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The Borders of Accountability:
the Case of FRONTEX

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Alle mie due famiglie.

Alla prima, perché mi ha dato tutto l'Amore, il Supporto e le Ali di cui avevo bisogno.

Alla seconda, perché mi ha insegnato che i "peers" sono fondamentali per diventare migliori.

E a Marco, perché senza di lui i sogni non sarebbero realtà.

Table of Contents

List of Abbreviations and Acronyms

AFSJ	Area of Freedom, Security and Justice
AI	Amnesty International
CEAS	Common European Asylum System
COSI	Council standing committee on internal security
DG	Directorate General of the European Commission
EASO	European Asylum Support Office
ECJ/the Court	European Court of Justice, renamed Court of Justice of the European Union after entry into force of the Lisbon Treaty
ECRE	European Council of Refugees and Exiles
EEAS	European External Action Service
EEC	European Economic Community
EP	European Parliament
Europol	European police office
FRA	European Union Agency for Fundamental Rights
FRO	Fundamental Rights Officer – Frontex
Frontex/the Agency	European Agency for the Management of Operational Cooperation at the External Borders of the European Union
GAMM	Global Approach to Migration and Mobility
HR	Human Rights
IBM	Integrated Border Management
IOM	International Organisation for Migration
JHA	Justice and Home Affairs
LIBE	Civil Liberties, Justice and Home Affairs Committee (EP Committee)
MEP	Member of the European Parliament
MS(s)	Member State(s)
NGO	Non-Governmental Organisation

NMG	New Modes of Governance
OMC	Open Method of Coordination
PICUM	Platform for International Cooperation on Undocumented Migrants
SBC	Schengen Borders Code
SEC	Schengen Executive Committee
TCN	Third-Country National
TEC	Treaty establishing the European Community (renamed TFEU after the Lisbon Reform Treaty)
TFEU	Treaty on the Functioning of the European Union
UNHCR	United Nations High Commissioner for Refugees

INTRODUCTION

"[This is] a time when the European Union continues to be in crisis. A financial and economic crisis. A social crisis. But also a political crisis, a crisis of confidence. [...] Yes, globalization demands more European unity. More unity demands more integration. More integration demands more democracy, European democracy. In Europe, this means first and foremost accepting that we are all in the same boat. It means recognizing the commonality of our European interests. It means embracing the interdependence of our destinies. And it means demanding a true sense of common responsibility and solidarity. Because when you are on a boat in the middle of the storm, absolute loyalty is the minimum you demand from your fellow crew members."

(Barroso, 2012)

The President of the European Commission, José Manuel Barroso, opted for the metaphor of the boat to describe the State of the European Union in 2012. This metaphor could not be more appropriate to introduce the themes discussed in the present work. Boats, in fact, represent the media-created symbol of irregular migration towards the shores of the EU; they embody a diffused mixed feeling[1] of fear of invasion and pity for the "poor people". Even though irregular migration is only for a small portion a "boat issue" – irregular migrants are for the most part third-country nationals who overstay their visa or people who have been unsuccessful in the asylum procedure, not the ones crossing irregularly the European external borders – in 2011 the influx of irregular migrants was particularly evident and the perception of the invasion spread more easily. The upheavals in North Africa and in the Arab world, commonly known as the Arab Spring, in fact, pushed more than 64 000 people through the "Central Mediterranean Route"[2] (in 2010 only 5 000 people were detected on the same route), that connects the northern shores of Africa with Spain, Italy and Greece (Frontex, 2012).

These events brought to the limelight an European agency, that has been operative since 2005 but that was mainly unknown to the public, in charge of the management of the European external borders: Frontex. Frontex has been presented by the media as a group

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[1] In August 2011, the Economist published a debate on the motion: 'This house believes that immigration is endangering European society'; the motion received a 49% of yes and a 51% of no. This is a clear sign of how divided is the opinion of Europeans on the issue. Retrievable at: http://www.economist.com/debate/overview/210 (accessed August 2011).

[2] The definition of migratory "routes" has been introduced to facilitate the control of borders.

of experts that are dealing with irregular migrants at the borders of Europe, helping Member States to detect and impede irregular crossings. By then, criticisms started to be moved consistently against the Agency – whose tasks and general description will be the object of Chapter 3 – and have been expressed also through demonstrations and protests of various nature, not only in Europe but also in the countries of origin and transit, where Frontex has concluded cooperation agreements (i.e. working arrangements) with the local authorities[3]. Even if these demonstrations remain marginal, their significance cannot be ignored: European citizens – at least some of them – want to understand how European policies are affecting people, especially in such a rapidly expanding and human-rights laden field.

Border management, in fact, is becoming more and more relevant both at the national and at the European level. It is a political priority, because modern nation states and regional organisations (i.e. the EU), faced with globalisation, "have to rely on a flourishing trade and offer a comfortable degree of security to their citizens" (Hobbing, 2005); and it is also a humanitarian concern, due to the elevated and rising numbers of deaths at the border. The European response in this field is necessarily complex; the need to find quick and effective solutions to the problems posed by the abolition of the internal frontiers, coupled with the need to find common approaches, shared by all the Schengen signatories, in the effort to combat irregular border crossing – specifically, cooperation between police, border guards and judicial systems in strengthening border controls and exchange of intelligence to fight against smugglers and human traffickers – , involves building trust and ensure solidarity among the participating states. The compromise that has been reached – in three decades of cooperation in the field – involves the implementation of an "Integrated Border Management", whose cornerstone is the EU external borders agency, Frontex. The Agency is (or was) the perfect solution for MSs to face less constraints on restrictive approaches in border managements, hiding from national political and public scrutiny behind the curtain of collective decisions (Boswell, 2005).

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[3] An example of protest in Europe is the rally organised on 23 May 2011, in front of Frontex headquarters, in Warsaw (see http://zspwawa.blogspot.it/2011/05/protest-and-street-party-in-front-of.html, accessed June 2012). Other demonstrations were organised by "Frontexplode" in Senegal, where Frontex has a close relationship with local authorities (operations Hera I and II were conducted in Senegal territorial waters); see http://frontexplode.eu/2011/02/02/frontexplode-in-mali-and-senegal/ (accessed June 2012). Moreover, from 18 to 23 May 2012, four days of debates and protests were organised in Warsaw under the name: Anti-Frontex days (see http://anti-frontex.noborder.org.pl/en, accessed June 2012)

As a consequence, now that the decisions regarding the border management have gained the spotlight, the need to have tools to exert democratic control over the Agency is particularly relevant. In the literature concerning the European Union, though, a single and clear definition of what does "democracy" and "democratic" mean, especially in relation to the *sui generis* European constituency, is nowhere to be found. However, in "the age of accountability" (Fisher, 2004), scholars find it reasonable to address the problem of agencies' democratic legitimation through, precisely, accountability mechanisms. Unfortunately, also accountability is a concept that can describe a wide variety of relationships and imply different meanings.

This work will look into some of the aforementioned issues, by placing them in the bigger picture. The problem of finding the right method to render Frontex accountable, while at the same time enhancing the democratic features of EU governance in the field of border management, is, in fact, part of a dramatic change in European decision-making processes, through the emergence of the phenomenon of agencification, and the consequent pursue of democracy and accountability in this new governance system. As a matter of fact, Frontex is only the tip of the iceberg and will be used as a case study.

Aim of this work is, therefore, to analyse Frontex accountability. In order to do so, this work is structured in three chapters, each one trying to answer one main question (each question requires two or three sub-questions in order to be solved) :

1. What kind of accountability is necessary to enhance democracy?
   a. What theoretical framework is best suited to analyse the EU?
   b. Which democratic deficit?
   c. Which accountability?
2. What is the framework in which Frontex operates?
   a. How do interactions between MSs and the Union work in the AFSJ and specifically concerning border management?
   b. How did border management evolve?
3. How can accountability mechanisms be applied to Frontex?
   a. How does Frontex work within the framework provided by Chapter 2?
   b. How can Frontex accountability be described according to the parameters identified in Chapter 1?

In the beginning of the first chapter the analysis focuses on where the EU is heading to, both in terms of *governance* and of *democracy*. The experimentalist governance architecture is thus chosen as the most suited to describe the "new" governance of the EU, shaped by the process of agencification, due to its peculiar predilection to deliberation processes[4]. Then, a detailed discussion of the democratic deficit/non democratic deficit theories is introduced, leading to the conclusion that some form of accountability is necessary in order to democratically legitimise these new "creatures" that live within the decision-making system of the Union: the European non-majoritarian agencies[5]. However, the literature on accountability is vast; therefore the need to explore it – first M. Bovens' actor-forum relationship and then C. Sabel and J. Zeitlin's peer review will be described – and to find the accountability mechanism that is best suited to enhance the democratic legitimacy of the *sui generis* governance of the Union. The choice will fall on the dynamic accountability model of Sabel and Zeitlin.

The second Chapter is instead focused on the description of the framework in which Frontex operates, therefore it will look at the policies of the AFSJ and their development and in particular to how borders have been managed (the Schengen Agreement first, and the Schengen acquis after, are the legal basis for this policy field). In order to do so, it will be necessary to understand the forces that are at play and the contradictions that are implicit in the evolution of this policy field; more specifically, the focus will be on the interaction and the division of competences between Member States and the Union bodies, and also on the definition of borders and on the migratory flows that affect critically the development of border related policies (often shaped in order to respond to "emergency situations"). Finally, the Chapter will deal with the European Integrated Border Management (IBM) – the latest ongoing project of the Union – and with the securitisation and externalisation trends that are affecting the whole system of migration policies, starting with the IBM.

The last Chapter will bring together all the major findings of this work in order to analyse Frontex' accountability relationships in a democratic perspective. The Agency will be described in detail, explaining its vertiginous growth and what has changed with Regulation (EU) 1168/2011 amending Council Regulation 2007/2004 establishing the

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[4] Deliberation is the process of reaching consensus through an informed debate (Eriksen E. O., 2000).
[5] "A public non-majoritarian institution is a wide term for all those organisations which spend public money and fulfil a public function but exist with some degree of independence from elected politicians." (Curtin D. , 2006, p. 90).

European Border Agency. Then, the experimentalist governance architecture will be applied to the AFSJ and therefore to Frontex, that was one of the products of agencification in this field. The most challenging part of this Chapter is the application of the different forms of accountability to Frontex; the fragmented forms of accountability mechanisms described by Bovens will be applied first, looking at the practices and the founding Regulations of the Agency – and in particular to the latest amendment –, followed by the dynamic accountability and peer review. In order to study how the peer review works on Frontex a definition of the "peers" will be provided, along with a short description of a selected group of them; in order to keep a democratic perspective, fundamental rights deserve a special attention and therefore civil society organisations with a human rights background will be preferred. The analysis will be based mainly on the Reports that Frontex' peers have drafted and made public over the life-span of the Agency, but also on interviews that were conducted with two stakeholders[6] and reference will be made especially to Regulation 1168/2011. Lastly, conclusions will be drawn on the results of this study.

Before delving into the specifics of the theoretical approaches to European governance (object of the first Chapter of this work), and to be able to understand them better, it is necessary to give some fundamental definitions and to describe the agencification process that has so much affected the AFSJ, and EU governance in general, in the last decade. At the EU level the first agencies appeared in 1975 and had an impressive boom, starting from the 1990s, over the last twenty years (see Graph 1). Two major types of agencies have developed: the decentralised and the executive agencies. The latter are endowed with executive powers and are entrusted with specific tasks "relating to the management of one or more Community programmes [...] for a fixed period of time. Their location has to be at the seat of the European Commission"[7]. The former, which are fundamental for the purpose of this work, are non-majoritarian in nature, and were conceived as being highly specialised and decentralised, to support the EU Member States and their citizens "in a rather autonomous fashion" (Curtin D. , 2006, p.

[6] The two respondents are: Marie Martin, Statewatch and Migreurop researcher, who answered to a written questionnaire with open questions and Michele Simone, UNHCR Senior Liason Officer with Frontex in Warsaw, who instead answered verbally to the same questions of the questionnaire, however leaving more space for the open debate.
[7] Retrieved from http://europa.eu/agencies/index_en.htm (accessed June 2012).

89); these groups of experts "are an answer to a desire for geographical devolution and the need to cope with new tasks of a legal, technical and/or scientific nature."[8]

Graph 1 - The growth of agencification
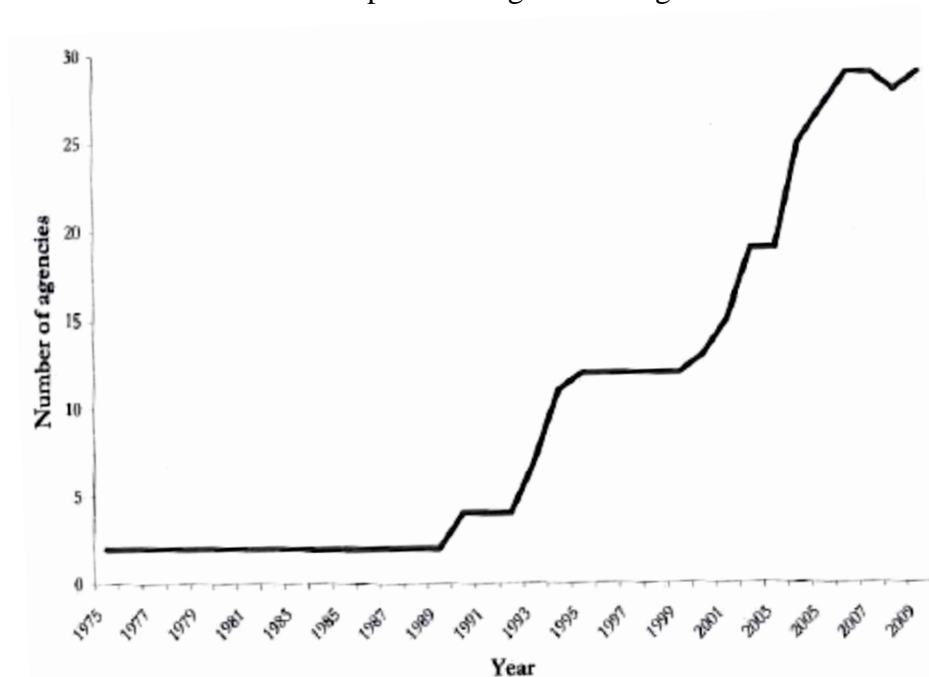
Source: Busuioc, M. (2010), p. 12.

The reasons for agencification are mainly five and have been described by Sweet and Tatcher (2002, p. 4)[9]: firstly, delegation is the solution for commitment problems; this means that agencies are supposed to "enhance the credibility of promises made, either between multiple principals, or vis-à-vis principals and their constituents, given underlying collective action problems". Secondly, they are supposed to balance information asymmetries by using their expertise to help principals in policy-making. Thirdly, agencies are established to enhance the overall efficiency of policy making, by leaving to the legislator only the duty to sketch general policy framework that are to be specified by agencies, and finally to "avoid taking the blame for unpopular policies", thus de-politicising them[10].

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[8] *Ibidem.*

[9] Even though the authors refer to the non-majoritarian institutions that are in a principal-agent relationship of delegation – "from [national] legislators to agencies, and from nation states to international organisations" (Sweet & Thatcher, 2002, p. 4) - the reasons for agencification at the EU level are the same.

[10] Another way to avoid blame, in the EU external border management policy, is represented by the externalisation of border controls and migration management; in the words of P. Pallister-Wilkins (2011, p. 3): "outsourcing migration-management allows liberal governments and institutions to eschew the constraints placed upon them by the very liberal democratic norms they are trying to circumvent.".

Moreover, at the EU level other factors contributed to the process of agencification, such as enlargement, that increased the heterogeneity of MSs, and the "creeping integration in more intergovernmental policy areas such as [...] border control demanded more cooperative types of 'networked governance'" (Wolff & Schout, 26-27 January 2012), and, of course, the response to emergency or crisis situations. These were all fundamental factors for beginning of the so-called "third wave" of agencification which – as clearly shown in Graph 1 – started with the beginning of 2000s. This is the background for the emergence of Frontex.

Nowadays, in the framework of the "new" EU governance, the Commission is by no means the only institution exercising significant power vis-à-vis other governments and private actors; *de facto,* comitology committees – the "back stages" of the EU according to Brandsma (2010) – and even European agencies "have perhaps less conspicuous but no less significant roles to play in shaping and implementing policies and decisions that bind the governments, businesses, and private citizens of its member states." (Bovens, Curtin, & Hart, The Real World of EU Accountability: What Deficit?, 2010, p. 17). This is why, in 2001, the Commission itself introduced the White Paper on Governance – remembered especially for the definition of the Open Method of Coordination (OMC) –, which was welcomed as a mean to clarify the framework for all the so called "New Modes of Governance" (NMG) but also as a way to solve the problem of the lack of trust in European institutions, i.e. through the establishment of agencies that were perceived in those years as offering "greater transparency, expert authority, flexibility, better informed decisions and better implementation" (European Commission (2001) cited in Wolff & Schout (2012)). However, the role of European agencies raises concernes regarding the possibility to hold them accountable. As a matter of fact, even though at the beginning of the process of agencification "the issue of control and accountability did not come to the forefront [...] given the fact that the tasks to be performed by the earliest agencies were meant to be purely informational and non-discretionary in nature" (Busuioc E. M., 2007, p. 3), nowadays the situation is significantly different and needs a thorough and attentive study.

CHAPTER 1

1.1 A political theory for the EU

> *"Research has shifted from analysing the process of integration to analysing the European Union as a system of governance [...] The main issue is now how the EU works as a decision-making system. As such, the EU is increasingly confronted, like any other political system, with the double requirement of effectiveness and democratic legitimacy."* (Eberlein & Kerwer, 2004, pp. 121-122)

The EU is currently undergoing an epochal transformation. The displacement and diffusion of state-based politics, the erosion of state sovereignty, the multiplication of bureaucratic centres – both at local and European level – are all factors leading to growing concerns regarding the democratic legitimacy of this multi-layered system of policy-making. The sense of estrangement of the European citizens towards the seemingly ever-increasing complexity of the EU governance is one of the main reasons for the emergence of a consensus, both in grassroots debate and among scholars, over the alleged democratic deficit and accountability deficit of the EU, that are the main objects of this Chapter. More specifically, this Chapter will prove that accountability, and a certain type of it, is fundamental in order to enhance the democracy of the new policy-making system, all the more so using a deliberative approach.

Evaluating the consistency of the EU's democratic deficit and accountability deficit hypothesis[11], however, involves the necessary description, first and foremost, of the type of framework in which European decision-making, and therefore policy-making, takes place, especially in the light of the recent transformation mentioned above[12]. Scholars have tried to respond to this matter either by stretching established frameworks over the new phenomena (e.g. federalists "have applied their approach to power sharing among as well as within states" (Hooghe & Marks, 2003, p. 2)) or by creating entirely new concepts (Kohler-Koch & Rittberger, 2007). In the 1990s a new theory regarding this framework and trying to respond to the "unravelling of central state control"

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[11] This is the starting point of the innovative research of G. Majone and A. Moravcsik; they challenge the traditional theories that use the standards of the modern state and the national democracies in order to evaluate the level of democracy reached by the EU.

[12] The agencification process, described in the Introduction of this work is one of the main distinctive features of this transformation in policy-making in the EU.

(Hooghe & Marks, 2003) emerged: the multi-level governance theory. It grew out of the need to describe non-hierarchical and non-binding modes of governance that were emerging in that period – the emergence of which was due to the necessity to circumvent the difficulties that MSs were posing in order to proceed on the integration path[13] – recognising the insufficiency of the previous frameworks. This theory, in fact, is in deep contrast with the literature describing the EU not as a governance system but as a government, similar to national ones.

Theories such as supranationalism[14] and intergovernmentalism[15], are still precious tools to analyse some areas of policy-making in the EU. Intergovernmentalism, for example, focuses on the bargaining process among MSs at the EU level and strongly purports the view that the EU institution are among them and with MSs in a hierarchical relationship; its contribution is fundamental in order to describe the former second pillar policies[16] and the pre-Amsterdam Treaty Schengen cooperation. Supranationalism instead is helpful for the outlining of the community method, still a rigidly hierarchic method, which is now, post-Lisbon Treaty, the most diffused method of policy-making in the EU. Nonetheless, these two theories cannot explain fully the variegated modes of governance that are currently enacted at the EU level and which are the main focus of this work. For example, NMG[17] are explained by intergovernmentalists as new ways for MSs to exercise their will in the domain of regulatory policies (Majone, 1999) or as regarding issues that are non politically salient (Moravcsik, In defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union, 2002); this approach therefore hinders the potential of NMG by not revealing some of their most innovative aspects (e.g. the deliberative nature of the OMC).

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[13] As Eberlein and Kerwer affirm "[NMG] are almost always introduced after legislative deadlocks" (2004, p. 125).

[14] Supranationalism is a theory about decision-making in the European Union according to which Member States which have pulled their sovereignties together to form an organisation that is "over and above" (Chalmers, Davies, & Monti, 2010) their national legal orders (the EU), take decisions by majority voting (i.e. by employing the Communitarian method) thus limiting MSs decision-making power.

[15] Intergovernmentalism is a theory about decision-making in the EU according to which bargaining among MSs interests is the rule and is expressed through unanimity voting, in contrast with supranationalism.

[16] The Common Foreign and Security policies were inscribed in the second pillar created by the Treaty of Maastricht. With the entry into force of the Treaty of Lisbon in 2009, notwithstanding the creation of the High Representative of the Union for Foreign Affairs and Security Policy – one of the main innovations introduced by the Reform Treaty – and the framing of these policy fields under the shared competence heading (including also defence policy), the mode of governance is still mainly intergovernmental.

[17] For a review of the literature on NMG see Tommel and Verdun (eds.) (2009) and Treib, Falkner, & Bahr (2005), who provide a very useful classification.

In this section I will first describe the multi-level governance framework, followed by Sabel and Zeitlin's visionary theory – aimed at integrating and better the multi-level governance theory – describing the evolution of decision making processes in the light of the latest developments and framing the New Modes of Governance in a new and more readable "architecture".

1.1.1 Multi-level governance

The idea of a multilevel governance in the EU appeared with the process of 'europeification' of policy fields that bear a high political relevance within the national arena and particularly to give a sense to the increasing complexity of decision-making processes at the EU level. Starting from the 1990s, in fact, member states started delegating to the Union competences over a wide range of policy fields, among which immigration, asylum and foreign affairs. On the other hand, the main Union institutions, the European Commission, the Council and the EP, finding themselves burdened by a whole new range of policy fields that required also a high level of expertise to be regulated, decided to delegate some of their competences to *ad-hoc* agencies and committees, created for the occasion, in order to relieve them from part of the burden of administrating what is growing as a highly complex and multi-faceted system.

State-centrism and a hierarchic type of authority have been purported by intergovernmentalists since the very beginning of the European experiment, while the hierarchical prominence of EU supranational institutions was underlined by supranationalists. However, the idea of *government*, as a centralised and hierarchic system of decision making, has lately been replaced in literature and in the definition of the European Commission (COM(2001) 428 final) by the one of *governance*[18] consisting "in the interaction of a plurality of 'governing' actors who are not all state nor even public ones" (Leca, 1996, p. 339 cited in Boussaguet, Dehousse, & Jacquot, 2010)[19]. In particular, the push factor that made this shift possible was the growing use of coordination procedures and practices at the EU level, leading to the emergence of new analytical concepts and interpretation. European policy-making started to be described according to the multi-level and multi-actor structure and the procedures that combine "formalized modes of rule setting with informal practices of negotiation,

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[18] For a throughout debate on the definition of governance in literature see Treib, Falkner, & Bahr (2005) and Sweet & Thatcher (2002).

[19] It should be noted that the European Commission has a slightly different approach towards the definition of governance and the new modes of governance in the EU; in particular, it has been argued (Wincott, 2001 cited in Eberlein & Kerwer, 2004) that the Commission in its White Paper of 2001 sought to re-define its role in the Community method rather than describing the emerging governance.

cooperation, and consensus building" (Tömmel, Verdun, & Lavenex, 2009), and, lastly, also to the different patterns of implementation adopted by MSs "under a common umbrella" (*ibidem*).

The NMG[20], with the evaluation of their efficiency and legitimacy, have spread the need for a renewed literature on EU decision making methods, along with the idea of governance at the EU level (Boussaguet, Dehousse, & Jacquot, 2010). NMG are defined usually in opposition to the Community Method and contrasting with the idea of a hierarchical control mechanism; "they build on the participation of private actors in policy formulation, relying on broad consultation and substantive input. Policymaking follows a procedural logic in which there is joint target-setting and peer assessment of national performances under broad and unsanctioned European guidance." (Eberlein & Kerwer, 2004). Among these we can find the Open Method of Coordination (OMC) which was, de facto, the starting point for the theorisation of NMG and it was officially introduced at Lisbon during the 2000 European Council in order to foster cooperation in the social policy field.

Contrary to the idea that the EU is organised and functions on the basis of a hierarchy between levels of government[21], the multi-level governance maintains that decision-making is not located in a specific level of government but it is dispersed in multiple centres that are not clearly hierarchically ordered; also, the decision-making processes enacted by these multiple centres are "mutually intertwined" (Marks, Hooghe, & Blank, 1996).

Multi-level governance has been described from different angles, stressing different characteristics; Eberlein and Kerwer focus on the way decision are taken in a multi-level governance, by addressing the allocation of preferences (Eberlein & Kerwer, 2004); while according to the most recent Boussaguet, Dehousse, & Jacquot's classification (2010), different forms of governance can be identified according to the instruments that are used in policy-making thus leading to a four-partite categorisation: governance by implication, by delegation, by reputation, and by integration. The first one calls for an enhanced participation of a broader range of actors, especially in order to involve a wider section of civil society, opening the policy-formation process to dialogue among all stakeholders; this has been the position of the European

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[20] A relevant research is being carried out regarding NMG; for the latest developments see "New Modes of Governance Project" website at: http://www.eu-newgov.org/ (retrieved April 2012).

[21] This is the basic tenant of intergovernmentalism.

Commission since 2001's White Paper, even though it appeared that a major fault for this approach is an increased difficulty to reach consensus. The second, involves the process of agencification and the consequent decentralisation and "expertification" of decision-making22; as it will be described in the next chapter, concerning border management policy, "the basic idea behind this move was that the development of the EU's regulatory capacity was necessary to reconcile free movement of goods with protection imperatives" (Boussaguet, Dehousse, & Jacquot, 2010, p. 9). The category of governance by reputation, on the other hand, describes the institutionalised use at the European level of the OMC and in general of methods of policy-formation based on mutual learning and the setting of objectives and standards that MSs implement according to their peculiar situation; with the entry into force of these more flexible and adaptable NMG, reputation of MSs is measured and compared in order to evaluate overall achievements[23]. Lastly, governance by integration has appeared in the 1990s and regards the practice of mainstreaming a certain policy or approach in all policy fields – such as humanitarian concerns that have been introduced in migration policies, that have always been focused particularly on the protection of the internal market instead of on the individuals.

What needs to be underlined again is that NMG have not replaced the 'old' Community method but, over time, they have sought to complement it. In fact, in the struggle between MSs, striving to preserve their autonomy, and the supranational institutions of the EU striving to further integration in new policy fields necessary for the smooth functioning of the internal market, the NMG did not prevent the Lisbon Treaty to reform the EU policy-making in the sense of a stronger role for the Community method, with the disappearance of the pillar structure and the extension of the ordinary legislative procedure – even if with some exceptions and delays24 – to a large number of policy fields and especially concerning the AFSJ. Moreover, NMG are considered to be by some literature (Tömmel, Verdun, & Lavenex, 2009) not completely new to EU policy-making; as a matter of fact, considering NMG not only confined to the introduction and formalisation of OMC but as "all forms of governance in the EU that transcend the classic forms of state intervention based on legislation and/or financial

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[22] Reasons for the appearance of the phenomenon and its history have been described in the Introduction of this work.
[23] The Schengen Evaluation Process has a similar function for candidate countries which have to prove to have reached the standards set by the Schengen acquis – lately modified through the 'Schengen governance package' (see next Chapter) – to fulfil the requirements for accession to the EU.
[24] These will be described for the AFSJ in the next Chapter (2.3.1).

incentives" (Tömmel, Verdun, & Lavenex, 2009), it can be assumed that these were present in EU policy areas since the inception of the Union; a perfect example can be considered the informal cooperation of the Trevi Group that led to the establishment of a JHA pillar, first, and then to the AFSJ or, more generally, the use of an "intense transgovernmentalism" as the dominant governance mode in the same policy area, according to S. Lavenex (Tömmel, Verdun, & Lavenex, 2009).

Table 1 – The EU modes of governance: a synchronic analysis of EU political theories

Political Theories	Focus	Modes of governance
Supranationalism	Supranational institutions and bureaucracy (Eberlein; Wessel)	Community method: hierarchical, vertical relationship; principal: EU supranational institutions, agents: member states.
Intergovernmentalism	Bargaining among MSs interests (Hoffman; Moravcsik)	Former Second Pillar policies: hierarchical relationship; principal: EU intergovernmental institutions (representing member states' will), agents: member states.
Multi-level governance	Dispersed centres of authority in a non-hierarchical relationship (Kohler-Kock; Hooge and Marks; Peters and Pierre)	Supranational and intergovernmental stances are integrated in the same theoretical framework and complemented with the NMG (e.g. OMC).

Source: Author's own elaboration

1.1.1.1 Experimentalist governance

According to Charles F. Sabel and Jonathan Zeitlin, multi-level governance theory misses the opportunity to describe the emergence of a totally new architecture for policy-formation in the EU (Sabel & Zeitlin, 2008). This decision-making architecture does not stem directly from the formal competences attributed to EU institutions or from the Treaties, nonetheless it is shaping European governance. It has to do mainly

with the way in which the different centres of the multilevel system interact, discuss, learn and evolve in the process of public rule-making at the EU level.

