegated supervisory power to the European Central Bank (ECB). Hence, the supranational end of the "regulatory continuum" was reached, namely supervision of systematically relevant euro area banks by a supranational EU institution. While national supervisors continue to exist, the ECB can for instance issue binding instructions they have to comply with. Even though representatives from member states' supervisory authorities are represented in the newly created supervisory board of the ECB, the governing council can veto its decisions and is therefore the final decision-making body (McPhilemy 2014: 1485). At the same time, the EBA continues to exist and oversees the so-called Single rulebook, which constitutes the foundation of the newly created Banking Union (Kudrna 2016: 257).[11]

Hence, banking supervision had first been subject to incremental changes. Eventually, the euro area crisis triggered a more punctuated change, namely the creation of the SSM, which can be seen as "one of the most radical institutional innovations of recent years." (Glöckler et al. 2017: 1136) As already mentioned in the introduction, this not only implied the delegation of further regulatory tasks, but also delegation to a more *independent* supervisor, the ECB.

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[10] Besides the EBA, the ESAs consist of the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA) (Busuioc 2013: 14).
[11] The SSM only constitutes one pillar of the Banking Union. As already mentioned in the introductory part of this chapter, these elaborations on banking regulation do not claim to be complete, but rather illustrate the possible institutional solutions for EU regulation and clearly focus on supervision. For further details, also on banking resolution and the Single Resolution Mechanism's creation, see (apart from the already cited publications) for instance Ottow 2014 or De Rynck 2016. In the concluding remarks (7), the reader will again find some references to banking regulation.

In this subsection, I clarified that for the purpose of this study, regulation is defined rather broadly, and revealed the many ways in which it is carried out within the EU. Moreover, by drawing on the case of Banking Regulation, I illustrated that these regulatory structures might undergo major changes over time – in particular in the context of transnational crises. The creation of the SSM demonstrates that such exceptional situations can eventually lead to the delegation of regulatory tasks to a supranational EU institution such as the ECB.

Having elaborated on EU regulation in general, I now move to the particular case of Frontex and raise the question of to what extent it can be labelled as an EU agency *sui generis*.

2.2   Frontex: an EU Agency *sui generis*?

The creation of the EBCG "has to be seen in the context of the long-term quest/search for an appropriate governance structure to ensure the management of EU external borders." (Free-Group/Statewatch 2016)[12] Frontex's initial creation dates back to 2004 (Regulation (EC) No 2007/2004),[13] when it addressed the need for a common EBM that had been caused by the Schengen agreement's signatory states'[14] decision to abolish internal border controls already 20 years before. Today, Frontex is "a key actor" in the EU's EBM (Rijpma 2017: 217): compared to the other agencies that have been established in recent years, it "experienced the most extensive upgrading in terms of financial and human resources." (Pollak/Slominksi 2009: 904) However, the agency's powers have always resisted "a true centralisation and a transfer of executive power." (Heijer et al. 2016: 20)

Most studies on Frontex focus on its activities, i.e. its operational role (Leonard 2009: 372; Ekelund 2013: 100; for examples see Mungiano 2013; Cortinovis 2015) and (alleged) human rights violations. In doing so, these analyses tend to be exploratory and descriptive, often arguing from a normative point of view, but are rarely explanatory and theoretically informed. The first of many of such papers was written by Carrera (2007), who critically studies Frontex's legal basis and work with a regional focus on the Canary Islands. An analysis conducted by the House of Lord's EU Committee is an example of studies being carried out outside the scholarly field (House of Lords/European Union Committee 2008).

Besides, there is also theory-driven research on Frontex. For instance, Pollack and Slominski investigate Frontex from an experimentalist governance perspective, which they

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[12] For instance, a 2002 feasibility study led by Italy considered the establishment of a "European Border Police" (European Council 2002). In 2014, an inquiry on behalf of the European Commission evaluated the possibility of a "European System of Border Guards" (Unisys 2014).

[13] Frontex was created as a "decentralised agency"; for a definition see European Parliament et al. 2012.

[14] Is has to be noted that the external borders of the Schengen area are not the same like those of the EU because of the policy area's external and internal differentiation, i.e. the opt-ins of several non-member states and the opt-outs of some member states in regard to the Schengen *acquis*. The fact that both the United Kingdom (UK) and Ireland have been granted observatory status in Frontex's management board (the UK also being involved in operations, see House of Lords 2017) makes the picture even more complex. Thus, while referring to the external borders of the *Schengen area*, the commonly used term of the *EU's* external border management will be used.

argue is more suitable to assess Frontex's role than a principal-agent (PA) approach. The authors state that the agency will only succeed in case it is granted enough independence and support by all member states. Furthermore, they question Frontex's accountability by arguing that "(supra-)national actors are sidelined and relevant legal rules are ignored." (Pollack/Slominski 2009: 904) Frontex has also been studied from a security studies angle: Neal (2009) concludes that securitisation theory cannot fully account for the agency's creation, remit, and practices. Ekelund (2013) uses Rational Choice, Sociological, and Historical Institutionalism as conceptual lenses to trace the process that led to the establishment of Frontex. The article concludes that insights from all three main strands of new institutionalism are needed in order to capture the creation and design of Frontex. Wolff and Schout analyse the agency as a policy instrument and draw on a legitimacy-based model. By comparing the input and output legitimacy of Frontex and its more intergovernmental predecessors – the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA+) and the External Border Practitioners Common Unit (PCU)[15] – the authors reveal "that the design of Frontex hardly offers the advantages of the agency structure." (Wolff/Schout 2013: 305) These examples reveal that theory-driven research on Frontex has so far focused on the agency's initial creation, but largely neglected its further evolution. Concerning methodology, most analyses are single case studies using qualitative approaches; very few authors compare it to other JHA agencies such as Europol (Pandit 2012).

At first sight, it seems puzzling that there is hardly a study drawing on the rich body of literature on EU agencies when analysing Frontex. An exception is Leonard's investigation of the creation of Frontex, "which is theoretically informed by the literature on European agencies [and] unveils a complex institutionalisation process, characterised by the existence of various models for increased cooperation and political struggles amongst the actors involved in the policy-making process." (Leonard 2009: 371) While the author draws on arguments from both the functional and the political approach, she does not make this combination explicit, for instance in terms of domains of application (see 4.4). Some other studies include concepts such as accountability or autonomy, which are also represented in the literature on EU agencies. For instance, Pandit (2012) investigates Frontex's operational legitimacy and political accountability, taking a critical stance on the question if the agency can fulfil such requirements.

This gap is, however, not limited to the case of Frontex: publications on EU agencies generally show an imbalance at the expense of those operating in the AFSJ (Kaunert et al. 2013a:

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[15] For more detailed analyses of Frontex's and its predecessors' development see also Leonard (2009). Rijpma (2017: 218f.) elaborates on the 2007 and 2011 amendments to the Frontex regulation.

274)[16] – even though the first JHA agency, the European Police Office (Europol), has already been established in 1995. It was followed by the European Police College (CEPOL) in 2000 and Eurojust, an agency dealing with the enhancement of judicial cooperation in criminal matters (2002). Whereas CEPOL's and Eurojust's creation was initiated by the Commission, all of these agencies were set up under the authority of the Council of the European Union (Council)[17] (Groenleer 2009: 99f.). Nevertheless, public policy scholars have rarely chosen AFSJ agencies for their empirical research, which is why

> "little is known about European agencies that deal with security matters from a public policy perspective. Thus, it can be concluded that the role of European agencies in the development of the AFSJ – especially from a practical, rather than formal and legal, viewpoint – remains vastly under-researched. This is problematic given the increasing importance of both the AFSJ in the EU and the apparently growing role of these European agencies within the AFSJ." (Kaunert et al. 2013: 275)

The reason why JHA agencies are underrepresented in this strand of literature is the fact that they show quite unique characteristics and do not necessarily resemble other policy areas' regulatory bodies: since they touch upon EU member core state powers, operational cooperation between national actors is strongly pronounced in JHA agencies (Rijpma 2017: 219f.). JHA are of particular political sensitivity, which is why member states try to avoid "extensive harmonisation and hierarchical structures." (Monar 2013: 339) This is reflected in JHA agencies' "'light' institutional governance structures with the task to facilitate, coordinate and strengthen the cooperation between national enforcement authorities, whilst at the same time respecting their prerogatives" (Rijpma 2012: 84 f.). Some authors even state that these agencies "have been designed to consolidate the predominance of member states in the AFSJ" (Trauner 2012: 785).

This look at the whole "population" of JHA agencies can be enlightening in order to better capture Frontex's nature *before* its most recent reform. Admittedly, it has to be noted that one year after the Commission had been enabled to initiate proposals on cooperation in the area of border control, Frontex was the first JHA agency to be created as a Community agency (Groenleer 2009: 99f.). Apart from that, Frontex shared many of the above-mentioned specifics of JHA agencies: it is an operational agency that coordinates operations between member states' border guards. The resulting coordinating network structure, consisting of national border guard

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[16] Vice versa, researchers with a focus on AFSJ topics have barely investigated *agencies* operating in this policy field. An exception is the special issue on "Justice and Home Affairs Agencies in the European Union" published in Perspectives on European Politics and Society and edited by Kaunert, Léonard, and Occhipinti (2013). For instance, Busuioc and Groenleer (2013) investigate the evolution of Europol and Eurojust in terms of *de jure* as well as de *facto* autonomy and accountability, concluding that Eurojust's attempts to expand its autonomy have been more successful. However, none of the cases studied features a "regulatory shift" comparable to that experienced by Frontex when the EBCG regulation was adopted.

[17] The initial distinction between two categories of EU agencies – "Commission" or "Community agencies" and "Council agencies" – reflected the former European pillar structure. Despite the abolishment of pillar divisions with the Treaty of Lisbon, this distinction "between the more supranational, former first pillar 'Commission agencies' and the more intergovernmental, former second and third pillar 'Council agencies' remains relevant." (Busuioc 2013: 22)

authorities, protected and even reinforced their rights (Rijpma 2012: 90). Other tasks rather resemble those of "typical" agencies: Frontex also assists the Commission, and especially the member states, in the implementation of a common policy by providing technical and informational assistance such as the development of common training standards.

It has to be noted that there is no generally accepted functional classification of EU agencies. In particular, it remains difficult to draw a clear distinction between regulatory and non-regulatory agencies (Trondal 2010: 130).[18] However, even if a broad definition of regulation is applied, one cannot label all EU agencies as regulatory. Busuioc, who questions if there are "truly regulatory" EU agencies at all, suggests to distinguish between the following types (starting from the least to the more powerful): information providing, management, operational cooperation, decision-making, and quasi-regulatory agencies (Busuioc 2013: 38-41).[19]

Busuioc classifies Frontex as an operational-cooperation agency (Busuioc 2013: 39). Since Frontex did not possess formal decision-making responsibilities before it was transformed into the EBCG Agency, but instead facilitated information exchange between national authorities, provided (technical) expertise as well as practical support, and coordinated operational activities (Regulation (EC) No 2007/2004, art. 2), this can be considered accurate. Other scholars share the view that one could not consider Frontex's tasks as regulatory (Ekelund 2013: 111). The agency's nature did not change fundamentally in 2007 and 2011, when amendments to Frontex's regulation (Regulation (EC) No 863/2007; Regulation (EU) No 1168/2011) focused on reinforcing the agency's operational role.[20] This development confirmed the assumption that because of the EU treaties not foreseeing a transfer of law enforcement powers to the EU level, agencies' activities in the AFSJ are likely to remain limited to coordinating operational activities between member states' authorities (Rijpma 2012: 84 f.). At the same time, observers like Rijpma (2012) criticised that there is no appropriate constitutional framework providing a comprehensive and clear legal basis for the operational cooperation of Frontex and the member states. Therefore, they pleaded for a further development of the agency's *regulatory* role – which would also be less likely to negatively impact individuals' rights and freedoms.[21]

Indeed, the recent transformation of Frontex constitutes such a development of the agency's regulatory role: it represents a major shift on the above-mentioned continuum towards a

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[18] For details on the Commissions's differentiation between regulatory and executive agencies, see Busuioc 2013: 22-24.

[19] While agencies primarily provided information and execution in the EU's early years of agency creation, one can observe an "increasing 'mushrooming' of more powerful agencies possessing operational, decision-making or even quasi-regulatory powers" (Busuioc 2012: 719), as evidenced by the financial sector.

[20] Besides, the amendments included mechanism to ensure compliance with fundamental rights. Since this however only implied monitoring "the respect for fundamental in all the activities of the *Agency*" (Regulation (EU) No 1168/2011, 26a, italics added), these changes cannot be considered a major step towards regulating the EU member states' EBM.

[21] Another distinct feature of AFSJ agencies is that they "potentially carry out direct or indirect implications for the fundamental rights of individuals" (Carrera et al. 2013: 338).

decision-making, if not even quasi-regulatory agency. In contrast to other EU agencies, Frontex cannot only adopt individual decisions that are binding on third parties (Curtin 2009: 163), but on national border guard authorities. Moreover, it even establishes a generally binding IBM strategy. This evolution from mere *coordination* to additional *regulation* (see 3.1) constitutes a remarkable qualitative shift of Frontex's institutional design towards a genuinely regulatory agency, which allows the researcher to draw on the theoretical approaches offered by the literature on EU regulation (see 4) in order to analyse the agency's evolution. As demonstrated above, this is an innovative approach to the case of Frontex, making it possible to investigate whether a JHA agency's institutional design follows the same logic like that of other agencies once it is assigned with a regulatory role – despite of the policy area's specifics.

Even though not being immediately connected to the EU's internal market, the consistent application of European rules at the EU's external borders can be understood as regulation as well. As pointed out in a discussion paper for an informal meeting of the JHA ministers, "[t]he control by each Schengen Member State and Associated State of its parts of these external borders is not only in the interest of that Member State (MS), but in the interest of all." (Netherlands Presidency of the Council of the European Union 2016: 1) Hence, a well-functioning external border management is clearly valued by the community of EU member states (as well as the EU institutions), and the transformation of Frontex's institutional design can be seen as an attempt to enhance sustained and focused control over these activities.

To conclude, Frontex – just like other JHA agencies – can be indeed described as an EU agency with a very specific institutional design. However, the latter experienced a major qualitative shift towards a "decision-making" and even "quasi-regulatory" agency when the EBCG regulation was adopted. Therefore, Frontex's evolution can be fruitfully analysed by drawing on the public policy literature on EU regulatory bodies. By doing to, I address a major gap in research on the particular case of Frontex and on JHA agencies in general.

Previous to the introduction of the above-mentioned theoretical accounts, I conceptualise the dependent variables in the last subsection of this chapter and subsequently describe the variation one can – or cannot – empirically observe on them.

2.3   EU Agencies' Institutional Design

Following Kelemen, EU agencies are defined as "EU level public authorities with a legal personality and a certain degree of organisational and financial autonomy that are created by acts of secondary legislation in order to perform clearly specified tasks" (Kelemen 2005: 175). Whereas

many studies focus on agencies' post-delegation behaviour (Rittberger/ Wonka 2010: 733), investigating their varying institutional design constitutes a crucial starting point.[22]

Before conceptualising this paper's dependent variables, I briefly introduce a comparative framework for agencies' *overall* formal institutional design developed by Groenleer (2009). The author states that even though "they share certain formal characteristics, the differences among agencies outweigh the similarities" (Groenleer 2009: 115) and distinguishes between six analytical categories. First, as there is no explicit legal basis for their creation and design, agencies' formal-legal status varies,[23] and the degree of autonomy that is formally granted to them differs. Secondly, an agency's institutional design is characterised by its mandate, objective(s) and task(s). Thirdly, agencies show different structures and compositions in regard to their management boards (MBs), executive directors (EDs), scientific/technical committees, and/or advisory forums. Among other things, these bodies are elected in different ways, show different decision-making procedures, and vary in their level of accountability. Fourthly, agencies' regulations usually do not elaborate on staffing: personnel policy is the ED's responsibility, who can in most cases act rather autonomously. This leads to different practices among agencies. The fifth category is financing. Agencies are funded by different sources; the degree to which they can allocate their financial resources freely varies. Last but not least, the relations agencies hold with external actors – namely the European Parliament (EP), the Commission, the Council, the member states, and other institutions such as the Court of Justice (ECJ) – are not uniform. Through varying formal obligations towards these actors, agencies are controlled and held accountable to different degrees (Groenleer 2009: 115-133). However, these "external relations" cannot be clearly separated from the institutional design's other components such as the MB's composition.

Since this study is in particular interested in regulation and how it is designed, the two categories that are to be chosen as the study's dependent variable are "tasks" (more precisely, *regulatory* tasks) and "governance structure" ("structure and composition" according to Groenleer's framework). These features not only cover what kind of new tasks Frontex carries out, but also capture their design (especially who decides on them), and therefore seem appropriate for a thorough understanding of the agency's new regulatory role in the EU's EBM. Being laid down by the agency's regulation, both its tasks and governance structure can be assessed quite easily.

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[22] At the same time, the researcher has to keep in mind that reality – for instance actual working practices – might deviate from the provisions that had been set down initially. For instance, Trondal reveals "that the *de jure* autonomy of EU level agencies is only weakly associated with their *de facto* behavioural autonomy." (Trondal 2010: 147, italics in original) However, this study is interested in the institutional change that Frontex experienced and and largely neglects how the agency's new *de jure* role plays out *de facto* – after such a short period of time, it would only be possible to generate very limited findings anyway. For some considerations on how Frontex's new institutional design will affect the agency's role in the EU's EBM, see 7.3.

[23] Groenleer refers to the already-mentioned distinction between Community agencies and Union agencies (Groenleer 2009: 116), see Footnote 17.

Since this is the most innovative and puzzling element of the new Frontex regulation, the analysis of the agency's new tasks concentrates on those that can be described as regulatory. In order to assess the expansion of the agency's regulatory tasks, Levi-Faur's categorisation of four basic functional tasks of regulation – namely information gathering, rule setting, monitoring, and enforcement – will be used as analytical framework (Levi-Faur 2011: 813). However, I follow various authors (Trondal 2010; Wonka/Rittberger 2010; Busuioc 2013) and do not consider information gathering tasks as regulatory activities. Moreover, information gathering tasks such as the conducting of risk analyses (Regulation (EC) No 2007/2004, art. 4) have been one of the agency's main activities from the very beginning and were not extended significantly in the new regulation.[24]

The development of the agency's governance structure will be analysed by drawing on Rittberger and Wonka's (2010) index on the formal-institutional independence of EU agencies from their political principals – namely the Commission, the EP, and the member state governments in the Council. While this paper is not primarily interested in the concept of agency independence or autonomy, it rather aims at investigating the relation between Frontex's principals in order to assess how "intergovernmental" or "supranational" the agency's governance structure was before the transformation into the EBCG Agency and whether or not this has changed in the course of the recent reform. However, this is closely intertwined with the concept of agency independence as formulated by Rittberger and Wonka: the "more equal" decision-making power is distributed among an agency's principals (for instance in regard to the appointment of the agency head), the more independent the index considers an agency to be. Hence, the authors' index is also useful to assess the relationship between Frontex's principals.

Only two of the index's components will be used for this study: The first one (A2) covers the appointment of the agency head, the second one (A3) the members of the agency's MB. The variables behind these components are suitable to capture how power over decision-making is distributed among Frontex's principals, i.e. to apprehend who "governs" Frontex and whether or not this changed.

Instead of including the index's forth component capturing agencies' (internal) decision-making (Rittberger/Wonka 2010: 751f.), it will be analysed which actors play a role in deciding on Frontex's new regulatory activities. This acknowledges that the study at hand is particularly interested in the expansion of Frontex's regulatory role. Even though the analytical part will show that the continuity of the governance structure and the design of the decision-making procedures in the context of the regulatory tasks follow the same logic, the descriptive chapter will present the regulatory tasks and the way in which decisions on them are taken in the same

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[24] While the newly established liaison officers also collect information, it is their primary function to supervise member states' EBM (Regulation (EU) 2016/1624, art. 12). Hence, they rather belong to the category of monitoring.

section. This approach is chosen for reasons of clarity. Except of monitoring tasks, it will not be possible to observe variation over time, as the other regulatory tasks are completely new features.

In the second chapter, I first elaborated on the broad definition of regulation on which this study is based. I subsequently depicted the different ways in which various policy areas within the EU are regulated by drawing on the case of banking regulation. This allowed me to emphasise that regulatory structures might undergo fundamental transitions over time – especially in the context of transnational crises. As demonstrated by the creation of the SSM, regulatory tasks may even be delegated to a supranational EU institution such as the ECB.

Secondly, I elaborated on the particular case of Frontex, which experienced a major qualitative shift towards a "decision-making" and even "quasi-regulatory" agency, when the EBCG regulation was adopted. This allows me to draw on the public policy literature on EU regulatory bodies, thereby addressing a major gap in research.

In the last subsection, I introduced a comparative framework for EU agencies institutional design. This enables the reader to recognise the significant differences that exist between these institutions. I justified my choice of the dependent variables regulatory tasks and governance structure, which I expect to fully capture to what extent Frontex's role in regulating the EU's EBM has changed in the course of the agency's most recent reform. These variables were conceptualised by drawing on Levi-Faur's (2011) categorisation of functional tasks of regulation (rule setting, monitoring, and enforcement) as well as Rittberger and Wonka's (2010) index on the formal-institutional independence of EU agencies (agency head, members of the MB).

After having conceptualised the dependent variables on a theoretical level, I can now empirically assess what kind of variation one can observe on them.

3   Mapping Variation: Expansion of Regulatory Tasks versus Continuity of Governance Structure

By using the analytical categories developed in the previous chapter, I now assess the institutional change Frontex experienced when Regulation (EU) No 2016/1624 was finally approved by the Council on 14 September 2016. In the first subsection, I demonstrate that a number of new regulatory tasks – namely rule setting, monitoring, and enforcement tasks – have been delegated to the agency. Furthermore, I describe the variation one can observe in regard to the design of these tasks. In the second subsection, I draw on the index on the formal-institutional independence of EU agencies in order to reveal that both in regard to the appointment of the agency head and to the members of the MB, Frontex's overarching governance structure did not undergo any significant change.

3.1   Regulatory Tasks

In this section, I describe the enhancement Frontex's regulatory role has experienced. At the same time, it is necessary to keep in mind that the agency's operational tasks have been expanded as well and that both categories cannot always be clearly separated (Rijpma 2017: 219).

3.1.1   Rule Setting

Rule setting tasks experienced a remarkable expansion in Frontex's new regulation. Before its recent reform, the agency did not develop any comparable strategy that would have been binding for the member states.[25] In contrast, the new Frontex regulation defines eleven components of integrated border management (Regulation (EU) 2016/1624, art. 4) and delegates the task of establishing "a technical and operational strategy for European integrated border management" to the agency (Regulation (EU) 2016/1624, 3(2)). This strategy, which shall promote and support the implementation of European integrated border management (IBM) in all member states, is to be based on a proposal of the ED and set down by decision of the MB. Where justified, the agency shall take into account the specific situation of the member states, particularly their geographical location. The strategies established by national border management authorities shall be in line with the Frontex IBM strategy (Regulation (EU) 2016/1624, 3(3)).