The theory describes four key *functional* elements that characterise governance as 'experimentalist':

- "the establishment of framework objectives;
- strong input of 'lower-level' units (national or sub-national) into the way objectives are pursued;
- reporting, monitoring, and peer review of results; and
- recursive revision of objectives in the light of these results" (Sabel & Zeitlin, 2010, p. 238)

The process of policy formation can therefore be synthesised as follows: EU institutions and MSs are the actors that give input to the process and that jointly establish framework goals and measuring devices and standards to be reached in order to assess the compliance of "lower-level units" – national, local or regulatory authorities and other actors with whom they collaborate – to these general objectives. Lower-level units are therefore encouraged to implement them as they see fit, dismissing the "one-size-fits-all" approach; this is where the principle of subsidiarity – one of the general principles of EU law – is recognised its relevance in EU policy-making. The autonomy of these units is granted through this mechanism. However, in return for this autonomy, a constant reporting is required, along with monitoring and peer review of their performance and achievements, thus activating a mutual learning process. Thanks to this tripartite requirement imposed on lower-level units, EU institutions and Member States have all the instruments to control and revise periodically framework goals and the indicators, also given the new inputs that may derive from the participation of other actors to the monitoring and peer review process; and "it is these processes of framework making and revision [...] that give precise definition to the deliberation, informalism, and multi-level decision making characteristic of the EU." (Sabel & Zeitlin, 2008, p. 274)

This form of governance is named by its authors "directly deliberative poliarchy" (DDP). The deliberative character lies in the use of "argument to disentrench settled practices and open for reconsideration the definitions of group, institutional, and even national interest associated with them" (*ibidem*, p. 276); moreover, it is directly deliberative due to the possibility to learn directly from the experimentation "on the

field" of the lower-units that interact and learn not only through their experience but also from their peers, therefore making this type of governance a poliarchy. This mutual learning, setting of goals and discipline regime is, according to the authors, particularly suited for heterogeneous constituencies such as the EU.

Moreover, this framework accounts for all the forms of NMG that had an amazing development starting from 1990s. NMG, as a matter of fact, were born out of the need to "learn from diversity in order to harmonise, coordinate, and revise regulatory rules without imposing an unworkable uniformity" (*ibidem*, p. 279). In particular, the experimentalist governance architecture was elaborated first in three domains: the energy sector, public health and safety and social solidarity, but then found its way also in other domains. Sabel and Zeitlin did not themselves analyse the JHA policy field – which is the object of this work – through these theoretical glasses, but J. Monar (2010) did and found that the same type of governance serves the purpose of describing the new policy-making trends in the field, such as the set up of the EU border management agency[25]. As a matter of fact, the experimentalist governance will prove fundamental also to explain the framework in which Frontex operates and some of the logics that underpin decision-making in external border management. Nevertheless, as the scope of this work is to describe Frontex accountability in a democratic perspective, it is still necessary to expound what does democracy means in this governance system and how did we get to the idea of democratic deficit, by giving an overview of the existing literature on the issue (the object of the next Section) and getting to the deliberative approach which is shared by the DDP framework.

1.2 The quest for democracy in the EU

Defining democracy is a hard task. But when it comes to defining democracy of a deeply integrated regional organisation, it is even harder. Puchala, already back in 1972, describing the different approaches to European integration, invented an allegory that can be used also to represent this quest; he delineated a "situation where a group of blind men approach and touch an elephant in order to determine what kind of animal it is. Each person feels a different part of the animal and not surprisingly they all come to different conclusions." (Puchala, 1972 cited in Jensen, 2009). This description is still perfectly fit for the current situation of European democracy.

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[25] A more in depth analysis of the experimentalist governance character of JHA/AFSJ and the implications for Frontex accountability will be presented in Chapter 3.

The EU appeared in 1957, as a regional organisation aimed at regulating the economic interactions among Member States, in order to preserve peace and stability on the continent; nonetheless, further steps on the path of cooperation were driven by political will towards an ever-tighter integration, not only on economic but also social and foreign policy matters. Of course, suspicions are raised when a new level of government is established and takes decisions that are binding on the units of the constituency, therefore the necessity to ascertain that this new level of government is sufficiently democratic.

Success and significance are the reasons why the EU has always been referred to – in the literature about international organisations' democratic deficit – as the most controversial case to be debated. The issue arises as a debatable one due to the increase in competences ('creeping competence' according to the functionalist view) that member states delegate to the European institutions. While Union's powers have been expanding and deepening over new policy areas, the burden of the executive has been also transferred from the supranational EU institutions to a variety of agencies and committees. The decentralisation and pluralisation process (Hofmann & Morini, 2012) started due to the enormous increase in market and political needs of member states at the EU level over time (Peters, 2008), bringing along the multiplication of agencies, committees, frameworks and institutions, thus making it highly complicated and articulated to exert democratic control over all processes of policy-formation and implementation.

In the last twenty years literature has been increasingly concerned with multilevel governance[26] theories aimed at determining whether the EU is suffering from a democratic deficit or not. The scholars that propend for the first option, propose a number of solutions for the EU to become more *procedurally* similar either to an ideal-typical national democracy, either to big democratic federal polities – such as the US – or, referring to the EU as a *sui generis* polity, that it requires a peculiar system of check and balances. On the other hand, the adversaries of the democratic deficit theories focus their attention on the functioning/steering and the outcomes of European governance, often relying on some specific and characterising features of the Union[27] and reaching

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[26] Interestingly enough, the term "multilevel governance" appears as a researched key word on Google only in 2006. Source: http://www.google.com/insights/search/#q=multilevel%20governance%20&cmpt=q (retrieved 8 May 2012)

[27] Majone describes the EU and its policies as regulatory in nature.

the conclusion that the EU is in general not more affected from democratic deficit than any existing international organisation or national democracy, but it has the potential to even enhance democracy (Keohane, Macedo, & Moravcsik, 2009). Nonetheless, all the theories follow a similar pattern of research: a normative definition of democracy and a positive set of standards, followed by the analysis of empirical cases; the difference in the outcome of the researches lays in the research itself: while democratic deficit theories have in common the focus on *formal* requirements – the *how* –, the others are more *substance-oriented* – the *what* –.

1.2.1 EU: a sui generis polity/state?

The question of the uniqueness of the EU polity is particularly debated. Or, better, it is the question of whether the EU is a *sui generis* state or a *sui generis* international institution that receives a high degree of attention among scholars (Neyer & Wiener, 2011, p. 116). The reasons why it is fundamental to assess whether the EU can be assimilated to a national democratic polity or not, lies in the necessity to find common standards against which evaluate its legitimacy and democracy. According to the different normative view of the schools of thought that will be reviewed in this section, in fact, the EU might or might not be affected by a democratic deficit.

As described in the introduction of this chapter, there is a general agreement on the presence of a "democratic deficit" in the EU institutions, but this is not the only viewpoint on the issue. The supporters of the democratic deficit theory base it on the widespread conviction that the democratic nation state is the model for "democracy" itself, therefore assimilating the EU polity to nation states. According to this first stance, any organisation that strives for being recognised as "democratic" needs to fulfil some standards that, apparently, vary according to the definition of democracy that scholars decide to assume, always in relation to national standards. On the other extreme of the spectrum of ideas on EU conceptualisation, there is the denial of the democratic deficit as an issue peculiar to European institutions; Majone and Moravcsik are the most prominent exponents of this position, along with Neyer. Their assessment derives also from the conviction that the EU has to be considered either as a 'regulatory state' or as a sui generis entity endowed with peculiar functions and answering to specific problems, which are different from the ones nation-states handle.

Democracy is a term that has been filled with multiple connotations over time. The most quoted definition of democracy is without any doubt R. Dahl's normative definition of

an ideal-typical democracy within the nation state; in order to be in conformity with what he defines the "elementary principle" of democracy itself, which is "that all the members are to be treated (under the constitution) as if they were equally qualified to participate in the process of making decisions about the policies the association will pursue" (Dahl, 2000)[28], every democratic state has to fulfil five criteria:

- Effective participation
- Voting equality, i.e. free and fair elections
- Gaining enlightened understanding
- Exercising final control over the agenda
- Universal suffrage

These criteria lay the basis for the analysis of the EU level of democracy, according to realists, supporters of republicanism (also known as communitarianism) and liberalists, even if posing a different stress on each criterion, according to their view. As a consequence, the classical approach to the study of EU democracy is based on the same democracy standards that are valid for national democracies.

According to E. O. Eriksen, "the conventional criticism levelled against the EU is generally informed by a realist view of politics, i.e. politics as struggles over outcomes" (Eriksen E. O., 2000, p. 45). The definition of democracy and its legitimacy are thus based on fair and neutral "rules of the game" or procedures, such as the "free and fair elections" invoked by R. Dahl, in order to aggregate the preferences of each and every individual. The main tool used to decide is bargaining among interests; at the national level this translated in the consensus over majority voting, but when it comes to the international arena, realists prefer to step back and to underline the necessity to preserve the sovereignty of nation states. Therefore, the main feature of the European Union that creates a democratic deficit in realists' opinion is the presence of decision making procedures other than bargaining, such as deliberation, or informal decision making. These are practices that are common especially in the flourishing committees and agencies and in softer modes of governance of the EU, compared to the hierarchical and hard mode of governance privileged by realists due to its linke to the monopoly of power of the state.

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[28] Second edition of the more famous "Democracy and its critics", published in 1989.

The republican or communitarian view instead focuses on people's participation. democracy is considered first and foremost as the rule of the people which deliberate "in relation to a common good" (Eriksen E. O., 2000, p. 49); this is an "input-oriented" (Scharpf F. W., 1999) legitimizing belief. Here the national model is applied also at the EU level; hence, one criterion in particular is taken into consideration when dealing with the EU: the effective participation and collective will-formation, both concerning the European Parliament and its powers, secondly the Commission and the Council, as the most powerful institutions of decision-making. Following this principle, the democratic deficit of the EU envisaged by the republican approach derives from the low level of participation in the EU decision-making. Various steps have been taken in order to fill this participatory gap, especially through the universal suffrage which applies to the elections of the European Parliament since 1979; moreover, the EP itself has gained, over time, equal legislative powers with the Council, through the co-decision procedure, now defined by the Lisbon Treaty the ordinary legislative procedure. Moreover, according to the republican view, the legitimacy of a democratic organisation derives directly from the will formation in the public sphere and in the parliament (Habermas, 1996); this requires the EU solving its democratic deficit by engaging EU peoples and member states' parliaments in a permanent dialogue. Follensdal and Hix, describing this source of democratic deficit, affirm "governments can effectively ignore their parliaments when making decisions in Brussels. Hence, European integration has meant a decrease in the power of national parliaments and an increase in the power of executives" (Follesdal & Hix, 2006, p. 535). The republican view makes consistently the analogy between the EU and the nation state; considering a continuum in which Dahl's ideal democracy is at one end and authoritarianism is at the other end, the democratic nation state is placed next to the ideal democracy therefore any organisation striving to achieve recognition as democratic should conform to nation state's standards.

The liberalist (or Lockean) paradigm, as the republican and the realist ones, is state-centred and the argument of the democratic deficit is explicitly made by analogy with the state. However, as the state is seen as a tool to promote citizens' negative rights and therefore is considered ideally democratic only when the government acts as a neutral institution[29], enabling society to fully exercise its rights. Society itself is seen as a "market-structured network of interactions among private persons" (Habermas, 1996, p. 21). In a nutshell, legitimacy of the democratic liberal government originates from the

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[29] An apparatus of public administration, in Habermas' words.

citizens and remains democratic as long as it protects the equal private rights. Moreover, the democratic process takes the form of "compromises between competing interests" (Habermas, 1996, p. 26). According to this definition, the liberal paradigm claims that the EU working as a regulatory institution, taking Pareto-efficient decisions, even if led by an élite of technocrats, is not experiencing a democratic deficit. G. Majone is a supporter of this thesis and he asserts that "Regulation is by far the most important type of policy making in the EU" (Majone, 1999, p. 2). Nonetheless, the EU is now dealing with policies that are mainly redistributive in scope and not targeted to the Pareto-efficiency, as sustained by Follesdal and Hix, thus engendering a democratic deficit, contrary to what Majone maintains but in line with the liberal view. European policy making is, in fact, dealing more and more with policy fields – i.e. immigration, social policies, employment policies – that do not pertain directly to market regulation.

Contrary to this nation-state approach, to "liberate the democratic principle from the (potentially distorting) confines of the nation state" (Kohler-Koch & Rittberger, 2007, p. 2), paves the way for another sort of theoretical approach: the discourse-theoretical or deliberative approach. Deliberative supranationalism but also neo-functionalism, in fact, consider the EU as having a *sui generis* character. These theories start from the assumption that "the EU can only be meaningfully assessed as suffering from a democratic deficit if it has the theoretical chance to become democratic" (Neyer & Wiener, 2011, p. 170), which means that it has to be evaluated according to standards that are specific to its features. The *sui generis* character of the Union can be inferred from a variety of distinctive features starting from the most evident that is the absence of a mainly homogeneous population – "Unity in Diversity" is the Stockholm Programme's catch phrase, conveying the idea of a multitude of peoples of Europe, in contrast with the "We, the People" incipit of the USA Constitution – or "the lacking of societal foundation" (Neyer & Wiener, 2011) and the non-intergovernmental while, at the same time, non-federal nature of the Union, to the ones concerning policy-making; EU policy-making, in fact, "is usually not directed at its final addressees or target groups" (Tömmel, Verdun, & Lavenex, 2009, p. 293), as national policies are, but to intermediaries, be they national or local authorities. Moreover, EU's competences are the result of a delegation and pooling of sovereignty process, thus rendering EU not sovereign in determining the realm and scope of its action; finally, Union institutions are dependent on the will of the member states to implement their policies. Particularly

this last feature is the embodiment of the distance between the democratic national governments and the Union governance.

Majone, criticises the argument by analogy as the first "inadequate current standard" that dwells in the "consistent application of legitimacy standards derived from democratic practices of familiar national institutions" (Majone, 1998, p. 7). The separation of powers, typical of parliamentary governments, is therefore assumed to be necessarily reproduced at the EU level; conversely in the EU the executive (the Council of Ministers and the Commission) legislates, and more specifically the Commission – which is avulse from the MSs' control – has the huge power of initiative and implementation control. As a matter of fact, it is impossible to locate the executive power in a single institution because the founding Treaties, ratified by all national governments, created a *sui generis* organisation, more similar to a power-sharing governance system than to a national parliamentary one.

1.2.2 Is the EU affected by a democratic deficit?

Globalisation is a phenomenon which is affecting all the levels of government and it is reshaping both the procedures and the substance of democratic policy-making. Delegation, deliberation and informalism are trends that cannot be ignored and have to be studied from a democratic perspective. In a sense the EU is the perfect example to discuss this transformation, this 'neo-medievalism' – as Bull and Majone describe the multi-level governance and the overlapping authorities and loyalties in contemporary governance. Therefore, the question is: which standards of democracy are better suitable to judge EU democratic legitimacy?

As discussed in the previous section of this work, between the parliamentary government and the multi-level governance, the EU is definitely closer to the second model, a *sui generis* multi-level governance, thus needs to be approached with the idea that the standards of parliamentary democracy would not be fit to analyse it. Secondly, the legitimation methods should be chosen between output-oriented and input-oriented, as F. Scharpf argues. As it is quite difficult to assess the level of democracy by the output, considering the ever-shifting focus of European policy-making, an input-oriented approach is preferable. I thus embrace, considering that to measure democracy a normative position is required, the experimentalist approach, in order to assess – from an empirical perspective that takes into consideration both the *sui generis* character of the Union as a governance system and the developments in the way in which

governance is handled at the European level (agencification, NMG, etc.) – the level of democracy of the EU.

In order to clear the slate from the democratic deficit concerns raised by the theories that propose to evaluate the EU by making the analogy with domestic parliamentary systems, the Lisbon Treaty, answered many claims purported by realists, liberalists and republicans. Representation has been enhanced by extending the co-decision procedure (now ordinary legislative procedure) to virtually all policy fields in which the EU has exclusive or shared competence, and especially, for the purpose of this work, in the AFSJ[30], thus providing the EP with an equal role with the Council in the legislative process; moreover national parliaments have seen their power of initiative enhanced along with the possibility to raise concerns in the rule-making process. At the same time, the participatory claim has been given response through the opening of policy-making to the channelled interests of civil society, with the Open Method of Coordination.

What remains still doubtful is the accountability of European institutions in fields like social policies and redistributive policies which are actually shifting to the area of EU policy-making, reviving the social-democratic claim (Scharpf F. W., 1999)[31].

Moreover, deliberative supranationalism defines the democratic legitimacy of the EU governance in terms not only of participation, as the republican view, but also of transparency and accountability. The definition lays on the conception that opinion formation and will formation – separate steps in Eriksen's work – is not based first and foremost on bargaining, as realists purport, but on deliberation. In addition, public spheres do not act and discuss on a national basis only, but on a trans-national one[32]. For what concerns the trans-national public spheres, no authority can claim control on them but must seek approval, therefore the need for the EU institutions to inform the

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[30] With some relevant exceptions that will be described in the next chapter.

[31] Scharpf pinpoints that the social democratic approach is "output-oriented", meaning that this perspective "emphasizes 'government for the people' [...] political choices are legitimate if and because they effectively promote the common welfare of the constituency in question" (Scharpf F. W., 1999, p. 6). In order to tackle the EU democratic deficit, he proposes a balanced set of norms which includes particularly accountability measures and specific norms for delegation. In sum, this approach gives voice to the alleged EU 'neo-liberal bias' which depicts the EU as a "fiscally weak, neo-liberal state" not balanced by social welfare guarantees (Moravcsik, In defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union, 2002), which leads to a 'ruinous competition' (Scharpf F. W., 1988, p. 245) between MSs and a lowering of standards to the lowest common denominator.

[32] Nowadays, in the EU trans-nationality is quite evident, considering lobbies such as the European Women Lobby or even international movements for the promotion of democracy in Europe (i.e. the European Movement), but also student exchange programmes and European associations of specific jobs.

public opinion. And it is in the public spheres that starts the process of opinion formation which is public and informal, freed from the threats of the strategic interaction. It follows that fundamental elements of a deliberative body are: the interaction mode – that should be argumentative, based on persuasion and the capacity to form a common will – and representation, as this contributes to political rationality. The principle of hierarchy is completely rejected in this definition of democratic governance[33].

Keeping in mind this deliberative perspective, that was presented previously in this Chapter while describing the DDP theory proposed by Sabel and Zeitlin, the other main issue of concern is the role of the European agencies in the EU governance pattern. The regulation through agencies, considered as "a new paradigm of European governance" (Curtin D. , 2006), is a reality in the EU system of multi-level governance. Therefore, do these non-majoritarian and technocratic bureaucracies need to undergo democratic control? And if so, which kind of democratic control has to be exerted on them in order to fulfil the requirements of democratic governance that were chosen in order to evaluate the EU polity? The experimentalist governance architecture clearly describes a model of governance, where peer review and the DDP are the keystone concepts, in which democracy is not intrinsic in the model or an immediate outcome of its application, but has to be reconstructed starting from this model itself. In Sabel and Zeitlin's words: "our claim is not the new architecture of peer review is itself intrinsically democratic, but rather that it destabilises entrenched forms of authority— starting with, but not limited to, technocratic authority—in ways that may clear the way for an eventual reconstruction of democracy." (Sabel & Zeitlin, 2008, p. 313). Therefore, ensuring the accountability of these agencies seems to be the most important step in order to achieve a higher degree of democracy in this governance architecture.

In sum, the answer to the questions "is the EU a *sui generis* polity?" and "is the EU affected by a democratic deficit" are strictly interconnected and have a different answers according to the theoretical glasses that scholars decide to wear. For the purpose of this work, it is necessary to acknowledge the difficulty in finding a common response but, at

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[33] "We define governance as the production of authoritative decisions which are not produced by a single hierarchical structure, such as a democratically elected legislative assembly and government, but instead arise from the interaction of a plethora of public and private, collective and individual actors. It reflects the increasing capacity of democratically elected legislative assemblies and governments to muster the information and control the resources necessary for effective policy-making in contemporary societies." (Christiansen & Piattoni, Informal Governance in the European Union: An Introduction, 2004).

the same time, to explain which side would be best fitted to describe the EU as a multi-level and experimentalist polity that is exponentially growing in competences, size (Dahl, 2000) and fragmentation. The analogy with the state has proven to be very difficult to apply to the EU and in many ways counterproductive – more representation and participation through the increased involvement of the traditional arenas of the EP and the national parliaments the decision-making process, as purported by Dahl, may on the one hand hinder the overall efficiency of the EU, with the multiplication of the arenas of debate without the means to coordinate them, but also it may not be possible to achieve as national parliaments, in particular, lack the expertise and time to re-discuss the issues that were legitimately delegated – provided they comply with some specific rules for delegation (see next section) – to a different level of governance (Agné, 2007).

Table 2: Is the EU affected by a democratic deficit?

Theories	EU: sui-generis?	Democratic deficit?	Focus on:
Realism	No	Yes	Stronger role for MSs; unanimity; bargaining
Republicanism	No	Yes	More participation
Liberalism (Majone)	No	No	Regulatory state
Intergovernmentalism (Moravscik)	Yes	No	Saliency of policy issues
Deliberative supranationalism	Yes	Yes/No	Deliberative processes; participation of trans-national public spheres.

Source: Author's own elaboration

1.2.3 Delegation and legitimacy

"From the early days of the European Community political scientists in particular defended a rather dominant theory of understanding the process of European integration as a series of delegations of power from the foundational Member States to (most specifically) the Commission as a supranational actor. In much more recent times a legal perspective has been that the Commissions policy making and executive functions are exercised in a delegated relationship of agency for the politically legitimated Member States." (Curtin D. , 2006, p. 88)

The process of delegation in the EU has to follow some specific rules in order to be lawful and legitimate[34]: the Meroni doctrine – dating 1958 and arising from a case brought before the High Authority of the Coal and Steel Community[35] – stated clearly the principles that have to be applied to a delegating authority delegate powers. These include:

- "the delegating authority can only delegate to an agency powers that it possesses itself under the EC Treaty;
- the exercise of power by the agency must be subject to the same rules as would apply if the delegating authority were exercising the power (e.g. duty to state reasons, right to be heard, right to appeal);
- the delegating authority has to take an express decision transferring the powers;
- any procedure for assessment by an agency on its own authority must be subject to precise objective criteria so as to exclude arbitrary decision-making and to make judicial review possible;
- delegation of power can only relate to *clearly defined executive powers*, the use of which must be entirely subject to the supervision of the High Authority;
- consequently, it was not permissible to delegate *broad discretionary powers* that gave the agency a wide margin of appreciation." (European Scrutiny Committee of the House of Commons, 2009)

The principles of the Meroni doctrine still apply and were recently reaffirmed by the ECJ in a 2005 case in which the Court upheld the conferral of power to a branch of the European Central Bank. The judgement recalled the Meroni principles: first of all, "a delegating authority cannot confer upon the authority to which the powers are delegated powers different from those which it has itself received", secondly the exercise of the delegated powers "must be subject to the same conditions as those to which it would be subject if the delegating authority exercised them directly", and finally "the delegating authority must take an express decision transferring them and the delegation can relate only to clearly defined executive power" (ECJ, 2005). In case a delegating act does not respect the principles outlined above, it would be liable to an action for annulment before the ECJ on grounds of illegality.

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[34] In the standard model of parliamentary democracy, the delegation process is delineated as follows: "(a) the (sovereign) people bestow authority on legislators by elections, (b) ministers derive their collective powers from parliament, and (c) the extent of an administrator's discretion is determined by statute, as controlled by courts. In liberal democratic theory, explicit acts of delegation legitimise the exercise of public authority." (Sweet & Thatcher, 2002, p. 2).
[35] Now the European Commission.

As a matter of fact, the Meroni doctrine "places strict limits on the delegation of power where the exercise of such power cannot be controlled by the delegator." (Fisher, 2004, p. 506). However, the existence of technocracies, such as the European Central Bank (ECB) which is by definition *independent* from any other EU institution and MSs, was not impeded by this doctrine. The same holds true for European agencies that are required to detain a high level of expertise and knowledge and are to be recognised a certain degree of independence in order to operate (Pollak & Slominski, 2009; Busuioc M. , 2010).

According to scholars investigating the connection between democratic legitimacy and delegation, legitimacy in itself depends on the retrievability of the authority delegated by a state to an international/supranational organisation (Agné, 2007). In the case of the European Union, this is not possible *in practice*, although a so-called 'exit clause' has been provided for with the entry into force of the Lisbon Treaty[36]. A viable alternative is the idea that "international institutions can be legitimized by reference to their ability to solve problems that individual states alone cannot handle" (Agné, 2007, p. 20); however this does not exclude the problem of assessing the *democratic* legitimacy of the institutions to which powers and competences were delegated. This is all the more so because delegation might be conceived as the alienation of participatory rights from citizens.

Legitimacy crisis is the problem that is affecting the EU according to J. Neyer and has therefore to be tackled, not democratic deficit. In his "Justice, not democracy: legitimacy in the European Union" (2010)[37] he proposes to substitute completely the discourse on democratic deficit with the discourse on EU's justice deficit. "In contrast to democracy, the notion of justice is not tied to the nation-state, but can be applied in all contexts and to all political situations, be they global economic structures, domestic election procedures or the EU. The proposal to analyse the EU in terms of justice does not lower the normative standard, it corrects it. Justice is not less important than the idea of democracy, but explains its normative thrust." (Neyer, 2010, p. 904)

What remains still dubious is the accountability of European institutions in fields like social policies and redistributive policies which are actually shifting in the area of EU

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[36] Article 50 TEU establishes the right for member states who wish to secede from the European Union to terminate their participation to the Union by ratifying a withdrawal agreement, negotiated between the Union (with a notification to the European Council) and the member state itself.
[37] See also (Neyer & Wiener, Political Theory of the European Union, 2011).

policy-making, reviving the social-democratic claim. Moravcsik idea of non-salience of issues debated at the European level (Moravcsik, In defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union, 2002) – along with the consideration that as EU institution are insulated from direct political interference and differently from national democracies, they do not suffer from a democratic deficit – is outdated, due to the current crisis that is accelerating the process of integration especially in the external border management sector – as in the fiscal and social sectors –. This idea was proposed by Follensdal and Hix who argue that "EU policies currently have large distributive consequences, rendering a purely unique Pareto-improvement argument insufficient" (Follesdal & Hix, 2006, p. 551). Border management policy is a perfect example: gaining more and more attention from the public, due to the politicisation of migration and border crossings started in 2001, this is currently managed in the dispersed IBM system which was formalised as a comprehensive EU strategy only with the entry into force of the Lisbon Treaty, by eliminating the separation between former second and third pillar.

In order to address this accountability concern, it is necessary to search for a common definition of accountability and to describe both the process of delegation – chain of delegation – and the derived chain of control that gives rise to vertical accountability mechanisms, and the role of peers in the quest for horizontal accountability. This explains the relevance of accountability in the democratic control of EU decision making and policy formation.

1.3 Accountability and its role in democratic deficit theories

"In contemporary political discourse, 'accountability' and 'accountable' no longer convey a stuffy image of bookkeeping and financial administration, but they hold strong promises of fair and equitable governance. Moreover, the accounting relationship has almost completely reversed. 'Accountability' does not refer to sovereigns holding their subjects to account, but to the reverse: it is the authorities themselves who are being held accountable by their citizens." (Bovens, 2007, pp. 448-449)

A common *mantra* in the current political discourse, both at national and European level, is that solving the problem of democratic legitimation involves the use of accountability[38], although the specification of which kind of accountability would be the

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[38] For a discussion regarding statements in support and against this affirmation see Fisher, 2004.

best to achieve this purpose remains *the* big issue. Democratic deficit theories often go hand in hand with accountability deficit ones. European institutions, in fact, have been accounted for as generally lacking accountability, according to both academic and policy literature (Fisher, 2004) that developed around the year 2000[39]. "Public accountability, in the sense of transparent, responsive, and responsible governance, is meant to assure public confidence in government and to bridge the gap between citizens and representatives and between the governed and government" (Aucoin and Heintzman, 2000 quoted in Bovens, 2010, p.954); this type of accountability, in fact, makes policy-formation more democratic not only through an enhanced control power but also through the promotion of trust (Fisher, 2004).

Accountability covers an even bigger role for what concerns the democratic legitimation of the non-majoritarian agencies operating at the EU level, considered as "a new paradigm of European governance" (Curtin D. , 2006). As a matter of fact, the chain of delegation that normally goes from the voter to the elected representative body (i.e. parliament) and therefore to the executive branch (i.e. government), which in turn avails itself of an administration apparatus, in the case of the EU governance and, all the more so, in the case of non-majoritarian agencies is much more complex. First of all, it cannot be conceived as a single chain, rather multiple chains that run from different principals[40] – different also from the voter, who is considered by all democratic theories, focusing on parliamentary democracies, the ultimate source of power and the first delegating actor – to the specific agency. Secondly, at the EU level, in fact, the EP cannot be considered as the only principal, it being the only *directly* representative body; the Council and the European Council are *de facto* delegating executive and administrative competences to committees and agencies because they are *indirectly elected*[41] (Curtin D. , 2006, p. 90); this means that both executive and legislative bodies delegate their powers at the EU level. On the other hand, the agents (i.e. non-majoritarian European agencies) are the ones that act on their delegated powers that are described by D. Curtin as *implementing* powers.

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[39] It is not by chance that the debate on accountability experienced a 'golden moment' in those years, as in 2001 the European Commission passed the white paper on European Governance (see Introduction).

[40] M. Busuioc (2010, p. 35) has explained this concept by asserting that the term "principal" is not necessary a synonym for "accountability forum"; in this sense, the principal coincides with the delegating authority – which is only one – while there can be multiple accountability forums in charge, particularly, of the oversight of agencies.

[41] In Curtin's view, the European Commission can also be considered as a "putative principal" due to fact that it is appointed via directly and indirectly elected bodies.

The impossibility to establish univocally the chain (or chains) of delegation and, especially, the consequent unfeasibility of a chain of control that might ensure the democratic legitimation of the European agencies[42], is the main reason underpinning the choice of this work to focus on the quest for an adequate definition of accountability. Choosing the most suitable accountability standards that have to be fulfilled by European agencies might lead to the laying of a stronger basis for democratic legitimation of the whole EU governance system, that is more and more relying on this "mode of growth of the Union" (Shapiro, 1997).

1.3.1 A theoretical framework for accountability: the state of the art

"Governance without accountability is tyranny. Few principles are as central to democracy as this. It is an idea that runs throughout the history of democratic thought as a way to differentiate democracy from rival regime forms: In democracy, governors are supposed to be accountable to the governed." (Borowiak, 2011)

As a normative definition of democracy in a multi-level and experimentalist governance system, a definition of accountability is as much essential to analyse the democratic legitimacy of the EU (Harlow, 2008). The standard accountability relationship involves the presence of a *principal* and an *agent* or an *actor* and a *forum*, that is to say a subject A – the *accountor*, which can be either an individual or an agency – that has to justify its conduct in response to a subject B – the *accountee*, which can be either an individual or an agency but can also be described as 'the public' (Bovens, Curtin, & Hart, 2010). As underlined by Sabel and Zeitlin, it is not so easy nowadays, in public administration, to distinguish the actor from the forum, or to establish which forum – in a multi-level polity – is the most relevant to hold to account the mentioned actor; they propose the case in which the actor has a no pre-determined goal, meaning that "actors have to learn what problem they are solving, and what solution they are seeking, through the very process of problem solving" (Sabel & Zeitlin, 2008, p. 304): in this situation the achievement of the goal cannot be measured so that the actor's performance cannot be judged and eventually sanctioned in a principal-agent perspective.

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[42] It is worth mentioning here that some literature has maintained that, even if the chain of control between a principal, such as the Council, and the agent, such as Frontex, is clearly defined, it might still be unfeasible due to the lack of "institutional resources" or "willingness" of the principal itself (Bovens, Curtin, & Hart, 2010, p. 22). Schillemans (2011) states that the same situation is operating also at the national level, where executive and authonomous delegaed agencies are for the most part not held accountable due to the "inability of democratic principals [...] and the insufficiency of hierarchical accountability mechanisms on their own". See also Shapiro (1997).

However, a large number of definitions and ways to evaluate it have been used by the large number of scholars that have embarked in the study of this issue[43]. Also, accountability seems to be an ever-expanding concept, which "has come to stand as a general term for any mechanism that makes powerful institutions responsive to their particular publics" (Mulgan, 2000) and a dynamic and evolving practice (Bovens, Curtin, & Hart, 2010); as a consequence, in a context in which accountability seems to be "*the* principle for an era of innovative governance unshackled from conventional understandings of the constitutional state" (Fisher, 2004, p. 496)   in the EU, it has proven very difficult to compare empirical researches on the issue.

In literature, two main meanings of accountability can be distinguished: one focusing on "rendering account", which involves only information disclosure and justification of conduct from the accountor, but also another focusing on "holding to account", that also entails a relationship with the accountee, be it vertical – as in principal-agent relationships – or horizontal – with third authorities (Brandsma, 2010). Another common practice in defining accountability is the listing of a catalogue of different species of accountability mechanisms: legal, democratic, financial, administrative, etc. However, in substance, "to make any governing system 'better' requires identifying and utilizing the right type of accountability in what is largely a mechanical process" (Fisher, 2004, p. 497)

Drawing attention on accountability is not only an issue for scholars: the European Commission, in its White Paper on EU Governance, lists accountability as one of five principles underpinning good governance, democracy and the rule of law (CEC, COM(2001) 428 final, 2001, p. 10). Among these principles it names also transparency and responsiveness. It is important to distinguish the accountability process from both concepts, because "within some EU policy, transparency has been viewed as interchangeable with accountability" (Fisher, 2004, p. 503). Transparency of the agency/accountor is to be considered as a good prerequisite for accountability and, in particular, for the "information disclosure" phase, but it cannot stand for the whole process. Responsiveness, also, represents only one part of the process; is it is "linked with the extent to which governments pursue the wishes or needs of their citizens" (Mulgan, 2000, p. 557).

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[43] For a review of literature defining accountability see Brandsma (2010), Chapter 3.

The accountability deficit has historically been a strong concern (Bovens, 2010, p. 957), traditionally taking the form of ministerial responsibility and judicial review, but lately it has particularly emerged with renewed importance regarding the booming in formal powers, numbers of staff and organisation complexity of executive branch both of states (Mulgan, 2000) and of EU networked governance (Curtin D. , 2007) (Bovens, Curtin, & Hart, 2010). European non-majoritarian agencies have a particular position in the quest for accountability of the multi-level EU polity (Busuioc M. , 2010) (Hofmann & Morini, 2012); they have been established in a number of policy fields, among which there are environment, health, food safety, energy, telecommunications and, particularly relevant for the purposes of this work, border control. Their accountability is being studied due to the trend towards the delegation of ever-broader powers; in particular, agencies are increasingly relevant because they can have a direct impact on individuals, member states and regulators (Busuioc M. , 2010).

The relationship between independence and accountability in the case of non-majoritarian agencies operating at the European level is particularly complicated. While the need for agency oversight is undeniable, the requirement of independence of agencies themselves could be jeopardised by it. As a matter of fact, "it is sometimes considered that accountability and independence are conflicting concepts" (Gerardin, 2005 quoted in Busuioc, 2010); European agencies – their distinctive features being non-politicisation and expertise, which position them far from 'petty national politics' – have their *raison d'etre* exactly in their independence, that makes them the perfect technical arenas – where even MSs are freer to discuss their interests – to ensure the deliverability of policies that could encounter political blame at any other level of governance. It is therefore necessary to struck a balance between the need to maintain this kind of autonomy and independence of agencies on the one hand and accountability and control on the other. All the more so, because agencification, as a process, has arisen on an ad-hoc manner and outside a proper Treaty basis.

### 1.3.2 Two different approaches: Bovens...

A widely used definition of accountability is Mark Bovens', which reads as follows:

> "A relationship qualifies as a case of accountability when: there is a relationship between an actor and a forum in which the actor is obliged to explain and justify his conduct; the forum can pose questions; pass judgement; and the actor may face consequences." (Bovens, 2007, p. 452)

Bovens' definition of accountability describes any kind of accountability relationship – which is recognised as a social relation – but, in particular, he "refers to 'public' accountability as the open process of explaining and justifying actions or omissions by public servants or those exercising public authority to an accountability forum." (Curtin D. , 2006, p. 87).

A further clarification is necessary for some of the terms of the definition provided by M. Bovens. First of all, the obligation of the actor to provide a justification for its conduct to the forum might be formal or informal, which means that the actor might have the formal obligation to render account to a court, auditors or another institutional organ, or might have an informal obligation to present itself as in the case of press conferences, informal briefings or even voluntary audits. Secondly, the information provided by the actor to the forum might take the form data reporting on performance of tasks, outcomes or procedures. Moreover, the "adequacy of the information" (Bovens, 2007, p. 451) provided and "the legitimacy of the conduct" of the actor should be questionable by the forum. Finally, the passing of judgement might take different forms – "approve of an annual account, denounce a policy, or publicly condemn the behaviour of an official or an agency" (*ibidem*) – and, as a consequence, might result in a sanction. According to Bovens, the *possibility* to sanction the actor has to be included in the narrow definition of the accountability relation because it "makes the difference between non-committal provision of information and being held to account" (*ibidem*). Of course, sanctioning might still be conceived either in the form of a formal or an informal punishment (e.g. for informal sanctioning: the naming and shaming of member states that do not meet the requirements of economic growth defined by the European Commission, which are non-binding in nature; for formal sanctioning: the exclusion from the full fledged application of the Schengen rights for the member states that do not pass the test of the Schengen Evaluation mechanism).

Figure 1 – Accountability
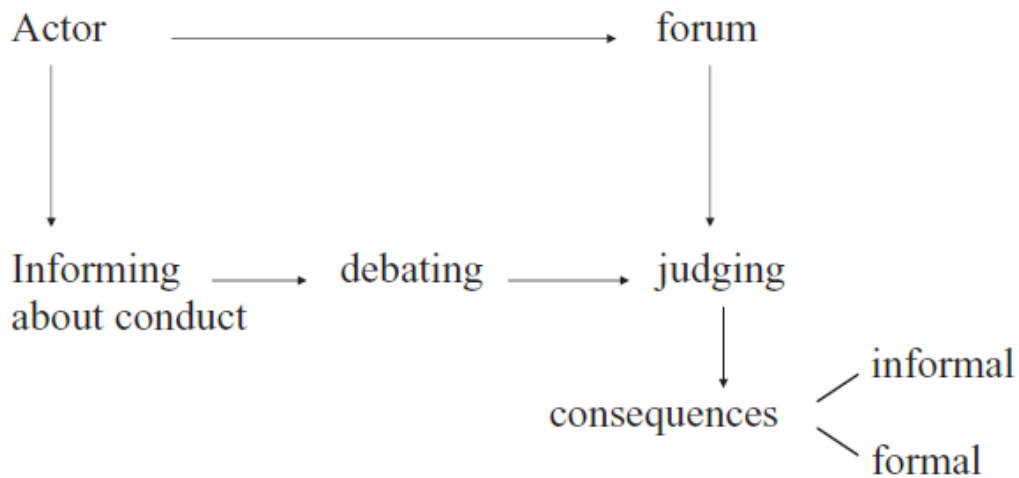
Source: M. Bovens (2007), *Analysing and Assessing Accountability: A Conceptual Framework*, p. 454.

The narrow definition of accountability proposed by Bovens[44] is described as being fundamental in order to empirically assess the level of accountability of actors and to make comparisons. This is why this definition has been used for empirical research on agency and especially comitology committees accountability, which has not been explored by Bovens in his work, and described by G. J. Brandsma (2010, p. 57) as having three main dimensions and two levels of intensity for each one of them[45]: information (little/much), discussion (rare/frequent) and consequences (few/many).

Bovens refers, throughout his work, to a public accountability relation that works for national parliamentary democracies. In this light, he asserts that in representative democracies there is a vertical relationship between the actor and the forum, that is to say a principal – agent relationship, called *political* accountability. As we have seen with the delegation principles set in the *Meroni* case, the Constitutional courts "vigorously assert the primacy of the politically accountable principal over its administrative agent and require therefore that the delegation of authority from the

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[44] The narrowness is described in comparison which less specific definitions of accountability which involve either the definition of other broad concepts such as transparency, liability, controllability, responsibility and responsiveness or "is basically an evaluative, not an analytical, concept" (Bovens, 2007).
[45] In his research, the so-called "accountability cube" proved to be a useful tool to evaluate and compare empirically the level of accountability of comitology committees.

former to the latter be limited and controlled by the definition of legislative goals." (Sabel & Zeitlin, 2008, p. 304).

However, political accountability is not the only relation that Bovens describes. He lists also other kinds of accountability relations in which "the forums are not principals of the actors, for example courts in cases of legal accountability or professional associations in cases of professional accountability" (Bovens, 2007, p. 451). He distinguishes the types of accountability based on four criteria: the nature of the forum, the nature of the actor, the nature of the conduct and, lastly, the nature of the obligation. These criteria reflect the questions: to whom should the account be rendered? Who is to render account? What is the conduct that has to be accounted for? And finally, under what kind of obligation is the actor to render account to its forum? These dimensions of accountability "can be used in the description of the various accountability relations and arrangements that can be found in the different domains of European governance." (Bovens, 2007, p. 467) and are listed in Figure 2 below. For the purpose of this work, the Frontex agency will be analysed in the next chapter also on the basis of this categorisation, retracing M. Busuioc work of 2010[46] (even if in a much smaller fashion!), therefore some more clarification is required for this taxonomy.

The first type, based on the nature of the forum, is burdened by the problem often referred to as "of many eyes". According to Bovens classification, in fact, there are at least five different kinds of forum to which an administrative/executive body operating in a constitutional democracy should render account: political, legal, administrative, professional and social forums are among the most relevant. It is interesting to notice in particular the social forum described by Bovens: civil society, interest groups and other stakeholders have more and more access to the data on the benchmarks and performance of public bodies thanks to the internet and transparency policies[47]; this non-formal accountability relation with these non-clearly demarcated forums will prove to be particularly interesting for this work and in view of a 'dynamic accountability' definition. Secondly, for what concerns the nature of the actor, a different problem arises: the one of "many hands", which describes the situation in which a single policy is implemented by a number of bodies, thus rendering it very difficult to ascertain

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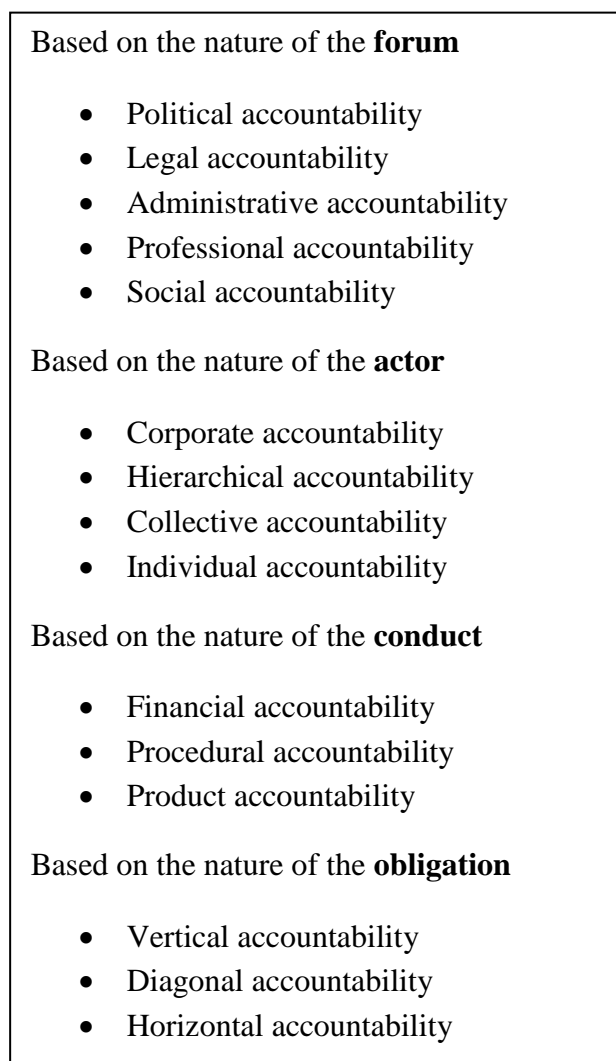[46] See (Busuioc M. , 2010) and (Bovens, Curtin, & Hart, 2010).
[47] For the EU see: Regulation (1049/2001) regarding public access to European Parliament, Council and Commission documents and Regulation (1367/2006) on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

responsibilities. The third type describes different typologies of conduct according to which a different forum is involved (e.g. financial accountability would be required by an audit body). Lastly, the nature of the obligation can be described as vertical in the principal-agent kind of relationship, in which the principal (forum) formally wields power over the agent (actor) which is the casa, according to Bovens, for most political, legal and professional accountabilities; the horizontal accountability is described instead as a voluntary form of account giving and is easily spottable in social accountability relations.

Figure 2 – Types of accountability

Based on the nature of the **forum**

- Political accountability
- Legal accountability
- Administrative accountability
- Professional accountability
- Social accountability

Based on the nature of the **actor**

- Corporate accountability
- Hierarchical accountability
- Collective accountability
- Individual accountability

Based on the nature of the **conduct**

- Financial accountability
- Procedural accountability
- Product accountability

Based on the nature of the **obligation**

- Vertical accountability
- Diagonal accountability
- Horizontal accountability

Source: M. Bovens (2007), *Analysing and Assessing Accountability: A Conceptual Framework*, p.461.

1.3.2.1 Which democratic governance?

Bovens provides another fundamental tool: he describes three perspectives to assess accountability relationships in European governance. From each one of these perspectives a different evaluation of accountability deficit (or its absence) can be derived. The first is the democratic perspective, according to which democracy spurs from the principal-agent accountability relation that legitimises and controls the democratic chain of delegation. According to this analysis it is popular control the key to a democratic system and this has to be exercised through the monitoring and evaluation of the executive bodies, which should change their behaviour according to the changing preferences of the citizens. The second perspective is a constitutional one, in which the equilibrium of power is the main aim of an accountable relation; this means that the arrangement between the actor and the forum is put in place to curtail "the abuse of executive power and privilege" (Bovens, 2007, p. 466). Lastly, there is the learning perspective; the accountability relation can, in fact, provide opportunities for both actors and forums to exchange information and learn from each other's experience thus increasing the overall efficiency of the governance system.

The concluding remark of his study is that the assessment of accountability "cannot be separated from the vision one has about what constitutes adequate democratic governance in the context of European integration—should we, for example, judge the European polity as any other Nation State, as a federal system, as an intergovernmental arena or as a *sui generis* case?". Bovens therefore avoids taking part to this theoretical debate in his 2007 work, thus providing the tools for other theories on the democracy of EU governance to build on its clarified notion of accountability. In 2010 instead, in collaboration with Curtin and Hart, he entered the debate with the book "The Real World of EU Accountability: What Deficit?". Their conclusion on the overall accountability of EU governance that "Although ex post accountability is only part of the larger equation determining the democratic quality of European governance, this study suggests that at least in this area, the EU is slowly but surely reducing its 'democratic deficit'." (Bovens, Curtin, & Hart, 2010, p. 22).

It is from this starting point that the experimentalist governance theory departs from; although refusing the principal-agent model as inapplicable for the analysis of European governance – and in particular of the non-majoritarian agency mode of governance – it

embraces Bovens' learning perspective and highlights the dynamic character of an effective accountability relationship, as will be described in the next section.

1.3.3 ... and Sabel&Zeitlin

In their DDP theory of the EU, Sabel and Zeitlin propose a different model for accountability. The main difference from Bovens' approach is that they describe a form of accountability that is not based on the analogy with parliamentary democracies, but based on the intuition that the EU governance is a completely *sui generis* system that requires a 'dynamic accountability'. This kind of accountability is mostly conceived as working among peers, in the framework of recursive redefinition of means and ends of the experimentalist governance, and which, accordingly, might lead to enhancing the whole legitimacy and democracy of the system; it is conceived as a *mechanism*[48].

Experimentalist governance, as described previously in this Chapter, is defined by Sabel and Zeitlin as being based on four main pillars: the establishment of framework goals that are formulated in a rather general fashion, leaving freedom for manoeuvre to the implementing bodies; the advancing of the goals by these implementing bodies, the so-called "lower-level units" (i.e. EU agencies, for the purpose of this work); the obligation of these units to report on their performance, as a condition for their autonomy, as well as to participate in peer-reviewing processes on a regular basis and, finally, the recursive revision of their operational framework (Pollak & Slominski, 2009). In the words of its creators, "Experimentalist governance in its most developed form involves a multi-level architecture, whose four elements are linked in an iterative cycle." (Sabel & Zeitlin, 2012).

In this framework, accountability therefore covers a highly relevant role; the very autonomy of the agencies is, in fact, dependent on the regular reporting of their performances – according to set benchmarks and agreed indicators – and their constant participation in peer-review processes "in which their results are compared with those of others employing different means to the same ends" (Sabel & Zeitlin, 2012).

Experimentalist governance acknowledges "the ambiguity and complexity of frontline issues, and hence the need for a flexible response" (Sabel & Zeitlin, 2012), thus elevating the bureaucrat to a relevant actor in the shaping of policies that are as fit as

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[48] Bovens in his "Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism" (2010), described also accountability not only as a social relation but also as a mechanism, placing himself in what he describes as the "European school", contrary to a vison diffused in the US of accountability as a virtue, that is a normative prescription to be achieved because it is inherently "good".

possible to the single problem, even if it means reviewing it from a multi-disciplinary perspective. Moreover, it supports the view that a distinctive form of monitoring is required, which has to be different for every field in which it is applied, in order to be effective. Finally, "[r]ules have a different relation to accountability in experimentalist administration than in conventional governance. Workers often have discretion to depart from rules where they believe it would be counter-productive to follow them. This discretion, however, is limited by the requirement that she do so transparently in a manner that triggers review and, if her judgment is sustained, prompt re-writing of the rule to reflect the new understanding." (Sabel & Zeitlin, 2012).

In this "new architecture" the application of the principal-agent model is "implausible" (Sabel & Simon, 2006, p. 398). First of all, because of the already mentioned lack of knowledge of the "assumed" principal; as a matter of fact, new governance institutions are born precisely from the necessity of rule-makers to leave to a lower unit the solution-finding to specific problems, while aiming at coordinating activities among increasingly diverse constituencies; the EU started out by regulating everything in detail – especially in the common market field – through Regulations, trying to harmonise standards across the member states, till it was clear that a "one-size-fits-all" approach was very difficult to carry on both for the level of detail that was required for the legislator (i.e. the Commission) to draft Regulations, and for the various member states and constituencies that were to apply these standards in very different situations. This situation is not at all new – M. Weber already presented in 1919[49] the problem of an omniscient bureaucracy that is at once fundamental to administrate complex policies and a threat for the political actor that did not possess the same level of knowledge – but has been intensified by "rapid technological and institutional change" (*ibidem*). The circumstances being the ones described, it is all the more important for "principals" to carefully define the boundaries of executive bodies' action and find a way to render them really accountable.

Secondly, the discretion of the implementing bodies cannot be totally avoided not even with the highest level of detail provided by the rule-maker, so that while the extensive use of Regulations by EU legislative bodies implies a high rigidity, the implementation of these rules might be however ambiguous due to agents' necessities. Thus interpretation would vary from the strict application of the letter of the norm to the

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[49] Weber, M. (1919), *Politics as a Vocation*.

search for its underlying intent. Experimentalist governance aims at closing this gap between rigidity and ambiguity, which is present in traditional legality, "through explicitly provisional and incomplete legislative frameworks that set the terms for diffuse groups of stakeholders to elaborate in particular applications, which will then be reviewed at the center with an eye toward revision of the frameworks." (Sabel & Simon, 2006, p. 398)

Thirdly, the relevant principals in the principal-agent perspective are supposed to be democratically representative of the people who are affected by agents application of their rules, that is if the chain of delegation works properly. However, the EU citizens are subjected to a number of bodies and institutions that they do not elect as they make use of their freedoms throughout the Schengen Area (e.g. travelling, moving to a different member state, etc.), thus rendering it necessary to find an alternative form of democratic legitimation.

1.3.3.1 Peer review

"Peer review is the answer of new governance to the inadequacies of principal-agent accountability." (Sabel & Simon, 2006) Both the questions of "many eyes" (multiple principals") and of "many hands" (multiple agents)[50] considered by Bovens, as all the other issues described in the previous section – knowledge, discretionality or arbitrariness and democratic representation – are not as problematic in the experimentalist framework, due to peer review processes.

With peer review, "agents" are obliged to justify the degree of discretion and autonomy they have been granted by "principals" in order to carry out their specific tasks, according to the wider policy framework provided to them. The framework itself, drafted in the light of "pooled comparable experience", undergoes continuous review thanks to this peer review system, in which agencies learn from and correct each other "thus undermining the hierarchical distinction between principals and agents and creating a form of dynamic accountability [...] Dynamic accountability becomes the means of controlling discretion when that control cannot be hard wired into the rules of hierarchy" (Sabel & Simon, 2006, p. 400).

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[50] EU governance system, as discussed in this Chapter, has a number of principals due to the diffusion of legislative powers; at the same time it has multiple agents: the national administrative authorities who implement EU law (e.g. directives) in their respective jurisdictions.

The role of peers is therefore fundamental as only they "have the same knowledge to evaluate the agent's explanations" (Nicholaides, 2003 cited in Sabel & Simon, 2006). Moreover, their sanctions – that can be either formal or informal, according to Bovens description – are, according to Sabel, not necessarily less effective or less easily enforceable than the sanctions imposed by principals to their agents. The control therefore is no more to be placed ex-ante, but rather is to be contemporary to the implementation and ex-post. Peers in a horizontal accountability perspective have been described by Schilleimans (2011), particularly for the national level executive agencies but which can be useful also for the European non-majoritarian agencies, and include agency's partners, professional peers, eventual evaluation committees, "customers" or "clients", interest groups and media. It might prove useful here to compare the dynamic model of Sabel and Zeitlin with the horizontal accountability[51] as delineated both by Bovens and by Schilleimans[52] (2011). Both accountability systems recognise the role of peers as fundamental for the process of learning, through the exchange of best practices and evaluation of performance according to set benchmarks. However, horizontal accountability, according to Schilleimans, has not the potential of being a powerful "proxy for democratic legitimation" because of the loose coupling with the democratically representative institutions (at the national level and all the more so at the supranational one); what is new in the theorisation of dynamic accountability, instead, is that it might become a truly powerful proxy for democratic legitimation *if* it is embraced by representative institutions that can review their policy frameworks according to the preferences expressed by peers, that might be even channelling the interests of citizens (which is the case of interest groups and NGOs).

This dynamic accountability mechanism has, finally, the great advantage of giving the possibility to "old and new political actors of all kinds to contest official proposals on the basis of much richer information about feasible alternatives than has been traditionally available" (Sabel & Zeitlin, 2012), again due to the peer-review process that can open up the black box of EU policy implementation (i.e. by European agencies).

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[51] It must be noted that horizontal and dynamic accountability are not the same, although the use of peer-review is the starting point for both mechanisms.
[52] Schilleimans describes horizontal accountability with regard to national executive agencies, but his study and his definition of horizontal accountability are particularly useful to discuss how this kind of accountability could contribute to the democratic legitimation of the "agencified" system and to the learning process.

> "In this way, experimentalist governance processes, though not intrinsically democratic in themselves, have a potentially democratizing destabilization effect on domestic politics, especially in transnational settings such as the EU. But whether the potential participants make use of the possibilities thus created, and what effects this may have on public decision-making if they do, remain empirical as much as theoretical questions." (Sabel & Zeitlin, 2012)

Sabel and Zeitlin describe also other "destabilising and disentrenching mechanisms" that are working within the EU governance, that might give even more relevance to experimentalist governance. In particular, they make reference to the situation where Member States find themselves confronted with the problems deriving from inaction in the face of a critical situation[53] or from uncoordinated response to change on questions of common concern. These include Member States' fear of the possible costs of inaction on matters such as the non-police of borders or the burdens of uncoordinated asylum policies, and "relevant decisions of the European courts, as well as the endogenous operations of peer review and other evaluation procedures themselves." (Sabel & Zeitlin, 2008, p. 307).

1.4 The kind of accountability that could enhance democracy in the emerging Europolity[54]

> *"If accountability is to be achieved in the EU, we need to replace the model of levels[55] with a network concept of accountability that can match and outstrip the apparatus of network governance. The rapid proliferation of European agencies, and hiving off of policy responsibility to transnational and international networks of agencies, renders a new theoretical approach the more necessary."* (Harlow, 2008, p. 176)

The democracy and accountability issues in the EU multilevel and experimentalist polity are currently debated among political scientist, sociologists and jurists and are considered to be at the core of the discussion over the future evolution of the EU as a

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[53] Most European non-majoritarian agencies, especially during the "third wave of agencification", as described in the Introduction, were established in response to a crisis affecting various Member States and which therefore implied some form of cooperation among them in order to be solved.

[54] From Bellamy and Castiglione's article of January 2003, "Legitimizing the Europolity and its regime. The normative turn in EU studies", in European Journal of Political Theory.

[55] "Conceptualisation of the EU in terms of 'levels': a three-tiered construction composed of transnational, national and sub-national levels, the bottom level receiving minimal attention." (*ibidem*). This description of the EU envisages a hierarchical approach towards the EU polity.

political union. This is evidenced by the research program "CONNEX"[56], coordinated by Deirdre Curtin, that sees one of its research groups dedicated to finding a common definition for the concepts of "Democratic Governance and Multilevel Accountability" and therefore common standards to evaluate the performance of EU institutions in these fields. My study aims at giving a contribution in this field of research, by proposing the application of the dynamic accountability standards purported by the experimentalist governance theory to the specific case of the European Agency for Border Management (FRONTEX), which will be the focus of the last chapter.

This work focuses, therefore, on a peculiar aspect of democratic governance, which is accountability. All schools of thoughts supporting the EU democratic deficit thesis "do agree that one of the key indicators for the democratic quality of the EU is the extent to which both European and national actors who populate EU institutions can be – and are – held to account by democratic forums." (Bovens, Curtin, & Hart, 2010, p. 19).

The reasons for the choice of the experimentalist governance theoretical framework and the consequent adoption of the dynamic accountability as a valid tool to analyse the European Agency for Border Management are mainly three. First of all, the principal-agent model fails to acknowledge all the implications of an ever-changing and ever-adapting governance such as the one that is currently present in the EU[57] while experimentalist governance "is particularly relevant in policy areas which are characterised by vastly heterogeneous interests, legal traditions and ideas" (Pollak & Slominski, 2009, p. 905). Secondly, accountability is less and less required by principals and more and more by peers, that are the best placed to assess the agent (because of interest and competence) and might ask for sanctions to the competent authorities or affect agencies behaviour through informal sanctions; this, in turn, might raise awareness among the general European public (e.g. through advocacy campaigns and writing reports, while at the same time trying to establish a dialogue that can lead to a mutual learning process). Lastly, for what concerns particularly the analysis of European agencies (i.e. coordinating European agencies such as Frontex, that will be analysed in this work) the principal-agent toolkit is not the best suited while the contrary can be said for the dynamic accountability working in the experimentalist governance

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[56] For further reference and a list of publications of the research group, see CONNEX website: http://www.mzes.unimannheim.de/projekte/typo3/site/index.php?id=123 and http://www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/Factsheets/RZ%20RG2_publications.pdf (retrieved April 2012).

[57] See Chapter 3 for the analysis of the AFSJ according to the tenets of experimentalist governance.

framework; the rationale underpinning this statement is that the establishment of Frontex "cannot be regarded as a delegation of authority from the Council or the member states to Frontex (Curtin 2005: 99), because neither of these potential principals has the power of transgovernmental coordination and assistance in the field of border management which could be delegated. The complementary powers of Frontex are, in fact, new forms of authority which cannot be derived from existing ones." (Pollak & Slominski, 2009, p. 905). Moreover, from a democratic perspective, the possibilities that peer review opens for deliberation are consistent and deliberation, in the DDP, has the role of enhancing the democratic character of the EU policy-making.

In Bovens perspective, the "accountability maps" emerging around the non-majoritarian European agencies are very difficult to evaluate, due to different reasons. The main concern arises because accountability arrangements might do well from one perspective but not from others; these agencies, in fact, might be evaluated according to Bovens constitutional perspective, and be found to prove highly accountable due to the increased judicial control from the ECJ and Ombudsman, while when evaluated according to the democratic perspective, accountability scores low due to the weak connection with democratically legitimised forums. On the other hand, "overly rigorous democratic control may squeeze the entrepreneurship and creativity out of public managers and may turn agencies into rule-obsessed bureaucracies" (Bovens, 2007).