3.1.2   Monitoring

The new regulation also introduces further monitoring tasks and strengthens the agency's supervisory role considerably. While assessments have already been added to Frontex's tasks in 2011, their conducting was neither mandatory nor regular (Regulation (EU) No 1168/2011, art. 4). According to the new regulation, the decision on the "new" vulnerability assessments' methodology is to be taken by the MB, based on a proposal of the ED. Among other things, this methodology shall lay down objective criteria against which the agency carries out the tests (Regulation (EU) 2016/1624, art. 13(1)).

However, the regulation already lists some elements to be established in the methodology. Based on its risk analyses, Frontex shall now carry out compulsory, at least annual (unless the ED decides otherwise) vulnerability assessments. The latter examine member states' technical equipment, systems, capabilities, resources, infrastructure, and staff that is necessary for border control (Regulation (EU) 2016/1624, art. 13(2)) in order to assess their capacity and readiness to face "present and future threats and challenges at the external borders" (Regulation (EU) 2016/1624, art. 13(4)). Frontex also checks the member states' capacity to contribute to the rapid reaction pool. Furthermore, the new regulation elaborates on the information member

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[25]   Being "unconditional and integral components of effective integrated border management" (Frontex 2011: 1), a so-called Fundamental Rights Strategy was introduced in 2011. However, the Fundamental Rights Strategy is legally non-binding and does not constitute an overarching integrated border management strategy.

states have to provide in order to support the assessments (equipment, staff, financial resources, and contingency plans) (Regulation (EU) 2016/1624, art. 13(3)).[26]

The assessments' results have to be submitted to the member states concerned, who may comment on them, as well as to the EP, the Council, and the Commission at least once a year (Regulation (EU) 2016/1624, art. 13(5)(9)). Once the results are available, the ED will – if necessary and after consulting the member state concerned – recommend measures eliminating the identified vulnerabilities that have to be taken within a certain time limit and "invite" the respective state to implement these (Regulation (EU) 2016/1624, art. 13 (6)). If a member state does not follow the recommendation within the defined period of time, the MB will adopt a binding decision based on a proposal of the ED that sets out the necessary measures to be taken by the respective member state. If the state does not follow this decision within the defined time limit, the MB shall notify the Council as well as the Commission and further action in accordance with art. 19 may be taken (Regulation (EU) 2016/1624, art. 13(8), also see 3.1.3).

In ensuring regular monitoring of all member states' EBM, Frontex is supported by liaison officers, who are to be deployed in member states (Regulation (EU) 2016/1624, art. 12(1)), not only in third countries like before (Regulation (EU) No 1168/2011, art. 14). While the liaison officers are appointed by the ED, the MB decides – based on a proposal of the ED that is developed in consultation with the member states concerned – on the nature and terms of the liaison officers' deployment (Regulation (EU) 2016/1624, art. 12(2)). The regulation lists a number of delegated tasks; inter alia supporting the agency in carrying out the vulnerability assessments by collecting information, facilitating the communication between member states and the agency, reporting to the ED on the situation at the external borders, and contributing to promoting the application of the *acquis communautaire* relating to external border management, including with regard to respect for fundamental rights (Regulation (EU) 2016/1624, art. 12(3)). In order to fulfil these tasks, liaison officers receive information from national coordination centres (Regulation (EU) 2016/1624, art. 12(4)). The regulation emphasises that liaison officers only take instructions from the agency (Regulation (EU) 2016/1624, art. 12(6)). Their reports (being part of the vulnerability assessments) have to be sent to the member state concerned (Regulation (EU) 2016/1624, art. 12(5)).

3.1.3 Enforcement

Similarly as in the case of rule setting, the regulation's enforcement tasks are a completely new element of Frontex's mandate. The provision will become relevant if so-called "situations at the external borders requiring urgent action [...] risk jeopardising the functioning of the Schengen

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[26] The regulation also contains a more general provision stating that national authorities are now obliged to share all necessary information in a timely and accurate manner (Regulation (EU) 2016/1624, art. 10).

area" (Regulation (EU) 2016/1624, art. 19(1)). This might be the case when a member state does not take the corrective measures mentioned in article 13 (see 3.1.2), when it faces specific and disproportionate challenges at the external borders without requesting sufficient support from Frontex (according to Regulation (EU) 2016/1624, art. 15, 17, 18), or when it does not take the necessary steps of implementation.

If such a situation occurs, the Council – based on a Commission's proposal, that is made after consulting the agency – can adopt an implementing act that identifies measures mitigating those risks (implemented by the agency) and requiring the member state to cooperate (Regulation (EU) 2016/1624, art. 19(1)). The EP has to be informed of this process (Regulation (EU) 2016/1624, art. 19(2)). The possible measures taken by Frontex include inter alia the organisation and cooperation of rapid border interventions (Regulation (EU) 2016/1624, art. 19(3)). The ED determines the concrete actions and draws up an operational plan, on which the member state concerned shall agree within three working days (Regulation (EU) 2016/1624, art. 19(4)(5)). Within five working days, Frontex shall deploy the necessary staff from the rapid reaction pool in order to execute the measures set down by the Council decision; the necessary technical equipment shall be deployed within ten working days (Regulation (EU) 2016/1624, art. 19(6)(7)). If the state concerned does not comply with the Council's decision within 30 days and decides not to cooperate with the agency (i.e. does not take the necessary action to facilitate the implementation of the decision), the Commission can trigger article 29 of the Schengen Borders Code (SBC), allowing other member states to reintroduce controls at internal borders (Regulation (EC) No 562/2006, art. 19(10)). Hence, a member states' request can be superseded if the control of the external borders is rendered ineffective or if the state does not implement recommended measures, even though it is not possible to intervene against its will.

Table 1 summarises the new regulatory tasks that have been delegated to Frontex – namely rule setting, monitoring, and enforcement activities. It also gives an overview of the decision-making procedures on which the execution of these tasks is based. The table reveals that monitoring is the only activity that does not represent a completely new feature of the Frontex regulation.[27] Moreover, it shows that decision-making on enforcement is – in contrast to rule-setting and monitoring, which are controlled by the ED and the MB – dominated by the Council and the Commission.

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[27] It has to be noted that the expansion of all of these regulatory tasks in the present case questions Levi-Faur's assumption that the different tasks of regulation are "strictly divided between different actors and institutions" in the EU system of governance (Levi-Faur 2011: 813).

	Regulatory tasks according to Regulation (EC) No 2007/2004	Regulatory tasks according to Regulation (EU) 2016/1624	Change: ✔ No change: ✘ Minor change:[28] ✘ / ✔	Design
Rule setting	-	Establishment of a technical and operational IBM strategy with which national strategies have to be in line	✔	Proposal of the ED, decision of the MB
Monitoring	Execution of assessments neither mandatory nor regular; liaison officers only in third countries[29]	Execution of mandatory, at least annual assessments; liaison officers also in member states	✘ / ✔	Proposal of the ED, decision of the MB
Enforcement	-	Adoption of implementing acts requiring member states to cooperate; reintroduction of internal border controls in cases of noncompliance	✔	Proposal of the Commission, decision of the Council; Activation of article 29, SBC by the Commission in cases of noncompliance

Table 1: Frontex's new regulatory tasks and their design (own illustration)

3.2   Governance Structure

In the second subsection, I compare Frontex's governance structure before its recent reform with that being set down in the agency's new regulation. Before describing the continuity one can observe in regard to this dependent variable, it has to be mentioned that some aspects are not covered by Rittberger and Wonka's index. However, these elements have not experienced any change in the course of the recent reform. The agency's consultative forum, which was established in 2011, is still appointed by the MB on a proposal of the ED (Regulation (EU) No 1168/2011, art. 26a(2); Regulation (EU) No 2016/1624, art. 70(2)). The fundamental rights officer, whose position was also created in 2011, remains to be designated by the MB (Regulation (EU) No 1168/2011, art. 26a(3); Regulation (EU) 2016/1624, art. 71(1)). Moreover, it has to be noted that the MB continues to take its decisions by absolute majority voting (Regulation (EC) No 2007/2004, art. 24(1); Regulation (EU) No 2016/1624, art. 67(1)).

3.2.1   Appointment of the Agency Head

The term of office of the agency head – Frontex's ED – continues to last five years. The Commission still selects candidates, among whom the ED is, just as before, appointed by the MB by

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[28] If a regulatory task has been present before and was only strengthened in the course of Frontex's transformation, this change is described as "minor".

[29] It has to be noted that *de facto*, these assessments have never been carried out (see 6.3.1). However, since this chapter is only interested in Frontex's *formal-institutional* design, the expansion of regulatory tasks regarding monitoring is categorised as "minor change".

a two-thirds majority. A dismissal of the ED continues to be at the appointer's discretion (Regulation (EC) No 2007/2004, art. 26(4); Regulation (EU) No 2016/1624, art. 69(2)). The EP's position in regard to the appointment of the agency's ED was slightly strengthened: the candidates proposed by the Commission now have to make a statement before the competent committee or committees of the EP and answer questions. Afterwards, the EP adopts an opinion setting out its views and may also indicate a preferred candidate. However, the EP's opinion is not binding (Regulation (EU) 2016/1624, art. 69(2)) and this slight change would not cause any change in regard to the independence index (Rittberger/Wonka 2010: 750).

The ED maintains his or her right to hold other offices (at least no specific provision ruling this out has been established) and can still be reappointed once (Regulation (EC) No 2007/2004, art. 26(5); Regulation (EU) No 2016/1624, art. 69(7)). By stating that the ED "shall neither seek nor take instructions from any government or from any other body", his or her formal independence continues to be laid down (Regulation (EC) No 2007/2004, art. 25(1); Regulation (EU) No 2016/1624, art. 68(1)). Last but not least, the new regulation also shows a formal requirement for the agency head's qualification (Regulation (EC) No 2007/2004, art. 26(2); Regulation (EU) No 2016/1624, art. 69(2)).

3.2.2   Members of the Management Board

Lasting four years, the term of office of the MB members remains the same. It is still composed of one representative of each member state[30] and two of the Commission (Regulation (EC) No 2007/2004, art. 21(1); Regulation (EU) No 2016/1624, art. 63(1)). Neither specific provisions for a dismissal of MB's members, nor for their right to hold other offices have been added. Since the 2011 amendment of Frontex's regulation, members of the MB can be reappointed more than once (Regulation (EU) No 1168/2011, amendment 24(a); Regulation (EU) No 2016/1624, art. 63(1)). There is still not article requiring the formal independence of MB members. However, they continue to be formally required to be qualified for the office (Regulation (EC) No 2007/2004, art. 21(2); Regulation (EU) No 2016/1624, art. 63(2)).

Table 2 provides an overview of the continuity one observes in regard to Frontex's governance structure. The only variation that can be assessed is a slight strengthening of the EP in the appointment of the ED. Since this does, however, not impact Rittberger and Wonka's formal-institutional independence index of EU agencies, it can be concluded that Frontex's governance structure has remained stable and that the agency has not become more independent in the sense that power has been distributed more equally among the EP, the Council, and the Commission.

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[30] The other four Schengen Area states retain limited voting rights; the UK and Ireland participate as observers (Frontex 2017a).

	Variable according to Rittberger and Wonka (2010)	Governance structure according to Regulation (EC) No 2007/2004	Governance structure according to Regulation (EU) 2016/1624	Change: ✓ No change: ✗ Minor change:[31] ✗ / ✓
Agency Head (AH)	Term of agency head	5 years	5 years	✗
	Selectorate/appointees of AH	Commission selects candidates; MB appoints AH	Commission selects candidates; MB appoints AH	✗ / ✓ (EP's role slightly strengthened)
	Quorum appointment AH	2/3 majority	2/3 majority	✗
	Rules for AH dismissal	Dismissal at appointers' discretion	Dismissal at appointers' discretion	✗
	Other offices AH	Yes (no specific provision)	Yes (no specific provision)	✗
	Reappointment of AH	Yes, once	Yes, once	✗
	(Formal) AH independence	Yes, *formal* requirement	Yes, *formal* requirement	✗
	Formal requirement for AH qualification	Yes	Yes	✗
Members of the Management Board (MMB)	Term of office MMB	4 years	4 years	✗
	Selectorate/appointees of MMB	Governments and Commission	Governments and Commission	✗
	Rules for MMB dismissal	No specific provisions for dismissal	No specific provisions for dismissal	✗
	Other offices MMB	Yes (no specific provision)	Yes (no specific provision)	✗
	Reappointment of MMB	Yes, more than once	Yes, more than once	✗
	(Formal) MMB independence	Yes, formal requirement	Yes, formal requirement	✗
	Formal requirement for MMB qualification	Yes	Yes	✗

Table 2: Continuity of Frontex's governance structure (own illustration)

In this chapter, I assessed the empirical variation one can observe in regard to the dependent variables regulatory tasks and governance structure. This comparison allows me to conclude that Frontex's institutional design has not developed consistently: while a number of regulatory tasks have been added, the agency's governance structure has remained almost untouched. Moreover, one can observe variation across different categories of regulatory tasks: whereas Frontex's rule setting and monitoring tasks have been expanded significantly, tasks of enforcement do not enable the agency to genuinely coerce member states to cooperate. Furthermore, the agency's MB has gained a considerable degree of power in regard to rule setting (deciding on Frontex's new IBM strategy) and monitoring (setting down the vulnerability assessments' methodology

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[31] Changes that would not affect Rittberger and Wonka's formal-institutional independence index of EU agencies are treated as "minor changes".

and approving the nature and terms of the liaison officers' deployment), but is not involved in the agency's reactions to situations at the external borders requiring urgent action: in contrast to the other new regulatory tasks, decision-making concerning enforcement was delegated to the Council and the Commission.

Stating that they expect agencies with regulatory tasks to be more independent than those with informational and executive tasks, Rittberger and Wonka (2010: 735) would find the mismatch between the regulatory tasks' expansion and the governance structure's continuity puzzling. This view is shared by other researchers, who for instance state that "delegation to *independent* agencies is particularly important within regulatory policy and administration. Therefore, we should expect a clear difference between agencies within the regulatory field and agencies responsible for non-regulatory policy." (Christensen/Nielson 2010: 178, italics added)

Therefore, further theoretical approaches from the literature on EU regulation are to be considered in order to investigate the *causal links* that have led to the particular change of Frontex's institutional design.

4 Theoretical Approaches to the Creation, Design, and Transformation of EU Regulatory Institutions

As already mentioned in the second chapter, there are various actors who carry out regulatory tasks. Since Frontex – just like other JHA agencies – legally is an agency, but also shows some distinct network features, I draw on theoretical approaches that focus on the two institutional types lying "in between" regulation at the national and the supranational level, namely ERNs and EU agencies.

In the introductory part of this chapter, I briefly elaborate on the relationship between both types of EU regulatory bodies and justify why the chosen theoretical framework is appropriate to explain the case of Frontex's institutional change (4.1). In the following, I introduce the two main theoretical approaches explaining the creation, transformation, and design of EU regulatory bodies: the functional and the political approach (4.2, 4.3). Usually, there is an analytical distinction between both accounts, and scholars use *either* functional *or* political explanations when analysing EU regulatory bodies. However, I present a combination of both approaches as suggested by Blauberger and Rittberger (2015, 2017) and deduce hypotheses for this functional-political approach (4.4), which I eventually translate into observable implications for the case at hand (4.5).

4.1 Applicability of Theoretical Accounts

The first EU agencies have already been created in the 1970s. However, they were rather the exception than the rule (Christensen/Nielson 2010: 176). Since the early 1990s, a process of *agencification* has led to a gradual replacement of ERNs by EU agencies – a phenomenon for which Frontex serves as an example. Usually, the phase from the beginning to the mid-1990s is defined as the first wave of agencification, and the time from the early 2000s until the present as the second one (Rittberger/Wonka 2010: 730). Moreover, EU agencies also "create, employ, and control" (Levi-Faur 2011: 810) ERNs (*agencified networks*), or are empowered by networking (*networked agency*). Scholars focusing on the underlying structural factors and trends of this development describe the proliferation of EU agencies as the result of isomorphism (Rittberger/Wonka 2011: 781) and argue that "EU lawmakers have simply followed a general trend that has been observed at the national, but has spread to the supranational level." (Christensen/Nielson 2010: 177) That this evolution can indeed "be seen as a *trend* in public policy and as a fashionable idea within the realms of public management" (Egeberg et al. 2012: 30, italics in original) is inter alia evidenced by the references to New Public Management in Commission documents on EU agencies and by the fact that the latter popped up within a short period of time (Egeberg et al. 2012: 30f.) However, this line of reasoning would imply that agencies' institutional design only shows little variation. As already mentioned, this is not the case.

Consequently, many theoretical arguments about regulation aim at explaining why decision-makers create regulatory institutions *of different kinds*; in particular why they choose agencies in some cases and prefer ERNs in others. Even though Frontex remained an agency, these approaches are suitable to explain the institutional change at hand because the lines between agencies and ERNs are blurred (Levi-Faur 2011: 812): whereas some agencies show intergovernmental structures and rather resemble networks, others are more influenced by supranational actors. As already mentioned in the introduction, JHA agencies usually belong to the former category. That institutions' legal status is not sufficient to capture their nature is for instance reflected in Boin et al.'s (2014) study on the EU's crisis management capacities, which makes an analytical distinction between a "network" and a "lead agency" model. Even though the lead agency model is typically found in nation states (Boin et al. 2014: 423) and many EU agencies resemble networks (Thatcher 2011: 790), features of the lead agency model can also be detected in EU regulatory bodies such as the new EU financial authorities (Boin et al. 2014: 423).

Whereas Frontex's formal status as an agency has not changed in the course of its reform, it experienced a remarkable shift towards a "less network-like agency". Before the new regulation was adopted, Frontex clearly was an agency with a network structure, operating at the centre of the national border guard authorities and only having supporting as well as coordinating tasks (Rijpma 2017: 219f.). This is confirmed by Wolff and Schout's (2013) study on the agen-

cy's initial creation: drawing on a legitimacy-based model, the authors compare Frontex to its predecessors SCIFA + and PCU and conclude that "Frontex *as agency* has not been a major addition" (Wolff/Schout 2013: 319, italics in original) and that the networking that had been practised before has continued under the agency (Wolff/Schout 2013: 319).

The recent delegation of further regulatory tasks has changed the agency's institutional design significantly and introduced a more hierarchical relationship between the agency and the EU member states: the agency can now adopt decisions that are binding for member states' border management authorities. Hence, one can argue that the transboundary refugee crisis led to changes of the EU's crisis management governance, namely a development away from a coordinating network towards a lead agency model, which "impose[s] control on network elements to enhance coherence of the system and maintain [or rather introduce] efficiency." (Boin et al. 2014: 423) Even though the agency had already existed before, one has to emphasise that existing institutional structures always shape the trajectory of institutional change (Blauberger/ Rittberger 2017: 3). Therefore, I also discuss Historical and Sociological Institutionalism as possible alternative explanations to the combined functional-political approach (see 6.6).

In summary, the blurred lines between EU agencies and ERNs in general and the kind of transformation Frontex experienced in particular allow me to draw on the two main theoretical approaches usually explaining the *creation* of EU regulatory bodies to investigate the *institutional change* Frontex experienced. These accounts are to be introduced in the next subsections, followed by a suggestion of how they can be fruitfully combined in order to increase their explanatory power.

4.2   The Demand Side: the Functional Approach

Since functionalists explain the creation, design, and transformation of regulatory institutions by pointing to a "mismatch between existing institutional capacities and the growing complexity of policy problems" (Majone 1996: 1632f.), their studies focus on the demand-side of regulation and analyse the advantages regulatory institutions provide in practical terms. Hence, the functional approach assumes that "the nature of an agent is defined by the function it is supposed to perform" (Magnette 2005: 5), i.e. that regulatory bodies are created, designed, and sometimes transformed in order to fulfil certain functions. These functions are to be described in the following sections.[32]

The functional approach expects policy-makers to delegate regulatory activities in order to limit their own possibilities for political interventions (Rittberger/Wonka 2010: 734) and thus

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[32]   Instead of providing an exhaustive list, it is this section's aim to present the functions that are most commonly named in the literature.

to strengthen the independence and consistency of EU regulation (Kelemen/Tarrant 2011: 924f.). In this manner, the implementation of EU policies should be carried out more efficiently and flexibly, enhancing the harmonisation of – in many cases still diverging – national regulatory practices (Groenleer 2009: 101f.).

Moreover, functionalism assumes regulatory bodies to meet the demand for independent technical expertise (Groenleer 2009: 100; Kelemen/Tarrant 2011: 924), which is expected to be based on high quality technical evaluations and not "influenced by political or contingent considerations." (Groenleer 2009: 101) In this way, delegation to independent regulators enables national and EU policy-makers to make efficient as well as effective decisions (Rittberger/ Wonka 2010: 736) and the Commission to focus on the political dimension of regulation (Groenleer 2009: 101; Egeberg et al. 2012: 29).

Besides, EU regulatory bodies are expected to serve as a "solution to the credible commitment problem faced by policy-makers in regulatory policy-making" (Rittberger/Wonka 2011: 781). By insulating regulation from office-seeking politicians and delegating it to non-majoritarian institutions, policy-makers are able "to send strong signals of regulatory stability" (Rittberger/Wonka 2010: 734) and to credibly commit themselves to their future behaviour (Majone 2000: 289). While this argument is most prominent in studies on economic regulation, it is not obvious that credible commitment only plays a role in certain policy areas (Rittberger/ Wonka 2010: 735). Another function that primarily aims at sending certain signals is blame shifting, for which in particular EU agencies serve national governments and EU institutions in cases of unpopular policies (Thatcher 2002: 125).

In addition, regulatory institutions that operate above the national level and enhance European-wide cooperation allow member states' governments to reduce transaction costs, to increase bureaucratic efficiency and to overcome collective action problems (Egeberg et al. 2012). If, for instance, 28 national regulatory authorities are replaced by a single EU agency, this also provides cost-servings for industry and business, now only having to deal with one agency (Groenleer 2009: 102). Hence, assuming that actors always delegate if it increases effi-ciency and lowers costs, functionalism's underlying ontology is rationalist (Magnette 2005: 5).

Whereas at first glance, functional arguments might rather suggest the choice of EU agencies, there are also functional arguments in favour of the creation of ERNs. For instance, ERNs can be the functionally more suitable solution in cases where EU rules "require case-by-case implementation and a high level of local, street-level expertise" (Blauberger/Rittberger 2015: 370). Moreover, drawing on the capacities of existing NRAs by enabling them to cooper-ate through an ERN can save resources (Blauberger/Rittberger 2015: 370).