Moreover, the accountability/independence dilemma considered by some scholars as a zero sum game and described by Busuioc as "one of the central challenges with regards to non-majoritarian agencies[that] is to strike the right balance between independence on the one hand and control/accountability on the other. (Kreher 1997; Everson 1995; Magnette 2005)" (Busuioc E. M., 2007)[58], might be solved not concluding that the principal has given up the power of direct control in the moment it has decided to delegate power – implying that the accountability relation is not one of direct control that interferes with agency independence –, which is Busuioc argument, but through the definition of accountability not as a principal-agent relationship but as a dynamic

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[58] For further reference on the distinction between the concepts of accountability and control see Mulgan (2000). He also provides an interesting link between control/accountability and democratic constraints: "Indeed, if the central issue of democracy is to control the government so that it complies with the people's preferences, then the entire complex edifice of a modern democratic political system becomes in effect a system for securing government accountability (Day and Klein 1987, ch. 1)." (Mulgan, 2000, p. 563)

concept that involves the participation of peers – whose judgement might have political implications – and indirectly also representative institutions.

Outside the experimentalist governance framework, a highly sensitive theme that has not been extensively presented in this work yet but that has been accounted for through Neyer's work (2010), is the legitimation of the EU governance through justice and in particular through the protection of rights. In this panoply of bodies and accountability relations, in fact, legitimising EU governance is more straightforward if considering the legal discourse and therefore human rights as an essential issue. This means that it might be necessary to evaluate the output of European agencies – and this is especially true for agencies whose actions may have direct consequences on individuals' rights, such as Frontex – also in this perspective, in order to see if one of the main tenets of democracy, in general, and of the Union, in particular, – the respect of fundamental rights – is applied and is given the required importance[59] in the implementation of EU policies.

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[59] The technical word in European studies is: "mainstreamed".

CHAPTER 2

2.1 Why did Member States decide to pull their competences together in border management field?

> *"The question of immigration and its control affects three issues of fundamental concern to states: the exercise of sovereignty, the control of territory and the definition of citizenship"* (Marie, 2004, p. 8)

The history of the border management policy in Europe is convoluted and enmeshed with the very significance of the process of integration of the European Union. From nation-state controlled to communitarised competence, it has undergone a fast evolution, even if the steps that led to the current situation are not always easily traceable. In this policy field, strong concerns for security and the preservation of a certain degree of sovereignty are enmeshed with the need to grant fundamental freedoms to a new generation of European citizens. These are the main driving forces that shaped this policy field. But the question still needs clarification: why did MSs decide to pull their competences? And how did they do it? This first section starts by trying to answer to the first question.

Nation states are defined by their borders and are endowed with the absolute power to control them and their crossing. Nonetheless, in the past twenty years, European states decided to cede border control responsibilities to EU institutions and to external border states. This trend has been originated by the introduction of the Schengen Agreement (1985), which was first laid down by Member States in order to secure the smooth functioning of the internal market. The free movement of persons – conceived at first to target mainly nationals of Member States moving for the purpose of work (CEC , 1997) – is one of the four basic freedoms of the common market, "the essence of the 'European project" (Geddes, 2008, p. 43), and it is stated in Art. 3 of the Treaty of Rome of 1957. With the implementation of this freedom came also the need for a common immigration and asylum policy but especially, the need for a common management of the external borders; as a matter of fact, the free movement of persons within the Schengen borders is difficult to attain without securing them. This has

entailed, since the very beginning of the application of this principle, a functional spill-over – as neo-functionalists would define it – of powers in the border management field.

The debate over this lengthy process of competences spill-over, that eventually evolved in an EU integrated border management system, concerned "the issues of identity, control and security that are enmeshed with the concept of border" (Peers, 2006, p. 93). These same issues form the core of the concept of Member States' sovereignty, not to mention the different degree of human and procedural rights granted to migrants. The classical perspective about sovereignty (Lake, 2003), purported by realists and neorealists, describes the definition of borders and their control as one of the key attributes of a state, along with the monopoly of the legitimate use of violence, the administration of public resources and their allocation and to provide protection, both internally – by bringing and assuring order – and internationally, from external threats. Moreover, sovereignty, according to the definition of international customary law codified in the 1933 Montevideo Convention, entails four elements: a defined territory, a permanent population, effective government over the territory and the population and the capacity to enter into relation with the other states. The implementation of the abolition of internal border controls through the Schengen Agreement thus produced harsh disputes over the competences to be attributed to the EC and the method to be followed[60].

Because of the strong disagreements on the issue, border management – along with immigration, visa and asylum policies – became one of the first fields in which the "variable geometry" idea was applied; the UK and Ireland did not take part to the Schengen Agreement[61] in the first place and maintained their specific opt-outs in this policy field till nowadays. Therefore integration followed a troubled path and implied a constant adaptation to the willingness of Member States to participate to it. Only lately[62] the Schengen acquis has been absorbed officially into the EU legal system and therefore imposed in its entirety to the new Member States. As a consequence, these states – Eastern European countries and particularly Romania – face a daunting task, not only to acquire the so called 'Schengen maturity', but also to deal with the international flows

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[60] The choice was to be made between the methods employed in the first and the third pillar: the communitarian versus the intergovernmental.
[61] The Protocol on the Schengen acquis provides for the possibility of the UK and Ireland to partially participate to the Schengen acquis, subject to unanimous favourable decision of the Council and the Schengen Member States. For a more detailed discussion of the subject see para. 2.3.1.
[62] The Amsterdam Treaty entered into force in 1999 and integrated the Schengen Agreement into the bulk of EU legislation.

of migrants crossing their borders while they are simultaneously countries of origin and transit and clearly lack the means to pursue the common objective of European security. This is *de facto* one of the main concerns of western European countries that, particularly in the last decade, have seen their governments winning the competition at the ballot box[63] over immigration issues, with a populist rhetoric: depicting migrants as a threat and talking of invasion, insecurity and loss of identity[64]. Clearly, all Member States now share a common ambition: "to police foreigners rather than have an [common] immigration policy." (Marie, 2004, p. 8)

A common definition of legal and irregular migration immediately appeared equally fundamental for the development of common policies and especially, concerning irregular migration, for its management at the external borders and for the relationship of EU with third countries. The definition of irregular migration is unfortunately still tentative and unofficial and its very wording is contested; in this work 'irregular migrants' will be preferred to 'illegal migrants' – which is instead commonly used within the EU institutions – and to the various denominations that have been used to define migrants crossing irregularly the EU external borders, such as the term 'clandestine' used to refer to foreigners living illegally in a country (Marie, 2004) (Perkowski, 2012). It is worth underline here that unauthorised migrants generally violate migration law, but their breach do not constitute criminal offence in the majority of EU countries[65]. The most authoritative source of definition is Resolution 3449 of 1975 of the United Nations General Assembly, which names them "non-documented or irregular migrant workers", stressing the economic purpose of migration. Every Member State has a different approach both to the definition of the irregular situation giving rise to the status of irregular migrant and to the management of undocumented migrants once they are present within national borders[66]. The definition of the irregular situation, in fact, pertains the exercise of state sovereignty, through the establishment of

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[63] See the success of Marie Le Pen at the presidential elections in France (Le Monde, 2012) http://www.lemonde.fr/election-presidentielle-2012/article/2012/04/22/marine-le-pen-cree-la-surprise-en-atteignant-les-20_1688834_1471069.html (retrieved 22 April 2012).

[64] For an overview of the anti-immigration rhetoric in European politics see Mamadouh, 2012 and Schain, 2007.

[65] Italy is the only European country where undocumented migrants can be defined illegal migrants, as breaching migration law gives rise to criminal liability. This was established with the entry into force of the so called 'Bossi-Fini law' No. 189 of 30 July 2002, modifying the law concerning immigration and asylum

[66] For a detailed description of national policies towards third country nationals see Marie, C. V. (2004).

legal rules regarding the right to enter and reside in the state concerned[67]. However, the Council and the EP finally passed a Directive[68] defining the term 'illegal stay' in 2008; it is described as "the presence on the territory of a Member State, of a third country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State" (Article 3(2)). The issue of defining the migrants and their status is not only a matter of philosophical concern; as a matter of fact, it determines "who is in and who is out". The reason why it is relevant in this context is that Frontex is part of the system which is in charge of giving definitions on these issues; according to H. Ekelund "an important part of this agency's mandate is to develop guidelines which will assist member states in their protection of external borders, [therefore] the agency is arguably also involved in perpetuating normative statements of EU immigration policy." (2008, p.7).

The legal basis for the management of the external borders lays with article 77 (ex article 62 TEC) of the Treaty on the Functioning of the European Union which provides for the powers that are recognised to the Union in this field. Paragraph 1 of the article lists three objectives: the first regards internal borders, to ensure "the absence of any control on persons" (a); while the second and the third concern external borders and state that the Union has competences in "carrying out checks on persons" (b), monitoring and gradually introduce "an integrated management system for external borders" (c). Not surprisingly, these principles were not implemented within the communitarian framework but through a purely intergovernmental process, following the rules of international law: the Schengen Agreement. Schengen is defined by Steve Peers as the "core act of negative legal integration" (Peers, EU Justice and Home Affairs Law. Second Edition., 2006, p. 93) implying that in order to reach the objectives stated in the Treaty of 1957, the borders – the barriers *par excellence* between states, the ones that define states themselves – had to be removed. And this was just the very first step towards an ever higher degree of integration, dictated by the shift of migration policies from "low" politics to "high" politics (Guiraudon & Lahav, 2007), due to the ever increasing importance of migration flows in terms of numbers and to the emerging

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[67] It is important to highlight here that freedom of movement is recognised by the Universal Declaration of Human Rights of 1948 (art. 13) and the International Covenant on Civil and Political Rights of 1966 (art. 12) as a fundamental right. However, within the EU freedom of movement is recognised to nationals of Schengen signatories only.

[68] 'Returns Directive': Directive 2008/115/EC on common standards and procedures in Member States for returning third-country nationals (OJ L348/98). Ireland and the UK do not participate in this Directive.

of integration problems in the absence of a common approach; the key factor for this shift remains embedded in the free movement framework that "empowered supranational institutions and created scope for constitutionalisation" (Geddes, 2008, p. 47) which turned the Schengen Agreement from an international treaty agreed between states into laws that bind the same states (Sandholtz & Stone Sweet, 1998) (Christiansen, Constitutionalising the European Union, Constructing EU Borders, 2005).

This chapter is aimed at giving a comprehensive overview of border management policies, by trying to cover all the relevant issues that determined their evolution. In order to do so, it is divided in five sections. The first section will start by giving some fundamental definitions for border management and by answering more specifically to two questions: where and what are the external borders of the EU? The definition of a common external border will be presented as a challenging matter also from a sociological perspective. Secondly, the development of border management from a national into a supranalisationalised competence will be described in detail, giving prominence to the legal aspects of the process of integration in the field, starting from the Schengen Agreement in 1985 to the latest Frontex Regulation (2011), and its political implications. In the third section, the pattern of international migration will be described from a geo-political perspective, highlighting the critical points of entry into the EU and the evolution of migration flows towards Europe. The fourth and last section will address in detail what is the current vision of EU institutions and Member States about the European Integrated Border Management, also through an overview of the proposed reform of the Schengen Agreement, supported by Italy and France in 2011. Moreover, the chapter will delineate the policy trends in border management, giving a first definition of the role of Frontex in the IBM system, with a particular attention to securitisation and externalisation, and will pave the way for a more detailed description of the European Agency for the Management of the External Borders, that is the object of the third chapter.

2.2 The external borders

"Border guards may check passports and customs officials may impose duties, but to conceive of the foreign-domestic distinction in this simple way is to mislead, to mistake surface appearances for underlying patterns" (Rosenau, 1997)

The EU is currently composed of twenty-seven Member States[69] and has a total of 8000 Km of land border, adding to 80000 Km of sea borders. However, only twenty-two Member States are signatories of the Schengen Agreement and part of the Schengen Area[70], operating as a passport union without internal borders and with a common external border, while accession to the Area of Romania and Bulgaria has been temporarily postponed by the Council of the European Union[71], as a consequence of their inability to fulfil the so-called 'Schengen maturity' criteria[72]. In addition, Norway, Iceland, Switzerland and Liechtenstein – Liechtenstein being the newest member, accessed on 19 December 2011 – are part of the Schengen Area without being members of the Union. Therefore, the countries that bear the responsibility of the external borders of the Schengen Area do not coincide with the external borders of the Union[73], where the principle of free movement of persons applies, and have an estimated 1792 official border-crossing points "of which 665 are air based (major airports), 871 sea borders and only 246 are land borders" (EOS, November 2009). On the whole, nowadays the Schengen Area consists of "25 European countries, covering a population of over 400 million people and an area of 4,312,099 km² with 10,000 km of land borders and 50,000 km of sea borders" (Hartmann, 2011). The Southern and Eastern Member States are the ones most involved in land and sea borders management issues, due to the provenience of the irregular migration flows, reaching Europe through five main routes[74]: the West and East Africa Routes and the West, Central and East Mediterranean Routes. In sum, the external borders of the Schengen Area are defined in Article 1 of the Convention Applying the Schengen Agreement of 14 June 1985 that reads as follows:

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[69] The EU will be composed of twenty-eight Member States by 1 July 2013, with Croatia's accession (Treaty of Accession 2011).

[70] Also referred to as 'Schengenland' (A. Geddes (2003), P. Hobbing (2005) and J. Monar (2005))

[71] Council of the European Union, Press Release of the 3111th Council meeting Justice and Home Affairs, Brussels, 22-23 September 2011 .

[72] The European Commission evaluates the maturity of the new Member States, according to criteria that varied over time, and the Council takes decisions regarding their full accession to the passport union. This evaluation is rendered necessary to ensure the security of the Union's citizens – "Should its candidacy be accepted, Romania would be the second largest land border in the entire Schengen Area (2070 km long) [and] [...] the most difficult to protect against migration and illegal trafficking." (Ciucu, 2010) – but it has come to be considered mainly as a mean to protect the internal labour market from the "invasion" of Romanian and Bulgarian workers.

[73] Cyprus has a particular status according to which it should have become part of the Schengen Area upon accession, but it is *de facto* still outside it due to the ongoing territorial dispute. Moreover, the non-European territories of Schengen signatories are also excluded from the Area.

[74] To have a complete picture of migration routes towards European external borders, see: http://www.iom.int/jahia/webdav/shared/shared/mainsite/microsites/rcps/mtm/2010-MTM-Map-on-Irregular-Migration-and-Mixed-Migration-Route-EN.pdf   or http://www.frontex.europa.eu/intelligence/migratory-routes (retrieved 15 March 2012)

"External borders shall mean the Contracting Parties' land and sea borders and their airports and sea ports, provided they are not internal borders."

Borders are at the very core of the study of the policies concerning their management (Zaiotti, 2008). For this reason, it is fundamental to firstly provide a theoretical definition of borders, that can be analysed according to different perspectives. According to A. Geddes (2008) "a distinction can be made between three types of borders: territorial, organisational and conceptual". Territorial borders are the ones defining "who is in" and "who is out" from a territorial entity, and decisions made about their crossing define the state's will and capacity to exclude unwanted migrants. These borders have been challenged by the European integration process and in the last 30 years have faced the increasing challenge of globalisation, in the form of international migration; the state organ that is in charge of implementing state sovereignty at the territorial borders is the border police force. Organisational borders describe instead the different areas of welfare management, that usually coincide with territorial borders, but might stretch over them (e.g. INTERREG cooperation in Europe). Lastly, conceptual borders involve concepts of "identity, belonging and entitlement" that are as fundamental notions for the state as the definition of its territory and its welfare; this last type of border is still felt as a strong divide between Europeans, even though the territorial borders has been removed (Anderson & Bort, 2001). This is one of the reasons why migration within Europe is not as consistent as the fathers of European integration had foreseen. The implication of these definitions of borders lays in the different policy approach towards migration; as A. Geddes expounds in a previous work: "concerns to maintain and protect borders of work, welfare and citizenship underpin the type, form and content of EU external action in the areas of migration and asylum" (Geddes, 2005).

The gradual enlargement of the EU – in 1973, 1981, 1986, 1995 and the most controversial in 2004 and 2007 – has rendered highly visible the shifting of the external territorial borders and the lifting of internal borders. Even though the shift was gradual, because of the strong resistance opposed by "old" Member States to the full accession of new Member States to the benefices of the Schengen Area, the impact on European identity and therefore on the concept of European citizenship has been impressive. Moreover, the recent opposition to the entry of Romania and Bulgaria into the passport union is evidence of another issue: the elimination of the internal borders and the creation of a common external frontier implies a complete mutual trust among the states

participating to the Union, a principle that has recently been stressed by the Commission[75] especially for the field of migration and border control. As a matter of fact, borders are the ultimate defining elements of sovereignty – at least in a Wesphalian order (Caporaso, 2000) (Zaiotti, 2008) – and there is a rich literature, regarding international migration and the EU, which has explored the evolution of border relationship between and within Member States with the process of integration, indicating that the role of the frontiers is rapidly changing (Anderson & Bort, 2001).

At the other end of the spectrum of national governments attitudes towards the communitarisation of the management of the borders, there is the consideration that it has enhanced the room for manoeuvre of executive branches of Member State governments. The elimination of internal borders, in fact, has had the effect of removing the direct political responsibility from them, "escaping" from political blame and circumventing national constraints of judicial and legislative nature (Lavenex, 2006).

From the perspective of migrants, willing to cross European external borders, borders themselves are perceived as creating a "fortress Europe", defined as such due to the extremely high death toll exerted by its 'walls' and the hardships that migrants encounter soon after entering the Schengen Area[76]. According to C. Boswell, in fact, as measures to restrict illegal entry and stay were introduced since the 1970s by Western European states, these "have driven migrants and refugees to use more dangerous routes to enter Europe, forcing many to employ the services of smuggling or trafficking networks." (Boswell, The 'external dimension' of EU immigration and asylum policy, 2003). The counting of the deaths in the Mediterranean Sea is kept meticulously by a journalist and blogger, Gabriele del Grande, who has counted – from 1988 till today[77], through official and unofficial reports – 18.244 deaths, even though to the count should be added also the deaths on/in other frontiers, such as the English Channel and other land borders, and the corpses that were not discovered. Moreover, the capacity of migrants to reach the border is also strongly compromised, due to the externalisation of

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[75] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions COM(2011)248 final, 4.5.2011, p. 7.
[76] For a socio-cultural and socio-political description of the concept of "Fotress Europe" see Thomas, D. (2012, September) Into the Jungle: Migration and Grammar in the New Europe, *European Studies: a Journal of European Culture, History and Politics*, 29(1), pp. 267-284.
[77] Figure retrieved May 2012.

migration control[78] through international cooperation with neighbouring countries (Lavenex, 2006), also defined as sending countries.

Even though borders acquire different significances, according to their function and in the perspective of the actor involved, this work will take into consideration only the territorial type of border and the implications deriving from its irregular trespassing.

Given the definition of the object of border management, the question of "who does what" still remains open. The next Section will address exactly this issue, that, as will be clear from the start, is probably the most complicated and unclear, due to its rapid and scattered evolution.

2.3 EU and Member States competences

"Sovereignty is nowhere more absolute than in matters of emigration, naturalisation, nationality and expulsion" (Arendt, 1973)

The troubled definition of competence in the field of border management is path dependent to the will of MSs to integrate in the field of migration and asylum policies. This will has been exercised for the first time, concerning the removal of border checks on persons, in 1985, when an agreement between six European states was reached. This is how the cooperation in border management was born, through the international legal instrument of the Schengen Agreement. After this first attempt at pooling sovereignty in the field, the central Union competences regarding border checks, immigration and asylum have had a convoluted history: from the Maastricht Treaty (1992), that casted the three pillar structure of the European Communities and, in particular, the third intergovernmental pillar on Justice and Home Affairs (JHA); to the Amsterdam Treaty (1997) that reorganised the Communities structure and its competences, shifting border checks, asylum and immigration under the "communitarian method" but subjecting it to restricted juridical control and mainly unanimity voting; and, finally, to the Lisbon Treaty and the creation of the Area of Freedom Security and Justice, with a firm legal basis in the Treaty on the Functioning of the European Union and the complete assimilation to the ordinary legislative procedure (Chalmers, Davies, & Monti, 2010).

In sum, the Union has reached a very high level of integration in these policy fields, unequalled by any other policy area, over a relative short time. As a matter of fact, the

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[78] See paragraph 2.5.2.

achievements attained in pulling together state powers are among the most significant, both qualitatively – from tentative intergovernmental cooperation to fully fledged communitarisation – and quantitatively – JHA is the fastest growing area of the Union's activity "with the Council of the EU adopting an average of 10 new texts per month since 1999" (Sabel & Zeitlin, Experimentalist Governence in the European Union, 2010, p. 237). Nonetheless, the integration process is still progressing. Member States still detain the power to sign international agreements with third 'sending' countries in order to regulate the entity of the flow of migrants that are given permission of entry (art. 79(5) TFEU); moreover, MSs can decide the criteria to obtain and retain the permit of residence on their territory by third country nationals seeking work – so called "reception capacities of labour market and public services" (Chalmers, Davies, & Monti, 2010, p. 495) –, excluding some specific cases, such as asylum, subsidiary, temporary and humanitarian protection and family members of legally residing migrants[79]; lastly MSs detain the responsibility for the "maintenance of law and order and the safeguarding of internal security" (Article 72 TFEU). On the other hand, the Union is strengthening its role in a vast number of areas and especially, for what concerns the scope of this work, in the management of operational cooperation at the external borders, even though the responsibility of control and surveillance of the external borders still lies with the MSs' border guards[80].

This Section will explore first the history of Union competences on border checks – inextricably linked to immigration and asylum policies – expounding in detail the Schengen acquis, and then the political outcomes and implications of this complex legal structure, especially targeting non-EU nationals. Finally, a recent development that gained the limelight in the media over the last year will be addressed, in order to demonstrate that the struggle of Member State governments to maintain a certain autonomy from the European policy framework, especially in times of crisis, is still high in the agenda.

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[79] These are regulated by numerous Directives that harmonise Member States conditions of reception, acquisition and loss of right of residence and a number of other related rights. A complete picture of the topic is provided by Chalmers, Davies, & Monti, 2010, pp. 485-532 and accessible at: http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/index_en.htm (retrived 02 October 2011)
[80] This has been slightly changed with the Regulation (EU) 1168/2011 of the European Parliament and the Council amending Council Regulation 2004/2007, which introduces the European Border Guard Teams; for an in-depth analysis of the new Regulation see Chapter 3.

2.3.1 Legal framework

The whole framework regulating the competences of the European Union concerning border management is based on the Schengen acquis. This comprehensive set of norms and regulations was born out of the will of five countries – France, Germany, Belgium, Luxembourg and the Netherlands – to create a territory without internal borders. However, a debate over the free movement of persons already sparked at the beginning of 1980s; the question whether to abolish border checks for everyone or only for MSs nationals, keeping internal frontiers closed for third country nationals. In 1984 the European Council created an *ad hoc* Committee[81] in charge of considering which measures had to be taken to abolish "all police and custom formalities for people crossing intra-Community borders" (Adonnino, 1985), immediately followed by a Commission White Paper[82] envisaging measures to deal with the thorny issue of third country nationals in the integration process. The signing of the Schengen Agreement[83] – providing "a framework of relaxation of border controls between the participating states and in the longer term their abolition, with a [unrealistic] deadline of 1 January 1990" (Guild, 2001, p. 215) – was contemporary to three other noteworthy events: the opening of the Inter-Governmental Conference (IGC) leading to the Single European Act (SEA); the issuing of a Decision "setting up a prior communication and consultation procedure on migration policies in relation to non-member countries", which was immediately challenged before the European Court of Justice (ECJ) by the MSs, and the issuing of a Council resolution (16 July 1985) "on guidelines for a Community policy on migration" (CEC, 1985). Moreover, an inter-governmental group within the Council, proposed by the UK and named the Ad Hoc Group Immigration, was established on October 1986 in order to counterbalance the Executive Committee established with the Schengen Agreement, where only five states, instead of twelve, were deciding on the issues of immigration, asylum and border checks. In 1990 a second Schengen Convention – the Convention implementing the Schengen Agreement – gave the possibility to other MSs to participate in the intergovernmental cooperation and came to include thirteen states, among which there were also Norway and Iceland (non-EU Member States). Successive agreements of accession integrated gradually the other nine states that are also currently participating to the development of the Schengen acquis.

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[81] The Adonnino Committee.
[82] COM (85) 310 final. Completing the Internal Market. White Paper from the Commission to the European Council. 14 May 1985.
[83] 15 June 1985.

The history of the integration of the Schengen-derived competences into the Treaties encompassed three main phases: the first of complete intergovernmentalism into the Union framework, the second sparkled by the Amsterdam Treaty and the last, of fully fledged communitarisation (Lisbon Treaty), with some exceptions. The Maastricht Treaty, in 1992, was the first to acknowledge the intergovernmental cooperation between Schengen member states, placing it under the third pillar of the EU structure, the pillar of Justice and Home Affairs. However, the EC had no powers – neither legislative, nor juridical – over the regulation of the external borders.

The decisive turning point for the Schengen acquis – formed by then by the two Conventions and the rules adopted on that basis – was reached with the Amsterdam Treaty, signed in 1997 and entered into force in 1999. With this Treaty the Schengen acquis was finally integrated for the first time into the legal framework of the TEU, through the Protocol (2) Integrating the Schengen acquis into the framework of the European Union "constituting an important shift from the intergovernmental coordination of operational activity under the Council to a more Community approach" (Rijpma J. J., 2009). Moreover, article 1 of the Protocol provides for the possibility of closer cooperation among participating Member States "in areas covered by provisions defined by the Council which constitute the Schengen acquis" which "shall be conducted within the institutional and legal framework of the European Union and with respect for the relevant provisions of the Treaties.". This implies that Member States are not only bound by Schengen under the EU framework but also that they are allowed to continue to build on the Schengen acquis. Nonetheless, not all EU Member States participated to the abolition of internal frontier checks[84], the establishment of a common external border[85] and the implementation of a common approach to asylum, visa and immigration policy[86]; the United Kingdom and Ireland signed additional Protocols (No 3-4-5) to the Amsterdam Treaty to opt-out from integration in this field. At the same time the third pillar competences where relocated: immigration, asylum and the rights of non EU nationals were absorbed into the EC pillar – the first – and became officially part of the shared competences of the European Union under Article 61 of the Treaty establishing the European Community. The transfer of policies from the Third Pillar to Title IV TEC named "Visas, asylum, immigration and other policies related to free movement of persons", therefore endowed the Community with competences on the

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[84] Schengen Implementing Convention, Article 2.
[85] *Ibidem* Articles 3-8.
[86] *Ibidem* Articles 28-39, 9-18, 19-27.

matter and posed it under the jurisdiction of the European Court of Justice, even if with relevant restrictions. It should be noticed, however, that the second pillar, namely the Common Foreign and Security Policy pillar, remained totally excluded from supranationalisation, along with policing and judicial cooperation on criminal matters; as a matter of fact, from the Amsterdam Treaty the only form of policing that is governed under the "first pillar" is the one concerned with external borders (Rijpma J. , 2009). Subsequently, the Treaty of Nice extended the communitarian method to a number of provisions concerning immigration, asylum and visas, but still unanimity voting, the procedure of consultation and very restricted ECJ jurisdiction (ex art. 68 EC) remained the most diffused practices in the field.

The last and most substantial turning point came first with the Council Decision of 22 December 2004 which stated that "from 1 January 2005 control and surveillance of external borders are legislated under the co-decision procedure by both the Council and the Parliament and decisions in the Council are taken by qualified majority" (Hartmann, 2011). With the ratification of the Lisbon Treaty, the establishment of a fully fledged communitarisation – except for police cooperation – in the newly renamed Area of Freedom, Security and Justice[87] (Article 67 TFEU), was completed. This involves that the policies on border checks, asylum and immigration are now all "subject to the same judicial procedures and legal norms as the rest of the TFEU" (Chalmers, Davies, & Monti, 2010). Articles 77(1), 78(1) and 79(1) are the three pillars of the Area: the first describes EU competences on border checks, the second on asylum and the third on immigration issues. Moreover, Article 3(2) TEU has put action in AFSJ on par with other strategic objectives of the EU:

> "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime."

The objective of the Treaty of Amsterdam was, in fact, to "maintain and develop" the area, whereas the Lisbon Treaty "shall offer" an area without internal checks (Pascouau, 2012).

Nowadays all Member States are signatories to the Schengen Conventions and participate in the Schengen acquis, except for Ireland, the United Kingdom, Cyprus,

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[87] Hereinafter AFSJ.

Bulgaria and Romania[88]; Denmark also has a peculiar status concerning the policies in the AFSJ. The UK, Ireland and Denmark have opted-out from the Schengen acquis in 1999, with the entry into force of the Protocols to the Amsterdam Treaty; this excludes them from the scope of Title V as regards its application and therefore from the possibility to decide in future developments in the field; however the UK and Ireland maintain the possibility to opt in individually and on a case-by-case basis, should they decide to do so, subject to the consent of the other participating states. According to T. Balzacq and S. Carrera "these countries tend to adopt most proposals concerning asylum and irregular migration, but opt out on matters dealing with regular migration" (Balzacq & Carrera, 2005). The retaining of the border checks on persons puts these states in an unprecedented position in the history of European integration. The reasoning behind this opt-out lays in the position of the British governments to retain power over border controls even in the free travel area, while to Denmark the matter has always been one of "national definition of sovereignty" (Guild, 2001).

The cooperation within the Schengen acquis, pertaining the management of external borders and immigration procedures, has made the development of a robust and complicated bulk of secondary legislation fundamental[89]. A. R. Hartmann (2011) divides the regulations, directives and decisions forming this regulatory scheme into five main categories of legislative measures, according to their function: first of all, the measures establishing the border crossing regime at the Schengen external borders that are provided for in articles 3-8 of the Schengen Convention (1990)[90]; the compliance to these measures and their correct application are regulated through the Schengen Borders Code[91] (SBC) which overall governs the movement of persons across the external borders. The second category aims at establishing the principle of financial burden-sharing in the management of the external Schengen frontiers; the main instrument

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[88] Provision is made for Cyprus, Bulgaria and Romania to join, once fulfilled the criteria for accession. For further details on the debate on Bulgaria and Romania accession, see the Romanian government webpage http://www.schengen.mai.gov.ro/English/index07.htm and (Traser, 2005)

[89] For a complete list of secondary legislation in the field of Schengen, borders and visa policies see: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/schengen/index_en.htm (retrieved June 2012)

[90] Art. 6 of the Convention is considered the article providing the fundamental principles of the whole Schengen acquis. These principles were summarised by Hobbing (2005, p. 14) as follows: "Border checks must be a) systematic ("All persons shall undergo at least one such check"); b) equivalent all along the border ("An equal degree of control shall be exercised at external borders"); and c) take account of the interests of all Schengen parties ("taking account of the interests of all Contracting Parties")."

[91] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders and successive amending acts.

adopted in this domain is the External Borders Fund[92], which, apart from supporting the implementation of National Programmes, Community Actions and Specific Actions[93], also finances Frontex and the efforts to build a common EU visa policy. The third consists of measures relating to the establishment of centralised databases, to enable border guards and national police forces to share information about border crossings; this is one of the most funded field of cooperation by Member States and the one that has evolved more impressively: from the Schengen Information System (SIS) and Eurodac – the European fingerprint database for identifying asylum seekers and irregular immigrants[94] – to the SIS II[95] and the Visa Information System[96] (VIS) a comprehensive database that will merge all the information about both persons who have applied for a short term visa to enter the Union and details of refusal or revocation of a visa (Chalmers, Davies, & Monti, 2010), accessible to all new Member States. These instruments are all intergovernmental in nature and the EU legislator has provided also for intergovernmental legal instruments such as the Prüm Treaty and the Framework Decision on the exchange of police information (2006), to regulate their utilisation by national judicial and police institutions (Brouwer, 2011). The fourth category covers the field of prevention and penalisation of unauthorised entry, transit and residence, in particular through the Returns Directive – which contains a definition of the term 'illegal stay' as described in the introduction of this chapter – and, again, in the Schengen Borders Code. Lastly, the fifth category covers for the institutional measures for the coordination of operational cooperation and was availed of a specific agency: the Community agency for the coordination of operational cooperation at the external borders of the Member States (Frontex).

For the purpose of this work, it is necessary to have a closer look to the external border control policies. Border controls are particularly regulated through articles from 3 to 8 of the Schengen Convention; article 3(1) authorises individuals to cross the external

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[92] Decision No 574/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the External Borders Fund for the period 2007 to 2013 as part of the General programme Solidarity and Management of Migration Flows.

[93] For further details see: http://ec.europa.eu/home-affairs/funding/borders/funding_borders_en.htm.

[94] Denmark participates to this database "for the effective application of the Dublin Convention" (2006/188/EC, OJ L 66, 8.3.2006, p. 37–37).

[95] See: Communication from the Commission to the European Parliament and the Council. Development of the Schengen Information System II (COM(2001) 720 final - Not published in the Official Journal); Regulation 1987/2006/EC on the establishment, operation and use of the second generation Schengen Information System (OJ L381/4).

[96] Regulation 767/2008/EC concerning the Visa Information System (VIS) and the Exchange of data between Member States on short-stay visas (OJ 2008 L218/60). Ireland and the UK cannot participate in it.

borders only at specific crossing points and only at fixed opening hours. The violation of this provision – i.e. the unauthorised crossing – determines the incurrence of penalties that are to be established by Member States. The issue of border controls was further settled through Article 21 of the Community Borders Code, which addresses the concern of Member States to retain control over their frontiers; this article provides that "the exercise of police powers by the competent authorities of the Member States under national law"(a), "security checks on persons"(b) and "the possibility for a Member State to provide by law for an obligation to hold or carry papers and documents"(c), in sum frontier policing, shall remain a MS competence, as long as "it does not call itself a border check" (Chalmers, Davies, & Monti, 2010, p. 497).

In the field of border controls, with the entry into force of the Treaty of Lisbon, the legal powers of the EU have been amended and the jurisdiction of the Court of Justice extended: the adoption of the ordinary legislative procedure along with the "gradual introduction of an integrated management system for external borders" (Art. 77(1) (c)) are among the main innovations in the field. The creation of a border integrated management system implies the emergence of a new competence of the Union, governed by the same ordinary legislative procedure, even if with some exceptions[97]. Moreover, Article 77(3) TFEU adds a new express power relating to the adoption of measures concerning passports, identity cards, residence permits and the like; differently from the other fields of competence, however, this one is regulated by the unanimity voting procedure and consultation of the EP (Peers, 2011, pp. 146-152).

For what concerns the extension of the jurisdiction of the ECJ regarding border controls, the Amsterdam Treaty was the one introducing the most fundamental changes. First of all, by setting up the possibility for the Court to intervene in external borders control's matters through the already mentioned ex Art. 68 EC. This article provided that only national courts from which no further judicial remedy is possible have a duty to refer preliminary questions to the ECJ under the ex Title IV EC; in substance, it was aimed at preventing the Court from "pronouncing itself on the legality and proportionality of Member States' law enforcement authorities" (Rijpma J. , 2009, p. 3), but it did not exclude the Court's power of review and the power to express itself on the correct interpretation of Community measures relating to the external borders (ex Art. 62(2)

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[97] Parliamentary control still varies according to the legal basis of the measure to be adopted (e.g. co-decision is applied when dealing with internal and external border controls, while consultation remains the procedure to be used in administrative cooperation matters).

EC) – such as, hypothetically, the conformity of border guards' actions with such legislation, contrary to MSs intentions (Peers, 2006). Moreover, the Court was given the role of scrutinising the implementation of any legislative measure in the field, especially when carried out by the Council, but also by the Commission acting under the supervision of a comitology committee. With the Lisbon Treaty, the jurisdiction of the ECJ is finally extended to all legislative acts concerning the AFSJ with article 263 TFEU – without the distinction between First and Third Pillar competences that was present in the Amsterdam Treaty –. However, along with a delay of maximum 5 years from the entry into force of the Lisbon Treaty for the application of ECJ jurisdiction in these fields, the Court possibility to review the legality and proportionality of national police or law enforcement agencies actions' remains excluded, as stated in Article 276 TFEU.

Another fundamental and substantial change brought about by the Lisbon Treaty is the extension of the principle of solidarity to the AFSJ. In all other Community cooperation areas, solidarity is understood as a broader value underpinning Member States' coordinated action; under the Lisbon Treaty solidarity came to be considered, for the first time, a general principle of EU law[98], not only a general value (Dagilyte, 2011), and it was extended explicitly to all cooperation on asylum, immigration and external borders through Article 67(2) TFEU. Of course, solidarity – burden sharing – in these fields and especially in border management, represents an extremely delicate issue as it is understood, on the one hand, as an "investment" by old MSs (Germany, France, the UK, Italy and Spain) in return for Union involvement in the management of the external borders – in the perspective of the creation of a European border police, effectively achieved with the entry into force of Regulation 1168/2011 –; on the other hand, the "new" Eastern member states were consistently trying to avoid the developments in the sense of Union operational involvement while claiming the financial aid for the common border expenses.

In sum, the Agreement of 1985, the Convention of 1990, the bulk of secondary legislation adopted on that basis and the related treaties – not forgetting all the non-legally binding acts establishing framework objectives and guidelines – together form the Schengen acquis. The borderless zone created by these provisions, with the common external border, is called the Schengen Area. The object of Community competence is,

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[98] Article 2 TEU.

as defined in the already mentioned Article 1 of the Schengen Agreement, the Schengen external border. As a matter of fact, border procedures are harmonised and regulated by EU law only at the Schengen external borders, while at the non-Schengen EU external borders "it is the national law of the Member State in question that determines the procedure to be followed, albeit within the limits imposed by EU law." (Hartmann, 2011). The troubled relationship between new and old member states poses serious problems for the overall success of an Integrated Border Management, as will be assessed later in this work.

2.3.2 Political implications and how it worked out

> *"The EU's external borders are of crucial importance at least for two of the major functions of AFSJ: to provide citizens with 'a high level of safety' and to allow for a 'more efficient management of migration flows'"* (Monar J. , 2005)

Multiple interests were at stake during the 1980s. Andrew Moravcsick (Moravcsik, 1991) gives a detailed insight of the political unrest of these years. From the side of European institutions, and in particular in the EP, two groups were battling over their vision of the future Union that was to be sealed in the SEA: on the one hand there was the "Crocodile Group" composed of European federalists, mainly Italians and Germans, who were in favour of an expansion of the scope of EC activities; on the other hand, there was the "Kangaroo group", which focused its work on the economic liberalisations coming from the removal of physical and technical barriers, especially concerning the movement of goods and capitals. Another important sector that pushed for reform was the transnational business sector, which aimed at removing barriers supporting the "Kangaroo group" view. The economic drive behind the completion of the internal market is evident, but the manifest trend in this period is the institutional supranationalisation of the economic governance, with scarce attention to the consequences of the lifting of barriers on the movement of persons and, especially, third country nationals.

As mentioned in the introduction of this chapter, the focus was on workers[99] and particularly on Member States nationals. The management of third country nationals and especially irregular migrants was still a thorny and almost unapproachable issue, as evidenced by the unprecedented reaction of MSs to Commission Decision of 8 July

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[99] The economic nature of migration remains the higher priority in the MSs and European institutions agenda, as evidenced by the Commission's Third Annual report on Immigration and Asylum of 2012 (CEC, 2012, pp. 4-8)

1985 "setting up a prior communication and consultation procedure on migration policies in relation to non-member countries"[100], in which the Commission tried to introduce the idea of an European direct involvement in these policies. The reasons for this MSs reaction is to be found once again in the MSs sovereignty claim, discussed in the previous section.

Lifting the barriers to the movement of persons implied also harsh divisions on the handling of the external borders. P. Hobbing (2005) describes brilliantly the different views of Member States dealing with 'Shengenland':

> "Discussions sprang up, inside the territory, as to whether 'these foreigners on the border' would do a good job in keeping the border tight, or create loopholes that allowed organised crime and illicit migration to penetrate all the way through the Union. Right on the border, discussions went in the opposite direction: 'Why is it just us who bear all the responsibility and the financial burden?' Weak links in the border chain, the need for burden-sharing and solidarity soon became the keywords and phrases of an EU-wide debate."

As a consequence, with the completion of the internal market, there were also multiple attempts to increase cooperation on external security issues "beyond the limits of the Schengen group" (Monar J. , 2005, p. 146). A collective approach was pursued with the proposition of an EC convention on external borders, supported also Great Britain and Ireland. However, the effort proved to be unsuccessful as in 1991 and 1993 the convention was repeatedly rejected, mostly due to the impossibility to reach an agreement between Great Britain and Spain over Gibraltar (House of Lords European Union Committee, 2008). However, other forms of bilateral cooperation between single MSs were established[101].

At the same time, cooperation within the Schengen framework was conducted through the Schengen Executive Committee[102]. Established by the Schengen Implementing Agreement, it was composed of representatives from each participating state, named exclusively by the governments of the member states, and it was endowed, from the very beginning, with a high level of independence and broad executive powers. The Implementing Agreement, in fact, empowered the SEC with "the implementation of this

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[100] OJ L 217, 19/08/1985.
[101] The bilateral cooperation between MSs is currently provided for in Article 73 TFEU and granted also by Frontex founding Regulation 2007/2004 and successive amendments.
[102] Hereinafter SEC.

Convention", thus establishing that the SEC can provide for binding decisions – law for the Schengen states – on the subject matter covered by the agreement. On the other hand, it totally lacked judicial accountability and parliamentary control (FECL, 1994), thus opening the way for the currently diffused practice of relieving governments of responsibility before their voters, shifting the management of thorny issues at the supranational level; as Eriksen notes "those who can be kept accountable have little control over the factors affecting peoples' lives, and those who have the decisive power are beyond democratic reach" (Eriksen E. O., 2011, p. 73).

After the entry into force of the Amsterdam Treaty, the intergovernmental nature of the Schengen acquis did not change: "Instead of replacing Schengen-related measures with truly Communitywide measures taken under prescribed procedures, the Council has continued to develop the Schengen acquis under the old intergovernmental machinery, leading to opaque and complex legal results." (Balzacq & Carrera, 2005). In particular, the main aims being the need to track third country nationals' movements through the borders and within the Union and the curbing of irregular immigration, the most funded instruments for border and migration management at the EU level became the databases – SIS, VIS, Eurodac, described previously – and the use of biometrics. As a consequence, in this complex and securitised intergovernmental system, a number of issues, among which there are the protection of human rights of the third country national concerned and the application of the principle of proportionality, result to be of difficult application and, most of all, control. Moreover, with the introduction of these new technologies to control and manage the frontier, two processes have been accelerated: first, "the de-territorialisation and virtualisation of traditional border controls" (Balzacq & Carrera, 2005), and secondly the implied securitisation of the border and criminalisation of the migrants (Geddes, 2008) (Lavenex, 2006)[103].

The political programming in this field was conducted from the very beginning not only through intergovernmental bargaining but also in a multiannual perspective by the European Council; the planning by Member States of common measures to be adopted is, in fact, "one of the most characteristic features of EU governance in the JHA domain" (Sabel & Zeitlin, 2010, p. 244). Starting from nationally focused systems, border security guidelines – from Tampere, Laeken, Seville, Thessaloniki, the Hague and Stockholm Council conclusions – have necessarily evolved in the sense of a more

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[103] See Paragraph 2.5.2 for a more detailed description of the phenomena.

cohesive operational cooperation, framed into a medium to long term perspective[104], even if always underlying the sovereignty of each state in controlling the external borders (Pascouau, 2012).

Notwithstanding the communitarisation of competences for the management of the external borders, operational coordination and executive action seem to remain the key features of the AFSJ (Rijpma J. , 2009), in opposition to the "legislation-centred constitutional logic of the EU" (Walker, 2004, p. 21). As a matter of fact, this peculiar characteristics are intrinsic in the very nature of the AFSJ policies and remain highly visible in border management policies; as MSs have always been harshly divided on how to handle these matters and at the same time needed to cooperate in order to be able to cope with the new challenges that European integration – driven by the economic rationale – was posing, the only way to agree on shared positions was to stress the operational coordination dimension, excluding the "high politics" concerns, and the executive action. In border management policies these two features are exemplified in the existence of Frontex, whose mandate is to manage the "Operational Cooperation at the External Borders of the Member States of the European Union" and whose actions are only of executive nature[105].

It is in this context that Frontex was established; in a situation in which MSs were active in the promotion of a new Community Agency – which might seem odd thinking at the meaning of such a support in such a sovereignty-valuable field – that was in charge of helping MSs in operational cooperation in the application of Community policies. As a matter of fact, previous forms of cooperation in the field of border management (Common Unit and SCIFA+) were not working as expected, especially regarding operational cooperation during joint operations, so that the Commission proposed that "the more operational tasks could be entrusted to a new permanent Community structure" (COM 2003 323 final, pp. 7-8). The Greek Council presidency endorsed the proposal and pushed for it; as a matter of fact, in the text drafted by the Commission of

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[104] Three are, until now, the main Programmes – each one of them covering for a period of four years – drafted by the European Council and enacted through European Commission's Action Plans: firstly, the Tampere Programme (1999-2003); secondly, the Hague Programme (2004-2009) and lastly the Stockholm Programme (2010-2014). These programmes set out planned measures and initiatives for the AFSJ (previously JHA). For a commentary of the latest Stockholm Programme, whose slogan is "An open and secure Europe serving and protecting citizens", see Statewatch Analysis: Bunyan, Tony (2011), *A bit more freedom and justice and a lot more security*, retrieved at http://www.statewatch.org/analyses/no-95-stockholm-action-plan.pdf (accessed November 2011)

[105] Frontex actions are regulated by Regulation 1168/2011 which delegates to Frontex only executive powers.

Frontex Regulation 2007/2004 there is clear reference that the initiative for this form of cooperation at the EU level did not came first and foremost from supranational actors but especially from the MSs through both the Council and the European Council (Council Conclusions, 2003). The EP, that was involved in the legislative process only through consultation, was however overall favourable of the establishment of this Community Agency, especially due to increasing concerns regarding the loss of migrants lives at the borders of the Schengen Area; nonetheless, issues were raised concerning the too much intergovernmental nature of the steering Board and of course the non involvement of the EP as a co-legislator; some discontent was also raised by the tasks entrusted to Frontex but mainly the need of such a body was strongly felt also by the EU representative body. It must be noted that also in a cost-efficiency approach, the establishment of the Agency as a centralised body was considered the best possible solution by the Commission and was embraced also by MSs as the perfect solution for coordination: a single body to refer to instead of the panoply of bodies that were in place before (Ekelund, 2008).

To conclude, another peculiar feature that characterised the development of EU immigration policy from its inception is a strong security rationale (Geddes, 2008), that was fuelled also by the establishment of Frontex, that will be expounded later in this work[106].

2.3.3 The proposed reform of 2011

> *"Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity."* (Schuman, 1950)

As described in the introduction to this section, the reasons that drove Member States towards a high level of integration in border management, immigration and asylum are mainly of economic nature. The urge to complete the internal market established a clear objective: the free movement of economic actors within the Union through the removal of internal borders (Guild, 2001). The transition to the passport union caused a sudden loss of control capacity over the entry of non-nationals, be they nationals of other Member States or third country nationals. The frustration over intergovernmental cooperation, enacted to cope with the new environment, "lead national governments to

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[106] See Paragraph 2.5.2.

voluntarily cede authority to supranational agents" (Hooghe & Marks, Multi-Level Governance and European Integration, 2001, p. 22). On the other hand, states determination to control access to, and stays on, their territory, which "manifests itself particularly in a desire to prevent irregular migration, to detect irregular migrants, and to remove any irregular migrants once they are detected" (Peers, 2006, p. 241), remained consistent throughout the whole process of integration. This will is embodied in the "emergency brake" of Article 2(2) of the 1990 Schengen Convention regarding the possibility to reintroduce internal borders' controls where public policy or national security so require[s]"[107]. Nonetheless, "the debate on how nation-states are responding to increasing cross pressures between market and rights-based tenets versus political and security pressures for limiting migration is still unresolved." (Guiraudon & Lahav, 2007, p. 6)

While some scholars propend for a vision of migration policies constrained by market norms and others claim, in a neo-realist perspective, that states will remain anchored to their power to defend their territorial integrity (Guiraudon & Lahav, 2007), in 2011, the response of Member States over this debate was quite clear-cut: the need for a renewed capacity of control and power to exclude, by the MSs themselves, was to take over the requirements of the market, all the more so during a crisis. The proposal of France and Italy to the European Commission, presented in April 2011, was made precisely according to this principle (Hewitt, 2011). The proposal spurred in a context of high tension: first of all, the failures of the common market and the European governance to deal with the financial, economic and debt crisis of the Euro area – affecting particularly Southern MSs as Italy, Spain and Greece; secondly, the Arab Spring that created a vacuum of power in the North African countries, thus leading to an uncontrolled flow of migration, especially from the shores of Tunisia, and burdening the MSs in charge of the control of the Southern European external border, namely Italy, Spain and Greece.

The strong request for reform of the Schengen acquis, supported by Italy and France, included the possibility of a reintroduction of border checks among MSs in case of emergency situations and the exclusion of the EP from the decision-making in this field, thus abolishing the ordinary legislative procedure, introduced by the Lisbon Treaty,

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[107] According to Statewatch statistics, internal border checks have been carried on, in the year 2001-2, on 172 days, meaning that "the chances of encountering such checks on the internal border of a given member state would be just 1 in 82." (*Statewatch European Monitor* (Vol. 3, No. 4, February 2003), as cited by Hobbing (2005)).

preferring the consultation procedure[108]. The letter that Prime Minister Silvio Berlusconi and President Nicolas Sarkozy addressed to the European Council President and the Commission President, explicitly asked for the examination of "the possibility to temporarily re-establish controls within [Schengen] borders in the case of exceptional difficulties" (Hewitt, 2011). Their request was transformed by the European Commission into two legislative proposals, one concerned with a reviewed Schengen Evaluation System in order to improve the Dublin II asylum system, and the second on the temporary re-introduction of the internal border checks. These were then passed on to the Council – and specifically to the EU Justice and Home Affairs ministers – under the name of Schengen governance package, a document framing the two proposals and prepared by the Commission itself in response to the European Council conclusions of 23-24 June 2011, which called for a mechanism to be "introduced in order to respond to exceptional circumstances putting the overall functioning of Schengen cooperation at risk, without jeopardising the principle of free movement of persons." (European Council, 2011).

The Council was not satisfied with the taking up of the problem from a Union perspective – even though the Schengen governance package as proposed by the Commission has been considered as "further strengthening the security side of the Schengen apparatus" (Carrera, 2012), therefore in line with MSs requests – and invoked a violation of the principle of subsidiarity. When on 7 June 2012 the Council – in agreement with the Danish Presidency – decided "to change the legal basis of the rules governing the evaluation of Schengen[109], removing rights for both the Parliament and Commission to exercise their supervisory role on the border-free area" (Euractiv, 2012), the EP reaction was a harsh opposition to the package, with political parties threatening to appeal to the ECJ to annul the legislative act (Vandystadt, 2012). The new rule would apply "if one state persistently fails to stop illegal migrants from entering Europe's Schengen zone" (Euractiv, 2012) and MSs representatives unanimously voted in favour of the possibility to reintroduce checks between the countries failing to meet standards and other EU states, for a time span of six months at a time, with possible extensions up to two years, as an amendment to the Schengen Borders Code. According to numerous MEPs (SDE, Verts, ALDE, EPP) (European Parliament, 2012), but also according to

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[108] Consultation procedure *de facto* ousts the EP from the legislative procedure in Schengen matters, as the Council has only the duty to ask for consultation to the EP, without the need to be bound by it once the opinion of the EP is expressed (Art. 289 TFEU).
[109] Legal basis has been changed from Article 77 TFEU to Article 70.

Commissioner Cecilia Malmstrom, this measure is contrary to the founding principles of Schengen and of the Union itself.

In response, both the Commission and the EP stressed the importance of shared responsibility, mutual trust and solidarity[110] as the guiding principles for a well-functioning Union (Pascouau, 2012) (Dagilyte, 2011) and on 11 June 2012, when the EP could not vote on the Schengen Governance Package due to the recent legal basis change, MEPs asked the Danish justice minister Morten Bødskov to come to the plenary meeting of the European Parliament to explain the reasons for such an about-turn (European Parliament, 2012). His argument, as the argument of MSs and the Council, is grounded in the need to protect the Schengen Area from a 'black swan' moment: "like the Eurozone, the Schengen area is vulnerable to systemic shocks that could fatally undermine it." (Brady, 2012, p. 17). As a matter of fact, the Schengen Area is heavily dependent on mutual trust and a Member State that appears to be a weak link in the chain of control – namely Greece and Italy – could truly create a situation of perceived insecurity, which is a case for national security that is a national sole competence. What the European Commissioner Malmstrom and the majority MEPs argue, on the other hand, is that the reason why the whole Schengen Area was created is to ensure a higher degree of freedom for EU citizens and, in order to do so, Member States decided to agree on the sharing of responsibilities and of burdens alike, in a solidarity fashion. Moreover, the statement of the EP and the Commission is clear: the stress on migration as a destabilising factor for the EU and therefore its criminalisation[111] goes in the direction of extremist right-wing talks, undermining social appeasement. However, in the words of Cecilia Malmstrom: "I'm convinced that the last word is not said on this. [...] We will defend security, but also freedom of movement".

2.4   The nature and size of migration flows to the Schengen Area
*"Knowing the **numbers** of people and their **purpose** in crossing borders is essential to planning future border controls."* (FRONTEX, 2011)

According to the most recent Eurostat report (Year Book 2012), on the total volume of third country nationals present in the EU-27, in 2010, citizens of non-member countries resident in the EU-27 amounted to 19.842.722 units, accounting for about 4% of the

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[110] See Paragraph 2.3.1.
[111] For a thorough description of the trends concerning migration policies in the EU see Paragraph 2.5.2 below.

total population. This is an esteem that indicates the migrant population that already lives in the EU, that is to say the "stock" of migrants present on the Member States territory, that has build up during the years and decades, due to the "flows" of people crossing the borders.

Table 1 - Citizens of non-member countries resident in the EU-27 by continent of origin, 2010

Population

Migration and migrant population statistics

Citizens of non-member countries resident in the EU-27 by continent of origin, 2010
(%)

non-EU Europe	36,5%	non-EU EUR	7.242.270	36,5%
Africa	25,2%	North	2.966.050	14,9%
		West	1.059.238	5,3%
		Cental-South	491.368	2,5%
		East	489.949	2,5%
Asia	20,9%	South-East	804.919	4,1%
		East	931.690	4,7%
		South	1.655.540	8,3%
		West-Central	762.224	3,8%
Americas	16,4%	South	2.234.834	11,3%
		North	520.054	2,6%
		Central and Carribeans	508.711	2,6%
Oceania	0,9%		175.875	0,9%
Total			19.842.7 22	

Source: Eurostat (online data code: migr_pop1ctz)
(retrieved 31 March 2012)

The "flows" include both in-flows and out-flows of people, therefore the current population of migrants living in the Schengen Area – that is accounted for, broken by region of origin, in Table 1 – is the result of the in-flows minus the out-flows of third country nationals, that adds to the pre-existing migrant population residing in the EU (the already mentioned "stock"). The reasons why people crosses the borders – and generate the "flows" – are of different nature: labour migration, family reunification,

turism and study purposes are among the most relevant. While for the most part (7 out of 10) migrants enter the Schengen Area with a visa permit issued for one of the reasons listed above, the remaining 30% heads to Europe without a granted visa; this might be the case of displaced refugees and people fleeing their countries to seek protection, or people in search of a job that has not managed to obtain a visa due to the European restrictive policies on labour migration. Not least, it is fundamental to mention the human trafficking, smuggling and terrorism as factors fuelling illegal immigration and monitored by Europol[112] in cooperation with Frontex.

Quantifying and assessing the nature of migration flows to the Schengen Area is fundamental to understand the reasons behind the adoption of specific border management policies at the EU level[113]. This is why a large number of agencies and institutions are handling the measurements of migration flows, both at national and European level; the European Commission with its DG Eurostat, which is currently one of the leading providers of high level statistics, constantly monitors the figures of people moving across the borders – made available by national authorities – providing reliable and comprehensive data for the European decision-makers (CEC, 2012). In addition, Frontex bears the responsibility to carry out risk analysis regarding migratory pressures at the external borders and, in particular, considering the fraction of migrants who are willing/trying to cross the external borders irregularly, which means without a visa to enter the Schengen Area. These irregular migrants are to be distinguished from the vast majority of irregular migrants who *become* irregular because overstaying their visa or breaching the conditions of stay and remaining on the territory of the MSs; people crossing the borders irregularly are undocumented migrants whose status has to be ascertained before a decision of expulsion might be issued.

However not completely reliable to assess the reasons why people migrate to the EU, it is possible to look at the data of the first residence permits by EU countries to get a snapshot of the situation. Overall, considering the first residence permits issued to third-country nationals in the Schengen countries, this amounted to almost 2.5 million in 2010. The primary reason why permits were issued was "remunerated activities" (32,5% of the total), showing once again that migrants come to Europe mainly for work purposes; second in relevance are the permits issued for family reasons (30,2%),

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[112] European law enforcement Agency.
[113] One of Frontex' main tasks is to provide risk analysis reports, studying the trends in migration patterns (see Chapter 3)

followed by study permits (20,6%) and other reasons, especially protection-related (17%). This last category is usually the most closely linked with Frontex work – even if these estimates regard only the persons already legally recognised as protected –; first of all, Frontex risk analysis results are based on the evaluation of how instabilities in the neighbouring countries may determine the nature of the flows. The assessment of the soundness of this analysis is carried out both by relying on MSs data of asylum application and on direct gathering of information by the Agency: during some joint operations (i.e. RABIT and Poseidon), in fact, Frontex has been involved in helping local authorities to carry out the preliminary interviews that are necessary to establish whether asylum seekers or people seeking international protection in Europe have the right to do so; moreover, Frontex is often involved in Search and Rescue operations at sea that require a careful study of the geopolitical situation to understand who are the people inside the wrecked boats in order to be able to quickly inform the host MS on the measures that should be taken to "manage" in the best way potential protection-seekers.

Unfortunately, the data concerning irregular migrants are very difficult to estimate, but the European Commission describes the situation of irregular migrants as accounting for "fewer than 2 million up to 4.5 million" people irregularly entering or residing in the EU.

> "More reliable indicators such as refusals, apprehensions and returns may be used, though they are subject to many caveats. In 2011,18 some 343 000 persons were refused entry to the EU, a decrease of 13% from 2010, with the vast majority (nearly 70%) being refused in Spain, notably at their external land borders. Also in 2011, some 468 500 persons were apprehended (a decrease from 2010 when it was about 505 000) and Member States returned around 190 000 third-country nationals (almost 15% less than in 2010)." (CEC, 2012, p. 4)

This estimate, however, dismisses once again a fundamental figure of irregular migration, which is the lost lives at the "borders sites", including physical borders, the migratory routes towards the European borders[114], offshore or onshore detention centres and during the forced return operations.

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[114] For an account of the deaths see the interactive map at: http://owni.eu/2011/03/04/app-fortress-europe-a-deadly-exodus/ (retrieved 20 June 2012)

The next section (2.5) will expound the European border management policies, that are now recognised by some literature[115] to have a direct impact on migrant's death toll (Migrants at Sea, 2009) (Schain, 2007) (Fekete, 2003).

2.4.1 Historical background

The history of migration towards Europe from non-Schengen countries – therefore not considering the internal migration – is convoluted. From the first Schengen Agreement, the EU enlargement is one of the factors that changed most radically the migration trends and the very definition of European citizen. However, after the last wave of enlargement, in 2007[116], the situation at the external borders is still difficult to predict. The Arab Spring of 2011, along with the continuously mutating situations of EU neighbouring countries, have induced MSs and the Union to a "breathing space" concerning immigration policy measures in the Schengen Area, not only by spurring debate at the European level over the possible reintroduction of frontier checks, but also at the national level where emergency measures have been introduced[117] in order to cope with the inflow.

Currently, all Member States participating to Schengen are net immigration countries. However, back in the 1960s, only some of the European countries had a history as host countries: France, Germany, the United Kingdom, Austria, Sweden, Denmark and the Benelux countries; needless to say that migration flows were mainly internal to the new born EEC. Net migration figures have been quite steady till the 1990s (see Graph 2 below) and the main reasons for migration remained family reunion, refugee protection and labour; from that time on migration flows towards European countries started to increase firmly, with the notable exception of Germany which had just experienced an unprecedented high level of influx in the very first years of the 1990s due to the reunification of the 1989. A peculiarity of the year 1980s and 1990s is that a second category of European countries became net receiving countries, despite their history of emigration, mainly due to growing economic prosperity sparkled by economic integration; these countries included Italy, Spain, Ireland, Greece, Portugal and Finland (Eurostat, 2001) and they experienced, for the most part, influxes of labour migration. A

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[115] For an overview of the position often assumed by NGOs concerned with migrants' human rights on the matter, see: http://www.unitedagainstracism.org/pages/underframeFatalRealitiesFortressEurope.htm (retrieved 20 June 2012)

[116] See Paragraph 2.2 above.