The most commonly used analytical expression of the functional logic is the PA model (Egeberg et al. 2012: 29). In contrast to EU agencies, ERNs are usually conceptualised as cases

of *non*-delegation (Blauberger/Rittberger 2015: 368). In order to better capture the relation between principals and agents in regard to EU agencies, approaches from the governance literature can provide further insights. Analysing regulation as a three-party relationship – the European institutions as regulators (i.e. rule-makers), Frontex as regulatory intermediary and the national border guard authorities as targets (i.e. rule-takers) – the regulatory governance approach captures the fact that the PA model's unidirectional logic is insufficient and that regulatory intermediaries feature different properties and roles (Abbott et al. 2017). Indeed, the relationship between Frontex and its "multiple principals" (Dehousse 2008: 801, see 4.3) can be described as a case of delegation rather than one of trusteeship, cooptation or orchestration.[33] However, the indirect governance approach and its underlying logic of a trade-off between competence and control (Abbott et al., forthcoming) enable the researcher to better understand the (sometimes endogenous) institutional dynamics between a governor and its intermediary.

Being asked why decision-makers do not perceive the Commission as being able to fulfil the functions mentioned in this subsection, functionalists would argue that "agencies can be more efficient than the Commission because they are usually smaller organisational entities with more specialised expertise, which allows them to respond to complex and emerging issues." (Groenleer 2009: 101f.) Furthermore, they show the practical advantage of having more flexible staffing structures, which allows them to uphold a high level of professionalism (Groenleer 2009: 101). Besides a lack of capacity and resources, the Commission's alleged growing politicisation might have also increased the functional need for delegating regulation to agencies (Kelemen/Tarrant 2011: 924; Rittberger/Wonka 2011: 781).

In summary, the functional approach expects institutional choices and designs to be "explained in terms of the functions that a given institution is expected to perform, and the effects on policy outcomes it is expected to produce" (Pollack 2006: 167). It assumes rational decision-makers to choose a certain regulatory body because it is perceived as the adequate institutional solution to meet a particular demand, i.e. a distinct "'regulatory gap' between rulemaking authority located at the EU level and implementation at the national level" (Blauberger/Rittberger 2015: 369).

For many of the above-mentioned functions to be fulfilled effectively, a certain degree of independence (or "autonomy") has to be granted to the regulatory institution. Therefore, functionalism assumes regulatory bodies to be "deliberately designed to operate at arm's length from their political principals" (Rittberger/Wonka 2010: 785). This independence should not only be reflected in the regulatory institution's governance structure, but also in the way decisions on the execution of regulatory tasks are taken, in order to ensure efficient and unbiased procedures.

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[33] That the orchestration framework is however useful to analyse the relationship between the Commission (orchestrator), ERNs (intermediaries) and NRAs (targets) was shown by Blauberger and Rittberger (2015: 368f.).

4.3 The Supply-Side: the Political Approach

However, these functional arguments have not remained uncontested: advocates of the political approach argue that functionalism spuriously neglects the role of politics, i.e. the diverging preferences, bargaining, and power struggles among the relevant actors. Whereas functionalists fail to identify who exactly fulfils the role of the agent (Thatcher 2011: 792; Kelemen/Tarrant 2011: 925), the political approach acknowledges that EU regulatory institutions have multiple agents. The latter are expected to not primarily fear an "agency drift", i.e. that an agent pursues its own political agenda, differing from that of its principal, but rather a "'political drift', in which agencies are somehow 'captured' by one of their institutional rivals in the leadership contest." (Dehousse 2008: 796)

Hence, the political approach does not expect the creation, design, and transformation of EU regulatory institutions to be determined by functional necessities, but "driven by motivations of the major players in EU regulatory politics to enhance their institutional power and secure influence over policy outcomes." (Blauberger/Rittberger 2015: 369) Moreover, political accounts state that a further centralisation of regulatory authority might also occur as a symbolic measure, i.e. as a possibility for policy-makers to demonstrate their willingness "to solve novel, pervasive and urgent problems" (Groenleer 2009: 103).

Nevertheless, opinions on which institutions can be seen as principals (apart from the Council) differ. Even though the Commission – who tends to present itself as the main principal of EU agencies – "corresponded to the standard principal-agent categories of monitoring and enforcing compliance, and filling in the details of incomplete contracting" (Trauner 2012: 786), it has to be noted that the powers that are delegated to agencies are in many cases not held by the Commission before, but by national authorities.[34] Hence, it is rather a vertical and not a horizontal transfer of powers (i.e. from the national to the EU level and not from the EU institutions to agencies) that occurs (Dehousse 2008: 792, 2016: 71). The EP has been treated in an even more ambiguous way and scholars could sometimes not agree on whether to treat it as a principal or an agent. However, also taking into consideration *ex post* accountability and control mechanisms, one can even argue for treating the EP as a principal in cases where it was not involved in the creation of an agency as co-legislator (Trauner 2012: 786ff.).

Hence, in order to being able to investigate the political considerations and the strategic interactions between the EU member states and institutions (Rittberger/Wonka 2011: 782), the first step is to analyse the institutional context, as decision-making procedures determine which

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[34] In the case of Frontex, it can also be argued that „the Council did not delegate its own existing executive powers but rather that the tasks in question had been largely exercised by the Member States and not the Council (or the Commission). At the same time the agency replaces, in a sense, much of the fragmentary and opaque structures that were attached to the Council in one form or another, for example the Common Unit for external border practitioners" (Curtin 2009: 164).

actors play a role in the political conflict (Kelemen/Tarrant 2011: 926f.). Since the EBCG regulation was adopted by an ordinary legislative procedure, the political approach's assumptions in regard to the preferences of the Commission, the EP and the Council will be elaborated on in the following sections. It has to be noted that conflicts might not only occur between these institutions, but also within them.

Advocates of the political approach expect the Commission to strive for an expansion of *supranational* regulatory authority (as opposed to national or intergovernmental institutional solutions) and to particularly aim at maintaining or increasing its own regulatory powers: like most bureaucratic structures, the Commission has a certain institutional self-interest and usually tries to expand its powers (Kelemen/Tarrant 2011: 927). Hence, the delegation of regulatory tasks to other institutions than itself is only the second-best option from the Commission's point of view. However, if an expansion of its own powers is unlikely to be accepted by the Council, the Commission can be expected to agree on the creation or transformation of an EU regulatory body (Dehousse 2008: 796). In these cases, the political approach assumes that the Commission tries to gain as much control as possible over the agency's governance structure and to oppose intergovernmental network-structures. However, if the creation of an agency explicitly restricts the Commission's powers, the latter is expected to oppose the agency solution.

Some of the EP's preferences resemble those of the Commission. Kelemen and Tarrant (2011) list three main concerns the Parliament has: it is in favour of more centralised, supranational regulatory institutions, it tries to expand its own powers and it aims at appealing to the electorate "by favouring regulatory institutions that promise to yield outcomes favourable for diffuse public interests." (Kelemen/Tarrant 2011: 928) Regarding the Parliament's attempts to protect its own interests, one has to note that it particularly tries to expand its oversight powers and to enhance the transparency and accountability of regulatory institutions (Kelemen/Tarrant 2011: 928). However, the EP's influence on the design of EU agencies is a rather recent development. Until the mid-1990s, the EP only played a minor role in their establishment. This has changed after the Maastricht and Amsterdam Treaties, when the Parliament could expand its legislative prerogatives beyond mere consultation and "began to assert its influence over the creation and design of new agencies" (Groenleer 2009: 107; also see Egeberg et al. 2012: 32).

The member states in the Council are typically torn between "their desire to make credible regulatory commitments that would allow them to enjoy gains from trade or benefits of collective actions and their desire to manipulate the distributional consequences of regulatory decisions" (Kelemen/Tarrant 2011: 928). Hence, they acknowledge the need for common regulation, for instance to avoid further crises, but at the same time show a certain reluctance to delegate to the EU level and give up power. This reluctance is in many cases reflected in agencies' MBs, which are strategically set up in order to protect national interests and keep sovereignty

over policy-outcomes (Kelemen 2002: 110).[35] In cases where member states anticipate redistributive consequences at their expense, the political account expects them to try to prevent delegation; "where it does occur member states will maintain as much national control as possible" (Kelemen/Tarrant 2011: 928). In particular, national governments are assumed to "jealously guard their remaining autonomy in implementation" (Blauberger/Rittberger 2015: 369) in these situations, rather favouring regulatory bodies with loose network structures that coordinate national bureaucracies (Kelemen/Tarrant 2011: 930). While the political approach is often focused on redistribution, sovereignty concerns can be another reason for member states' reluctance (Blauberger/Rittberger 2017: 1 f.).

Advocates of the political approach would argue that the reasons why many new regulatory tasks were not delegated to the Commission since the beginning of the 1990s are not functional, but political and that national governments have simply been "unwilling to countenance any significant expansion of the Commission" (Kelemen/Tarrant 2011: 929).

To conclude, the political approach doubts that variation in regulatory bodies' institutional design across cases and time can be explained by functional necessities and instead assumes that "inter-institutional battles over regulatory authority and conflicts between member states over the distributional effects of regulation play a decisive role in the design of EU regulatory bodies." (Kelemen/Tarrant 2011: 925) It expects actors' preferences to be driven by rationalist calculations and "determined by their expectations concerning how various design options will impact on policy outcomes." (Kelemen/Tarrant 2011: 924) Hence, a decision is perceived as rational if it provides the actor with more power, not if it optimises the fulfilment of a certain function – regulatory bodies are not depicted as functional solutions, but as "political instruments through which member states and EU institutions act" (Busuioc et al. 2012: 4). This enables the researcher "to understand the relative weakness of existing agencies and the multiplicity of controls to which they are subjected." (Dehousse 2008: 789) In summary, the political approach would expect the regulatory tasks, their design, and the overarching governance structure of an EU regulatory body to reflect the diverging preferences and power relations among EU regulatory bodies' principals.

Having introduced the two main theoretical approaches to the creation, transformation, and design of EU regulatory bodies allows me to present a possible combination of both accounts in the following subsection.

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[35] A number of studies investigate the role MBs play *de facto*. For instance, Busuioc (2012: 733) concludes that "boards are in act living up to the strategic expectations for which the were set up."

4.4   A Combined Functional-Political Approach

Usually, the functional and the political approach are treated as analytically distinct approaches to EU regulatory bodies and researchers either use the one or the other in order to explain the delegation of regulatory tasks (Groenleer 2009: 100). For instance, Kelemen and Tarrant (2017) insist that political considerations not only determine the institutional design, but also the institutional choice of EU bureaucratic structures – in other words, whether policy-makers choose to delegate to an ERN or an EU agency – and that functional considerations play no major role.

In contrast, Blauberger and Rittberger (2015, 2017) suggest a combined functional-political approach and argue that by defining their respective domain of application as suggested by Jupille et al. (2013: 21), both accounts' explanatory power can be increased. Even though they focus on the creation and design of ERNs when suggesting a combination of both approaches, the authors' framework also increases explanatory leverage in regard to an agency's transformation: whereas functional explanations can be expected to be most qualified to explain why decision-makers saw a need to expand Frontex's regulatory role in the first place and transformed Frontex into a less network-like agency by delegating new regulatory tasks, i.e. introduced a clearer hierarchy between member states and agency, one can assume that political accounts are more suitable to investigate the following bargaining process resulting in a particular design of the agency's new tasks and an unchanged governance structure.

Rittberger and Blauberger (2017) suggest that functional considerations will be able to explain the choice of an ERN if EU regulatory competencies are highly developed but operational ones are not. As one can observe an evolution "away" from a network structure towards a further centralisation of regulatory authority on the European level, the scope conditions – the conditions under which the theory is expected to hold – have to be redefined: it is not a lack of operational, but of regulatory competencies that will be treated as scope condition for a functional explanation of the creation of an EU agency or the further centralisation of regulatory authority. Hence, where EU regulatory competencies are weakly developed, functional considerations are expected to explain the centralisation of regulatory authority, even though operational competencies might be highly developed. This scope condition was clearly given before Frontex was reformed: even though there had been no *European* border and coast guards, the agency's operational role had been highly developed and was strengthened by several amendments (see 2.2). In contrast, its regulatory competencies had been weak: expect for monitoring, all regulatory tasks were newly introduced features of the Frontex regulation (see 3.1). Whereas the SBC contains common rules for external border controls, it does not entail many details on border surveillance and "leaves the national organisation of border management in the hands of the Member States." (Rijpma 2016: 9) The following two hypotheses can be deduced from Blauberger and Rittberger's elaborations on a combined functional-political approach:

H1 (functional approach): *In the context of the migration crisis, regulatory deficits in rule setting, monitoring and enforcement caused a functional gap in the EU's external border management, which was the reason for decision-makers to delegate new regulatory tasks to Frontex.*

H2 (political approach): *Inter-institutional power struggles and national sovereignty concerns shaped the design of the regulatory tasks and the governance structure. Sovereignty concerns that were asymmetrically distributed across member states led to particular strong efforts to limit regulation and to control decision-making on it.*

4.5 Observable Implications for the Combined Functional-Political Approach

In this section, I operationalise the above-mentioned hypotheses and translate them into observable implications. Thus, I will be able to test in the following whether they can account for the transformation Frontex experienced (see 6).

4.5.1 Observable Implications for the Functional Part of the Explanation: Delegation of Further Tasks due to Regulatory Deficits

In order to confirm the explanatory power of the functional approach in regard to the extension of Frontex's regulatory role, one would have to observe a functional gap in the EU's EBM prior to the agency's transformation. Such a functional gap would become apparent in the form of (some) member states' inability to implement existing rules (for instance on the registration of arriving asylum seekers) and/or other kinds of varying standards in border management across member states. One can expect such varying standards to be present in cases of diverging degrees of "migratory pressures" across different parts of the external borders, assuming migrants and refugees[36] to choose parts of the borders where standards are lower, i.e. where a successful entry is more or even most likely.

Some empirical observations would emphasise the seriousness of the functional gap and hence further update the confidence in my theoretical assumptions: one can state that the functional gap caused most pressure to act if it also affected other policy areas. Moreover, it can be expected to have been most serious if developments of disintegration could be observed or if states took unilateral measures in order to mitigate negative externalities of other states' non-compliance with EU policies.

A mismatch between institutional capacities and the degree of policy problems' complexity can be caused by operational and/or regulatory deficits. Since this section aims at deriving observable implications for a functional explanation for the delegation of *regulatory* tasks, this functional gap would have had – at least to a remarkable degree – to be caused by a *regula-*

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[36] When referring to people crossing the external borders of the EU, I use the terms "refugees and migrants". In this way, both those people who flee armed conflict or persecution, being classified by international law as refugees (see 1951 Geneva Convention and its 1967 protocol) and those leaving their home because of the attempt to improve their living conditions and not due to an immediate threat are included. Since not all of them may eventually seek asylum, the term "asylum seekers" would not be appropriate.

tory deficit in Frontex's mandate. Hence, the empirical analysis is not primarily interested in Frontex's possible lack of resources, personnel, or coordinating power (that most likely has been present as well), but rather in the lack of regulatory power that had been delegated to the agency before. The following subsections develop observable implications for regulatory deficits that would explain the (further) widening of a functional gap and consequently the delegation of the new regulatory tasks. It is not only necessary that such regulatory deficits existed, policy-makers must also have been aware of them. Hence, one has to observe them referring to it.

In order to explain the establishment of a technical and operational strategy for IBM by Frontex in functional terms one would have to observe a regulatory deficit in rule setting prior to the adoption of the new regulation. Such a deficit would become visible in the form of a lacking sound legislative framework. Moreover, legislation in other policy areas might have negatively affected EBM or set the wrong incentives.

A regulatory deficit in monitoring was present if the supervision of member states' EBM showed serious gaps. For instance, this was the case if monitoring did not assess (all) components being essential for an effective EBM, if it was not frequent enough, if it was not connected to any corrective measures, and/or if it was only introduced *de jure*, but not carried out *de facto*.

For a functional explanation to hold true in regard to the delegation of enforcement tasks, one has to observe that there were deficiencies in EBM in one or several member states, but these neither showed the necessary efforts to improve this situation themselves nor asked for support from Frontex. Functional explanations would be even more convincing if EU and national actors not only recognised this lack of willingness to cooperate, but even exerted pressure by requesting the member state(s) concerned to accept help and maybe even issued threats.

4.5.2 *Observable Implications for the Political Part of the Explanation: Inter-Institutional Power Struggles and Inter-State Bargaining due to Sovereignty Concerns*

In order to confirm the political approach in regard to the continuity of Frontex's governance structure and the design of the agency's regulatory tasks, one would have to observe at least some degree of inter-institutional/-state disagreement and bargaining. Hence, the political approach would expect the institutional outcome to reflect not only functional necessities, but also the diverging preferences of Frontex's principals. How the political approach would expect these to be shaped, is to be elaborated on in the following.

The Commission is assumed to strive for a supranationalisation of the agency's governance structure and in particular an expansion of its own powers, for instance by trying to gain an additional seat in the MB. Since the regulatory authority that is to be delegated to Frontex had not been held by the Commission before, but by national authorities, one can also expect the Commission to support an expansion of the agency's regulatory mandate. At the same time, the

Commission should aim at securing as much decision-making power as possible over these far-reaching regulatory tasks. Similar preferences could already be observed in its 2002 Communication on European Border Management, when "the Commission had contemplated the establishment of a true European corps of border guards, disposing of executive powers independent from the Member States." (Heijer et al. 2016: 19) Whereas member states in the Council had resisted this move and adopted Frontex as a regulatory agency tasked with mainly coordinative activities (Heijer et al. 2016: 19), Groenleer's (2009: 100) observation of a generally growing role of the Commission in regard to JHA agencies might as well hold true in the case of the new Frontex regulation.

In relation of JHA agencies' institutional design, the Commission has often been an ally of the EP. The latter also favours more direct accountability mechanisms at the European level, "including transparent appointment procedures for senior management, comprehensive consultation and information rights for the EP, possibly in conjunction with national parliaments" (Trauner 2012: 787). Concerning the development of the EBM policy, the EP "has had mixed reactions" (European Parliament 2017: 4) While supporting the creation of Frontex from the very beginning and emphasising the need to allocate sufficient resources (European Parliament 2017: 4), the EP has always pleaded for a "more communitarian" character of the agency (Trauner 2012: 793). However, the Parliament only had a consultative role when the original 2004 Frontex regulation was adopted and the Council largely ignored its amendments (Trauner 2012: 793).

Since the Parliament was actively involved as co-legislator in the most recent reform, one would assume the new regulation to increasingly reflect its preferences. This growing influence might become visible in the form of a seat in the MB granted to the Parliament or the introduction of a further body increasing the agency's transparency (in particular the EP's oversight powers). The political approach would also expect the EP to support the expansion of the Commission's powers. Furthermore, the protection of fundamental rights – which played little to no role in the founding regulation (Rijpma 2017: 218) – is a key concern of the EP in its relations with Frontex. This reflects the political approach's expectation that the Parliament usually tries to design regulatory institutions in a way that appeals to certain societal groups. In the present case, these "diffuse public interests" (Kelemen/Tarrant 2011: 928) are fundamental rights concerns voiced by non-governmental organisations (NGOs) or the like. However, issues like the principle of non-refoulement have not only been contested between the Council and EP, but also within the Parliament (Trauner 2012: 795).[37]

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[37] Nevertheless, the EP could achieve remarkable successes such as the appointment of a fundamental right officer and a consultative forum (Regulation (EU) No 1168/2011, art. 26a) since Frontex's creation.

Because external border control can be described as a core state power, one would assume the EU member states to oppose a more supranational governance structure and to aim at controlling the decision-making on the agency's regulatory tasks either through the MB or even the Council itself. The Council can be expected to pursue similar aims as it usually does in regard to JHA agencies:

> "JHA has been one of the policy fields where the Council's concern to prevent 'political drift' – when an institutional rival seeks to capture an agency – has been at least as strong [sic] its anxiety to prevent 'agency drift' – when an agent pursues an agenda different from that of its principals […]. Where the Parliament has gained more influence over the creation and operation of Community agencies, the Council has eagerly sought to limit the EP's role in relation to agencies established in the former second and third pillars." (Trauner 2012: 785).

Hence, one can conclude that the member states in the Council should strive to keep their role as Frontex's "dominant principal" (Trauner 2012: 785). Instead of redistributive concerns, one can expect member states' geographical position to determine their preferences, as this is decisive for whether or not they fear sovereignty losses: it is to assumed that member states with external borders oppose an extension of the EP's and the Commission's decision-making power most resolutely. Furthermore, they might also reject the delegation of regulatory tasks because of sovereignty concerns. Member states that have no external border themselves but are affected by the regulatory gap's consequences should rather support a broad scope of these tasks.

In the fourth chapter, I first justified the choice of my theoretical framework, which is usually used to explain why decision-makers create ERNs in some cases, but EU agencies in others. It is adequate to draw on the functional and political approach because the lines between ERNs and EU agencies are blurred. In particular, even though Frontex legally is an agency, it also shows some distinct network features. Moreover, in the course of its most recent reform, these network components experienced a remarkable dilution.

Subsequently, I showed that the functional approach assumes regulatory bodies to be created, designed, and sometimes transformed in order to fulfil certain functions. Hence, this account expects the delegation of regulatory tasks and the design of a regulatory institution to reflect functional necessities and to fill a certain gap between institutional capacities and policy problems. In contrast, the political approach focuses on diverging preferences, bargaining, and power struggles among the relevant actors. Therefore, it would expect the regulatory tasks, their design, and the overarching governance structure of an EU regulatory body to reflect the varying preferences and power relations among EU regulatory bodies' principals.

Eventually, I introduced a possible combination of both accounts as suggested by Blauberger and Rittberger (2015, 2017), who argue that by defining their respective domain of application, one can further increase the approaches' explanatory power. Since one can observe an evolution "away" from a network structure towards a further centralisation of regulatory au-

thority on the European level, I refined the scope conditions: it is not a lack of operational, but of regulatory competencies, which will be treated as scope condition for a functional explanation of the creation of an EU agency or the further centralisation of regulatory authority.

I deduced two hypotheses from this combined functional-political approach. The first hypothesis, being derived from the functional approach, assumes that a functional gap in the EU's EBM caused by regulatory deficits was the reason for decision-makers to delegate new regulatory tasks to Frontex. The second hypothesis, which is deduced from the political approach, presumes that inter-institutional power struggles and national sovereignty concerns shaped the design of these regulatory tasks and prevented a change of the governance structure. Moreover, it is to be expected that sovereignty concerns that were asymmetrically distributed across member states led to particular strong efforts to limit regulation and to control decision-making on it. In the last subsection, I developed observable implications for the case at hand.

Before empirically assessing to what extent these theoretical expectations are confirmed, it is necessary to elaborate on the methodological tools I draw on for this purpose.

5 Methodological Approach: Robust Congruence Case Study

After having developed these diverse propositions about possible evidence, I elaborate on the methodological tool that I use in order to determine whether the accessible empirical evidence confirms or disconfirms the theoretical expectations. It is to be drawn on ontological and epistemological assumptions from congruence methods as understood by Beach and Pedersen (2016: 269-301), which allows me to assess mechanistic evidence for the theorised causal relationship without making the study of the underlying causal mechanism explicit. Even though they can be described as the most commonly used within-case approach, congruence methods have almost disappeared from current methodological debates and are often conflated with process tracing (Beach/Pedersen 2016: 269). After describing why the latter are not the most suitable approach and why congruence methods are better suited for the purpose of this study, I clarify what type and variant of congruence method is to be chosen.

Even though the most recent change of Frontex's institutional design undoubtedly is a case of further European integration, for which process tracing has been identified as a suitable methodological approach (Schimmelfennig 2014), it is not the most appropriate choice in this case. First, tracing every single causal mechanism at hand would go far beyond the scope of this paper. Second, neither the functional nor the political approach offer theoretical expectations that are specific enough to genuinely *unpack* a certain causal mechanism; in other words: "the causal mechanisms linking causes and outcomes are not explicitly theorised" (Beach/Pedersen 2016: 272). Since it is only possible to trace a mechanism empirically if one is "told about what the process actually is" (Beach/Pedersen 2016: 270), another method has to be applied.

An approach that is better suited for the purpose of this study are congruence methods,[38] which have initially been introduced by George and Bennett (2005: 181-204). The authors' understanding of congruence however shows certain weaknesses, as they in fact only assess "*correlations* across values of causes and outcomes" (Beach/Pedersen 2016: 270, italics in original). Beach and Pedersen go beyond this approach and provide a methodological tool that enables the researcher to assess mechanistic evidence for the theorised causal relationship without making the study of the underlying causal mechanism explicit.

Even though congruence and process tracing methods have to be distinguished, they show important similarities. Like process tracing, congruence studies are within-case analyses. Moreover, neither of them counterfactually compares existing with hypothetical cases in which the cause is absent; instead they allow the researcher to investigate the complexity of *actual* cases and push her "toward thinking more in terms of observable implications of hypothesised causal relationships" instead of cross-case patterns (Beach/Pedersen 2016: 272). Both methods make asymmetric and deterministic causal claims and draw on Bayesian probability in order to make inferences (Beach/Pedersen 2016: 272). Bayesian inference "emphasises the theoretical impact and likelihood of collecting individual observations" (Rohlfing 2012: 180). Since this analysis only collects mechanistic evidence and does not explicitly unpack a causal mechanism, it will neither be necessary to assess each piece's of evidence uniqueness (i.e. to ask whether it is considered to be sufficient for inferring causation) nor to ask if it shows a high certainty (i.e. to test if it is necessary for inferring causation) (Rohlfing 2012: 182f.). While not going into depth concerning the probative value of causal process observations, it will, however, be focused on collecting pieces of evidence of high quality – this understanding of causal inference is opposed to frequentism, which is "based on the number of observations and the premise that the more supportive or disconfirming observations one collects, the stronger causal inferences are." (Rohlfing 2012: 180)

If the hypothesised causal link exists, I expect to find different types of evidence (Beach/Pedersen 2013: 99f.), namely pattern evidence (e.g. information on the increasing number of irregular border crossings), sequence evidence (e.g. a certain chronology of events such as actors' statements, the publication of evaluation reports, etc.), trace evidence (e.g. Council conclusions as evidence that meetings took place), and account evidence (e.g. negotiating mandates revealing different actors' positions). It is crucial to assess the accuracy of the pieces of evidence one collects, meaning their validity and their reliability. Reliability can be increased by asking critical question in relation to one's sources, which is to be done exemplari-

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[38] From a more general point of view, congruence methods also offer other advantages such as the fact that they require less analytical resources than process tracing. Therefore, a commonly used approach is to combine both methods: for instance, one can first carry out a plausibility probe and subsequently trace the most promising causal conjectures (Beach/Pedersen 2016: 273f.).

ly, and by corroborating, i.e. by using new and different evidence, which is to be done whenever possible (Beach/Pedersen 2016: 191-226).

Similar to their classification of different variants of process tracing, Beach and Pedersen distinguish between explaining-outcome, theory-building, theory-testing, and refining-theory congruence case studies. Since the literature on EU regulation offers well-developed theoretical conjectures, it is possible to evaluate their prior probability of being present in the case at hand and apply a theory-testing congruence case study. In order to carry out this variant of congruence study, it is necessary to select a typical case, in other words: a case where both condition and outcome are present. This requirement is fulfilled by choosing a case where the conditions of a functional gap and political power struggles are given, as well as the outcome of an institutional change of a regulatory body. Moreover, Beach and Pedersen advise to only select cases where one can find a rich empirical record (Beach/Pedersen 2016: 284). As there was an extensive public debate on EBM in the context of the migration crisis and one can not only access official documents such as communications from the Commission, but also a number of leaked documents, this requirement is met as well.

Not being a comparative, but a within-case method, congruence studies can only make claims about causal relationships within the studied case. Since the actual causal mechanism producing the evidence is not explicitly theorised and unpacked, the type of causal inferences that can be made in congruence studies is much weaker than that made in process tracing:

> "The inference we make using congruence are either disconfirming or confirming claims about the existence or nonexistence of a plausible causal relationship. Congruence methods produce weaker mechanistic evidence than process-tracing, enabling us to make only tentative conclusions about a causal process that potentially links a given cause and outcome." (Beach/Pedersen 2016: 272f.)

Hence, even if one finds the predicted evidence, it is only possible to make a relatively weak inference about a causal relationship, because the mechanism has not been traced explicitly (Beach/Pedersen 2016: 273).

In order to meet these limitations,[39] this study will make use of a cluster of tests, which is one of two types of congruence studies between which Beach and Pedersen distinguish. Whereas in "a singular test, a single proposition about potential evidence is assessed multiple times during a temporal process or across space", cluster tests empirically assess "multiple non-overlapping propositions about evidence" (Beach/Pedersen 2016: 273). The latter allows the researcher to get closer to actually apprehending what could be parts of a causal mechanism (i.e. to "grey-box" the mechanism, see figure 1), which should produce slightly stronger mechanistic evidence (Beach/Pedersen 2016: 273). Nevertheless, it has to be noted that one stills deals with indirect evidence, since the causal mechanism is not explicitly theorised.

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[39] Typically, this weakness of congruence studies is met by supplementing the first case study with analyses of further typical cases and/or process tracing studies. It will however not be possible to strengthen cross-case inferences within the scope of this paper.
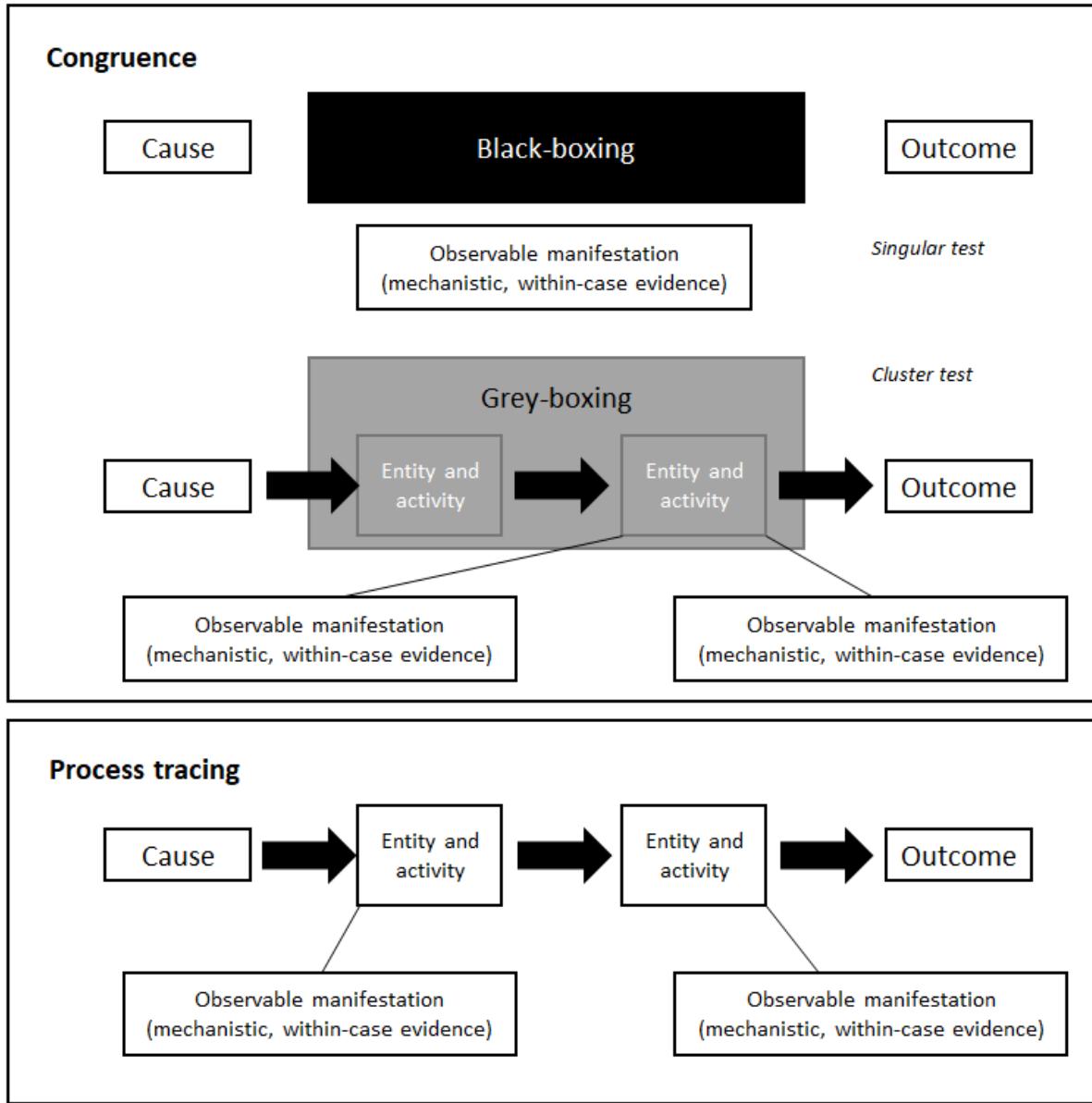
Figure 1: Mechanisms in congruence and process tracing case studies (derived from Beach and Pedersen 2016: 274)

To conclude, I consider congruence methods to be more suitable than process tracing to empirically assess whether the accessible empirical evidence confirms or disconfirms the theoretical expectations developed above (4.5). However, it is crucial to recognise that in contrast to process tracing, congruence studies do not explicitly disaggregate or "unpack" causal mechanisms and instead draw on a "minimalist understanding of mechanisms […], where they are viewed as merely causal arrows in between causes and outcomes." (Beach/Pedersen 2016: 272) Since the functional-political approach's well-developed theoretical arguments can be deduced from the existing literature, it is appropriate to carry out a theory-testing congruence study. The limitations of congruence methods are partly met by using a cluster of tests.

Having clarified the methodological proceeding, I carry out the empirical analysis in the following chapter.

6   From Management of Operational Cooperation to European Border and Coast Guards

In the following empirical analysis, I show that the combined functional-political approach can account for the delegation of new regulatory tasks to Frontex, their design, and the continuity of the agency's governance structure.

In the introductory section, I draw on functional arguments and demonstrate that existing institutional capacities were not sufficient to meet the challenge of increasingly complex policy problems in the context of the migration crisis. Moreover, I show that this widening of a functional gap in the EU's EBM was recognised by decision-makers. I subsequently reveal the negative externalities this functional gap implied for other policy areas, namely asylum policy, internal security, and the single market, which further triggered the functional pressure to expand Frontex's mandate. I conclude the section by showing how decision-makers tried to tackle the problem by *operational* means at first, but finally recognised that *regulatory* deficits had also been a cause of the emergence of a functional gap in EBM and consequently had to be limited as well.

In each of the following three subsections, I first examine these regulatory deficits in rule setting, monitoring, and enforcement and provide evidence for their recognition by decision-makers. These pieces of evidence include statements made before the Commission's proposal was presented as well as justifications that were used to explain the delegation of regulatory tasks during the legislative procedure. Secondly, I investigate in each case how inter-institutional and inter-state bargaining shaped the design of the regulatory tasks. Eventually, I explain how these power struggles prevented a supranationalisation of Frontex's governance structure. I assess the Commission's, the Council's,[40] and the EP's (respectively the responsible Committee's on Civil Liberties, Justice and Home Affairs)[41] preferences regarding the design of the regulatory tasks and the governance structure by examining the institutions' initial proposal/negotiating mandates.[42] Comparing these positions with the final regulation allows me to reveal which institution could prevail in which respects. The only aspect causing public inter-

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[40] For details on the Dutch Council Presidency's "thematic approach in the handling of this file" see Council of the European Union 2016b: 2.

[41] Within the scope of this paper, it will not be possible to take into consideration the opinions of the advisory Committees (Foreign Affairs, Budgets and Fisheries). In the final vote on 30 May 2016, 40 members of the responsible Committee were in favour of the proposal (members of ALDE, ECR, PPE, S&D), ten voted against it (EFDD, ENF, GUE/NGL) and five decided to abstain (S&D, Verts/ALE) (Committee on Civil Liberties, Justice and Home Affairs 2016: 193).

[42] As usual, after the vote on the negotiating mandates by the Council and the EP, the further bargaining process became blurred. However, it will be possible to analyse some documents on the Trilogue that have been leaked by Statewatch. An overview of basically all relevant documents related to the legislative process can be found on the FREE Group website (a "wiki-lex" exercise launched in cooperation with Statewatch). Besides, as also pointed out by Ferraro and Capitani, it is indeed "interesting to compare the negotiating position of the European Parliament, the Council and the Commission" (Ferraro/Capitani 2016: 3).

state disagreement – namely Frontex's possible enforcement powers – is also to be investigated by having a closer look at media sources.

In the last subsection of this chapter, I discuss possible alternative explanations, namely Historical and Sociological Institutionalism.

6.1   A Widening Functional Gap in External Border Management

In the present case, the growing complexity of policy "problems" mentioned by the functional approach occurred in the form of a sharp increase in the number of refugees and migrants crossing the external borders of the EU. This was caused by various developments in the MENA (Middle East and North Africa) region, in particular by the Syrian civil war. However, politicians like German Interior Minister de Maizière argued that Greece's "behaviour" (see below) also caused a certain pull-effect (Die Welt 2015).

Even though a functional gap between national as well as EU border management capacities and the actual challenges had been present before,[43] a number of figures indicate that its extent has reached new levels. In 2015, 1.82 million "irregular" border crossings were counted (European Parliamentary Research Service 2016: 2). This was not only six times the number of detections reported the year before (European Parliamentary Research Service 2016: 2) – which itself was an unprecedented year with record monthly averages since April 2014 – but even a "never-before-seen figure" (Frontex 2015: 10). Finally, July 2015 can be described as a "turning point" with more than 100 000 detections (Frontex 2015: 10). The number of irregular border crossings counted in 2015 even exceeded the total number of the period from 2009 to 2014, i.e. 813 044 (COM (2015) 675 final: 2). According to the eighth biannual report on the functioning of the Schengen area, fingerprints were only taken in 23% of cases (COM(2015) 675 final: 4).[44] In contrast, the forth report on the Schengen area's functioning had still emphasised positive developments, for instance the progress made in the Greek EBM (COM(2013) 832 final: 5). That border guard authorities have been increasingly overburdened is also shown by the fact that in 2015, 470 dead bodies were counted in the Mediterranean. Compared to the previous year, this was an increase of 112% (Frontex 2016: 12).[45] Growing difficulties in protecting human

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[43] The most recent migration crisis was or is not the first of its kind. Besides ongoing deficiencies in the EU's EBM, a major crisis situation could be for instance observed during the 2011 "Franco-Italian affair", when the Italian authorities issued about 24 000 temporary-residence permits for North-African asylum seekers. As many Tunisians headed towards France, the country reintroduced border checks (according to art. 26, SBC) and even blocked a train carrying third-country nationals at its border (Heijer et al. 2016: 7f.; Carrera et al. 2017: 10f.). Furthermore, Greek border authorities had also been well-known for their capacity shortages and organisational problems before (Monar 2016: 142).

[44] Period of investigation: 1 May 2015 – 10 December 2015.

[45] The numbers on deadly incidents in the Mediterranean vary hugely across different sources. However, figures provided by other institutions such as the International Organisation for Migration (IOM) show an increase in recorded deaths as well (see for instance IOM numbers).

rights such as violations of the obligation of *non-refoulement* under Art. 3 ECHR (Carrera et al. 2017: 12-17) indicate a functional gap in EBM as well.

Consequently, the Commission admitted that "[t]he crisis has exposed weaknesses and gaps in existing border management mechanisms, which have proved insufficient to guarantee effective and integrated border management" (COM(2015) 673 final: 2) and the Council recognised that the growing number of border crossings led to "severe difficulties in several Member States in ensuring efficient external border controls in accordance with the Schengen acquis and in the reception and processing of migrants arriving." (Council 2016: 2) According to EU analyses, national border guards were "unable or unwilling to 'protect' the Schengen area effectively by stopping the influx of irregular migrants. Frontex, on the other hand, was held to have been too illequipped in terms of powers, personnel and equipment to render sufficient support or remedy the situation." (Rosenfeldt 2015)

Because of varying standards in EBM, the functional gap was bigger in some member states than in others. That such varying standards existed is evidenced by diametrical developments at different parts of the EU's external borders. As shown by the 2015 general report of Frontex, one could observe a "shift towards the Eastern Mediterranean route" (Frontex 2016: 10): whereas the Central Mediterranean route experienced a slight decrease in the number of detections of irregular border-crossings – about 154 000 –, the largest number of detections was counted on Eastern Mediterranean route – 885 386 (Frontex 2016: 10).[46] The fact "that the Schengen rules are enforced differently at national level" (Unisys 2014: 19) was already recognised by EP representatives in 2014.

Hence, the vast majority of refugees and migrants entering the EU via the Eastern Mediterranean route arrived on several Greek islands, where the functional gap in EBM became most obvious:[47] the "non-management" (Monar 2016: 142) of the Greek external border was the single biggest issue in regard to EBM in 2015. As pointed out by a Commission spokeswoman, only 121 000 out of 400 000 refugees and migrants crossing the Greek part of the external borders from July 20, 2015 to November 30, 2015 were registered appropriately (Deutschlandfunk 2015). That there were "serious deficiencies" (European Commission 2016) in Greek EBM was for instance recognised by Commission and member states experts during an unannounced evaluation visit[48] to the Greek-Turkish land border as well as to Chios and Samos[49] in Novem-

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[46] Due to comparably low numbers of detections of irregular border-crossings, the Western Mediterranean route, the Western African route, and the situation at the Eastern land border can be neglected for the purpose of this paper (Frontex 2016: 10f.). The Western Balkans route has to be seen mostly as a follow-on of the Eastern Mediterranean route (Monar 2016: 134).

[47] The Greek struggles to ensure an effective EBM were aggravated by the impact of the economic and financial crises (EurAktiv 2015): while "shortages of capacity and organisational problems of the Greek border authorities" (Monar 2016: 142) had also been an issue before, the debt-crisis linked austerity measures have further exacerbated this problem.

[48] As foreseen by the Schengen evaluation mechanism (Council Regulation (EU) No 1053/2013).

ber 2015, i.e. in the month before the Commission presented its EBCG proposal. The draft report concluded that "Greece is seriously neglecting its obligations and that there are serious deficiencies in the carrying out of external border controls that must be overcome and dealt with by the Greek authorities." (European Commission 2016) In its recommendations, the Council particularly pointed to "the lack of appropriate identification and registration of irregular migrants at the islands, of sufficient staff, and of sufficient equipment for verifying identity documents. Under the current circumstances, situational awareness and reaction capability are not sufficient for efficient border surveillance." (Council of the European Union 2016a: 4)

In order to remedy these deficiencies at *all* parts of the Greek external borders, the Council recommended a number of measures to be taken to ensure compliance with the Schengen *acquis*, namely in regard to the registration procedure, border surveillance, risk analyses, international cooperation (with Turkey), human resources and training, border checks procedures, infrastructure and equipment (Council 2016: 5-12).[50] The Council also emphasised that the whole EU was affected by the functional gap in Greek EBM: "The overall functioning of the Schengen area is at serious risk [...] The difficulties faced in the protection of the external borders by Greece is an issue relevant to the whole EU and must be solved in the interest of the whole EU." (Council 2016: 3)

The functional gap in EBM also affected other policy areas, which further triggered the pressure to amend the Frontex regulation. These close links are reflected in a section of the Commission's proposal explicitly dedicated to other EU policies that the new regulation should complement (COM(2015) 671 final: 91). First and foremost, the closely linked field of migration and asylum was concerned: the growing number of asylum-seekers crossing the EU's external borders, in many cases without being registered appropriately, revealed the Dublin system's dysfunctionality. In 2015, 1 255 600 asylum applications were received within the EU (thus almost twice the number reported the year before); their asymmetrical distribution among member states further complicated the situation (Monar 2016: 135). The debates on possible relocation mechanisms – including some member states' complete refusal to cooperate – led to serious tensions. Even though some political leaders (especially those from Central/Eastern Europe) clearly tried to do so, the crisis could "in no way be reduced to border controls" (De Bruycker 2016: 560). While acknowledging that the new Frontex regulation was not the universal solution to the current problems, the responsible EP committee's rapporteur Artis Pabriks

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[49] In 2015, 868 000 "irregular migrants" arrived on these islands (Council 2016: 4).
[50] It has to be noted that there are limitations in regard to what border controls can achieve in practical, economic, humanitarian and legal terms (Heijer et al. 2016: 8f.), to which Greece also pointed. For instance, Immigration Minister Mouzalas said he had taken EU ambassadors out to sea to show them situation and that pushing back a plastic boat with 50 or 70 refugees aboard in the middle of the sea means in fact letting drown them (EurAktiv 2015a). In contrast, Austrian Interior Minister Mikl-Leitner stated that it was a myth that the Greek-Turkish border cannot be controlled, emphasising the strong naval fleets Greece possesses (Politico 2016).

(European People's Party/EPP) from Latvia however stated that it "addresses the need to ensure the proper control of the Schengen external border as a *precondition* to manage migration effectively" (Committee on Civil Liberties, Justice and Home Affairs 2016: 127, italics added).