[117] In Italy a 6 months permit of stay (renewable for an additional 6 months) was issued for all the people landing on the Italian shores from 1 January 2011 to 5 April 2011 and a special fund was established to cope with the needs of some 30.000 people.

third category of European countries that lived the inversion of trend, from net emigration countries to net immigration countries, included the former socialist countries that entered the European Union in 2000s (Eurostat, 2012). However the pull factor acting at the Eastern border was still, at the very beginning, the promise of wealth of the Western countries, rendering the ex CEECs 'transit' countries. However, economic growth and political stability in Southeastern countries – deriving particularly from the accession to the EU – has now "rendered them destination countries in their own right" (Boswell, 2005, pp. 2-3)[118]. This history of migration trends continues to shape the attitude of the various Member States towards migration issues in general but also, more specifically, towards the way in which borders have to be managed; as MSs are the ones concerned with the steering of Frontex – through its Management Board – their background is to be considered highly relevant.

Graph 2 – Net migration (including corrections), EU-27 (1000s)
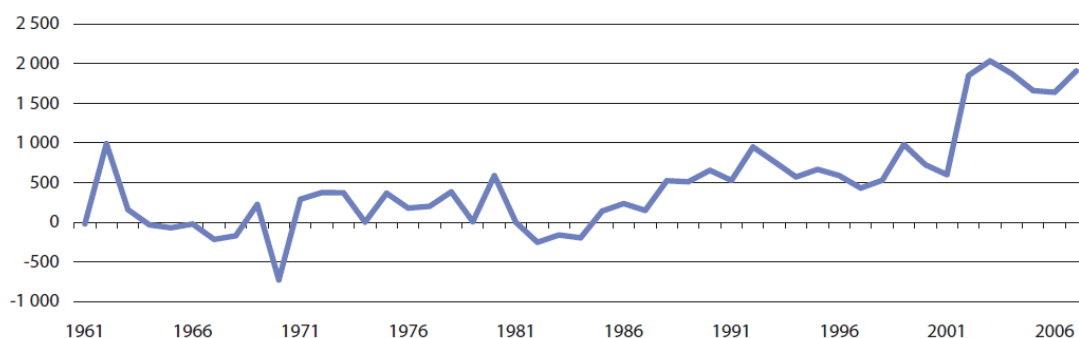
(1) Break in series: up to and including 1997 France includes metropolitan regions only; 2007 data are provisional.
Source: Eurostat (tsdde230)

Source: Eurostat (2009), *Europe in Figures*, Statistical Yearbook, p.168. Eurostat data available for net migration flows end in 2006. More recent figures on migration flows can be found in the Statistical Yearbook of 2011, in which, however, net migration is no more considered as a relevant issue and therefore is not present.

2.4.2 Migratory pressure at the external borders

As already mentioned in the first section of this chapter, nowadays FRONTEX and IOM (IOM, 2012) have identified five to six main migratory "routes"[119] that have been schematised to render more readable the situation at the external borders of the Schengen Area. The figures provided by them, and particularly by Frontex Risk

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[118] For a complete list of Eurostat publications:
http://epp.eurostat.ec.europa.eu/portal/page/portal/publications/eurostat_yearbook_2011/previous_edition s (retrieved June 2012).
[119] See footnote n. 61.

Analysis Office, show that currently the external borders that are the most under pressure – due to the crossings and attempted crossings of migrants entering the Schengen Area without a visa – are the ones concerned with the management of the Central Mediterranean (64.261 irregular crossings in 2011) and the Eastern Mediterranean Routes (57.024 irregular crossings in 2011). Moreover, in the period between October and December 2011 "the number of irregular border crossings increased compared to the previous year, to nearly 30,000 crossings. About 75 percent of those were reported from the Eastern Mediterranean route, whereby Afghans and Pakistanis were the most frequent nationalities" (CEC, 2012, p. 3). The pressure at the Schengen external border derives from the situation in relevant third neighbouring countries; the Central Mediterranean Route's renewed importance – after two years of sensible reduction of the flow of irregular migrants, due both to the tougher European border control regime and the bilateral agreements of MSs with transit and origin countries i.e. the Italy-Libya Treaty, causing the diversion of the flow to the Greek-Turkish border – is due, in fact, to the turmoil of the North African countries, following the so-called Arab Spring of 2011, which saw Italy, Malta and Greece especially concerned in the management of the "emergency" (Campesi, 2011). For the months to come, both Frontex (Frontex, 2012) and the Commission expect an increase in Syrians crossing the Greek land border to escape civil war in their country.

For what concerns asylum seekers, the EURODAC Central Unit – concerned with the handling of the fingerprints of migrants crossing the borders for the correct application of the so called Dublin II Regulation[120] – reports that with the Arab Spring applications for asylum grew steeply, especially in Italy and in Greece, after a period of decreasing applications involving particularly these two countries[121]. The available global data on asylum applications describe the situation of 2011, in which the total number of asylum applicants increased of 16.8% compared to the previous year, amounting to just over 302 000 asylum seekers.

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[120] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

[121] According to the 2010 Commission's "Annual Report on Immigration and Asylum", asylum applications in 2010 slightly decreased (-3%) compared to 2009, but the deepest decreases were recorded in countries such as Italy, Greece and Malta, while Germany Belgium and Sweden received an increasing number of asylum seekers. These figures are evocative of the malfunctioning in the Dublin System and the CEAS due to an incomplete harmonisation of the field. For an analysis of the CEAS see ECRE, 2008 and UNHCR, 2008.

The Arab Spring-related migration flows are particularly relevant for the purpose of this work because of the effect it had on the rhetoric of certain MSs concerning the management of the external – and internal – borders, as was described in Section 2.3.

2.5   The European Integrated Border Management

"Women and men in Europe rightly expect to live in a peaceful and prosperous Union confident that their rights are fully respected and their security provided." (COM(2010) 171 final)

In order to provide a European Area of Freedom, Security and Justice where member states can honour "the duty to protect and project our values and defend our interests" and ensure that peoples' "rights are fully respected and their security provided" (COM(2010) 171 final), the EU is developing a border management strategy. The interests that have to be defended are mainly of economic nature while the security provided to citizens should be at a comfortable degree. The formula commonly chosen in combining these two objectives is that of 'Integrated Border Management', which represents the delicate attempt to combine security concerns with trade facilitation[122] (Maučec, 2012). This strategy is intended as an integrated and global response to the challenges emerging from the irregular flow of migrants, penetrating the common external borders of the so-called Fortress Europe.

However implying a global response to common challenges, the European Integrated Border Management guiding principles and norms are scattered into a wide variety of legal texts, some of which started to emerge only very recently, while the concept itself remains poorly defined. Cooperation and coordination in this field, in fact, have been built on a daily basis and have been generally oriented to create common problem-solving measures as the Common Manual on external borders adopted by the Schengen Executive Committee (Council of the European Union, 2002) and the Catalogue of Best Practices drawn up by the Working Party on Schengen Evaluation. The next section will describe how this system emerged, with all of its complexity, and the problems that it is facing on its way to become a coherent and functional tool in the hands not only of MSs but also of the European Union.

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[122] "[...] to find solutions that can marry security concerns and trade facilitation" (CEC, 2003).

2.5.1 IBM history: EU view and Mss view

"A key component in the common integrated border management system has been the development of Union solidarity mechanisms, supporting a uniform and high-quality application of the Union standards on border management and the common visa policy." (COM(2011) 750 final)

The Lisbon Treaty recognizes the definition of Integrated Border Management[123], a term that started to appear only recently[124] in political debates at the international level and which was introduced at the European level in 2001 by the European Commission (CEC, 2001), partly borrowing its characterization from a federal state that has a long history of integrated border management: the United States of America. However, while in the US IBM has mainly to do with "greater efficiency in border-related cooperation at the nation-state level" (Hobbing, 2005), the European version of IBM, and the setting of Union competences on the matter, was instead conceived more specifically to take into account the interests of Member States with different necessities: those on the border and those far away from it. The latter have always been concerned with the entrustment to another Member State of the security of the common external border, while the former have always felt burdened by the responsibility of the external borders' control and stress the need for more solidarity.

The concept of IBM in Europe was firstly shaped along the borders of the enlargement process; after the completion of the internal market it was fundamental for Member States-to-be, placed at the new external borders, to be able first to control and then to manage in an 'integrated' fashion theirs and everyone's frontiers. The control was funded mainly through the PHARE pre-accession instrument and TACIS[125] assistance programme (Hobbing, 2005) for what concerns the Eastern border, with the aim of developing efficient border structures and increase cooperation with sending or transit countries, non members of the Schengen Area. A successive INTERREG Community initiative was thought to "help the regions on the EU's internal and external borders

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[123] Hereinafter IBM.

[124] The Google tool "Insights for search" clearly evidences that the term "integrated border management" was researched (*googled*) on the web worldwide only from 2010 on (Source: http://www.google.com/insights/search/#q=integrated%20border%20management&cmpt=q)

[125] Regulation (EC) No 99/2000, OJ L 12 of 18.1.2000, states in Annex II that support should be provided for the development of infrastructure networks (4) in border-crossing, in order to make cooperation in the areas referred to in Article 2(2) and Article 3(3) and (4) viable.

overcome the problems resulting from their isolation"[126] especially through financial aid[127].

However, while the term was still far from being coined, the legal tools for its development were laid by the Schengen Agreement and especially in the 1990 Convention implementing it, as described earlier in this work[128]. The chapters that mostly concern IBM system are the second ("Crossing external borders") and the third ("Visas"), but also the provision concerning the liability of carriers (Art. 26) and of those "who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties" (Art. 27) and, lastly, the SIS, to which authorities responsible for border checks and issuing visas are expressly entitled access (Art. 101).

But it was the Laeken process, better known as the process of constitutionalisation of the Union, that truly gave a sense to the concept of IBM and brought it to the limelight. In Conclusion n. 42 of the Laeken meeting, the European Council undertook to manage in a more coordinated fashion the Union's external border controls in order to combat more effectively terrorism, illegal immigration and human trafficking[129]. In 2002 a Commission's Communication (COM(2002) 233 final) and the JHA Council Action Plan on the management of external borders – adopted on 13 June (2002/463/EC) – furthered the idea of the need for a comprehensive approach to the issue, fundamental first of all to achieve the objective of internal security and secondly to share the financial and operative burden of border controls among the MSs of the Schengen Area. It is evident that the particular attention paid to border controls and the stress on internal security were due to the recent attacks to the Twin Towers and the widespread fear of terrorism.

At this stage the European version of IBM was being established along four guiding lines: "(i) a comprehensive approach to border problems across (ii) administrative and (iii) national dividing lines under the management of (iv) dedicated professional skills"

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[126] Communication of 28 April 2000 from the Commission to the Member States laying down guidelines for a Community Initiative concerning trans-European cooperation intended to encourage harmonious and balanced development of the European territory (Interreg III) [Official Journal C 143 of 23.5.2000].

[127] It should be noticed that financial aid came with strings on it: the bigger member states pouring money into these funds, stressed the need, from the very beginning, of a thorough evaluation of the 'maturity' of future members of Schengenland (see Footnote 13).

[128] See Paragraph 2.3.1..

[129] Conclusion n. 42 reads as follows: "Better management of the Union's external borders will help in the fight against terrorism, illegal immigration networks and the traffic in human beings".

(Hobbing, 2005, p. 6). The instruments adopted were aimed at encouraging first of all the development of a system of data sharing – databases – and of privileged channels of communication among MSs administrations in order to tackle common issues (trafficking in human beings, smuggling, terrorism, etc.), avoiding working separately and at cross purpose; secondly, the establishment of a dialogue with neighbouring countries; thirdly, the enhancing of the internal coordination of MSs administration between local and national levels of government regarding the border crossings record and control; and lastly, the development of a professional and trained police service for the patrolling of borders, conforming their actions to the Schengen Catalogue on external borders control (CEC, 2002). What was still missing, as evidenced by Commission Communication of 2002 was also a comprehensive and common corpus of legislation, that due to the reticence of MSs was difficult to achieve; that is why Commission's proposals were confined to the casting or recasting of non-binding manuals of best practices at the borders, with the only exception of the standard and procedure setting concerning the carrying out of checks at the external borders (then Community Border Code, introduced with a 2006 Regulation[130]). Another important step forward was the introduction of the External Borders Fund[131] to facilitate the building of infrastructures and provide officials' training.

The Hague programme gave new impulse to the planning of the strategy, by setting the stage for the creation of the most powerful tool of IBM: the European Border Agency (Frontex)[132]. This agency was thought to finally create a truly European environment in which best practices of member states' border guards – and their training – could be shared and implemented through the whole Schengen Area, the possible risks analysed with a supranational approach, actions coordinated in order to reach common objectives and the different visions better discussed and handled.

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[130] Regulation of the European Parliament and of the Council establishing a Community Code on the rules
governing the movement of persons across borders, OJ L 105, Brussels, 13 April 2006.
[131] For the period 2002-2006, EUR 950 million was overall allocated, while the successive years saw a steep increase in funding: EUR 1820 million (2007-2013). According to DG Home Affairs "The Fund has led to significant improvements, such as to the shortening of the duration of passenger checks, modernisation of surveillance systems and development of IT systems for external border controls." (CEC, 2012).
[132] The predecessor of the European Border Agency was the External Borders Practitioners Common Unit, working as the central steering body of SCIFA+ for integrated border management.

A finally more detailed definition of Integrated Border Management (Jorry, 2007) in the EU was provided officially during the JHA Council meeting in 2006[133], with the adoption of a the comprehensive "border management strategy", that was rendered fundamental by the 2004-2007 enlargement waves[134]. The Finnish presidency was able to shape it balancing the different positions of member states, in order to tackle efficiently all border-related issues, especially the tragic events consistently taking place at the Southern border that were, by then, the most controversial issues on the table and needed to be addressed[135]. The definition of the Council describes IBM as consisting in four dimensions:

- "border control (checks and surveillance) as defined in the Regulation establishing a Community Code on the rules governing the movement of persons across borders, including the necessary risk analysis and criminal intelligence;
- investigation of cross-border crime;
- a four-tier access control model (measures in third countries, cooperation with neighbouring countries, border control and control measures within the area of free movement);
- cooperation between the authorities in the field of border management at the national and international level (border control, customs and police authorities, security services and other relevant authorities);
- coordination and coherence of action taken by Member States and institutions."

In substance, the Council defined border management as covering "all border related threats".

In 2008, a Commission initiative[136] aimed at making it easier for bona fide travellers to cross European borders and at implementing the border related technologies, was still conceived to fulfil the objectives that were decided back in 2002. State-of-art surveillance technologies were the object of further concern by the European Council that introduced the idea of "smart borders" (European Council, 2011) or e-borders, whose core instruments are the Entry/Exit System (EES) and the Registered Travel

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[133] Council of the European Union, 2768th session of JHA Council meeting, Brussels, 4-5 December 2006, 15801/06 (Presse 341), p. 27.

[134] It is important to remember that new member states had no choice of opting-out from the Schengen acquis, measure that signals once again the lack of trust and mutual recognition.

[135] The rising death toll of migrants trying to cross European borders, required a mild shift in the focus of EU border control policies, which did not mean a diminished attention on security issues but an increased sensitivity towards the human rights perspective.

[136] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Preparing the next steps in border management in the European Union. Brussels, 13.02.2008 (COM(2008) 69 final).

Program (RTP). The first is meant to tackle the problem of the so-called overstayers –
TCN remaining on the European territory exceeding their visa –, by introducing a
register; the second allows for faster bureaucratic procedures for specific groups of
travellers who frequently cross the borders. In general, 2011 was a tough year for the
implementation of new measures concerning the external borders and in informal
meetings of JHA ministries the stress was often posed on the necessity to carefully
evaluate any new measure, especially in the light of its costs. However, these concerns
did not stop the gradual introduction of EUROSUR (CEC, 2008), the European border
surveillance system, which will introduce new tools for Frontex and the MSs –
especially Malta, Italy, Greece and Spain, which struggled the most to cope with the
Arab Spring flows – to stop an divert people trying to reach the European shores (Hayes
& Vermeulen, 2012) by establishing a common framework for information exchange
and cooperation[137], setting up national coordination centres for border surveillance,
which will exchange information among themselves and Frontex via a protected
communication network (Europa, 2011); EUROSUR will become fully operational by 1
October 2013. Lastly, the 2011 amendment to the Frontex Regulation was also passed
in this environment of rebuilding intra-Schengen frontiers and shut the national borders
and greatly enhanced the possibilities of intervention of the European agency.

The problem of the achievement of a truly integrated border management system at the
EU level and of its complicated structure, does not lay in the borders being longer than
in any other IBM system (e.g. the US) but in the "unfinished status of the EU as neither
a nation state nor a full-size federation" (Hobbing, 2005, p. 11). The European but
especially the member states' institutions involved in this complex system are in fact
still far from being completely coordinated. It is exactly because of the need for a
smoother cooperation that the European Commission, acting on a European Council's
decision, proposed the so-called Frontex Regulation, which by 2004 established the
European Agency for the Management of Operational Cooperation at the External
Borders of the Member States of the EU. The other institutions involved in the
European IBM are mainly national institutions and include: the member states' border
guards, the Ministries of Home Affairs, the national administrative branches and all
national authorities responsible for border checks and issuing visas. The major threat to
the failure of the project is therefore the possibility that Schengen members would

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[137] Among the main challenges recognised as needing solution, other than irregular migration, there are
also the loss of life of migrants at sea and cross-border crime (Europa, 2011).

decide not to empower the tools that the EU institutions are providing them – even preferring bilateral agreements (Jorry, 2007) – because of lack of trust, which constitutes the basis for European integration in every field, or to use them only to escape from national political blame.

2.5.2 Securitisation and Externalisation

"The future of international migration depends in large part on how these doors are manipulated" (Geddes, 2008, p. 29)

The two trends that shaped the most the European migration policy and therefore defined the role of IBM are definitely the securitisation of migration (Huysmans, 2000) and the externalisation of its control. This section aims at explaining the evolution of the perception of migration in the EU and the consequent development of border management policies, explicitly targeted at stopping migration flows from the outset.

The history of migration policies can help to shed light on how migration came to be considered as a security question. In the 1950-60s labour migration was supported by Western European states as a flexible and cheap mean to fill the gap of labour shortages; migrants were therefore considered as guest workers and the freedom of movement of people was not yet considered a primary issue for the functioning of the internal market. Successively, in the 1960-70s, guest workers started to settle down and to ask for family reunion; at this time political rhetoric started to shift and legislative measures were enacted at the national level to halt migration, while at the European level a distinction was made for the first time between the freedom of movement granted to MSs' nationals and third country nationals[138]. However, until the 1980s, the focus of third country national policies was concerned only with social and economic rights; after that time asylum became a relevant drive for migration and the political debate started to describe asylum as an "alternative route for economic immigration in the EU" (Huysmans, 2000, p. 124), therefore it took an "illegal" connotation. In these years migration policies started to be Europeanised, at first mainly through intergovernmental cooperation[139], and to be associated with the control of irregular migration. The communitarisation of these policies did not change the underlying assumptions that were formulated in the 1980s and which appear to be still rampant

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[138] Regulation (EEC) No 162/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

[139] The TREVI Group – a working group outside the EC framework, set up in 1978, whose initials stand for the French words "Terrorisme, Radicalisme, Extremisme, Violence Internationale" –, the Schengen Agreement and subsequently the Third Pillar on Justice and Home Affairs are to be considered as the main steps in the intergovernmental bargain in this field.

nowadays in the political and grass-roots debate[140]. On the contrary, the 1990s saw the adoption of the 'immigration zero' objective (Sciortino, 2000), thus increasing the number of irregular migrants in the EU and strengthening the perception of migrants as a threat[141].

On the contrary, the idea of a Fortress Europe is nowadays so radically enmeshed with common sense – both from the EU and the non-EU nationals – that it is difficult to think about migration as a non-security issue. This is exemplified also by the institutions that generally deal with migration policies and implement them: police forces, border guards and the Home Affair Ministries are the institutions competent for the management of security issues and migration alike. The EU not only does not escape from this logic, but also it reproduced it with the creation of the common market through the contemporaneously lowering of internal barriers and the strengthening of the external ones (Huysmans, 2000, p. 127). Nowadays, the trend has not been reversed and it is clear from the expansion of financial resources dedicated to the European agency for the management of the external borders, Frontex, the creation of the European Border Guard Teams, the application of the Dublin II Regulation[142] that the objective is to help MSs to better patrol their borders, repatriate irregular migrants and, more in general, to tighten the possibilities for asylum seekers and irregular migrants to disrupt the fabric of European welfare states[143]. The security continuum that is thus created links "border control, terrorism, international crime and migration", moving decision making in this field away from the "traditional human rights and humanitarian field of policy making" (Huysmans, 2000). In the next Chapter, the institution that is more involved in the European IBM – Frontex – will be described in detail[144].

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[140] See Paragraph 2.3.3.

[141] Significantly, the five key challenges formulated by the European Security Strategy can be found in threats coming from outside the EU, against which barriers should be built: international terrorism, regional conflicts, failing states, weapons of mass destruction and organized crime.

[142] This Regulation makes it impossible for asylum-seekers to lodge their asylum application in more than one MS – inhibiting the *dangerous* "asylum shopping procedure" – thus lowering their possibilities to find protection in Europe.

[143] Third country nationals are increasingly considered as not necessarily entitled to welfare provisions; this is due to a growing competition over the distribution of welfare goods such as housing, unemployment benefits and health care deriving from successive economic recessions in the Union and aggravated even further by the current economic crisis.

[144] The effects of the securitisation of EU migration policies have been described in this work (see Paragraph 2.4). For further reference see Schapendonk (2012), Sabel & Zeitlin (2010), UNHCR (2008) and the documentary "How much further?" retrievable at http://www.ecre.org/component/content/article/67-films/288-how-much-further.html.

Moreover, the criminalisation[145] of migration has strengthened the migration-security nexus. Policy of migration and policy of crime are more and more intertwined. One example is striking: the utilisation of biometrics at the borders to recognise and keep trace of all the migrants entering the Schengen Area (Brouwer, 2011). These information systems – such as Eurodac, SIS II and VIS – are to be used both by migration agencies *and* international police agencies. Moreover, the Lisbon Treaty establishes, in line with past practices, an internal security committee that is in charge *also* of migration and asylum[146]. Lastly, there is a double standard for migrants/asylum seekers and MSs nationals[147]: in fact, "if there is a presumption in favour of privacy for EU citizens, the reverse seems to be increasingly true with regard to non-EU nationals" (Chalmers, Davies, & Monti, 2010, p. 500).

In sum, as Anderson affirms "there are three modes in which internal security concerns have become amalgamated with immigration and asylum." (Chalmers, Davies, & Monti, 2010, p. 497). First of all, there is the ideological dimension, in which migration is thought of as a threat to European "homogeneous" societies and welfare states, therefore associating the word 'migrant' with 'terrorist' and/or 'criminal'; secondly, there is the institutional dimension, in which police forces and other law-enforcement bodies are the main carer of migration policies; lastly, there is the criminalisation of the migrant, that is frequently policed and kept in detention centres as a criminal.

Born out of the same need of the Member States that led to securitisation of migration policies – need to control and restrict migration flows –, the 'external dimension' of the JHA policies became a reality during the 1990s. The practice of externalising the immigration controls, relying on third countries – migrant 'sending' or 'transit' countries – was first embraced due to the fall of the Berlin Wall and the consequent massive inflow of refugees to the EU[148]. In fact, in 1991 the European Commission was calling, in a Communication to the Council, for the integration of migration issues into the EU's external policy (CEC, 1991). Again in 1992, it was the Edinburgh European

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[145] For a description of the criminalisation trend in the juridical realm see "Undocumentary. The reality of undocumented migrants in Europe", which is a PICUM project, accessibile on-line at http://www.undocumentary.org/index.php (retrieved on September 2012).

[146] Art. 71 TFEU establishes a committee within the Council "in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union".

[147] This holds true in spite of declarations of the contrary by the Tampere European Council of 1999, in which it was stated that, in order to respect the principle of fair treatment, "the legal status of third country nationals should be approximated to that of Member States' nationals." (Presidency Conclusions. Tampere European Council, 15 and 16 October 1999, Part III, par. 21)

148 It is worth mentioning that in the 1990s another important push factor moved masses of desperate people to leave their countries: the Yugoslav wars. Today the externalisation of control is still motivated by the vulnerability of the EU vis-à-vis its neighbouring countries.

Council that stressed the need for "coordination in foreign policy, economic cooperation and asylum policy" (European Council, 1992) in order to improve the management of migration flows. However, it was only in 1999 that the external dimension of JHA policies was officially adopted by the EU, during the Special European Council on Justice and Home Affairs in Tampere. Nowadays, with the creation by the Lisbon Treaty of the External Action Service and of the High Representative of the Union for Foreign Affairs and Security Policy, migration and mobility came to feature as key components of the Global Approach to Migration and Mobility (GAMM)[149] (CEC, 2011) – managed by the EEAS and the High Level Working Group on Asylum and Migration[150] – through the set up of partnerships with non-EU countries. These partnerships are to be intended as the tool to make cooperation on migration "mutually beneficial" to sending/transit countries and Schengen member states.

The objective was, and still is, to engage non-EU countries in the control of migration flows. This is the result of two main concerns: the shortcomings of "traditional" migration control policies (Boswell, 2003) and the will of MSs to retain the power of migration control while moving away from the blame coming from its politicisation (Lavenex, 2006). In fact, the external dimension of migration policy was considered at the very beginning as a flanking measure in order to cope with the perceived diminished control of MSs of their borders. However, there are two approaches that can be distinguished in the practice of these policies; one regards the cooperation with third countries in order to prevent migration, by acting on the 'push factors' that are present within the country of origin by the use of typical foreign policy tools151, while the other is just an extension of EU border controls tools through measures aimed at preventing illegal entry, migrant trafficking and smuggling. The latter approach is the one which seems to be more in line with the action of EU abroad: restrictive visa policies, the requirement of the strengthening of border controls for countries that wish

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[149]Approved in November 2011, the GAMM is to be translated into action via Migration and Mobility Dialogues in which policy tools known as Mobility Partnerships are foreseen as the principal instruments for future cooperation. Mobility Partnerships are to be conceived as "a long term framework based on political dialogue and operational cooperation [...] within the general context of the relations between the EU and the partner country concerned". For a more in-depth analysis of the GAMM see (Weinar, 2011).

[150] This strategic group works under the auspices of the European Council and comprises high level officials of each state present in the Council and representatives of the Commission. It was established to prepare action plans concerning the country of origin and transit of asylum seekers and migrants to be debated in the COREPER (EMN, *Glossary*, http://emn.intrasoft-intl.com/Glossary/viewTermByName.do?name=HighLevel%20Working%20Group%20on%20Asylum%20and%20Migration%20%28HLWG%29 accessed 12 May 2012).

[151] Such as development assistance, capacity-building, training, financial and technical assistance.

to gain accession to the EU and the practice of readmission agreements with neighbouring countries are the core measures on which EU external migration policy is focusing. According to 2010 PICUM's report regarding "main concerns about the fundamental rights of undocumented migrants", the year 2009 was the exemplification of the increased efforts of member states and the EU to deflect migrants from the borders through the practice of externalisation; as an example for member states' behaviour, in May Italy diverted over 500 migrants to Libya without assessing their protection needs, by signing a *refoulement* agreement with Muammar Khadafi's government. Moreover, of the same year is the notice of the first joint forced return operation coordinated by Frontex on the high seas[152] (PICUM, 2010), in open violation of the *non-refoulement* rule. These practices are clear examples of the externalisation of the handling of migrants, in agreement with a sending/transit non-EU country (in these cases Lybia).

The policies of migration control have experienced a great shift in the way they are handled; from being a national exclusive competence, to the realm of intergovernmental bargaining, moving up to supranalisation, to end in the hands of foreign policy administrators. This is what Sandra Lavenex calls the moving "up and out" of European immigration control policy (Lavenex, 2006). Despite its troubled history, the fortune of the externalisation of migration control policy has grown steadily; at the very beginning, MSs were eager to regain control over migration policies through the external dimension of the JHA, while the EU home affairs actors seized the opportunity to push forward, at the European level, some EU home affairs agendas that were blocking the construction of the AFSJ. Also, DG Home Affairs sought the 'going abroad' strategy in order to expand its competencies in the field, even with the support of the Council. At the same time,

> "the predominance of Home Affairs officials effectively playing the part of diplomats within the external dimension has had a profound effect on the policy priorities and actions implemented under the Global Approach, enabling the logics of security, policing and mobility as 'migration control' (in particular readmission agreements and border controls) to prevail over collaboration on legal channels for human mobility, such as labour immigration, and the promotion of migrants' rights." (Carrera, Hertog, & Parkin, 2012, p. 2)

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[152] ECRE Weekly Bulletin of 26 June 2009 available at http://www.ecre.org/media/news/weekly-bulletin.html.

With the Lisbon Treaty, notwithstanding the major changes in the supranalisation not only of migration control policy but also of foreign and security policy – which led to the establishment of the GAMM – it is still evident that MSs' need to retain power affects and fragments the action of the EU institutions[153].

However, paradoxically, "the ability to control migration has shrunk as the desire to do so has increased" (Bhagwati, 2003, p. 212). As a matter of fact, ever increasing masses of migrants – with an appreciable slow down in net migration in Europe only in the last few years, before the Arab Spring, due not only to the tightening of migration control measures but also to the economic crisis affecting the Union – are landing on EU's shores. This is to be attributed to two main factors: first of all globalisation is making easier for people to travel across the borders, even though for undocumented migrants, refugees and asylum seekers this statement generally does not apply; secondly, failed states and failing states are a never-ending source of people on the move, trying to find a place where to live decently, and these states are not decreasing in number over time, on the contrary, they are slightly increasing while their populations living conditions are deteriorating[154]. Also, the achievements in the ability to control migration are dependent on the EU and MSs migration policies[155].