Moreover, he argued that the regulation addressed the need "to ensure high level of security within [...] the Union." (Committee on Civil Liberties, Justice and Home Affairs 2016: 127). This reveals that another policy area being particularly affected was internal security: as pointed out by Neville, an EBM "system that cannot cope with the number of arrivals, cannot register them, cannot properly detect falsified documents and cannot properly check those arriving against existing databases, like the Schengen Information System (SIS) database [...] poses an inherent risk to an area without internal border controls." (Neville 2016: 14). This became most apparent in the course of the November 2015 Paris attacks, committed by islamists who reentered the EU through Greece disguised as refugees and by using fraudulent documents. As a consequence, France reintroduced internal border controls because of a "persistent terrorist threat"[51] and the Council also recognised that deficiencies in EBM "constitute a serious threat to [...] internal security" (Council 2016: 4). That the negative impact the functional gap in EBM had on internal security was a reason to strengthen Frontex as well is evidenced by a number of statements. For instance, Cazeneuve referred to "the security of the continent" when advocating the EBCG regulation (gouvernement.fr 2016). Growing security considerations also become visible when comparing the 2004 with the 2016 regulation: whereas the term "terrorism" was not mentioned in the old Frontex regulation, it was now included six times and thus reflects the enhanced contribution the agency shall make to the prevention of terrorism, inter alia through risk analyses and data sharing (Regulation (EU) 2016/1624, recital 18 and art. 47(1)(a)).[52]

France was not the only country that reintroduced border controls. While a number of member states unilaterally decided on re-introducing internal border controls (in accordance with art. 23, 24, 25 SBC) – sometimes without sufficient prior consultation with neighbouring member states (Monar 2016: 141f.) – others followed a Council recommendation (in accordance with art. 29 SBC). The functional gap's seriousness is evidenced by these tendencies of "disintegration" one could – and still can – observe. Since the Schengen agreement is an "important complement to the Single Market, giving tangible reality to the four fundamental freedoms (goods, services, capital and persons)" (Neville 2016: 14), the reintroduction of internal border controls also affected the common European market. These significant social, political and economic "costs of non-Schengen" were recognised by the Commission, estimating that the imme-

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[51] A regularly updated list of all temporary reintroductions of border controls can be found on the Commission's Migration and Home Affairs website.

[52] As stated in an informal SCIFA discussion paper, the Commission included an enhanced role of Frontex in the fight against terrorism upon a request of the Council (Netherlands Presidency of the Council of the European Union 2016a: 2).

diate economic costs of a full reintroduction of internal border controls within the Schengen area for the EU economy would range between €5 and 18 billion annually. Therefore, the Commission suggested a "Back to Schengen Roadmap" (COM(2016) 120 final: 3). While some member states still consider internal border controls an appropriate measure, a number of decisions-makers referred to the need for an abolishment of internal border controls when arguing in favour of the regulation. For instance, Pabriks emphasised that "adopting this Regulation is urgent in order to strengthen the control of the external border and thus return to a situation without border controls within the Schengen area." (Committee on Civil Liberties, Justice and Home Affairs 2016: 130) Similarly, the Commission stated in its EBCG proposal that "we can only have a Schengen area without internal borders if its external borders are effectively secured and protected." (COM(2015) 673 final: 2) The Council emphasised "safeguarding EU-internal free movement" was one of the main objectives of the new regulation (Council of the European Union 2016e: 1).

In regard to the reactions to the widening functional gap in EBM, one can observe an interesting development. At first, there were attempts by policy-makers to meet the increasing challenges at the EU's external borders by operational means, i.e. by enhancing "the *de facto* Frontex role in border management" (European Public Affairs 2016, italics in original). Following an extraordinary Council meeting on migration in April 2015, "Frontex's budget for maritime operations hosted by Italy and Greece was almost tripled, to EUR 70.4 million, resulting in a higher volume of operational activities." (Frontex 2016: 17) Temporarily, up to 1 000 officers from member states performed border control duties (Frontex 2016: 17); the increased budget also made the provision of additional equipment possible (European Public Affairs 2016). Another example of these attempts to manage the migration crisis by operational means was the introduction of the so-called hotspot approach: together with other agencies such as the European Asylum Support Office, Frontex and "frontline" member states' authorities collaborate on the ground in order to ensure compliance with EU law (COM(2015) 240 final). The establishment of EUNAVFOR Med Operation Sophia represents another component of this "short-term response to the refugee crisis" (Heijer et al. 2016: 19; European Council 2015: 1).[53] In his speech on the conclusions of the above-mentioned special European Council, Commission President Jean-Claude Juncker underlined that there was no need to amend Frontex's regulation: "We do not need to expand the mandate, but we must ensure that the operation has the resources it needs to be able to operate at the high seas." (European Commission 2015)

On the one hand, this demonstrates the sense of urgency that was present – increasing the agency's budget was a measure that could be taken much faster than an amendment of the Fron-

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[53] As noted by Heijer et al., the fact that such a "police mission with military means" has been established instead of a border management operation reveals "the security dimension that this crisis has taken in the eyes of European policy makers." (Heijer et al. 2016: 19)

tex regulation. On the other hand, it also reveals decision-makers' reluctance to delegate regulatory power to Frontex. However, the further deepening of the crisis after these measures had been taken – as already mentioned, July 2015 can be seen as a "turning point" – indicates that there was a regulatory deficit that could not be compensated by merely strengthening Frontex's operational role. Moreover, the implementation of operational measures was difficult: for instance, there was a long delay in the establishment of hotspots in Greece (Tagesspiegel 2015).

Only two weeks after Juncker neglected a need to amend the Frontex regulation, a Commission's communication labelled "A European Agenda on Migration" revealed a change of mind that had been taken place in the meantime. Despite of still being focused on strengthening the agency's operational role, in particular in regard to return missions (COM(2015) 240 final: 10), this publication demonstrated that the Commission perceived a need to make use of its right of initiative and intended to launch further reflections on EBM. The Council approved this step at its meeting on 25 and 26 June 2015 (European Council 2015).

Eventually, the Commission presented its EBCG proposal on 15 December 2015 (COM(2015) 671 final). Two days later, the European Council invited the Council "to reach a position on the border guards proposal by June 2015, and the Presidency decided to pursue work […] as a matter of absolute priority." (Council of the European Union 2016b: 1) In February, the European Council even announced that work should be accelerated in order to reach an agreement under the Netherlands Presidency "and to make the new system operational as soon as possible (Council of the European Union 2016b: 1).

In this introductory part of the empirical chapter, I demonstrated that the functional gap in the EU's EBM widened in the context of the migration crisis and showed how this affected other policy areas as well. I revealed that decision-makers tried to tackle the problem by operational means at first, which did not bring the expected success. Therefore, the Commission decided to make use of its right of initiative and national decision-makers subsequently recognised as well that "existing mechanisms at the EU level are no longer sufficient to guarantee efficient integrated border management at the EU's external borders." (Netherlands Presidency of the Council of the European Union 2016a: 2)

Even though the Commission's initial announcement had focused on strengthening Frontex's *operational* capacities, the agency's *regulatory* mandate was eventually reinforced as well. In the following three subsections, I first investigate what kind of regulatory deficits led to this measure and present evidence that indicates that decision-makers were aware of them. Secondly, I analyse how political considerations and strategic interactions among Frontex's principals shaped the design of the regulatory tasks, being established as a response to these regulatory deficits, as well as how they affected the agency's governance structure.

6.2 Rule Setting

6.2.1 Functional Reasons for the Creation of the Rule Setting Task: Lack of a Sound Legislative Framework for the EU's Integrated Border Management

In order to better capture the regulatory deficit in rule setting being present before the adoption of the EBCG regulation, it is crucial to have a closer look at the notion of IBM. Even though an IBM concept had already been introduced in the early 2000s, it had not been outlined at legislative level before the EBCG regulation was adopted.

After the Treaty of Amsterdam had shifted the "power to adopt rules for the regulation and management of the external borders" to the European level (Rijpma 2012: 87), the 2001 Laeken Declaration introduced IBM as political – i.e. not legally binding – objective and asked "the Council and the Commission to work out arrangements for cooperation between services responsible for external border control and to examine the conditions in which a mechanism or common services to control external borders could be created." (European Council 2001: 12) In the following year, a Commission communication entitled "Towards Integrated Management for the External Borders" listed five components that should be included: a common corpus of legislation, a common coordination and operational cooperation mechanism, common integrated risk analysis, staff trained in a European dimension, as well as interoperational equipment and burden-sharing between the member states in the run up to the establishment of a European Corps of Border Guards (COM(2002) 233 final: 12). The idea of an IBM was also debated during the negotiations on Constitutional Treaty (Ferraro/De Capitani 2016: 4).

According to Carrera (2007: 4) the "first generation of the EU IBM" was created by the adoption of the Schengen Borders Code (SBC) and the establishment of Frontex. However, neither the 2004 Frontex regulation nor the 2006 SBC comprise a definition of IBM or elaborate on how they exactly contribute to achieving the integration of border management. In 2006, the Council adopted an IBM strategy, which stated that the following dimensions should be included: border control as defined in the SBC, investigation and detection of cross border crime, the so-called four-tier access control model,[54] inter-agency and international cooperation, as well as coordination and coherence of member states', institutions' and other bodies' activities (Council of the European Union 2006). A 2008 Commission communication elaborated on the next steps in border management (COM(2008) 69 final).

Since the Treaty of Lisbon, the gradual introduction of an integrated management system for external borders is a treaty objective (art. 77(2)(d) TFEU). Whereas being set as an objective in primary law, IBM had not yet been introduced in "hard" law (De Bruycker 2016: 563; Ferraro/Capitani 2016: 2). Hence, there were commonly formulated goals, but their implementation

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[54] This model includes "measures in third countries of origin or transit, cooperation with neighbouring countries, measures on border control at the external border and control measures within the common area of free movement" (Carrera 2007: 3).

was left to member states, on whose willingness to cooperate their achievement fully depended (Heijer et al. 2016: 14).

This legal situation did not correspond with the policy area's high level of interdependence: as pointed out by many observers, "the external border is as strong as its weakest link" (Heijer et al. 2016: 7). Nevertheless, member states remained individually responsible for guarding their part of the external borders (art. 4(2) TEU; art. 72 TFEU; Regulation (EC) No 2007/2004, recital 4). Since the length and "vulnerability" of external borders varies significantly across member states, this implies an asymmetric distribution of responsibility, which was – and in fact still is – not compensated by an adequate solidarity mechanism (De Bruycker 2016: 565-567).[55] Instead, the EU's common border policy suffers from a free-rider behaviour (Heijer et al. 2016: 7).

There is not only a lack of incentives for member states with external borders to manage these effectively because of this lack of solidarity, the common European asylum system – to which border management is "intimately linked" (Heijer et al. 2016: 7) – even shows distinct disincentives for member states to implement existing legislation: a reinforcement of controls of member states' parts of the external borders "will not only trigger their responsibility for asylum-seekers under the Dublin-system, but also for the return of irregular migrants under the Return Directive [Directive 2008/115/EC]." (Heijer et al. 2016: 7) Hence, member states with external borders are rather incentivised to "disregard their obligations to comply with European and international standards and fundamental rights protections" (Carrera et al. 2017: 1). If they do not register and process asylum seekers as they are obliged to, member states of first entry can avoid responsibility for these migrants and refugees. They may also engage in other "practices whose compatibility with Schengen rules, the Treaties and the EU Charter of Fundamental Rights is questionable." (Carrera et al. 2017: 10)

While the notion of IBM was missing at the legislative level, "a common culture of border management" (Rijpma 2017: 227) should be achieved through developing a common core curriculum, joint operational activities and trainings. However, the reinforced Schengen evaluation mechanism (SEM; Council Regulation (EU) No 1053/2013; including the possibility to reintroduce internal border checks) reveals that these rather "soft" instruments could not foster trust between member states (Rijpma 2017: 227). Furthermore, the above-mentioned diverging standards in border controls show that this approach did not result in a genuinely integrated EBM.

Even though the above-mentioned Agenda on Migration still focused on the amendment of Frontex's operational role, the Commission already recognised the regulatory deficit in rule

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[55] It is noteworthy that art. 67(2) TFEU explicitly mentions solidarity as a principle on which the common policy on external border control should be based.

setting: "while rules on border control are in place, border management today varies, based on a patchwork of sectorial documents and instruments. In 2016, the Commission will consolidate this into a Union standard for border management to cover all aspects of the Union's external border management." (COM(2015) 240 final: 11).

This necessity was further emphasised by the publication of an external evaluation of Frontex in July of the same year. Its final report's recommendations, being addressed to Frontex, the Commission, and the Council, highlighted the "need to establish a common and perhaps updated understanding of the concept of Integrated Border Management and clarify Frontex's role in implementing this concept" (Ramboll Management Consulting/Eurasylum 2015: 102).[56] According to the Commission, this feasibility study on the creation of a European System of Border Guards was taken into account in the preparation of the proposal (COM(2015) 671 final: 6). Hence, it constitutes an important piece of evidence to which I refer on several occasions.

That this recommendation had an impact on national decision-makers and made them recognise the need to reduce the existing regulatory deficit in rule setting becomes apparent when having a look at the MB's recommendation, which has been published in the course of the external evaluation. The MB endorsed that the EU's IBM concept should be updated – based on the 2006 Council Conclusions and the catalogues on external borders (Management Board Decision No 40/2015: 5). Out of the six components such an update should include according to the MB, four were included in the new Frontex regulation: inter-agency cooperation, cooperation between member states coordinated by Frontex/solidarity mechanisms, enhanced cooperation with third countries and the use of new technologies (Regulation (EU) 2016/1624, art. 4).

Moreover, references to the need of eliminating a regulatory deficit in rule setting can also be found in documents such as the Commission's explanatory memorandum on its EBCG proposal: "in the absence of strategic implementation of integrated border management at Union level, there are discrepancies in implementation that still remain at national level among Member States. Hence, there is a need, as identified by the Commission in the European Agenda on Migration, to have Union standards for border management to cover all aspects of the Union's external border management." (COM(2015) 671 final: 3)

To conclude, a sound legislative framework for IBM had clearly been lacking before the adoption of the EBCG regulation: whereas being set as an objective in primary law, IBM had not yet been introduced in "hard", secondary law. This regulatory deficit was recognised by decision-makers, whose bargaining on the concrete *design* of rule setting is to be investigated in the following section.

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[56] Before, a 2009 evaluation report had already recommended a Frontex Communication Strategy, which "should be devised to enable Frontex to establish an overview of and contribute to the international debate on IBM." (COWI 2009: 78).

6.2.2 Political Reasons for the Design of Rule Setting: Exclusion of the European Parliament from Decision-Making Despite of Possible Violation of the Meroni Doctrine

First of all, it is noteworthy that most EU agencies do not have rule-making responsibilities because the Commission still guards this prerogative (Levi-Faur 2011: 813). This division of regulatory tasks was confirmed by the so-called "Meroni doctrine" (Meroni vs High Authority [1957/1958] ECR 133), strictly limiting the degree to which the EU institutions can delegate tasks to regulatory agencies: the latter are only allowed to execute legislation and policies made by the European institutions, not having any discretionary powers themselves (Groenleer 2009: 97f.).

Nevertheless, according to the final regulation, the ED proposes a technical and operational strategy for IBM, which is then decided on by the MB. Only stating that it should be established by the agency, the Commission's initial proposal entailed no details on decision-making on the strategy. However, the Commission wanted the strategy to ensure (instead of support) the implementation of European IBM. Also by stating that national strategies shall be coherent (instead of being in line), the Commission chose a language that emphasised the supremacy of the agency's strategy over national ones even more (COM(2015) 671 final, art. 3(2) and 3(3)). This confirms that the Commission strove for an expansion of supranational regulatory authority, which is in line with assumptions derived from the political approach.

Even though there was no public inter-institutional/-state debate on Frontex's new technical and operational strategy, a Council Presidency document leaked by Statewatch reveals that the issue was discussed during the Trilogue (Council of the European Union 2016d). Such documents that were not intended to be published usually are particularly reliable. The EP's and the Council's preferences can be assessed by having a closer look at their negotiating mandates. According to its amendments, the EP wanted the Commission – if appropriate and after consulting the Agency – to present a legislative proposal for an European IBM strategy, including general guidelines, objectives, and key actions to be taken to establish an IBM system. Furthermore, the Parliament wanted the strategy to be revised whenever necessary and to ensure the continuous and uniform application of Union law, including the Union *acquis* on fundamental rights, at all external borders (Committee on Civil Liberties, Justice and Home Affairs 2016: 35, amendment 55). A 2014 survey among EP representatives had already shown that they are largely supportive of a more integrated border management approach: "A fully fledged EU system with both decision making and executive powers was strongly supported under the assumption that adequate legal framework is put in place." (Unisys 2014: 19) Since the EP tried to expand its own powers by proposing its involvement in the decision-making on the strategy and aimed at appealing to civil society groups being concerned with the protection of refugees' fundamental rights, the political approach is suitable to explain its negotiating mandate.

Even though the rejection of the EP's attempt to gain control over rule setting by the Council confirms the political approach, the finally established decision-making procedure is remarkable. As pointed out by Ferraro and De Capitani (2016), the fact that the ED and the MB develop the strategy and vote on it (without any clarification as what kind of legal document the strategy will finally be adopted to become binding) contradicts the regulation's eighth recital, which states that the EU institutions are responsible for the development of an IBM strategy. Actually, the agency defines and at the same time implements "an overarching political objective of the Treaty" (Ferraro/De Capitani 2016: 6), which questions the third article's accordance with the above-mentioned Meroni doctrine. It is telling that the member states prioritised control over the IBM strategy's content through the MB over such obvious concerns. While member states have recognised "[t]he need for continuous harmonisation of the code of conduct (e.g. defining common tactics and procedures) and common standards when performing different activities (liability rules on joint return operations)" (Unisys 2014: 17), they have always preferred rendering EBM more homogeneous through operational and rather soft means (e.g. exchange of best practice between seconded guest officers) (Unisys 2014: 17). Hence, when member states finally agreed to establish regulatory instruments in order to harmonise EBM standards, they were determined to control decision-making on it through their representatives in the MB.

While the Parliament had no success in its attempt to be involved in the strategy's adoption by co-decision, its suggestion that the strategy shall take into account specific situations of the member states was included in the regulation's final version (Committee on Civil Liberties, Justice and Home Affairs 2016: 35, amendment 55; EU Regulation 2016/1624, art. 3(2)).

In summary, it has to be noted that the Council could prevail in regard to rule setting and only accepted those EP amendments that further strengthened the position of national border guard authorities. Moreover, the final design of rule setting possibly constitutes a violation of the Meroni doctrine.

6.3 Monitoring

6.3.1 Functional Reasons for the Enhancement of Monitoring: Deficiencies in the Supervision of Member States' External Border Management

Besides the lack of a sound legislative framework, deficiencies in member states' EBM were not detected early enough because of a regulatory deficit in supervision. That this deficit has not only emerged during the most recent crisis but had already been present before is confirmed by a closer examination of the *gradual* enhancement of Frontex's monitoring role. When Frontex was created in 2004, it had no supervisory powers over member states and only conducted risk analyses of the situation at the EU's external borders (Regulation (EC) No 2007/2004, art. 4).

The possibility to assess member states' capacities "to face upcoming challenges" (i.e. equipment, resources) was added in 2011, when the Frontex regulation was amended (Regulation (EU) No 1168/2011, art. 4). However, this should only be possible "after prior consultation" with the member state concerned and still formed part of the agency's risk analyses. The results should be presented to the MB and, as part of the risk analyses, incorporated in the development of a common core curriculum for border guards' training. Member states should not face any immediate consequences in the case of deficiencies being detected.

However, according to the 2015 external evaluation of Frontex, this competence had not been implemented: "Although in 2014-2015 the Agency has taken steps towards the implementation of this provision by developing a methodology for the assessment, the framework for data collection and analysis is not functional yet." (Ramboll Management Consulting/Eurasylum 2015: 105) As stated in the report, the reasons for the delay had been both internal and external:

> "On the one hand, the RAU [Frontex's Risk Analysis Unit] reported that the introduction of this task in the Regulation did not result in the allocation of human resources for its performance. Given the rest of the on-going activities, new tasks set (such as the use of risk analysis in Schengen evaluations) and ad-hoc requests for risk analysis by the European Commission, the development of vulnerability assessment capacities were not prioritised. On the other hand, the assessment of vulnerabilities can also be a politically sensitive subject and there is a perceived reluctance from some Member States to engage in the process." (Ramboll Management Consulting/Eurasylum 2015: 35)

No statement indicating that it was simply not necessary to conduct the tests (i.e. that there was no functional need for supervision) can be found – instead, the assessments' implementation has been delayed because of a lack of resources and their politically sensitive nature. Since the key stakeholder groups being interviewed for the evaluation of Frontex states (representatives from the EU institutions, the member states, the MB, the research community, international organisations, NGOs and Frontex staff) considered the agency's risk analysis to be helpful for improving EBM (Ramboll Management Consulting/Eurasylum 2015: 141), a lack of trust in the assessments' effectiveness can also be excluded as a reason for the delay. Consequently, the report emphasised that assessments would improve the risk analyses, underlined the benefits they could bring for the agency's, member states' as well as other stakeholders' activities, and recommended that the "Agency should enforce this provision of the Regulation and prioritise the development of its capacities in the area of vulnerability assessment for the purpose of risk analysis." (Ramboll Management Consulting/Eurasylum 2015: 105)

As briefly mentioned in the above-cited quotation, there are other supervisory mechanisms that show certain links to EBM. For instance, Frontex had already been involved in the SEM before its regulation was amended in 2016. The agency submits annual risk analyses to the Commission and the member states, taking into account "illegal immigration and significant changes in the operational environment at the external borders" (Council Regulation (EU) No 1053/2013, art. 7 (1)) and including recommendations referring to specific parts of the external

borders and border crossing-points. Besides, Frontex prepares recommendations on possible priorities for the unannounced on-site visits taking place in the SEM's framework (Council Regulation (EU) No 1053/2013, art. 7 (2)). However, on average, only 5-7 member states are evaluated each year (European Commission 2016a), which does not ensure a continuous monitoring of member states' EBM. Furthermore, the SEM only verifies the application of the Schengen *aquis* and does not assess the material dimension of EBM, i.e. member states' capacities in terms of equipment, staff, etc. That member states did not sufficiently ensure the "availability of relevant technical equipment for joint operations" had already been mentioned in an 2009 evaluation (COWI 2009) and was still considered a problem in 2015 (Ramboll Management Consulting/Eurasylum 2015: 176). The lack of sufficient equipment and staff ensuring the appropriate identification and registration of refugees and migrants was also one of the main problems of Greek EBM during the migration crisis (Council of the European Union 2016a: 4).

The Eurosur[57] Communication Network (ECN; Regulation (EU) No 1052/ 2013, art. 7) is supposed to fulfil the function of collecting data on member states' capacities in separate external border sections (Ramboll Management Consulting/Eurasylum 2015: 35). However, according to Frontex, this function of ECN is not used sufficiently by national authorities – in contrast, Frontex officials and national officials deployed in Frontex-led operations are much more willing to share information such as analytical reports (Frontex 2015: 13). The quality and timeliness of information from member states had already strongly varied in 2009, which affected the quality of Frontex's risk analyses negatively – even though national representatives considered the latter to be very important (COWI 2009: 47).