In conclusion, as evidenced in this section, immigration policies in Europe are mainly informed by two trends – securitisation and externalisation – other than by humanitarian and/or human rights' concerns; this situation is causing serious problems for the application of human rights provisions that are currently, supposedly, mainstreamed in all European policies.

2.6   Concluding remarks

A European area of freedom, security and justice must be an area where all people, including third country nationals, benefit from the effective respect of the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union.

(COM(2010) 171 final)

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[153] As exemplified in the 2011 and 2012 Schengen events described earlier in this work.

[154] See "Trends of the worst performing states in the Human Development Index" at http://hdr.undp.org/en/data/trends/ (retrieved December 2011).

[155] Migrants that stay on after the expiration date of their visa are considered irregular migrants and therefore are accounted for, in the statistics, as a negative result for migration control policies. This is a reason why visa policies have become one of the main tools of the externalisation practice, in order to keep out unwanted migrants.

More than 60 years have passed since the beginning of the European integration project. The rationale for integration was to give a political response to the continent post-war devastation by safeguarding Europe from extreme nationalism and intolerance that could have led to a new destabilisation and, eventually, war. "Enmity among European societies would be abandoned once and for all, exchanged for the bonds of cooperation and common institutions." (Islam, 2012). Even if Member States struggled not to cede their powers in the field of Justice and Home Affairs, their cooperation became deeper and deeper over time, as the target of trade facilitation had to be coupled with the need for security.

As a counter product of this tension, especially in times when the stress on internal security is particularly high – as in the last Schengen events of 2011-2012 connected with the Arab Spring's "emergency" – the plea for "more border controls and public policy suspensions to the abolition of internal border checks" might lead to "more insecurity from the perspective of the fundamental right of free movement of individuals" (Carrera, 2012, p. 25). On the other hand, from the perspective of migrants and refugees, more security in Schengenland equals increased difficulties to see their fundamental rights recognised and riskier journeys on their way to European shores.

"Crucial issue here is to strike a balance between measures to ensure common security in the EU and measures that ensure the rule of law and the legal rights of the individual." (Maučec, 2012, p. 124). In order to do so, cooperation among MSs is essential so that individuals can truly enjoy equal rights in any part of the Schengen Area. EU institutions, and especially the Commission, are pushing in this direction, by introducing common standards and procedures in this field and trying to mediate between national interests and supranational needs.

The IBM is a perfect example of the quest for this balance and it is becoming a strong tool in the hands of MSs and the European Union, whose cornerstone is represented by the European Border Agency (Frontex). However, the policies that derive from this complex system affect the everyday life of millions of people and therefore need to undergo a continuous democratic control. The question that will be addressed in the next chapter has to do specifically with the possibility of the European citizens to exercise this control, through the channelling of their requests via international organisations – endowed with expertise and funding – thus leading us to the question:

how can Frontex accountability be described according to the parameters identified in the first chapter?

CHAPTER 3

3.1 Introduction

The standards of democracy for the EU are extremely difficult to set. Different normative assumptions regarding both the definition of democracy and the nature of the EU itself have been proposed and analysed in Chapter 1, coming to the conclusion that the quest for democracy in an experimentalist governance – or DDP – perspective starts with laying solid foundations for the whole system. These solid foundations can be detected, particularly for what concerns the flourishing agencies detaining a high level of expertise and independence in the EU, in a specific form of accountability: a dynamic accountability based on peer review processes.

In this cadre of complex and multi-layered governance and not clearly defined accountability relationships, Frontex emerges nowadays as an extremely powerful actor. In the wake of the third wave of agencification, which started around the year 2000s and saw a number of agencies spawning in a number of new policy fields, Frontex "experienced the most extensive upgrading in terms of financial and human resources." (Pollak & Slominski, 2009). Created in 2004 by Regulation 2007/2004, it became operative in 2005 in Warsaw; it was defined to give a comprehensive European response to the increased fear of terrorism following the 9/11 disaster and to the ever-growing political concern for migrant pressure on the shores of Europe. Soon after, due to a veritable mushrooming in the competences and administrative/operational tasks that the need for an harmonised control of the European external borders requires, Frontex underwent a reform in 2011, which substantially widely enlarged the bases for its financial and human resources while recognising the new administrative and operative competences that it had already informally acquired over time (Statewatch, 2003) and also establishing new duties for member states to cooperate in the field and new bodies within the Frontex framework.

The reason for the choice of this case study lies not only in the growing importance and power of this actor, but also in the fact that it is has been generally understudied in literature notwithstanding its rapid evolution. Moreover, the modification of its mandate

through Regulation (EU) 1168/2011[156], implies that this agency has either undergone a deep scrutiny by the European institutions and member states, or that these institutions (the "principals") have had the time to positively evaluate its performance; this implies that also from a scholarly perspective Frontex cannot be further ignored. A third reason for the choice of Frontex as a relevant case study is its implication in the management of one of the most relevant and politicised issues in the European and national agendas: the crossing of the European external borders. Lastly, there is the impact of the European agency on the phenomenon of securitisation in EU and national migration policies – e.g. coordination and co-leading role in joint operations at sea in order to *refoule* migrants to neighbouring third countries and the finalisation of "working agreements" with the same third countries, of transit or origin, to externalise migration control – and, in particular, its impact on the human rights of the individuals trying to enter Europe – e.g. coordination of joint operations at the Greek-Turkish land border aimed at implementing the detention requirements for irregular migrants provided for by both Greek and EU law –.

This Chapter aims at confronting Frontex with the two models of accountability that were defined in the first chapter and to "take a picture" of the different accountability relationships that are in place to democratically legitimise Frontex' existence for the time being. In the case of the application of Bovens' description of accountability mechanisms, an analysis of Frontex vertical relationship of accountability vis-à-vis multiple forums will be carried out, in particular by studying the founding Regulation as amended in 2011. For the description of the dynamic accountability that shapes Frontex framework of relationships with its peers, instead, and to describe these horizontal dynamics, a different approach will be considered as a better fit, namely the examination of reports describing both the activity of Frontex and its attitude towards its peers. Human rights will, as a matter of fact, play an important role in the last section of this chapter, opening new possibilities for democratic legitimation of the EU governance.

This Chapter is therefore divided in four sections: the first is a detailed overview of the European Agency for the Management of the External Borders of the European Union's history, legal framework, structure and tasks and serves the purpose of giving a thorough description of its complex nature; the second section is instead the result of the

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[156] Amending and replacing Council Regulation 2007/2004 establishing Frontex.

application of the experimentalist governance architecture – whose theoretical justification was presented in Chapter 1 – to the AFSJ in which Frontex operates, while at the same time it provides for the description of some experimentalist features that are at work within the Agency itself. Section three delves Frontex Regulation(s) and considers its practices in order to depict some relevant types of accountability relationship described by Bovens: political, financial, judicial and managerial. The last section will finally describe Frontex' accountability relationships vis-à-vis some relevant peers, whose accounts of Frontex activity will be utilised to have a clear picture of the situation.

3.2 FRONTEX

3.2.1 History

The idea of Community agency[157] in charge of the coordination of the activities of Member States at the external borders derives directly from the first bilateral agreements of cooperation among MSs[158]; they considered, in fact, "the establishment of Frontex as a compromise between upholding national sovereignty and creating greater communitisation of border control" (Perkowski, 2012, p. 4). But the breakthrough moment for the acquisition of the competence at the European level came with the unprecedented flow of migrants crossing the Mediterranean sea and landing on the shores of the Canary Islands, from the year 2000 onwards[159] coupled with the post-9/11 terrorism-phobia, not to mention the wider enlargement of the Union since its inception (2004); it was therefore created out of an emergency situation[160] and was up and running already in 2005[161]. Since the abolition of the internal frontiers (1995) and to "keep a balance between freedom and security" the MSs participating to the Schengen Area agreed to increase the cooperation and coordination of national police and judicial authorities through the so-called "compensatory measures". They were meant, from the

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[157] Community agencies, differently from Council agencies, were born to ease the workload of the Commission, mainly in First Pillar policy areas, where they also had a credibility-boosting function due to their expertise and efficiency (Busuioc M. , 2010). Frontex is a Community agency which has its formal roots in the "First Pillar" but it cooperates closely with "Third Pillar" agencies and bodies (e.g. Europol).
[158] See Paragraph " Political implications and how it worked out"
[159] See Paragraph "Nature and size of Migration flows", graph 1.
[160] "A month after it began operations Frontex found itself in the front line when, in November 2005, hundreds of mainly sub-Saharan nationals breached the borders of the Spanish enclaves of Ceuta and Melilla in Morocco." (House of Lords European Union Committee, 2008, p. 15).
[161] EP Rapporteur for Regulation 1168/2011, Simon Busuttil, comments the creation of Frontex in 2004 in these terms: "this agency was asked to start running before it could know how to walk" (Introductory intervention of Frontex debate, retrievable at http://www.youtube.com/watch?v=bB53f_U12ao, accessed June 2012)

very beginning, to safeguard internal security from organised crime networks and evolved into key policy instruments for the EU.

Therefore, the European Agency for the Border Management did not appear as a completely new institution. The Sea Borders Centre, supported by the expertise of the CIVIPOL Conseil[162], is a clear example of previous cooperation of MSs and involvement of the Union aimed at combating "illegal immigration across the maritime borders of the European Union"[163]. Moreover, proposals for ad hoc EU Sea Borders Centres were purported by Greek and Spanish authorities – the Western Sea Borders Centre (Madrid, Spain) and the Eastern Sea Borders Centre (Piraeus, Greece) –, to grow out of the EU legal framework but under the auspices of the Council and the Commission; a similar cooperation was already in place when Frontex was proposed: the EU Centre for Land Borders, situated in Berlin, Germany. This Centre had almost exactly the same tasks and aims of the new agency: the enforcement of joint operations, the outlining of risk analysis (in cooperation with the Risk Analysis Centre in Helsinki, Finland), the prevention of illegal entry through the checks at border-crossing railways; the creation and support of an information system (Statewatch, 2003, p. 8). Other Centres were set up by the member states and in particular, the Air Borders Centre (Rome, Italy), the Ad-hoc Training Centre for Training (Traiskirchen, Austria) and Centre of Excellence (Dover, United Kingdom) (FRONTEX, 2012).

In order to coordinate these national projects of ad hoc centres of border control, a more institutionalised form of cooperation in the field was however set up and embodied in the External Border Practitioners Common Unit, set up in June 2002. The Common Unit was composed by members of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) and the heads of national border control services (SCIFA+ working group) (Ekelund, 2008). SCIFA was itself preceded by the Article 36 (TEU) Committee which was a Council Working Group "whose purpose was to coordinate the competent working groups in the field of police and judicial cooperation and also to prepare the relevant work of the Permanent Representatives Committee (COREPER)." (EMN, 2012). With the entry into force of the Lisbon Treaty, this was substituted by

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[162] French agency that produced the "Feasibility study on the control of European Union maritime borders" (Council of the European Union (2003, 19 September), 11490/1/03). This document was transmitted to the DG JHA and was followed by the drafting of a Council action plan (see footnote below). The "feasibility study" is defined in a Statewatch report (November 2003) "a law enforcement blueprint" and the subsequent action plan is described as proposing "police, military and naval operations against people trying to reach the EU by sea" (p. 2).
[163] Council of the European Union (2003, 21 October), *Programme of measures to combat illegal immigration across the maritime borders of the European Union*, Brussels, (13791/03).

SCIFA whose tasks included – and continue to do so – issuing strategic guidelines regarding immigration, frontiers and asylum; addressing by synthesising and solving the questions arising from articles 77 to 80 TFEU; providing useful background for COREPER discussions. As a Standing Committee it can also give mandate to a so-called "Working Party" to consider in detail legislative proposals of the Commission; their conclusions are reported to SCIFA and subsequently to COREPER, which in turn passes them on the JHA Council (EMN, 2012).

While SCIFA continues to operate, the Common Unit ceased to function when, in 2004, the Frontex Regulation (2007/2004) was passed by the Council. The legal basis chosen for this Regulation was Article 66 TEC, which provided for the consultation procedure with the EP; it is worth noticing the specificity of this choice, considering that a different legal basis (article 62(a) TEC covering for "measures on the crossing of the external borders of the Member States") could have been provided, so to give to the EP the possibility to express itself on the matter standing on an equal footing with the Council, through the co-decision procedure (Statewatch, 2003). This would have enhanced the participation of a representative body thus answering some of the concerns of the supporters of the democratic deficit theory on the basis of the "analogy with the state".

Frontex started to operate in 2005, in Warsaw, as a specialised and independent European body. Setting this strategically important agency in one of the new Member States was not an arbitrary choice[164]; as a matter of fact, Frontex is the first European agency to be located outside of the hard core of the territory of EU signatories, which might be considered as a relevant symbol both to affirm the decentralisation trend of European governance and to recognise the importance of "new" member states[165] in the implementation of the border management policy. These countries being all situated at the external borders of the EU, they found themselves carrying the burden of "old" Member States' apprehension concerning migration and security issues while still struggling to integrate[166]. The institution of the Border Management agency was

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[164] As decided by Council Decision of 26 April 2005 designating the seat of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (2005/358/EC).

[165] Poland accessed the EU in 2004, during the biggest enlargement of the Union which included for the first time countries of the former "Eastern Block", the year before the establishment of Frontex.

[166] See the discussion on the interpretation of "solidarity and "burden-sharing" concepts between "old" and "new" Member States in Chapter 2.

considered, in this perspective, a way to sustain financially, but also with human resources and expertise these countries.

Frontex main task is to coordinate the operational cooperation between Member States in the field of border security. One of the main issues stressed by Frontex Regulation (2007/2004) is that the agency "should facilitate the application of existing and future Community measures relating to the management of external borders" leaving to the Member States "the responsibility for the control and surveillance" of their borders (Council of the European Union, 2004), meaning that Frontex is not established to replace national border management systems of the Member States but to complement and provide added value to them, by using intelligence tools (FRONTEX, 2012).

Other than the "emergency response" rationale (Carrera, The EU Border Management Strategy. Frontex and the Challenges of Irregular Immigration in the Canary Islands, 2007), the creation of this agency lays also on political reasons that include, in particular, the prospective institution of a European Border Police force (Monar J. , 2006). In 2005, a G5[167] meeting produced a Declaration that indicated the political intentions of the 5 more powerful and old Member States; it contained provisions for the future of Frontex and in particular it openly declared that "We are studying the idea of a 'European Border Intervention Police Force' which would allow deployment, in times of crisis, of specialized national pre-identified resources in our countries so as to intervene on the European external border." (Hobbing, 2005, p. 8). This idea was supported by a feasibility study, drafted in 2002, for the setting up of a "European Border Police" and promoted by Italy, Belgium, France, Germany and Spain. With the latest Regulation (1168/2011), this project became a reality with the establishment of the European Border Guards Teams[168].

The agency evolution followed the growing concern of Member States regarding migration and therefore border management issues. The most evident indicator of its expansion is the amount of resources allocated by the European Union for the

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[167] A group consisting of Germany, France, Spain, Italy and Great Britain's Ministers of Interior, that whose common goal was the release of the blockade in EU interior policy from 2000 on. Consequently, the states of the G5 become heavily involved in the development of Frontex and IBM (Frontexwatch, 2006).

[168] The discussion over the future of Frontex was introduced also at the EP level during the Interparliamentary LIBE Committee Meeting of 2011, by Simon Busuttil, EP rapporteur for Regulation 1168/2011, who proposed the questions: "Where is Frontex heading? [...] Do we want to continue to have loose cooperation among us when it comes to protecting our external borders or do we want to move on and integrate completely to create, who knows, a European Border Guard Agency?"

accomplishment of its tasks. In 2005 its initial financial resources amounted to 6 million, for the first year of operation (1 May-31 December 2005 (Frontex, 2005)), raising to 19 million in the second (Frontex, 2006). The expenses for 2005 and 2006 were covered by the General Budget of the Union – Commission section – with an annual subsidy and by Norway and Iceland's contributions[169]; ideally, voluntary contribution from other MSs was possible, but did not happen. Frontex became financially independent for the implementation of the entire budget starting from 1 October 2006 and in 2007 a specific fund was established, systematising contributions from MSs: the External Borders Fund[170]. Frontex funding boomed in that year reaching 44 million EUR (Frontex, 2007) and kept rising over the years, peaking to 88 million in 2011 (Frontex, 2011)[171]. Not surprisingly[172], in a period of zero growth and budgetary restriction, Frontex saw an increase in MSs' input in Frontex' coordinated activities (Frontex, 2012). The human resources increased with the same pace, from the first year of struggling to recruit personnel[173] to 313 staff employed in 2012 (Frontex, 2012, p. 6).

3.2.2 Legal framework

As discussed in the previous Chapter, with the entry into force of the Treaty of Amsterdam, the Council was conferred the power to adopt measures on the crossing of the external borders of the MS and set standards for MSs to follow when carrying out checks on persons at these borders (Article 62(2)(a) TEC, now 77 TFEU). Moreover, Article 66 TEC provided for the power of the Coucil to take measures to ensure cooperation among MSs' competent authorities in the areas covered in the JHA pillar. It

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[169] In general, the financial support has to be provided by third countries which have become associated with the implementation, application and development of the Schengen acquis.

[170] As part of the general programme "Solidarity and management of migration flows", Decision No 574/2007/EC of the European Parliament and of the Council of 23 May 2007 establishes the External Borders Fund (EBF) for the period 2007-13, with resources totalling €1820 million and to be used for all activities linked with management of external borders, not only Frontex.

[171] For 2012 the budget increases further to 118 million; see http://www.europarl.europa.eu/oeil/popups/summary.do?id=1220859&t=d&l=en (accessed September 2012).

[172] According to COWI's evaluation of Frontex of 2009: "The increase in funding is first of all reflected in increased interest and costs connected with *Joint border operations,* which cater for more than 75% of Frontex' total operational costs. These operations are at the core of Frontex' activities and the main interest for many stakeholders, especially Member States with exposed external borders." (COWI A/S, 2009, p. 8).

[173] Several issues have been hampering Frontex' staff recruitment and in particular: the low salary for highly skilled staff (due to a salary "correction coefficient" applied to Warsaw that renders particularly low the salaries) and the absence of an "headquarter agreement" with the Polish Government (COWI A/S, 2009). See: "Border Agency in Warsaw struggles to find staff", *Financial Times*, 21 January 2007, http://www.ft.com/intl/cms/s/0/8a861304-a82a-11db-b448-0000779e2340.html#axzz29GOwthnF (retrieved September 2011).

is in this legal context that the idea of an European Agency for the Management of Operational Cooperation at the External Borders was nourished.

Nowadays, Frontex is one of the core institutions working within IBM. The JHA Council meeting of December 2006, in fact, established three pillars for the IBM strategy: a common corpus of legislation, Frontex and MSs cooperation, and the principle of solidarity; this was considered to be the "first generation" of EU IBM.

The legal basis for Frontex Regulation 2007/2004, as described in the previous section, is Article 66 TEC, "to ensure cooperation between the relevant departments of the administrations of the Member States". The establishing regulation has been amended twice in the last 8 years: the first time with the adoption of Regulation (EC) No 863/2007 of the European Parliament and the Council setting up a mechanism for the creation of RABIT (Rapid Border Intervention Teams) and amending the previous Regulation as regards the tasks and powers of guest officers; the second, which introduced some major changes in the whole structure of the agency, with the implementation of Regulation 1168/2011.

One of the main tenets of Regulation 2007/2004 is to be found in article 1(2) which states that "responsibility for the control and surveillance of external borders lies with the Member States". Moreover, article 1 is fundamental for the description of the relation of the agency with its "principals"; paragraph 3 states that Frontex has to provide "technical support and expertise" to the Commission and MSs concerning border management. Chapter II of the Regulation provides for the tasks attributed to Frontex (see next section), while Chapter III describes its structure (see Section "Structure"). For what concerns the "Financial requirements" chapter, it starts with article 29, listing the possible sources of financing: first of all the Commission section of the General Budget of the Union, secondly the contribution from the third countries participating in Schengen but not in the Union, thirdly the fees "for the services provided" and, finally, the possible voluntary contributions from the MSs. Implementation of the budget is left in the hands of the Executive Director and Management Board while its control is for the Court of Auditors to carry out. Finally, article 33 provides for the evaluation of the agency effectiveness, impact and working practices, to be carried out by an independent body, for the first time after three years since inception and from then on every five years. This independent and professional

evaluations (COWI A/S, 2009) have generally promoted the Agency in the performance of its duties.

The introduction of the Rapid Border Intervention Teams in 2007 was conceived as a response to possible requests of support from MSs due to mass influx of migrants trying to cross the borders irregularly[174], necessary in particular to complement the already existing Regulation No 562/2006, the so-called Schengen Borders Code. It was necessary to specify, in fact, the code of conduct[175], liability and specific competences of guest officers whose presence is required by the MSs in distress. In this Regulation, for the first time, fundamental rights, the *non-refoulement* principle and the law of the sea search and rescue rules are cited regarding Frontex activity[176].

The latest Regulation amendment recognises Articles 74 and 77(2) points (b) and (d) TFEU as the legal bases for the Agency activity and for the first time reference is made of the "gradual introduction of the concept of Integrated Border Management" (Regulation (EU) No 1168/2011, par. 7).

3.2.3 Competences and tasks

Competences and tasks of the agency have been expanding over time. As indicated in Regulation 1168/2011, they now include seven main areas: joint operations, training of officials, risk analysis, research, rapid response capability, joint return operations assistance and, lastly, information sharing through information systems.

Frontex main activity is to plan, coordinate, implement – also with a newly introduced co-leading role – and evaluate joint operations[177] at the external borders of the EU. These operations are carried out by MSs' staff and equipment, whose liability for illegal actions arises before their national Court. More than half of the total amount of Frontex resources are devoted to these operations and these are the biggest concern of NGOs that monitor Frontex activity. There are three types of joint operations, according to the

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[174] The Regulation (EC) 863/2007 defines them as "third-country nationals attempting to enter [EU] territory illegally".

[175] The Code of Conduct, nonetheless, " does not [...] address the consequences of non-compliance with the code, leaving an [judicial] accountability gap" (FRA, 2012, p. 15)

[176] In introductory Paragraphs No. 17, 18, 19.

[177] Joint operations are usually named after the ancient Greek gods. Among the most famous – or "infamous", according to civil society organisations promoting HR in the Union – joint operations there are the operations conducted at the Greek-Turkish land border, which, from 2010, is exposed to the 80% of all irregular border-crossings detected in the Union (as described in Chapter 2, Section "Nature and size of migration flows"): Poseidon, Saturn, etc.

type of external border involved: sea border checks and surveillance[178] – the European Patrols Network is the networked structure, created by Frontex to help MSs in this activity –; land border checks and surveillance – that involves cooperation with other agencies for the fight against human trafficking and terrorism –; and, lastly, joint operations are carried out also at airports[179], and include not only passports' controls but also and especially "prevention, detection, deterrence" (FRONTEX, 2012). Joint operations, moreover, are carried out also outside the territory of the Union, even though the legal basis for this kind of operations is debated, and these include "patrols on the high seas as well as the territorial waters of third states" (Fink, 2012, p. 22). In the accomplishment of this task, what is questionable and unclear, from civil society organisations' perspective but not in Frontex and its spokespersons' opinion[180], is its responsibility in the eventual case of a violation of fundamental rights. Regulation 1168/2011 provides for two new bodies in charge of mainstreaming fundamental rights that will be described in the next section.

Another highly relevant task is to establish common standards to train border guards across Europe. The Common Core Curriculum is the most relevant document on the issue prepared by the agency. Training is also carried out for both entry-level and mid/high level officers. This task is conducted also in association with FRA for what concerns training officers with a human rights perspective.

For what concerns the intelligence activity, risk analysis and research are performed by Frontex in order to keep under control the situation at the border crossing points and gather operational information from both MSs and "open sources including mass media and academic research" (FRONTEX, 2012). Moreover, research implies the possibility for the EU to keep the pace of technologic developments, apt to enhance control of the borders; Frontex therefore can be considered a useful "platform" to bring together the world of research and industry and the world of research. Another competence of Frontex is to carry out Feasibility Studies "intending to develop the so-called 'Second Generation of IBM'" (Carrera, The EU Border Management Strategy. Frontex and the

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[178] Search and Rescue activities are especially relevant at this type of border.

[179] According to Frontex risk analysis, as many as 45% of Europe's 271 million entry/exits per year are from countries "at risk" of being an irregular migration source. If only one percent of these 121 million passengers are migrating irregularly, that means as many as 1.2 million irregular migrants enter the EU every year through its airports. For this reason alone air operations present unique challenges. (FRONTEX, 2012)

[180] Ewa Moncure's lesson at Turin International Summer School (September 2011), organised by ETF on migration issues. Ms Moncure is currently one of the spokespersons of Frontex.

Challenges of Irregular Immigration in the Canary Islands, 2007, p. 18). Regulation 1168/2011 provided Frontex with additional powers concerning risk analysis, that is to assess regularly the "capacity [of MSs] to face upcoming challenges at the external borders" (Council of the European Union, 2011).

The latest development in Frontex tasks is to be found in the European Border Guard Teams (EBGT), whose equipment is no more provided by MSs on a voluntary basis only but can be bought or leased by Frontex itself or in co-ownership with a MS. These teams are considered as the evolution of RABIT; their purpose is to provide a rapid response to MSs requests for intervention in crisis situations. Differently from RABIT teams, these are always kept in full readiness because dependency from MSs will to cooperate has proved inefficient for this kind of operations.

Another reason of great concern for NGOs defending migrants' rights are joint return operations (ECRE, BRC, 2007, point 2.8). Even though return operations are decided by Member States on the basis of illegal stay of the third-country national, Frontex is highly involved, not only in the study of cost-effectiveness and of efficiency maximisation, but also in the practical assistance of the Member State personnel during the whole process (Human Rights Watch, 2011). With the latest amendments to Frontex regulation, the commitment of the agency for the respect of human rights and human dignity of returnees is stressed for the accomplishment of this task. It has been estimated that joint return operations have lately "increased considerably in number (1,622 persons returned in 2009, compared with 428 in 2007). Moreover, the Agency's budget for coordinating JRO flights has risen from €0.5 million in 2005 to over €7 million in 2010." (Keller, Lunacek, Lochbihler, & Flautre, 2011).

Lastly, Frontex is involved in the processing of personal data, competence that was highly debated before the adoption of the 2011 amendments. The current text extends the powers of the agency in this field by providing that it should "develop and operate [...] information systems that enable swift and reliable exchanges of information regarding emerging risks at the external borders" (article 2(h)), namely the Information and Coordination Network and the European Border Surveillance System. Moreover, Frontex now has the possibility, to increase efficiency in tackling organised and trans-national crime, to transfer personal data to Europol "or other EU law enforcement agencies regarding persons suspected of involvement in cross-border criminal activities,

facilitation of illegal immigration activities or in human trafficking activities" (Council of the European Union, 2011).

It remains to mention the ability of Frontex to enter in bilateral relations with third countries administrations, in order to carry out its tasks. These are called "working arrangements" (Fink, 2012) and are the evident embodiment of the shift of borders control towards the area of foreign affairs[181].

3.2.4 Structure

Frontex structure is very similar to other European agencies and consists mainly of a Management Board, an Executive Director with his/her deputy and executive support, and three divisions according to its tasks: operations, capacity building and risk analysis.

The Management Board is the assembly – constituted by representatives of the heads of the border agencies of the 25 EU Member States that are signatories of the Schengen acquis, plus Iceland, Lichtenstein, Norway, Switzerland and UK and Ireland representatives[182], and two members of the European Commission – through which all major decisions have to pass; it adopts all the main documents of the agency – the programme of work and the general report –, sets the budget, verifies its execution, establishes transparent working procedures for decision making by the agency, and, finally, appoints the Executive Director (FRONTEX, 2012).

The executive Director has been given in the new mandate the power to "suspend or terminate, in whole or in part, joint operations and pilot projects" if he/she considers that the home MS is not providing for appropriate "disciplinary or other measures" in case of violations of fundamental rights or international protection obligations and especially if such violations are of a serious and persistent nature.

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[181] See section on "Externalisation and criminalisation" in Chapter 2.
[182] These latter two are invited to the meetings, that take place five times a year, but have no right to vote, while the other non-EU participants retain a limited power to vote.

Figure 3 – The structure of Frontex
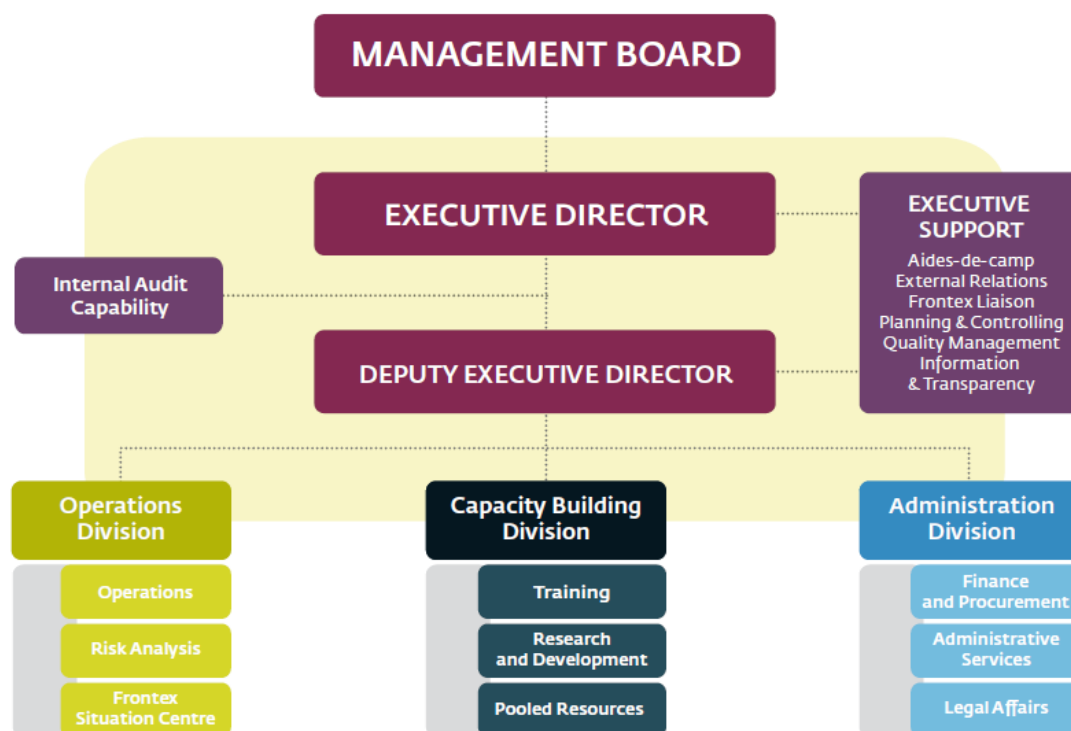
Source: *Frontex Press Pack* (May 2011, p.4).