This reveals that there was indeed a regulatory deficit in the supervision of member states' EBM. Several pieces of evidence confirm that this was also recognised by decision-makers, which finally explains the vulnerability assessments' introduction in the new regulation. For instance, the Presidency of the Council sent a note to the delegation in early October, stating that the above-mentioned external evaluation of Frontex should be taken into account when amending its mandate and asking them how existing evaluation and monitoring mechanisms could be improved and if more frequent visits to ensure the Schengen *aquis's* well-functioning could be helpful (Council of the European Union 2015: 3f.). The EP's rapporteur described the EBCG proposal as "a response to [...] the lack of an effective monitoring and preventive measures" (Committee on Civil Liberties, Justice and Home Affairs 2016: 129). Similarly, the Commission stated that for Frontex to effectively work in all phases of border management, it needed "a system where deficiencies are identified well in advance" in its communication on the new regulation (COM (2015) 673: 3). Moreover, that the existing supervision was not sufficient

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[57] The European Border Surveillance System (Eurosur) is "managed by Frontex and can be described as a map of the situational picture at the border which serves to exchange information." (Committee on Civil Liberties, Justice and Home Affairs 2016: 127)

was emphasised by a Commission official, who stated that compared to Frontex's newly added vulnerability assessments, "Schengen evaluation is different because it is designed to see if member states comply with the zone's border-free rules." (EUobserver 2016)

Whereas the assessments added to the Frontex regulation in 2011 have never become functional, one can already observe progress in regard to the more recently delegated monitoring tasks. At the JHA Council in April 2016 – thus even before Frontex's new regulation was adopted – the member states asked the Commission to start preparations to implement five "priority elements", inter alia the conduction of vulnerability assessments (Council of the European Union 2016: 6). This demonstrates that the importance of this regulatory deficit and the need for action was recognised by the national ministers. As Frontex ED Fabrice Leggeri told Members of the European Parliaments (MEPs) in the civil liberties committee on 12 October 2016, six member states had volunteered to "undergo border checks before similar stress tests are carried out for all EU states" (EUobserver 2016). Three of those – Finland, Germany and Slovenia – were selected by the agency, being "used to set up a baseline in order to create a benchmark for the upcoming controls." (EUobserver 2016) Moreover, a vulnerability assessment network, being composed of experts from member states, the EBCG Agency and the Commission, was established in order to support the implementation of monitoring and has already had its first meeting on 12-13 December 2016 (COM(2017) 42 final: 5f.). At the end of 2016, a common vulnerability assessment methodology (including baseline assessments, simulation exercises and emerging threats mechanism) has already been adopted (COM(2017) 42 final: 5) and Frontex started to collect data on member states' capacities in January 2017, which will "serve as a basis and key reference for performing vulnerability assessments in 2017." (European Commission 2017) This swift action indicates that the 2016 delegation of further monitoring tasks was not symbolic but that there actually was a regulatory deficit that was recognised by decision-makers and should be eliminated as soon as possible by carrying out vulnerability assessments.

Summarising the above, it can be stated that even though a number of monitoring mechanisms have already existed prior to the adoption of the EBCG regulation, they did not assess all components being essential for an effective EBM (SEM), were not connected to any corrective measures (Frontex assessments), suffered from member states' lack of willingness to provide the necessary information (ECN), were not frequent enough (SEM), or were only introduced *de jure*, but not carried out *de facto* (Frontex assessments). As demonstrated, this regulatory deficit in supervision was recognised by decision-makers. In section 6.3.2, I investigate to what degree the design of the newly introduced vulnerability assessments changed during the legislative process.

6.3.2 Political Reasons for the Design of Monitoring: Consensus on Decision-Making Procedures and Partial Success of the Council's Attempts to Indirectly Control Supervision

Like in the case of rule setting, the Commission's proposal on monitoring (i.e. the establishment of vulnerability assessments, the deployment of liaison officers, and the closely linked provisions on information exchange) was still vague in some respects. For instance, it did not specify who would decide on criteria for the vulnerability assessments (COM (2015) 671 final, art. 12). One could assume that this reluctance was due to the fact that the Commission has already gained supervisory power with the SEM's introduction.

Taking various sources provided by Statewatch into account, it has to be considered that the design of monitoring was one of the most debated issues between member states. For instance, the assessments' exact form was discussed during a JHA ministers meeting, where details such as the involvement of member states in the tests and the bindings decisions of the ED were debated (Netherlands Presidency of the Council of the European Union 2016: 2). Member states representatives had already voiced their concerns regarding assessments of their resources in 2014 (Unisys 2014: 18). However, a public debate could not be observed.

As revealed by a Council Presidency document leaked by Statewatch, the design of monitoring was also one of the most contested issues during the Trilogues, even being debated at several meetings (Council of the European Union 2016d). In its amendments, the EP suggested that the ED should present to the MB a proposal laying down objective criteria against which the agency would carry out the vulnerability assessments; the final decision was delegated to the MB (Committee on Civil Liberties, Justice and Home Affairs 2016: 49 ff., amendment 65). This decision-making process was adopted in the final regulation (EU Regulation 2016/1624, art. 13(1)). However, the EP's request for a stronger focus on monitoring states' capacity to handle the arrival of large number of persons *with full respect for fundamental rights* was deleted by the Council.

The final regulation states that the results will be submitted to the member state concerned, who may comment on the assessment, as well as to the EP, the Council, and the Commission at least once a year. In this way, the EP could reach its goal of expanding its oversight powers – before, risk analyses had only been accessible to the Council and the Commission (Regulation (EC) No 2007/2004, art. 4). The importance of such oversight powers was emphasised by the EP's rapporteur: "The rapporteur also considers necessary to increase the accountability of the future Agency by providing for more information to be made available to Parliament and the general public. More transparency is necessary to increase legitimacy and to avoid false impressions as to the role of the Agency." (Committee on Civil Liberties, Justice and Home Affairs 2016: 130) Since it was not established, the EP's and the Commission's proposal of giving the supervisory/advisory board access to the assessments' results became obsolete.

According to the new regulation, the ED will (when necessary and after consulting the member state concerned) recommend measures to be taken within a certain time limit and invite the respective state to implement these. The Commission's proposal that the member state should do so by using resources under the Union financial instruments was obviously deleted by the Council. This confirms that the majority of member states oppose stronger solidarity elements in the Frontex regulation. If a member state does not follow the recommendation within the defined period of time, the MB will adopt a binding decision based on a proposal of the ED. The Council added that the MB should decide on corrective measures *based on a proposal by the ED*. If the respective member state does not follow this decision, further action in accordance with art. 19 (see below) may be taken.

The agencies' liaison officers (EU Regulation 2016/1624, art. 12) are now also deployed in member states, not only in third countries like before (EU Regulation No 1168/2011, art. 14). As suggested in the Commission's proposal, these officers explicitly support the agency in carrying out the vulnerability assessments by collecting information (COM(2015) 671 final, art. 11). While the Commission did not specify in which member states liaison officers should be deployed, the EP suggested to send them to all member states (Committee on Civil Liberties, Justice and Home Affairs 2016: 47, amendment 64). As the final regulation states that Frontex should "ensure regular monitoring of all Member States' management of the *external* borders through liaison officers" (EU Regulation 2016/1624, art. 12, italics added), liaison officers will obviously only be deployed in member states with external borders.

Several of the Council's amendments were included in the final document. The MB (not the ED as suggested by the Commission and the EP) – based on a proposal of the ED and in consultation with the member states concerned – decides on the nature of the liaison officers' deployment, who will not have unlimited access to information from the national coordination centre (but instead receive information selected by national authorities); the liaison officers' reports (being part of the vulnerability assessments) have to be send to the member state concerned. Hence, the Council could further strengthen the MB's role and achieve that Frontex's liaison officers do not have access to potentially sensitive national information. However, some of the Council's amendments were not accepted by the Parliament: the provision that liaison officers should only take instructions from the agency was not deleted and it was not added that monitoring through liaison officers should only be done if necessary. Hence, member states could neither ensure a greater degree of influence over the liaison officers nor limit the scope of their deployment. Last but not least, the EP could successfully achieve that the liaison officers contribute to promoting the application of the *acquis communautaire* relating to EBM, including with regard to respect for fundamental rights (EU Regulation 2016/1624, art. 12 (3e)).

Whereas the Council and the EP agreed on decision-making on the vulnerability assessments' methodology, the former had to insist on granting the MB the right to decide on the nature of liaison officers' deployment. Apart from that, both the EP and the Council could push through some of their preferences: for instance, the Council prevented an introduction of greater financial solidarity among member states and restricted the liaison officers' access to information; the EP could partly prevail with regard to fundamental rights protection and expanded its oversight powers. It is noteworthy that the Commission did not try to gain additional power.

6.4   Enforcement

6.4.1   Functional Reasons for the Creation of the Enforcement Task: Inability to Tackle Greece's Reluctance to Request Assistance from Frontex

That EBM suffered another regulatory deficit became particularly apparent when Greece delayed a request for additional border assistance (according to some observers due to domestic political reasons) and only backed down when the country's suspension from Schengen area became a realistic scenario (Monar 2016: 142). It is to be argued that this particular experience let decision-makers recognise a regulatory deficit in the EU's EBM in terms of enforcement.

The Greek failure to identify and register arriving people as prescribed by EU rules caused serious impatience among other member states (EurAktiv 2015). However, before Frontex's transformation, any EU involvement in border control required an *active* request by the member state concerned (Regulation (EC) No 2007/2004, art. 7, 8(1)). Hence, when Greece "turned down a deployment of up to 400 Frontex staff to immediately reinforce its border with Macedonia, complaining in a letter to the European Commission that their mandate was too broad and went beyond registration" (Financial Times 2015), it was not possible to force the government to cooperate. Moreover, Greece declined to request a Rapid Border Intervention Team (RaBIT) and "resisted taking many of the 300 eurodac machines available to help them fingerprint and register migrants in the EU's common database, citing problems with internet connections and staff training." (Financial Times 2015)

Therefore, other governments – especially of those member states being most affected by Greece's "wave-through" approach and those strongly opposed to migration – exerted public pressure in order to force the country to make a request and publicly accused Prime Minister Alexis Tsipras's coalition of refusing EU help, in particular foreign border guards. The Commission increased pressure on Greece to accept additional support as well (EurAktiv 2015) and backed Macedonia's plan to erect a fence with Greece (Financial Times 2015). Some Eastern European politicians (e.g. Slovak Prime Minister Robert Fico) even used the threat of a temporal exclusion of Greece from the Schengen area, while other governments raised this possibility at

least informally as pointed out by Greek Immigration Minister Ioannis Mouzalas: "It is not said officially, but there is pressure" (EurAktiv 2015a). Even though the German government did not publicly call for a suspension of Greece from the Schengen area, frustrations were growing behind the scenes: "'The red line for the Germans was not allowing Frontex to come in and help them', said one EU ambassador in Brussels. 'The Germans are furious and that's why people are talking about pushing Greece out.'" (Financial Times 2015) Since Greece does not have any land borders with other member states, this measure would have rather been symbolic, most probably without any effect on migratory flows. Nevertheless, it would have had negative economic effects, in particular on Greek tourism. Thus, a senior diplomat described the threat of a suspension from the Schengen area with the following words: "It's a tool for pushing Greece to accept EU help" (EurAktiv 2015a).

At the same time, the accusations were rejected by the Greek government (EurAktiv 2015). For instance, Mouzalas said these were "lies" and denied that Greece "refused an EU offer of devices to share the identity of data of incoming refugees around the bloc." (EurAktiv 2015a) Besides, Greece rejected the criticism that its authorities were incapable of protecting the EU's external borders. Mouzalas described the situation as an "unfair" blame game towards the country (EurAktiv 2015a): "Schengen is part of the blame game: 'If you don't do this or that, we do this to you.' It is a punishment" (EUobserver 2016). Acknowledging that there was a problem, Mouzalas pleaded for a common solution and emphasised that a proposal on how to enter the EU legally and seek asylum was still missing (EUobserver 2016).[58] Moreover, the Greek government accused other member states of not offering the right help (Huffington Post 2016).

In early December 2015, EU interior ministers wanted to meet in order to discuss possible reactions to Greece's inability to cope with the flow of refugees and migrants entering the EU (EurAktiv 2015). According to diplomats, a discussion of a temporary suspension of Greece from the Schengen area was possible (EurAktiv 2015a). One day before this meeting took place, Greece finally accepted EU help to secure its borders, i.e. European aid and foreign border guards. More precisely, three offers had been accepted: "EU staff to help on its northern frontier, foreign border guards on its Aegean islands and tents and supplies to house stranded migrants[59]" (EurAktiv 2015). On the Greek islands, Frontex organised a RaBIT, a mechanism that forces other EU member states to reinforce Greek border guards, which has only been the second time the system has been activated (EurAktiv 2015).

Even though Greece could finally be convinced to accept support from Frontex, the whole debate "poisoned relations among European governments" (EurAktiv 2015), which led the Commission to conclude that another mechanism was needed, in other words: that a regula-

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[58] It has to be noted that some observers suspected Greece of using the refugee crisis as bargaining chip in order to win concessions on the implementation of its third bailout (Financial Times 2015).
[59] In accordance with the EU Civil Protection Mechanism (Reuters 2015a).

tory deficit in enforcement was present. This is evidenced by the Commission's statement that an effective EBM needed "a strong and responsive system to ensure crises are adequately addressed whenever needed" (COM (2015) 673: 4). Moreover, the Commission explained that enforcement would be applied in "urgent situations […] where that Member State considers that there is no need for additional intervention." (COM(2015) 673 final: 6) This quite obvious reference to Greek authorities' reluctance to request support reveals that this experience was crucial for the Commission to recognise the regulatory deficit in enforcement. Likewise, the EP's rapporteur presented the EBCG proposal as

> "a response to the weaknesses identified be they the unwillingness or inability of Member States to make border guards and equipment available for the deployment by the Agency when so requested, […] or the fact that mechanisms created were not activated by Member States (there were only two rapid border interventions since the mechanism was established)." (Committee on Civil Liberties, Justice and Home Affairs 2016: 129)

In summary, it was the particular experience of the Greek non-use of operational support on a voluntary basis that let decision-makers realise that a regulatory deficit in enforcement was present. That this issue was not completely new is underlined by the fact that the RaBIT intervention that took finally place was only the second of its kind (EurAktiv 2015). Compared to rule setting and monitoring, the discrepancy between the Commission's initial proposal and the final design of Frontex's new enforcement task was most significant. In the next subsection, I analyse how these changes came about.

6.4.2 Political Reasons for the Design of Enforcement: Inter-State Bargaining and Abolishment of the "Right to Intervene" through a Strategic Use of Norms

Whereas the governance structure's as well as rule setting and monitoring tasks' institutional design only caused inter-institutional disagreement (at least as far as we know), the agency's new enforcement powers were also contested between member states and fiercely discussed. Compared to rule setting and monitoring, enforcement can be considered to be most "visible" and far-reaching in terms of possible sovereignty losses, as it not only implies national authorities' subordination to a common strategy or their supervision by the agency, but may ultimately result in an intervention of foreign border guards. An analysis of the debate on enforcement is not only helpful for assessing European institutions', but also member states' diverging preferences and check whether or not they are determined by sovereignty concerns as assumed by the observable implications.

Already before the Commission presented its proposal on a new Frontex regulation, the Presidency of the Council had invited the latter to discuss how to ensure "a better and at times compulsory allocation of border guards and equipment from low risk areas to those most affected by illegal migration" (Council of the European Union 2015: 3). Initially "boldly" (Rosenfeldt

2016) labelled as "right to intervene" (COM(2015) 673 final: 6), the Commission's proposal would have empowered Frontex – based on a decision of the Commission itself – to intervene against the will of the member state concerned if corrective measures had not been taken or "in the event of disproportionate migratory pressure at the external border, rendering the control of external borders ineffective to such an extent that it risks putting in jeopardy the functioning of the Schengen area." (COM(2015) 671 final, art. 18(1)). It is noteworthy that in contrast to the rather vague or even lacking statements on decision-making on rule setting and monitoring, the Commission clearly aimed at expanding its competences in regard to enforcement, which confirms the political approach's assumption that the Commission has an "institutional self-interest in increasing its own powers." (Kelemen/Tarrant 2011: 927)

Several statements by Commission representatives can be seen as attempts to make the proposal more likely to be accepted. Commission First Vice-President Frans Timmermans described the mechanism as "a safety net which, like all safety nets, we hope will never need to be used." (EurActiv 2015b) Similarly, Justice and Home Affairs Commissioner Dimitris Avramopoulos appeasingly stated: "We don't replace member states' responsibilities and definitely not their sovereignty" (quoted from EurActiv 2015b). Migration and Home Affairs Director General Matthias Ruete emphasised that member states had to agree to the operational plan and that there was no possibility to force them to cooperate: "We can take the member state to court, that's all" (quoted from EUobserver 2016a). That the functional argument of credible commitment might also play a role regarding the design of a regulatory task (even though the policy area concerned was not of economic nature), can be discerned from a statement by Timmermans, who argued that even if the agency's "right to intervene" might never be used, it was "essential to restore the *credibility* of our border management system" (EurActiv 2015b, italics added).[60]

Nevertheless, a number of member states perceived the mechanism as "an encroachment on their sovereign powers" (Politico 2015) and strongly opposed it. Besides representatives from Spain, Romania, and Greece who raised concerns, the Polish and Hungarian foreign ministers described the proposal as undemocratic and said it violated national sovereignty (euobserver 2015; EurActiv 2015; Reuters 2015; Tagesschau 2016).[61] Having external borders, all of these member states could potentially be affected by the "right to intervene". At the same time, potential sovereignty losses were not equally likely in all of these cases.

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[60] Furthermore, it is remarkable as well that the EP's rapporteur referred to functional necessities in his explanatory memorandum by stating that "[t]he amendments proposed by the rapporteur aim to further strengthen the proposal by increasing the Agency's effectiveness, as well as its efficiency" (Committee on Civil Liberties, Justice and Home Affairs 2016: 129). Hence, actors might also draw on functional arguments in order to justify amendments which in fact primarily expand their own powers.

[61] At first, Sweden opposed the "right to intervene": by arguing that "[b]order control is the competence for the member states, and it's hard to say that there is a *need* to impose that on member states forcefully" (Politico 2015, italics added), Swedish Interior Minister Ygeman also used a rather functional line of reasoning. However, he changed his opinion and was finally also supportive (Dagens Industri 2016).

In regard to Greece, the above-mentioned debate on its reluctance to request support from Frontex (see 6.4.1) made such a scenario quite likely. Several statements made by Greek officials during these discussions underlined the government's sensitivity in regard to EBM. Inter alia, Mouzalas said he welcomed assistance from Frontex to register refugees, but at the same time emphasised that under Greek law, only Greek forces could patrol the country's border (EurAktiv 2015a). Another concern was "sensitivity over the long-running dispute over Macedonia's name and suspicions about Turkish designs on certain Greek islands, including Lesbos, point of entry for many migrants." (Financial Times 2015) Greek Foreign Minister Nikos Kotzias also emphasised the need for a regulation that is in line with the treaties:

> "The problems have to be resolved in a democratic manner, within the framework of the treaties […] We have said that the process and regulation for Frontex can certainly change, but any change must be in line with articles 72 and 79 of the Treaty on the European Union, which prioritizes each member state's sovereign interests with regard to defending its security and the immigration issue." (quoted from Politico 2015)[62]

To which degree Greece saw its sovereignty under threat was reflected in the quite narrow terms stipulated by the Greek government according to which it would accept a cooperation with Frontex. For instance, it only considered the deployment of foreign border guards acceptable in the north of the country, where migrants were trapped because Macedonia tightened border checks. This was also recognised by the Commission: "Sensitive to suggestions Greece was losing sovereignty on its territory, a government spokeswomen stressed Frontex would only work on registration of people not documented further south and not take park in 'joint border controls'." (Reuters 2015a) Hence, regarding the new Frontex regulation, Tsipras stated that while his government was in favour of European border guards, it was also determined to keep ultimate responsibility for its borders (Tagesspiegel 2015).

Since they did not face an immediate *de facto* threat of sovereignty losses at their external borders, some other countries' (like Poland's) opposition rather was an expression of their general reluctance to further communitarise asylum and border issues. Therefore, they framed the issue as a general critique of the lacking democratic accountability of supranational structures. For example, Polish Foreign Minister Waszczykowski stated that replacing Frontex "by a structure that is independent of member states is shocking" (EurActiv 2015b) and "[t]here would be an undemocratic structure reporting to nobody knows who." (Politico 2015) Such statements can be seen as an attempt to appeal to the right-wing electorate of Waszczykowski's PiS (Prawo i Sprawiedliwość) party.

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[62] These doubts about the right to intervene's constitutionality are shared by several authors, who raise concerns as regards art. 4(2) TEU (respect for essential state functions, including ensuring territorial integrity, maintaining law and order and safeguarding national security) and art. 72 TFEU (no affection of the exercise of responsibilities incumbent upon member states with regard to the maintenance of law and order and the safeguarding of internal security) (see for instance De Bruycker 2016: 562; Rijpma 2016: 18).

In contrast, France and Germany were not only supportive of the Commission's suggestions, but most probably even gave the impetus for the "right to intervene". Only nine days before the Commission presented its ECBG proposal, Interior Ministers Cazeneuve and de Maizière sent a letter to Avramopoulos, claiming that "in exceptional circumstances, Frontex should also take initiative to deploy under its own responsibility rapid intervention teams at its external borders" (Politico 2015). In other words: both ministers favoured a proposal "which has the goal of when a national state is not effectively fulfilling its duty on defending the external border, then that can be taken over by Frontex" (Reuters 2015) – without a prior request of the member state concerned (see also Frankfurter Allgemeine Zeitung 2015). Therefore, it is likely the article was included due to this Franco-German initiative. At least, this was the interpretation of some Greek observers: for instance, a Greek blog (publishing in English) labelled the draft as "an all German plan" (Keep Talking Greece 2015). Even though a rather obvious attempt to demonstrate his ability to act, a statement by Cazeneuve indicates that there has been at least some kind of influence: "We would have not proceeded in the case of Frontex without the almost fusing relationship between me and de Maizière" (Le Monde 2017, own translation). Both member states were supported by Luxembourg (holding the Presidency of the Council at that time), whose Foreign Minister stated that "every country, which is on the external border and does not want to build a fence, needs to accept a European mechanism" (euobserver 2015). All of these three governments did not have to fear possible Frontex interventions at their part of the external border. In contrast, both France and Germany had a vital interest (in the case of France rather security-related, in the case of Germany because of migration) in preventing a repetition of the situation at the Greek external borders.

It has to be noted that these member states' preferences obviously experienced a certain change over time. In October 2015, they had still agreed on Council Conclusions requesting an enhancement of Frontex's mandate being "in full respect of the national competence of the Member States" (European Council 2015a: 3). It can be argued that some governments changed their minds because of Greece's lack of action, pointing to the fact that de Maizière and Cazeneuve explicitly criticised the delay in the establishment of Greek hotspots in the above-mentioned letter (Tagesspiegel 2015).

The fact that Italy was also supportive of the issue is striking. As described by Politico (2015), Italy was "also backing the measure. Sandro Gozi, the country's under-secretary for European Affairs, told reporters Tuesday that his country was in favour of the creation of an EU border force but wouldn't comment further." Indeed, Italian officials did not further comment on the issue. Whereas this indifference seems puzzling at first sight, it can be explained by having a look at Italian preferences in regard to Frontex: since Italy is one the countries suffering most

from the lack of burden-sharing in EBM,[63] it has been focusing on calling for a strengthened Frontex for years (see for instance Ministero dell'Interno 2014). Domestic pressure on the government pointing to the high costs Italy spends for its border guards is in particular exerted by right-wing Lega Nord. Hence, empowering Frontex in terms of human and financial resources can be considered the Italian government's top priority, obviously even accepting a loss of sovereignty in return.

Similarly, the Belgian reluctance to agree on the introduction is not self-explanatory. Having a closer look at diplomats' statements is, however, insightful. As elaborated on by a representative of the Belgian government, even Belgium would have difficulties to agree on this proposal – despite its support for European integration: the government was concerned that – like in the case of EU deficit procedures – the new provision would primarily affect smaller member states, while the bigger ones would be able to prevent being affected by using their greater power. He concluded: "In the EU, some states are unfortunately more equal than others." (Tagesspiegel 2015, own translation) Hence, also member states in fact not having to fear any restrictions of their sovereignty opposed the right to intervene, simply because they considered themselves being rather small and powerless as well.

Recognising that the situations at the external borders requiring urgent action were one "of the most politically sensitive issues" (Council of the European Union 2016f: 3), the Netherlands Council Presidency suggested the reintroduction of internal border controls as "balanced wording aiming to avert, or mitigate risks for the Schengen Area" (Council of the European Union 2016f: 3; also see below).

Last but not least, the EP's position is to be analysed. Whereas Green and Leftist members of Parliament criticised the planned enforcement task due to accountability and responsibility concerns in regard to fundamental rights violations (EUobserver 2016a), the EP's President Schulz was rather supportive: "That the EU creates common instruments to help and intervene, that is completely normal. The European Commission's proposals … are a step in the right direction" (EurActiv 2015b). However, Pabriks stated in the Committee's on Civil Liberties, Justice and Home Affairs report on the proposal:

> "As regards the proposed procedure for situations at the border requiring urgent action (Article 18) the rapporteur considers that the proposal respects Member States' sovereignty as it also foresees that the Member State concerned has to agree with the Agency on the operational plan and is also the one who has to issue instructions to the teams. The rapporteur, however, believes that decisions to act should be taken by the Council to strengthen the decision making process and further emphasise the sovereignty of the Member States." (Committee on Civil Liberties, Justice and Home Affairs 2016: 129)

Since the political approach assumes that "[d]elegation to the Commission remains the first preference for the European Parliament and for the Commission itself" (Kelemen/Tarrant 2011:

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[63] For instance, the costs for operation Mare Nostrum were estimated at €9m a month (The Guardian 2014).

928f.), it is quite remarkable that the EP's proposal preferred delegation to the Council. However, the EP also aims at appealing to the electorate "by favouring regulatory institutions that promise to yield outcomes favourable for diffuse public interests." (Kelemen/Tarrant 2011: 928) Statements by Paprisk like "If we succeed with this file, we can show our electorate that the EU is serious, and efficient" (EUobserver 2016a) suggest the assumption that appealing to the electorate was a main concern for parts of the EP that obviously expected the public opinion to prefer delegation to the Council. Similar statements can be found when analysing the other institutions' discourses. For instance, head of Migration and Home Affairs directorate Matthias Ruete stated that the EU was exposed to "enormous pressure also from our citizens to see if we can move for a more collective management of external borders" (EUobserver 2016a) and the Netherlands Council presidency emphasised in regard to external border control: "Our citizens expect us to carry out this task, and will lose their confidence in Schengen if we don't." (Netherlands Presidency of the Council of the European Union 2016: 1)

Consequently, the situations requiring urgent action were also debated during the Trilogues (Council of the European Union 2016d: 2). According to the final regulation, the Council – based on a proposal from the Commission – adopts an implementing act in cases of member states' noncompliance with binding measures (art. 13(8)) or exceptional situations. If the state concerned does not comply with the Council's decision within 30 days and decides not to cooperate with the agency, the Commission can trigger article 29 of the SBC, allowing other member states to reintroduce controls at internal borders. Hence, a member state's request can be superseded, but it is not possible to intervene against its will. The Council's negotiation mandate reveals that member states would have preferred to delegate the power to "recommend that one or more Member States decide to reintroduce border control" (Council of the European Union 2016: 55) to the Council. Moreover, the Council's proposal to oblige member states not following the recommendation of reintroducing border controls to justify this decision by informing the Commission in writing of their reasons (Council of the European Union 2016: 55) was not added to the final regulation. The final outcome reveals that not only decision-making on regulatory activities or details on their execution might be amended during legislative process, but that the scope of these tasks can be significantly watered down as well.

To conclude, it has to be noted that sovereignty concerns were not the only factor determining member states' preferences. Some member states also opposed the right to intervene because of their general reluctance towards further European integration or because they feared disadvantages for less powerful countries. The significant variation one can observe between the Commission's initial proposal and the final solution agreed on by the Council and the EP cannot only be explained by the fact that the Commission envisaged a more far-reaching mechanism

than in regard to rule setting and monitoring, empowering itself to a considerable degree. By strategically drawing on common norms such as democracy, the intervention right's opponents could eventually achieve a considerable dilution of enforcement and thus prevailed over a group led by Germany and France, even though one would expect the latters – being the "engines of European integration" – to have more bargaining power. In addition, it has to be underlined that the empowerment of the Council in regard to enforcement was supported by the EP.

6.5 Governance Structure: Political Reasons for the Failure of the Struggle for Supranationalisation

As already mentioned (see 3.1), Frontex's overall governance structure remained largely stable. The Commission and the EP, however, tried to "supranationalise" the way in which the agency is governed, but faced too resolute opposition from the Council. In contrast, the latter even tried to further enhance the role of the MB by establishing an executive board.

One of the proposals of the Commission and the EP being rejected by the Council was the establishment of a "supervisory" (Commission) respectively an "advisory" (EP)[64] board. This additional body within Frontex's governance structure would have been composed of the deputy ED, four (Commission) respectively three (EP) senior officials of the agency to be chosen by the MB, one representative of the Commission, and, according to the EP's proposal, the fundamental rights officer. These officials would have advised the ED and reported to the MB. Inter alia, the board was intended to advise the ED on the measures needed to be taken for the practical execution of the Commission's respectively the Council's decision on situations requiring urgent action (COM(2015) 671 final, art. 69; Committee on Civil Liberties, Justice and Home Affairs 2016: 114f., amendment 161).

The supranational institutions' attempt to establish an additional advisory or supervisory body confirm some of the political approach's assumptions. For instance, one can argue that the EP tried to enhance the transparency and accountability of Frontex in this way. However, it did not suggest that the new board should report to the Parliament, which contradicts the assumption that the EP usually tries to strengthen its oversight powers. This is puzzling, since interviewees from all political parties represented in the EP had expressed their wish for an expansion of parliamentary control powers over Frontex in 2014 (Unisys 2014: 20). By aiming at the establishment of a further body with a Commission representative, the Commission clearly tried to expand its own powers as predicted by the political approach.

While rejecting the creation of such an advisory/supervisory board because of "a consistent request by many delegations" (Council of the European Union 2016c: 2), the Council

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[64] It has to be noted that unlike the EP's negotiating mandate, the rapporteur opposed the establishment of such a board for reasons of efficiency (Committee on Civil Liberties, Justice and Home Affairs 2016: 130).

wanted to enable the MB to "establish a small-sized Executive Board" (Council of the European Union 2016: 113, art. 61(6)). This board should assist the MB and the ED "with regard to the preparation of the decisions, programmes and activities to be adopted by the Management Board and when necessary, because of urgency, to take certain provisional decisions on behalf of the MB, excluding decisions on which a reinforced majority is needed in the Management Board." (Council of the European Union 2016: 113, art. 61(6)) Since no other elaborations on the composition of such a board can be found in the Council's mandate, this innovation would have further empowered the MB – being the responsible body for the new board's establishment. Instead of a stronger role for the EU's supranational institutions, this would have implied an even more intergovernmental governance structure, in other words: an even more dependent agency.

This try to render Frontex's governance structure more intergovernmental also confirms the political approach: since further regulatory tasks were delegated to the agency, member states attempted to tighten control by the MB, which they had set up strategically in order to protect their national interests and to keep sovereignty over policy-outcomes (Kelemen 2002: 110). However, the result of these diverging preferences obviously was the lowest common denominator of neither establishing a supervisory/advisory nor an executive board.

The EP also tried to gain a seat in the MB (Committee on Civil Liberties, Justice and Home Affairs 2016: 107, amendment 147). This attempt to gain more influence was blocked by the Council as well, even though the MB would have still been dominated by member states' representatives. This shows that the Council was not willing to make any concessions in regard to this instrument through which member states protect national interests and keep sovereignty over policy-outcomes.

The appointment of the ED was one of the key issues discussed during the first Trilogue (Council of the European Union 2016d: 2). In this respect, the EP could slightly improve its position: the candidates proposed by the Commission now have to make a statement before the competent committee(s) and answer questions. Afterwards, the EP adopts an opinion setting out its views and may also indicate a preferred candidate (EU Regulation 2016/1624, art. 69(2)). However, the Parliament initially wanted to appoint the ED together with the Council by common accord based on a list proposed by the Commission. Furthermore, it suggested that the ED and his/her deputy could be dismissed by the Court of Justice at the request of the EP, the Council or the Commission (Committee on Civil Liberties, Justice and Home Affairs 2016: 113f., amendment 160).

In summary, except for the comparably small concession in regard to the ED's appointment, the Council rejected all proposals of the EP and the Commission. In contrast, it even attempted to further strengthen the MB's position by allowing it to establish an additional executive board.

The fact that Frontex's governance structure persisted despite of the EP's and the Commission's efforts of supranationalisation reveals the remarkable extent of member states' reluctance to grant more independence to a JHA agency that touches upon one of their core state powers.

In the previous five subsections, I demonstrated that the combined functional-political approach is an adequate theoretical framework to investigate the change of Frontex's institutional design. However, one has to consider the possibility that other theoretical accounts might provide alternative explanations, which could even capture components of the studied phenomenon that are neglected by the functional-political approach.

6.6   Alternative Explanations: Historical and Sociological Institutionalism

Since this thesis investigates the institutional *change* of an already existing agency, and not an agency's initial creation, it seems all the more important to also elaborate on approaches that theorise the ways in which existing institutions shape new institutional outcomes. Therefore, I discuss whether or not Historical and Sociological Institutionalism provide alternative explanations to the functional-political approach regarding the change of Frontex's institutional design.

Historical Institutionalism (HI) is characterised by "the primacy it accords temporality – the notion that the timing and sequence of events shape political processes." (Fioretos 2011: 371) Put simply, HI theorises two basic modes of institutional change. First, its advocates argue that past institutional developments strongly condition present decisions through path dependency (Thatcher 2011: 793). Institutional changes that are driven by path dependency are assumed to be rather incremental, resulting in periods of relative stability. This idea implies the assumption that institutions are "sticky", i.e. that they are rather redesigned than abolished (Pierson 1996: 142ff.). Secondly, HI emphasises the importance of so-called critical junctures. These can be described as moments of fluidity, turning points, crises, or unsettled times, and are expected to trigger new outcomes, which would not have occurred without these particular events (Capoccia/Kelemen 2007: 341f.). Thus, historical institutionalist hypotheses may be weakened by conducting counterfactual analyses (Ekelund 2013: 104). The occurrence of such critical junctures makes far-reaching, punctuated changes possible (Capoccia/Kelemen 2007: 341f.).

Since it was characterised by relative stability and incremental changes, the period in time *before* the adoption of the EBCG regulation can be well explained by drawing on the notion of path dependency. For instance, the 2007 and 2011 amendments to the Frontex regulation strengthened the agency's operational role, but did not fundamentally change its overall institutional design.

In contrast, the most recent reform repealed Frontex's founding Regulation (EC) No 2007/2004. Considering the events that took place in the context of the migration crisis, and in

particular the situation at the Greek external borders, one could assume that the occurrence of a critical juncture can account for this major transformation and for the point in time at which it occurred. Indeed, decision-makers referred to the migration crisis on numerous occasions when justifying the new regulation, which supports the hypothesis that this particular event caused the observed institutional change (Ekelund 2013: 104). Since the Commission only decided to propose a new Frontex regulation when it became obvious that operational means could not tackle the crisis situation at the EU's external borders adequately, one can assume that without the migration crisis, the observed institutional change would have not occurred. Member states decision to delegate several far-reaching regulatory tasks to Frontex – despite of their previous reluctance to do so – can be seen as one of the major changes that HI expects to occur due to a critical juncture. The fact that Frontex is the first JHA agency to be granted with such tasks supports this line of reasoning.

At the same time, some of the changes indicate that path dependency also played a role. For instance, Frontex's – respectively member states' – inability to deal with the challenges at the EU's external borders led *de facto* to a redesign of the agency, not to its replacement. More-over, in contrast to its regulatory role, Frontex's governance structure was "sticky" and remained dominated by member states – neither the EP nor the Commission could force the Council to accept further changes.[65] This continuity contradicts the historical institutionalist expectation that critical junctures lead to the occurrence of major changes.

A case that helps illustrating this issue is the euro area crisis and the creation of the SSM (see 2.1). Since the migration and the euro area crises are often compared (see for instance Börzel/Risse 2017) and the latter can also be described as a critical juncture, this seems appro-priate. In contrast to the establishment of the EBCG Agency, decision-makers decided to both delegate regulation and to render it more independent by enhancing the ECB's role when they created the SSM. Hence, both regulatory tasks and governance structure experienced a punctu-ated, major change and thereby followed the logic of a critical juncture. Consequently, a number of studies draw on historical institutionalist arguments when explaining the case of the SSM or the creation of the Banking Union in general (see for instance Jones et al. 2016; Glöckler et al. 2016).

To conclude, HI is indeed well-suited to analyse how one could first observe a period of stability with incremental changes in the form of several amendments, followed by more far-reaching changes in the course of the migration crisis. However, it can barely account for the variation on the dependent variable that is being analysed in this thesis: Historical Institutiona-lists cannot explain why one could observe path dependent stability regarding Frontex's

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[65] This is also in line with observations that have been made in regard to JHA agencies in general: Trauner argues that these agencies' governance structure is not likely to be changed quickly "due to the path dependency of the institutional design of these agencies" (Trauner 2012: 785).

governance structure, but punctuated, major changes concerning its regulatory tasks. In other words: they would expect either path-dependent, incremental change of both the governance structure and the regulatory tasks, or far-reaching, punctuated change triggered by a critical juncture on both variables. Since a possible combination of both modes of change has not yet been theorised by advocates of HI, the specific variation of the present case cannot be fully captured by this theoretical account.[66]

Another possibility is to consider Sociological Institutionalism (SI), which has already been mentioned briefly as a possible explanation for the proliferation of EU agencies across sectors and states (see 4.1). SI focuses on the social and cultural context in which change takes place and analyses its influence on individuals' identities, behaviour, and preferences. Hence, advocates of this theoretical account perceive institutional change "as a response to choices made on the basis of *socially constructed preferences* and not necessarily to fulfil particular functional needs" (Ekelund 2013: 103, italics added). In particular, SI expects transformations to take place because of processes of isomorphism and mimicry (DiMaggio/Powell 1983), meaning that "institutional change takes place through mimetism, the development of cultural norms about 'appropriate institutional forms' across organisational fields and by coercion" (Thatcher 2011: 792). Thus, isomorphic processes that cause diffusions of particular institutional designs cannot only be observed between the national and the EU level, but also across policy areas at the EU level. The timing of change "is expected to coincide with, or closely follow," the change of similar institutional structures (Ekelund 2013: 104).

The expansion of Frontex's regulatory role can be seen as an attempt of decision-makers to align its institutional design with that of decision-making and quasi-regulatory agencies operating in other policy areas. This delegation of regulation to an EU agency – even in the politically highly sensitive AFSJ – confirms SI's assumption that affording non-majoritarian bodies such tasks is perceived as an especially legitimate, if not even a "fashionable" idea (Egeberg et al. 2017: 4). Even though observable implications such as direct references to other institutions and their institutional design or statements "about the desirability of the agency form" (Ekelund 2013: 104) could be barely observed, it has to be noted that Frontex's continuing existence as EU *agency* was not questioned at all. While the Commission did not explicitly justify its choice of the agency form, it stated in its explanatory memorandum that "having regard to the fact that the Frontex Agency, renamed European Border and Coast Guard Agency, was

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[66] From a more general point of view, HI suffers from a "lack of theoretical positions, relying instead on empirically grounded generalisations." (Thatcher 2011: 793) Since JHA agencies in general and Frontex in particular can be described as under-researched (see 2.2), this weakness of HI might be another problem when applying the theory to the present case. Furthermore, the account's focus on certain events at the expense of a thorough analysis of actor preferences (Ekelund 2013: 104) does not seem appropriate to fully grasp how the particular institutional change came about in the case at hand.

established by means of a Regulation, the same legal instrument is also *appropriate* for this proposal." (COM(2015) 671 final: 6, italics added)

Whereas the isomorphism argument can account for the expansion of the Frontex's regulatory role, it has difficulties in explaining the continuity of the agency's governance structure: Sociological Institutionalists would expect an alignment of Frontex's overall institutional design with that of other agencies, and cannot explain why only some components have been adjusted, while others remained stable. Indeed, it would be possible that the diverging development of regulatory tasks and governance structure was an attempt to imitate the reactions to similar crisis situations in other policy areas. Again, the accessible evidence does not support such a claim: even though decision-makers referred to the case of the Banking Union on many occasions (see for instance Netherlands Presidency of the Council of the European Union 2016: 1; Euraktiv 2016a), they obviously did not attempt to mimic it when they changed Frontex's institutional design. As already mentioned above, this would have implied to not only expand the agency's regulatory role, but also to render regulation more independent. Thus, SI is not suitable to analyse the diverging development of Frontex regulatory tasks and governance structure.

On the contrary, Frontex shows a very particular institutional design after the adoption of the EBCG regulation, which can be located somewhere in between typical JHA agencies and their more powerful decision-making and quasi-regulatory counterparts in other policy areas. This unique design contradicts the hypothesis that decision-makers tried to imitate another regulatory body when designing the "new" agency. Since Frontex's institutional change was not part of a larger wave of reforms of EU agencies, SI also has difficulties in explaining the timing of change. In addition, sociological approaches rather study the formation of preferences (Thatcher 2011: 792) and not how diverging preferences are finally aggregated to produce an institutional outcome. Thus, drawing on Sociological Institutionalist assumptions would have also meant to focus on another phase of Frontex's transformation and to investigate how the Commission's, the EP's, and the Council's initial positions came about.

To conclude this discussion of alternative explanations, it has to be noted that they both provide further insights concerning Frontex's most recent institutional change. In particular, HI's notion of path dependency can account for the relative stability one could observe before the establishment of the EBCG, as well as for the continuity of the governance structure. Moreover, HI is especially useful to capture the role of the migration crisis as a critical juncture, which can explain why Frontex was reformed at this particular point in time and how the remarkable expansion of its regulatory role came about. The latter would be seen as an attempt to imitate other EU agencies by SI: since Frontex was granted a regulatory role, its institutional design experienced a decisive shift towards the decision-making and quasi-regulatory agencies operat-

ing in other policy areas. Furthermore, Frontex's form as an EU agency was not questioned at all, which confirms that these regulatory bodies are still perceived as legitimate, adequate, or even "fashionable ideas" by decision-makers (Egeberg et al. 2017: 4).

However, neither HI nor SI can account for the discrepancy between the expansion of Frontex's regulatory tasks and the continuity of its governance structure: both institutionalist approaches would either expect variation on both or none of the dependent variables. Although, from a theoretical perspective, institutionalist approaches seem to offer adequate explanations for Frontex's institutional change, the accessible empirical evidence disconfirms their applicability to the case at hand. Therefore, the functional-political approach seems to be most suitable to explain the particular institutional change that Frontex experienced.

Revealing these limitations of possible alternative explanations further updates the degree of confidence I have in the combined functional-political approach. Therefore, it is now possible to summarise my empirical findings and to elaborate on their contribution to existing research.

7 Concluding Remarks

In the following, I first summarise my main empirical findings (7.1). Subsequently, I elaborate on their contribution to existing research, also mentioning some possibilities for future studies (7.2). In the last subsection, I raise the question of whether or not the newly introduced regulatory tasks actually reduce the previous deficits in EBM. Moreover, I analyse if one can expect Frontex to *effectively* carry out its new activities and flesh out some features of the EBCG regulation that seem to be in particular functionally problematic (7.3).

7.1 Empirical Findings

In this thesis, I demonstrated that the combined functional-political approach, which theorises the creation, design, and transformation of EU regulatory institutions, is well-suited to explain the changes that the institutional design of Frontex has experienced in 2016. Both hypotheses that were deduced from these theoretical accounts could be confirmed to a great extent by using various pieces of empirical evidence. Nevertheless, some limitations regarding the political approach are to be pointed out below.

First, I revealed that the shift from mere coordination to additional regulation indeed occurred due to functional necessities. I described the increasingly complex policy problems in the context of the migration crisis, which further widened the functional gap in the EU's EBM. The close ties between EBM and other policy areas such as asylum and internal security further triggered this functional pressure. I demonstrated that decision-makers eventually recognised that the growing functional gap in EBM did not only emerge due to an operational, but also

because of a regulatory deficit. In regard to rule setting, this deficit was characterised by the lack of a sound legislative framework: whereas various non-binding documents elaborated on IBM and the latter was finally set as an objective in primary law, there was no secondary legislation clarifying IBM's actual implementation. Concerning monitoring, a number of mechanisms existed prior to the EBCG regulation's adoption. However, they did not assess all components being essential for an effective EBM, were not frequent enough, did not imply any corrective measures, suffered from member states' reluctance to provide information, or were only introduced *de jure*, but not carried out *de facto*. That both deficits were recognised by decision-makers was evidenced by a number of sources. The regulatory deficit in enforcement was characterised by the fact that the decision to make use of Frontex's operational means was completely left to the member state concerned. Regarding the recognition of this issue, the particular experience of Greece's non-use of operational support on a voluntary basis was crucial.

Thus, functional arguments explain why member states agreed on the introduction of regulatory tasks, even though they had shown different preferences beforehand: as revealed by a 2014 survey, member state representatives had endorsed an enhancement of Frontex's operational and supporting tasks such as the facilitation of return operations, support in negotiating readmission agreements/procurement activities, or the conducting of risk analyses, but had shown clear reluctance towards an assessment of their resources (Unisys 2014: 18).[67]

However, assuming that "institutional choices are explained in terms of the functions that a given institution is expected to perform" (Pollack 2006: 167), functionalism would have failed to explain the regulatory tasks' diverging design and the agency's unmodified governance structure. Therefore, I secondly used the political approach to investigate the considerable inter-institutional and inter-state disagreement, which could be observed although the new Frontex regulation was adopted by a fast track legislative procedure of less than a year. While the political account's assumptions are accurate in many regards, some peculiarities are to be pointed out.

Actors' preferences regarding the design of rule-setting largely confirm the political approaches' assumptions. Whereas the EP wanted to set down the new IBM strategy through co-decision, the Council favoured a decision by the MB. Eventually, the Council could prevail and only accepted those EP amendments that strengthened member states' prerogatives. Except for decision-making procedures, the actual content of the relevant article was barely changed during the legislative process, its wording only being slightly diluted. It is, however, remarkable that the Council ignored possible problems arising from a violation of the Meroni doctrine.

Even though the Council and EP agreed on delegating decision-making on the vulnerability assessments' methodology to the MB and the ED, monitoring was a contested issue as

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[67] Other Council documents confirm member states' initial focus on enhancing Frontex's role in fields such as return/readmission/reintegration, relocation/resettlement, and cooperation with transit countries/countries of origin (European Council 2015: 1-4).

well. Eventually, both the EP and the Council could push through some of their preferences. Inter alia, the Council prevented an introduction of greater financial solidarity among member states, insisted on granting the MB the right to decide on the nature of liaison officers' deployment, and was able to restrict the latters' access to information. The EP could partly prevail with regard to two of its main concerns: fundamental rights protection and expansion of its own oversight powers, which had only been weakly developed before.

It is noteworthy that both in regard to rule setting and monitoring, the Commission's proposal left considerable room for manoeuvre concerning the design of decision-making. This is particularly remarkable in regard to rule setting: the Commission, often acting as the EP's "ally" in regard to bargaining on JHA agencies' institutional design, did not support the Parliament's attempt to establish a decision-making on the IBM strategy through co-decision – even though this would have expanded the Commission's own powers as well.

The delegation of enforcement capacities – in the form of a so-called right to intervene, to be implemented by the Commission – was the only issue being publicly debated between member states. Concerning the latters' preferences, it has to be noted that sovereignty concerns immediately linked to the right to intervene were obviously not the only determining factor. Some member states also opposed this mechanism because of their general reluctance towards further European integration, due to domestic electoral considerations, and/or because they feared disadvantages for less powerful countries. At the same time, electoral interests could also cause a supportive stance towards the right to intervene, as evidenced by the case of Italy. By strategically using common norms, the intervention right's opponents could achieve a considerable dilution of enforcement and thus prevailed over a group led by Germany and France. It has to be underlined that the strengthening of the Council in regard to enforcement was supported by the EP, which is usually supports an expansion of the Commission's powers. Several pieces of evidence indicate that this was an attempt of MEPs to appeal to their electorate.

Last but not least, member states showed remarkably great reluctance to supranationalise Frontex's governance structure. Apart from a comparably small concession in regard to the ED's appointment, the Council rejected all proposals of the EP and the Commission – member states even tried to further strengthen the role of the MB by establishing an executive board. Eventually, Frontex's governance structure did not undergo any fundamental change, which can be seen as an agreement on the lowest common denominator.

By collecting various pieces of evidence, I demonstrated that functional necessities led to a further centralisation of regulatory authority in the policy area of EBM, whereas the design of the newly introduced regulatory tasks and the governance structure were shaped by political power struggles. After this summary of my main empirical findings, I now proceed by elaborating on their contribution to existing research.

7.2   Contribution and Further Research

First, by conducting this analysis, I demonstrated that the combined functional-political approach, which had previously only been used to explain the creation and design of ERNs, can also account for the transformation of an already existing EU agency. In addition, I revealed that alternative explanations offered by Historical and Sociological Institutionalism cannot adequately capture the discrepancy between the expansion of Frontex's regulatory tasks and the continuity of its governance structure. Therefore, I significantly updated the degree of confidence one can have in the combined functional-political account's validity. As already mentioned, the Commission's partial reluctance cannot be fully covered by the political approach. Its restraint with regard to decision-making on rule setting and monitoring could be explained by having a look at enforcement. In this respect, the Commission tried to increase its own powers remarkably by suggesting a so-called "right to intervene". It seems as if this innovation was the Commission's priority, which probably caused a certain willingness to compromise regarding the other regulatory tasks. Such possible issue linkages are not captured by the political approach. Additional research investigating this aspect would make it necessary to conduct interviews, which could lead to a much deeper understanding of the negotiation process.

Secondly, the peculiarities I revealed with regard to inter-state bargaining on enforcement might be linked to the fact that this study does not analyse economic regulation, but regulation of the core state power of border control. Strategic references to common norms like democracy are not explicitly mentioned in political accounts, since the latters usually neglect JHA agencies. Negotiations on economic regulation hardly offer the opportunity to draw on such values to achieve certain goals, but instead revolve around (re)distributional issues. However, a dysfunctional EBM is not only an issue that is of interest to political and economic elites, but also to the broader public. Therefore, a mere examination of possible sovereignty losses was not sufficient to predetermine member states' preferences. These peculiarities reveal that further research on JHA agencies is needed, and that it is in particular necessary to investigate bargaining on these agencies' institutional design in order to refine the political approach.

The assumption that regulation of EBM cannot be equated with economic regulation is further supported by the fact that decision-makers ignored the new IBM strategy's possible violation of the Meroni doctrine. This contrasts with the case of the EBA, an agency that

operates in the economic field (banking regulation) and that was transformed in the course of a crisis as well. However, the EBA's "regulatory powers have been tailored to a *strict reading of the Meroni doctrine*" (Dehousse 2016: 80, italics added). Decision-makers might have simply considered the threat of a lawsuit less likely in the case of EBM than in regard to banking regulation. In addition, member states' strong efforts to at least indirectly control decision-making on rule setting can be also explained by the fact that national border guard authorities are affected by the new technical and operational Frontex strategy, and not "only" market players like banks. In order to investigate such possible considerations, it would be particularly interesting to conduct interviews with member states representatives who were involved in the negotiations.

Notably, the debate on the right to intervene contradicts the assumption that "[r]egulatory integration is less prone to politicisation because it only strengthens European control rights over power resources that remain notionally national." (Genschel/Jachtenfuchs 2015: 8) Delegating regulatory tasks to the non-majoritarian institution Frontex could not depoliticise the issue, as one would usually expect (Grande/Kriesi 2016: 290). A possible reason for this might be that whereas power resources – namely border guards – have indeed remained national after the EBCG's establishment, the regulation of EBM does not impose the same constraints on all member states (due to their different geographical positions). Further research on the politicisation of regulation and its scope conditions, in particular in cases of delegation to EU agencies, could provide additional insights.

Thirdly, concerning the particular case of Frontex, I contributed to a better understanding of the agency's institutional design and its evolution over time. I pointed out some ambiguities of the EBCG regulation, which was presented as a highly ambitious piece of legislation by decision-makers (see also below). In addition, I provided further insights with regard to the relationship between the agency's principals. Frontex has – similar to other JHA agencies – obviously "become a focal point of inter-institutional struggles, conceptually embedded in the different visions of the Council and the EP concerning how to ensure their accountability." (Trauner 2012: 785) Since having a bigger say in the appointment of the ED and strengthening the Commission's role in the MB have been goals of the EP since the creation of Frontex (Leonard 2009: 382; Trauner 2012: 793),[68] it is striking that MEPs could not reach these goals when the Parliament has finally become a "legislative actor of equal standing" (Trauner 2012: 784).[69]

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[68] A number of proposals put forward by the EP during the negotiations on the initial establishment of Frontex were rejected by the Council. For a summary, see Leonard 2009: 381-385; Trauner 2012: 793-796.

[69] Nevertheless, "the EP's strategies vis-à-vis both the Frontex agency and the institutional competitors were fairly effective in terms of compensating *ex post* for its limited involvement in the founding regulation of the agency." (Trauner 2012: 796, italics in original). As this study analyses Frontex's *formal-institutional* governance structure, this will not be described more closely. Trauner, however, provides a highly useful overview of this issue, describing inter alia how the EP voted to freeze one third of Frontex's administrative budget in 2007 in order to make the agency increase its accountability and effectiveness (Trauner 2012: 793-796).

Fourthly, these findings should also be reflected in the light of JHA agencies' development in general. As pointed out by Groenleer, "the creation [and consequently also the transformation] of European agencies should be seen as a part of the debate on reform of the EU institutional framework and the future of European governance" (Groenleer 2006: 163) Many observers believe that due to the gradual introduction of the co-decision procedure, JHA are "likely to be increasingly caught up in the dynamics of supranationalism and that problems in relation to transparency, democratic control and accountability will decrease if not eventually be overcome" (Trauner 2012: 784). However, the unchanged governance structure and the intergovernmentally dominated decision-making on regulatory tasks contradict the assumption that EU agencies' multi-principal framework is remarkably dynamic (Trauner 2012: 798f.) and that agencies in the AFSJ gradually gain autonomy vis-à-vis the EU member states and institutions (Kaunert et al. 2013: 274). Similarly, Groenleer's assumption of a growing role of the Commission in regard to JHA agencies (Groenleer 2009: 100) does only seem to hold true to a very limited extent in the case at hand. My findings rather support previous studies that emphasise that "the continuous establishment of new agencies expands the EU's administrative capacity without compromising member state control over the agencies" (Christensen/Nielson 2010: 179) and reveal that the same might hold true in regard to JHA agencies' further evolution under the co-decision procedure.

Having shown how this study on the change of Frontex's formal-institutional design contributes to existing research and how it might be supplemented by further studies, it is important to eventually reflect on the new institutional design's implications for the agency's future activities.

7.3 Implications for the Effectiveness of Regulation

In the final section, I elaborate on how Frontex's new *de jure* role in regulating the EU's EBM can be expected to play out *de facto*. As pointed out by Rijpma, the delegation of regulatory tasks to Frontex "could make an important contribution to a more integrated and efficient management of the borders without unnecessary duplication or undue centralisation." (Rijpma 2017: 240) However, this goal can only be achieved if regulation is designed adequately. First, I argue that not all of the newly introduced regulatory tasks seem to be able to compensate the previously identified deficits. Secondly, I question if the agency's governance structure allows for an effective execution of these tasks.

With regard to rule setting, a certain discrepancy has to be emphasised: whereas the regulatory deficit in rule setting was in particular characterised by a lacking secondary legislation on IBM's implementation, the new regulation does not clarify as what kind of legal document the strategy will finally be adopted to actually become binding. While being

mentioned in Frontex's Programming Document 2017-2019 (Frontex 2016a), no concrete action in regard to the new IBM strategy has been taken yet in late July 2017.

In contrast, the newly introduced vulnerability assessments are indeed designed in a way that could reduce existing regulatory deficits. As pointed out by the Commission, the assessments are "designed in a way so as to *complement* the Schengen evaluation mechanism" (COM(2015) 673 final: 4, italics added): in cases of noncompliance, the agency's MB – not the Council like in the case of the SEM – can adopt a binding decision setting out measures to be taken by the respective member state. This implies at least a slightly more supranational decision-making. Sending liaison officers to member states enables Frontex to "ensure proper and effective monitoring not only through risk analyses, information exchange and Eurosur, but also through its presence on the ground." (COM(2015) 671 final: 83) Hence, Frontex is not only present if its assistance is requested on an ad hoc basis in the context of SEM on-site visits at the external borders, but "ensure[s] *regular* monitoring of *all* Member States'" EBM (Regulation (EU) 2016/1624, art. 12(1), italics added). Since member states are obliged to provide information (Regulation (EU) 2016/1624, art. 10, 13(3)), a major issue hampering an effective functioning of the ECN is addressed. However, liaison officers' access to information is restricted. Being linked to the implementation of binding decisions, the new assessments are expected to increasingly focus on the prevention of crisis situations (COM(2015) 671 final: 4).

The scope of enforcement tasks was significantly watered down during the legislative process. According to the final provision, a member state's request can be superseded, but it is *de facto* not possible to intervene against its will. Hence, the previous regulatory deficit is not completely abolished. However, it has also been shown that the threat of a reintroduction of internal border controls can be effective.

In summary, it has to be noted that not all of the new regulatory tasks seem equally able to fill the identified functional gaps. However, a weakness all newly established activities might suffer from are Frontex's dominant intergovernmental features. Since from a functional perspective, *regulation* is expected to require more independent, i.e. supranational, decision-making structures than mere *coordination*, one can doubt that the observed institutional changes are sufficient to significantly improve the EU's EBM with regard to three issues: it can be questioned if Frontex will be independent enough from EU member states to carry out its new regulatory tasks effectively, to send signals of credible commitment, and to successfully shift blame.

First, according to the logic of the PA-model, the EU governance system's principals delegate regulatory functions to independent agencies in order to limit their own possibilities for political interventions, hereby ensuring better implementation of EU policies. Therefore, functionalism assumes agencies to be "deliberately designed to operate at arm's length from their political principals" (Rittberger/Wonka 2010: 785).

At the same time, agencies' MBs are strategically set up in order to protect national interests (Kelemen 2002: 110). As pointed out by Busuioc (2012: 733), these boards show a number of pitfalls such as "a lack of interest in overall agency performance; a bias towards a 'national outlook' not aligned with their European roles; the presence of conflicts of interests; a focus on administrative detail; poor participation in discussions; and a lack of knowledge on financial and budgetary matters." Hence, the delegation of further competencies to the MB in regard to rule setting and monitoring, as well as its still continuing powerful position within Frontex's overall governance structure, seem to make an effective regulation rather less likely. In the case of enforcement, the Council is even able to *directly* exert political influence, while the EP, only being informed of the measures that are taken, is excluded. Already in 2009, members of the MB and Frontex staff had criticised

> "how the dual role of the members is executed: On the one hand members are responsible for the overall planning and management of the Agency and on the other hand members are representatives of their respective governments. Hence, some members find that some members tend to 'politicise' the MB and promote national interests at the cost of the overall effectiveness of the Agency. The composition of the Board is widely discussed. According to the preamble in the Regulation members should be national border guard chiefs. However, in practice members have different backgrounds. This influences discussions in the Board with some members preferring the operational discussions and other members preferring political discussions." (COWI 2009: 65)

Moreover, Frontex Senior Management would have favoured the participation of key MEPs in MB meetings as observers (COWI 2009: 65).[70] The fact that the composition and the tasks of the MB were even considered ineffective by MMBs and Frontex staff themselves, underlines that the MB's role is not only a problem of theoretical nature. However, decision-makers did obviously not learn from these previous institutional deficiencies.[71]

In contrast, they even delegated further tasks to the MB, which could also make it also more difficult for the MB to strike the balance between strategic and operational management. Agencies' MBs often fail to effectively fulfil their role as links between governance and management if they take over daily management functions and move too much into details (Groenleer 2009: 120). Even before Frontex's transformation, an external evaluation of Frontex pointed to the lack of effectiveness of the procedures and working methods of the MB (plenary and lengthy discussions in meetings, delays in decision-making process because meeting agenda often exceeds the time available) and recommended more decentralised consultations through working groups (Ramboll Management Consulting/Eurasylum 2015: 113).

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[70] During the negotiations on Frontex's establishment, the Commission had suggested a MB being composed of only twelve member states representatives and two representatives of the Commission. The EP had even preferred the Council and the Commission to each appoint six MMB. In addition, it had proposed to elect a Commission representative as chair of the MB. However, the Council could eventually push through that each member state has a representative in the MB (Leonard 2009: 382).

[71] Such a lack of lesson-drawing could already be observed when Frontex replaced its predecessors. As mentioned by Wolff and Schout (2013: 319), Frontex continued to suffer "from the downside of this hands-on hierarchical control: political interferences."

The continuity of the MB's composition is particularly puzzling because whenever an agency is transformed in the course of a transboundary crisis, one would expect a limitation of the number of actors who have a final say over the use of capacities in order to facilitate the responses to crises (Boin et al. 2014: 423). Nevertheless, the composition of Frontex's MB did not change: it continues to have 34 members and is therefore still dominated by member states (Regulation (EU) 2016/1624, art. 63). Still, "this means that control of the work of the Agency is to a large extent in the hands of the Member States, which have been considered the main stakeholders." (Leonard 2009: 383)[72]

That regulation might be inefficient if it is not carried out independently enough, can be illustrated by referring to the example of banking supervision once again. Frontex's newly introduced vulnerability assessments are often compared to the stress tests in the Banking Union (see for instance Netherlands Presidency of the Council of the European Union 2016: 1; Euraktiv 2016a). However, they rather resemble the mechanisms in banking supervision that had been present *before* the creation of the Banking Union, when the ECB had not yet possessed supervisory powers over European banks. Back then, the EBA was solely responsible for conducting stress tests. The first stress tests conducted by the agency were harshly criticised and not able to calm the markets. According to some observers, this was because of the agency's weak powers and the risk of capture it was exposed to, which prevented it from sending signs of credible commitment to the markets. The EBA's governance structure was described as "highly problematic, as it gives each member state equal weight in crucial decision-making and does not give voting power to any representation of EU interest beyond individual member states" (Dehousse 2016: 79f.). An indication that the composition of MBs might indeed affect the results of monitoring is Spanish banks' poor performance in the first stress tests – Spain was not represented in the EBA's MB (Dehousse 2016: 80). Since stress tests conducted by the EBA had not been able to convince investors, additional supervisory tasks were delegated to the more independent ECB in the framework of the Banking Union's SSM. Now, the ECB directly supervises 37 of the 51 banks that are subject to the EBA-led stress tests and conducts parallel stress tests of further 56 banks (European Central Bank 2017).

This experience from banking regulation, which revealed that it might be crucial to delegate supervision to an *independent* actor, was obviously not taken into consideration when designing Frontex's new monitoring tasks. Even though there are two Commission representatives in the Frontex's MB, they can be easily outvoted. Therefore, Frontex's vulnerability assessments are likely to suffer similar weaknesses as bank stress tests did before the SSM's introduction.

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[72] Apart from concerns in terms of effectiveness, the MB's composition has also been criticised from a human rights perspective (House of Lords 2008: 109).

Secondly, while the argument of credible commitment is most prominent in studies on economic regulation, it is not obvious that such considerations only play a role in certain policy areas. Instead of sending signals of regulatory stability to firms and consumers (Rittberger/ Wonka 2010: 735), decision-makers might also be interested in credibly committing themselves towards their voters or sending dissuasive signals to refugees, migrants, and smugglers. A number of pieces of evidence suggest that "ensuring a *credible* response to the ongoing, unprecedented challenges for the common external borders and the integrity of the Schengen Area" (Council of the European Union 2016b: 1, italics added) was one of decision-makers' main motivations for the adoption of Regulation (EU) 2016/1624. As already emphasised by other scholars, "the agency would need an institutional design and management structure that allows it to assume responsibility for upholding policies, thus isolating them from political pressures [and a] strong, independent mandate" (Ekelund 2013: 103) for this purpose. In other words, a credible commitment to the new regulatory tasks would have been for instance making the agency's governance structure more independent by giving the EP a seat in the MB. Even though member states' representatives expressed their intention to credibly commit themselves, they clearly rejected such institutional changes.

Thirdly, close ties between principal(s) and agent can be expected to be detrimental to blame shifting. The creation of – and consequently also the delegation of further tasks to – Frontex can be seen as a way for the member states and the Commission to shift the blame for deadly incidents at the EU's external borders. Similarly, "a failure to curb irregular migration would be attributed to the agency rather the EU institutions or member states." (Rijpma 2012: 92) In other words: Frontex is criticised both "for reinforcing the proverbial 'Fortress Europe' [and] for not doing enough to protect it." (Rijpma 2017: 218) Indeed, these attempts of blame shifting can be seen as successful: criticism on the EU's EBM has often been "misdirected against a relatively weak actor", namely Frontex (Rijpma 2010: 1). A recent study by Rittberger et al. (2017) confirms that, in a context of complex, multi-level policy making structures, the "implementing actor" Frontex is held publicly responsible for the human tragedies at the EU's external borders, not the member states.

While the even closer ties between Frontex and the member states might not be obvious enough for the general public in regard to rule setting and monitoring, it is likely that the Commission's and the Council's immediate involvement in decision-making on enforcement will be recognised in cases where the provision is used. That this design of enforcement was chosen is even more puzzling since enforcement tasks can be expected to be most politicised, which has already become obvious during the negotiations on the new regulation. At the same time, these obstacles for successful blame shifting might be desirable in terms of transparency and accountability: the Council's involvement in enforcement activities makes it less likely that successes or

failures of policies are attributed to the implementing agent Frontex instead of the responsible decision-making body, rendering responsibility for the EU's EBM more transparent.

Despite these first thoughts on functionally problematic components of Frontex's new institutional design, it certainly remains to be seen how Frontex's new institutional design will affect the agency's *de facto* role in the EU's EBM.

To conclude, this study offered a rather critical stance towards the scope of one of the main institutional changes decision-makers could agree on in light of the most recent migration crisis. This constitutes a necessary complement to the Commission's depiction, which labelled the EBCG as the establishment of "an integrated management system for external borders at Union level" (COM(2015) 671 final: 5). However, I equally acknowledged that for the first time, a JHA agency has been granted a far-reaching regulatory role. In the light of the situation at the EU's external borders, which will most probably not become less challenging in the near future, it is likely that this was only the first step towards a tightened regulation of EBM. The experiences from banking regulation support this presumption.

By focusing on Frontex's expanded regulatory role and its unchanged governance structure, I revealed that the combined functional-political approach offers suitable conceptual lenses for capturing not only the variation between these variables, but also the discrepancy between the functional gap in the EU's EBM and the final institutional outcome. Since decision-makers could not agree on creating a genuinely *European* Border and Coast Guard, meaning that Frontex still depends on member states' contributions in the form of national border guards, it would have been all the more important to design regulation in a way that ensures its effective execution. However, EU member states were only willing to delegate regulation to the EBCG Agency, but not to give up decision-making power on it – this can be seen as an attempt to enhance Frontex's competences, without being willing to loosen control (Abbott et al., forthcoming). Since EU agencies are agents of *multiple* principals, they almost necessarily show a certain degree of weakness (Dehousse 2008). However, it has to be noted that output-legitimacy – due to an at least alleged lack of input-legitimacy – is of crucial importance to EU agencies. Their inability to carry out tasks effectively may undermine the credibility of the advantages common European solutions provide and therefore eventually puts European integration itself at risk.

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Hiermit erkläre ich, dass ich die Arbeit selbstständig und ohne Benutzung anderer als der angegebenen Quellen und Hilfsmittel angefertigt habe.

…..
Ort, Datum

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Unterschrift