Regulation 1168/2011 made some significant changes particularly for what concerns the structure of the agency. As a matter of fact, it instituted two new bodies: the Consultative Forum on Fundamental Rights and the Fundamental Rights Officer (FRO) (art. 26(a)). The latter has just been designated by the Management Board, on 27 September 2012[183], while the former was already in place thanks to the agreed decision on its composition taken on 23 May 2012[184] and it is holding its inaugural meeting in October 2012. Frontex Consultative Forum is composed by a number of organisations, among which there are also the civil society organisations that more harshly criticised Frontex' activity; there are representative of: FRA, EASO, UNHCR, Council of Europe,

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[183] Office has been taken by Ms. Inmaculada Arnaez Fernandez, a jurist active in the field of human rights and international affairs.

[184] Management Board Decision No. 12/2012 of 23 May 2012 on the composition of Frontex Consultative Forum, retrievable at http://www.frontex.europa.eu/assets/Images_News/MB_Decision_12_2012.pdf (accessed May 2012). Currently it is constituted of the representatives of six European agencies and governmental organisations and nine civil society organisations, for a total of fifteen bodies represented, each and everyone with a different perspective and expertise on fundamental rights matters. These are: Amnesty International European Institutions Office; Caritas Europa; Churches' Commission for Migrants in Europe; Council of Europe; European Asylum Support Office; European Council for Refugees and Exiles; European Union Agency for Fundamental Rights; International Catholic Migration Commission; International Commission of Jurists; International Organization for Migration; Jesuit Refugee Service; Office for Democratic Institutions and Human Rights; Platform for International Cooperation on Undocumented Migrants; Red Cross EU Office; United Nations High Commissioner for Refugees.

IOM, OSCE Office for Democratic Institutions and Human Rights, but also – only to name some – Amnesty International, Caritas Europa, ECRE, International Commission of Jurists, Jesuit Refugee Service, Platform for International Cooperation on Undocumented Migrants, and the Red Cross EU Office.

These two bodies are complementary in their work, but while the Consultative Forum has only a "consultative" role, which includes the task of advising and informing Frontex on the "promotion and respect of Fundamental Rights" in all Frontex activities, the FRO's decisions are binding upon the Agency; FRO's role is, in fact, to monitor Frontex activity and to report on it to the Management Board and the Consultative forum. She should be independent in the performance of her duties; her independence will be a matter for further discussion.

3.3 Experimentalist Governance in JHA and Frontex

In this section we will first follow Jörg Monar's description of the reasons why experimentalist governance emerged in particular in the JHA policy field and his identification of the DDP core elements[185] in the decision-making process of the AFSJ. Secondly, a closer look will be given to the role of Frontex in this model of governance in order to be able to apply, in the last section of this chapter, Sabel and Zeitlin's idea of dynamic accountability to the European Agency's activity, to assess whether it is a viable option for the enhancement of democracy in this field.

As described in the second chapter of this work, the struggle between the European supranational institutions (i.e. the Commission) and the MSs to gain or retain powers in the field of border controls, as well as asylum, immigration and visa policy, produced as an outcome a variegated system of policy-making which bears all the experimentalist features described by Sabel and Zeitlin. From the point of view of the MSs, these features of governance have been considered "attractive because they do not impose a tight regulatory framework, replace rigid enforcement procedures by reporting and peer review procedures, and allow for recursive adaptation of goals and procedures with a strong input from national 'stakeholders'" (Sabel & Zeitlin, 2010, p. 240).

For the most part, the instruments used it the AFSJ are created in order to strengthen cooperation of MSs more than to attempting really to a deeper integration. Frontex is the perfect example: MSs are still the ones empowered with the control of external

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[185] See "Experimentalist governance" and "Dynamic accountability", Chapter 1.

borders and they are the only ones which can require Frontex intervention, while the European Agency detains – formally – the power to enrich coordination and cooperation instruments. Nonetheless, it must be noted that some sign of change can be detected in the establishment of the EBGT.

Moreover, the Area of Freedom, Security and Justice comprises a wide range of diverse policy fields. Asylum policy, police cooperation or judicial cooperation, for example, are all in the same basket; nonetheless, different governance instruments are used to reach determined targets in each one of them: asylum policy is mainly about creating common standards throughout the Union, while police cooperation and cooperation in the field of border management requires mainly a continuous amelioration in information collecting and sharing and the furthering of operational interaction between MSs' law enforcement authorities, namely through the establishment of European agencies such as Europol and Frontex[186]. The choice of the different instruments is discussed by Wolff & Schout (2012), in particular for the border management field: "The diversity in countries due to enlargement and the creeping integration in more intergovernmental policy areas [...] demanded cooperative types of 'networked governance'" (Wolff & Schout, 26-27 January 2012, p. 3). The experimental seed here is to be found exactly in the variety of governance instruments employed at the European level to achieve common goals such as 'internal security' (COM(2010) 673 final) that undergo constant monitoring and reviewing.

The operational dimension of the AFSJ, especially concerning external border control and police cooperation, is definitely of primary importance even if legislative measures are not absent, particularly for what concerns migration and asylum policies. The operational measures ensure a high degree of flexibility and speed compared to legislative measures taken through the traditional Community method (now virtually applied to all AFSJ policies).

The complexity of this area does not lay only in the wide range of policy fields and in the types of measures enacted to achieve goals; it is, in fact, further increased by the different membership of its participants. Particularly regarding the Schengen *acquis*, as described in Chapter 2, there are both members of the Union, 'opt-outs' and third countries participating with different entitlements to the decision-making process. The

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[186] In total, in 2013 there will be 8 fully-fledged European Agencies operating in the AFSJ: Frontex, Europol, Eurojust, FRA CEPOL European observatory for drugs and drugs additions, EASO, EU Agency for large-scale IT systems.

experimentalist approach in this field is therefore fundamental in order to allow a more effective participation of all the members.

To give an account of the four main features listed by Sabel and Zeitlin for the definition of the experimentalist governance in the AFSJ, it is necessary to quickly recap them here: first of all the establishment of non-detailed framework objectives, secondly the contribution of 'lower level' units in the process towards the achievement of the objectives, thirdly the exercise of monitoring, reporting and peer reviewing to assess if and how objectives are met, and, lastly, the recursive revision of the objectives and the means employed to reach them, in the light of the results described in the previous step. According to J. Monar: "The relevance of experimentalist governance in the JHA domain obviously depends also on its accountability and effectiveness as major contributory factors to its legitimacy. Accountability can be regarded as a major dimension of 'input legitimacy' and effectiveness as a major dimension of 'output legitimacy'." (in Sabel & Zeitlin, 2010, p. 255).

In Chapter 2, a description of multi-annual frameworks adopted within the AFSJ was provided; considering that "a statistical analysis of the texts adopted by the JHA Council from 1 May 1999 to 31 December 2006 shows that target-setting accounts for 215 out of total of 868 texts (i.e. 24,8%), a major share of the Council's policy output", (Sabel & Zeitlin, 2010, p. 244), it is important here to highlight the specific multi-annual framework in which Frontex is operating in order to achieve the European objectives of internal security, on one hand, and respect for fundamental rights and freedoms, on the other[187]. The Stockholm programme is a four year framework programme (2010-2014), establishing the guiding lines for the policies to be adopted in the AFSJ; within this programme Frontex is mentioned explicitly for the achievement of specified targets: "further develop [EU] integrated border management and visa policies to make legal access to Europe efficient for non-EU nationals, while ensuring the security of its own citizens. Strong border controls are necessary to counter illegal immigration and cross-border crime. At the same time, access must be guaranteed to those in need of international protection and to vulnerable groups of people, such as

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[187] European borders should be permeable enough to allow for enhanced mobility, "for *bona fide* travellers to *enjoy* the freedom they expect while ensuring also the security that they *deserve* [emphasis added]". from Illka Latinen speech (Frontex Executive Director) delivered at the Interparliamentary Committee Meeting, in Brussels, 5 October 2011, on "Democratic accountability of the Internal Security Strategy and the Role of Europol, Eurojust and Frontex". Mr Latinen words are in line with the slogan of the Stockholm Programme: "An *open* and *secure* Europe serving and protecting citizens [emphasis added]".

unaccompanied minors." (EUROPA, 2010). Mention is also made of the necessity to enhance cooperation and promote partnerships with non-EU countries while at the same time maintaining a single external relation policy for the whole EU.

Frontex is particularly relevant especially when the experimentalist feature of the AFSJ, describing "the role of 'lower-level' units in the way objectives are pursued" comes into play. As a matter of fact, Forntex has a major role in the pursuing of the common framework objectives of the AFSJ, as pinpointed in the Stockholm Programme. In order to perform its duties in this framework it has been granted more and more autonomy as regards the attaining of the common objectives: for example, its annual document of work is endorsed only by the Management Board with no requirement for the EP or the national parliaments or other stakeholders to be consulted on the matter. The Management Board, even if composed of representatives of the MSs, it is totally an internal body of the Agency, therefore no significant scrutiny is carried out on how the Agency plans to enact its mandate year after year. Moreover, in the words of J. Monar: "Although [networked information agencies, such as Frontex] do not have a 'command-and-control' power over national authorities, [...] [they] play an important role in encouraging, developing and supporting cooperation between them." (Sabel & Zeitlin, 2010, p. 248).

The third feature of experimentalist governance also implies an important role of the agencies in the AFSJ. Reporting, monitoring and peer-reviewing of results are of widespread use in the AFSJ and are distinguished by Monar (2010) according to the "forum" – to use Bovens' terminology –, that is if the Commission carries them out or other specialised structures are in charge. The Commission has enacted over time a some initiatives directed at evaluating the achievements of the EU in JHA fields: in particular, the "Scoreboard Plus" – substituting in 2006 the ineffective "Scoreboard" mechanism – was used to establish a system of information gathering and sharing on results so that the Commission itself, after discussing the reported results with relevant stakeholders (e.g. NGOs), could produce evaluation reports, finally leading to a possible redrawing of political priorities in each policy area (COM(2006) 332 final). Unfortunately, with the Stockholm programme this interesting tool seems to have disappeared (Bruycker, 2012), probably for the dislike of MSs towards this system of 'naming and shaming', leaving the evaluation of the implementation of the Stockholm

Programme to the will of Member States and the Commission (European Council, 2010, items 1.2.5 and 1.2.11).

However, a more general evaluation mechanism and a fundamental peer-review instrument – already mentioned in Chapter 2 – has been recently rendered more efficient and up-to-date by the Commission Proposal of November 2010, further amended in 2011: the Schengen Evaluation Mechanism (European Commission, 2011); this evaluation is enacted on two levels: on future participants of the Schengen governance system and on MSs alredy bound by the Schengen acquis. In this evaluation framework, MSs' ('lower-level' units) compliance with Schengen acquis' rules – which has to be effective and in accordance with fundamental principles and fundamental rights – is carried out once in five years for each MS; as evidenced by Y. Pascouau (2012), the mechanism now focuses on entrusting the Commission with the relevant powers to implement effectively the evaluation and on the necessity for a more consistent follow-up on evaluation findings for MSs, through the improvement of their own involvement along with national experts and EU agencies[188]. For what concerns evaluation made by specialised bodies, instead, Frontex is responsible for the assessment of the external border security and its management by MSs; on this basis it provides recommendations on action to be taken for the development of better security strategies.

Lastly, the recursive revision of "means and ends" in the light of results has been divided by Monar (2010, p. 252) in three: the recursive revision of programming, of legislation and of practices. The first is exemplified by the successive adoption of the Tampere, Hague and Stockholm programmes, all started from the evaluation of the policies provided for in the previous version to ameliorate them and find new political objectives to be met on the basis of precedent experiences. For what concerns the revision of legislation, it is possible to find in some legislative measures explicit revision clauses; an exemplification of this concept can be found in the provision, present in the Hague programme, to revise 'en bloc' all Community measures adopted in the field of standards' harmonisation of asylum-related issues before the Commission presents new proposals on the same issues. Frontex Regulation has been amended twice, in 2007 and in 2011, and it can be argue that this happened on the basis of the evaluation of the needs for coordination of MSs – Rapid Intervention Teams were

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[188] This Commission Proposal is still frozen (September 2012) due to a harsh debate on its legal basis; for a description of the debate see Pascouau, Y., 2012.

introduced exactly due to the experience of the necessity of a rapid and solidal response to crisis situations – and due to the number of reports presented by civil society organisations on its activity – the major change brought about by Regulation 2011, along with the sensible extension of competences of Frontex, is the introduction of two bodies in charge of monitoring the respect of fundamental rights in Frontex'operations, which is the major critique moved against the Agency from its inception – welcomed by the Commission. As a consequence, experimentalist governance an important tool to enhance democratic deliberation at the European level.

It is interesting to underline how also *within* Frontex, in the performance of its duties, it is easy to spot experimentalist features. For example, in the process of joint operations management – which is Frontex main task also according to the resources allocated (see previous section) – Frontex, first of all, plans and develop these operations on the basis of its Annual Risk Analysis Report and in cooperation with the MSs concerned, establishing priorities on the basis of the resources during annual meetings; this can be conceived as a general framework which can be revised according to the evolving necessities of MSs and of the situation. Secondly, in agreement with the host country, it indicates the "quantity and quality" of officers and of the equipment necessary to the other MSs, requesting their participation and contribution; here is easily distinguishable the fundamental role of "lower-level" units, considered as embodied by national ministries of interior and police forces. Then a detailed operational plan is drafted, describing the aim of the operation, staff and equipment deployed and the rules of engagement of the officers; all officers[189], moreover, are bound by the Code of Conduct[190] – a Frontex document created with the consultation of UNHCR and FRA – including specific provisions on the respect of fundamental rights and the right to international protection and they must follow the behavioural standards set therein; benchmarks in this case are not set by the general framework but in these documents which might also incur revision[191]. It is according to these documents that the evaluation

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[189] "This document is binding not only for Frontex staff, but also for all those who take part in our activities: operations, training and any other activities coordinated by this Agency.", Illka Laitinen introductory note to the Frontex Code of Conduct, adopted by decision of the Executive Director (Mr Laitinen himself) of 21 March 2011.

[190] See: http://www.frontex.europa.eu/assets/Publications/General/Frontex_Code_of_Conduct.pdf (accessed April 2012).

[191] And have indeed been revised over time. An example is clearly provided by the two back-to-back operations HERA I and HERA II. Also the introduction of the Code of Conduct was a great achievement reached through FRA and UNHCR advocacy.

of the joint operations is carried out[192]; as a matter of fact, "once completed, each operation is evaluated by Frontex, the participating countries and other stakeholders involved ensuring that the operational process is constantly refined." (FRONTEX, 2012).

3.4 Bovens accountability and Frontex

Before proceeding further in the application of the experimentalist model for the description of Frontex accountability, it is necessary to explore its accountability from the multi-faceted accountability perspective proposed by M. Bovens (see Chapter 1), which can, however, help to shed light on some aspects of the "traditional" accountability perspective, thus rendering it even more evident the insufficiency of this kind of approach in such a complex system of governance. In this section, therefore, the accountability *regime* – the coherent complex of accountability relationships described by Bovens – to which Frontex is subject. In doing so, the cathegorisation of accountability relationships proposed by M. Busuioc (2010, p.41) will be followed: the political, financial, judicial or legal, managerial accountability mechanisms will be analysed in turn, trying to give relevance to the *democratic perspective*, proposed by Bovens.

3.4.1 Political accountability

The first issue in order to use the forum-actor/principal-agent perspective for what concerns the political accountability, as described by M. Bovens, is to assess who is/are the principal/s in a relationship in which the agent is the only specified actor: Frontex. Principals in this vertical relationship are mainly to be individuated in elected bodies; C. Lord reports that the EP, in all its reports regarding non-majoritarian agencies, takes exactly this perspective: "all administrative bodies should be part of a single hierarchy of political control that leads back to the public via the power of an elected Parliament to sanction a politically appointed leadership of an integrated executive" (Lord, 2011, p. 912). Therefore, we will take into consideration the relationship between Frontex and the directly elected bodies of the European Union: the European Parliament and the

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[192] According to Article 3(4) of Regulation 1168/2011 "The Agency shall make a comprehensive comparative analysis of those results with a view to enhancing the quality, coherence and efficiency of future operations and projects to be included in its general report provided for in Article 20(2)(b)." This is another clear example of experimentalism: this implies, in fact, *revision* in the light of results.

national Parliaments, therefore excluding the the Council[193] and the Commission as they are *indirectly* elected bodies (see Chapter 1).

The already mentioned study from Lord, describes role and attitude of the EP in and towards the process of agencification; he reports that while the EP has an explicit preference for vertical rather than horizontal accountability and a negative theoretical attitude towards the fragmentation induced by this process, *de facto* it has used its powers to establish new agencies and to amend agencies' Regulation in the sense of an increase in competences and even authonomy. This applies also to the current Frontex Regulation, not analysed by Lord, in which the EP had a role of co-legislator.

The amendments proposed by the EP to the Regulation in question are syntetised by Rapporteur Simon Busuttil in his introductory intervention to EP debate on Frontex: first of all, the EP sought to increase Frontex "visibility" by naming the national border guards participating in European missions coordinated and even co-led by Frontex "European Border Guards"; the second contribution was directed at "strengthening the effectiveness of the Agency" by rendering MSs solidarity "compulsory"; thirdly, the EP focused on giving to Frontex the possibility to "lease, purchase, own or co-own" the basic equipment necessary to engage especially in emergency missions; the EP also agreed to give Frontex the power to process personal data – "under strict conditions"[194] –, but the main concern was to mainstream fundamental rights through the appointment of a FRO plus the creation of a Consultative Forum and the introduction of the provision of the suspension or termination of an operation by the Executive Director in case of a serious violation of fundamental rights or of the rights deriving from international protection. Finally, the European Parliament pushed for the increase in democratic legitimacy of the agency through enhanced monitoring carried out by the EP itself: art. 3b introduces an annual report on the number of seconded border guards and equipment deployed per MS; artt. 13 and 14 require that the EP is "fully informed" regarding both arrangements made with any other EU agency/body and the deployment of liason officers in third countries (of transit or origin for "illegal" migration and return operations); and art. 25(2) states that the EP can invite Frontex Executive Director to

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[193] The political accountability relationship with the Council would be relevant for the study of Council agencies, as evidenced by Busuioc (2010, p. 118).
[194] S. Busuttil, in his speech, refers to rules laid down in Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1)

report "on the carrying out of his/her tasks. in particular on the implementation and monitoring of the Fundamental Rights Strategy, the general report of the Agency for the previous year, the work programme for the coming year and the Agency's multi-annual plan referred to in Article 20(2)(i)".

As a matter of fact, there are three ways in which the EP can control[195] agencies – and Frontex in particular – and make them accountable. First of all, by making use of its co-legislator role in the drafting of Regulations establishing the agencies, as was proposed in the previous paragraph. Secondly, through budgetarial control; agencies do not have a budget of their own: they are financed mainly through the Union's budget, which has to be approved by the EP, and their financing is often subordinated to an annual budgetary discharge procedure; as a consequence, not only control on agencies' agendas can be exercised by the EP, but also, as the EP is in charge of signing off their annual accounts, it can use this power to summon executive directors to question them and require satisfactory answers. The third tool is the possibility for the EP to always require agencies' directors to report on agencies' activities and to inquire them, even though this is not as binding as a tool as the legislative and budgetary powers[196].

National Parliaments' role in the AFSJ is delineated by Article 12 TEU. They should always be informed regarding legislative proceedings and they are the repositors of the control on the application of the principle of subsidiarity, through the European legislation. Moreover, point (c) provides a specific evaluation power for national parliaments in the AFSJ especially concerning "the implementation of Union policies in that area" (see also art. 70 TFEU), and by being directly involved in the monitoring of the activities of two agencies operating in the AFSJ: Europol and Eurojust (artt. 88-85 TFEU). No mention is made of Frontex in the Treaty; thisi is so because Frontex has "no executive power whatsoever" as Illka Laitinen affirmed in the LIBE Interparliamentary Committee meeting of 2011, before the representatives of 18 national parliaments of the Union.

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[195] Control and accountability, as discussed in Chapter 1, are two different concepts. Busuioc (2010) argues that accountability is a mechanism of control (even if of *indirect* control) but the viceversa is not true, meaning that there are forms of *direct* control that cannot be considered as accountability relations.
[196] Debating is probably the most essential requirement for accountability to work; M. Busuioc cites R. Mulgan in this respect, who writes that "forcing people to explain what they have done is perhaps the essential component of making them accountable. In this sense, the core of accountability becomes a dialogue between accountors and account-holder." (Busuioc M. , 2010, p. 34).

That said, Frontex' political accountability vis-à-vis the EP can be considered both in its *ex-ante* and *ex-post* dimensions (Busuioc M. , 2010). The *ex-ante* dimension comprises the duty of Frontex Management Board to forward its annual work programme to the EP along with the approval of the budget. The *ex-post* dimension, instead, implies the agency reporting on its activity to the EP; in this sense the work programme can be useful for the Parliament to assess the performance of Frontex against its annual report. However, there is no provision that formally requires the EP to produce an evaluation of the agency activities. The EP is also involved in the periodical evaluation of the agency, usually carried out by an independent body – see COWI A/S Frontex assessment of 2009 – which may have informed the decisions regarding legislative amendments to the 2011 Regulation[197]. Another possibility for the EP to hold Frontex accountable is the possibility to require hearings to the Executive Director, provided by article 25(2). This has happened quite often[198] even though it is difficult to assess whether it is the EP which requests the hearings or those are proposed by the agency itself in order to "promote" (Busuioc M. , 2010, p. 112) its work and increase its chances to raise more money for the next year's activity. In this sense, the combination of the two tools, budgetary control and hearings, can produce a positive outcome for the democratic perspective, provided the EP or – more specifically – the LIBE Commission has the sufficient know-how and expertise to pose the right questions and therefore to evaluate Frontex' activity. Sanctioning can be considered as being enshrined in the EP power to discharge or not Frontex annual budget and to limit Frontex financial assets for the next year.

In conclusion, it must be recognised that the instruments for an effective political accountability relationship, especially between the forum-EP and the agent-Forntex, are in place. The problem of effectiveness lays, in fact, in the incentive to enter this relationship and engage in the debate, particularly from the part of the EP, except for crisis situations or "where serious problems involving a particular agency come to the public eye" (Busuioc M. , 2010, p. 131).

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[197] S. Busuttil reports that the EP has acknowledged the overall success of the activity of Frontex in "its first six years of life", recognising that it could not express all of its potential due to the limitations arising from the inconstant cooperation of MSs to its joint operations and the lack of specific instruments, such as the power to process personal data; these issues were raised also in the mentioned COWI evaluation of Frontex, that will be analysed in the (Simon Busuttil, 2011).

[198] The latest appearance of Gen. Brig. Illka Laitinen before the LIBE Committee of the EP is of 11 October 2012; a video-recording of the meeting is retrievable at: http://www.europarl.europa.eu/ep-live/en/committees/video?event=20121011-0900-COMMITTEE LIBE&category=COMMITTEE&format=wmv (accessed 15 October 2012); this, however, does not imply that the hearings are held on a regular basis even though they are formalised in Frontex Regulation.

3.4.2 Financial accountability

Financial issues are mainly in the hands of Frontex' Management Board, as provided by article 29 of Regulation 1168/2011. As described earlier in this Chapter, once the annual budget of Frontex is endorsed by the Management Board, it is passed on to the Commission, then also to the European Parliament and the Council[199]. The agency is legally obliged to give a detailed report of its activities and finances and equipment to the EP. This is the information phase of financial accountability which can be followed by requests and questions being raised by the EP for the agency to answer; as depicted in the previous section, hearings might be requested from the EP, thus introducing the debate phase of the financial accountability arrangement. In addition, the European Court of Auditors is in charge of the external auditing on the accounts and expenses of the Agency so that is can ensure financial transparency[200], according to the Financial Framework and Financial Regulation of the Community agencies[201]. Of course there is also an internal audit body, working within Frontex, whose scope is to "audit the internal control system put in place in order to assess its effectiveness and, more generally, the performance of the units in Frontex in implementing its policies, projects and actions with a view to bringing about continuous improvement" (Frontex, 2012, p. 75); its report is published within the annual work programme.

As a matter of fact, the debate part of financial accountability involves a number of forums – EP, Council, Commission, European Court of Auditors – and a number of actors within the agency – Management Board, Executive Director in charge of receiving the evaluations made by the Court of Auditors and the internal audit body –. Also the sanctions for the wrong management of financial resources can be determined via different forums: formal sanctions can be imposed by the EP – as already described in the previous section – by not discharging the proposed budget, or not allocating new funds for the agency ; while informal sanctions may arise from the annual audit report that the European Court of Auditors is obliged to produce and forward to the EP and the Council, thus making the Court of Auditors a real accountability forum, both because Frontex is obliged to inform and justify its conduct before it and might face

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[199] Article 98 of the consolidated version of Financial Regulation No 2343/2002 reads as follows: "The European Parliament, the Council and the Commission shall be empowered to obtain any necessary information or explanations regarding budgetary matters within their fields of competence."

[200] The Court of Auditors, however, has no control over state-financed bodies.

[201] Consolidated version of 13 July 2008 of Commission Regulation (EC, EURATOM) No 2343/2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities.

consequences imposed by it, and because it provides information for the EP to take further action (Busuioc M. , 2010, p. 151). From a political perspective, however, the most relevant financial accountability mechanism remains the discharge procedure[202] enacted by the EP, through the Committee on Budgetary Control (European Parliament, 2012).

The Financial Regulation also provides for all Community agencies to publish their budget "including the establishment plan and amending budgets, as finally adopted, as well as an indication of the number of contract staff expressed in full-time equivalents for which appropriations are budgeted, and seconded national experts" on their Internet site, within four weeks from their adoption, in an "easy accessible, transparent and comprehensive" manner, in order to make available to the large public what the Union is doing with European citizens' money. Frontex has clearly acted on this provision and all the documents related to financial accountability can be found on its web site at: http://www.frontex.europa.eu/about/governance-documents/.

The situation of financial accountability is however further complicated by the presence of the "fees" that are included in the sources of income of Frontex. As other "income-generating" agencies, Frontex experiences some tensions on the budget due to the very composition of its Management Board; the heads of the national offices in charge of border management, in fact, are, at one time, supposed to make the interests both of their national office – that will require the services of Frontex – and Frontex itself[203]. However, from the documents retrievable on-line, there is no mention of major tensions between the Court of Auditors requests and the Management Board responses (European Parliament, 2011) and, instead, content is expressed on the continuous increase in Frontex budget, at least according to UK government representative Mr Byrne (House of Lords European Union Committee, 2008, p. 145).

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[202] Defined by Busuioc as "the political endorsement of the implementation of the budget" (2010, p. 152).
[203] According to E. Benedetti: "the same States who are asking for a more strict cooperation at the EU level are, during the different formal and informal meetings held on these problems [e.g. Frontex Management Board meetings], expressing doubts or a clear opposition to the increase of funds for Frontex or to joint control on the borders, while their policy in this field is still mainly bilateral, characterized by the conclusion of readmission agreements with major transit or sending countries" (Benedetti, 2012, p. 13)

3.4.3 Judicial accountability

"Audit offices, ombudsmen and administrative tribunals, are properly described as 'institutions of accountability' because their primary function is to call public officials to account." (Mulgan, 2000, p. 565).

M. Busuioc analysis of the possibility for the judicial process to be recognised as a fully-fledged accountability process and of the Court of Justice of the European Union to be considered as an accountability forum, reached the conclusion that in both issues deserved a positive response: "judicial review of the agency actions and decisions (conducted by an independent and depoliticised judiciary) is essential to prevent and control the arbitrary and unreasonable exercise of discretionary powers" (Busuioc M. , 2010, p. 166).

For what concerns Frontex' field of action, however – as discussed in Section 2.3.1 of the previous Chapter –, the ECJ did not have the power to exercise its judicial authority until the entry into force of the Lisbon Treaty. Border management decisions were therefore off limits for judicial review until 2009, when article 263 extended the Court's powers to "review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties". This means that it is necessary to look at the constituent act of Frontex to see, first, if the agency actually produces legal effects vis-à-vis third parties and, secondly, whether judicial review is mentioned therein. According to J. Rijpma (2009, p. 16), one thing is sure, that acts in the field of coordination of operational activities are however excluded from the possibility of an action for annulment, as the Court has held in its jurisprudence[204].

Frontex has no decision-making powers; nonetheless, it possesses significant powers which create legal effects for third parties: it can propose, organise and participate in joint and return operation, it can enter into agreements with third states and organisations (Europol, FRA, the European Anti-Fraud Office, etc.), store and exchange sensitive personal data in order to fight not only irregular migration but also human

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[204] The Court's position was underlined in particular during the case C-160/03, *Spain v Eurojust* (2005). However article 263 TFEU lists the grounds on which actions can be brought before the Court, and in particular, "It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers."; also Court of Auditors, the European Central Bank and the Committee of the Regions, together with natural or legal persons directly affected by the act in breach of EU on the grounds listed.

trafficking and terrorism, etc. The situation of Frontex is further complicated by the wide range of areas covered by its competencies, especially considering the external dimension of EU policies, not to mention the field of police and judicial cooperation in criminal matters. Before the entry into force of the Lisbon Treaty these policy fields were scattered in all three pillars, as described by S. Carrera (Carrera, The EU Border Management Strategy. Frontex and the Challenges of Irregular Immigration in the Canary Islands, 2007, pp. 18-19), rendering it impossible to have a clear picture of the boundaries of the Court's jurisdiction[205] on Frontex acts.

Nonetheless, there are explicit provisions in the Frontex Regulation (as consolidated by the 2011 amendments) that describe the jurisdiction of the Court on specific matters. First of all concerning the attribution to either host or home MS of the civil liability arising in case of breach of national law or damage caused by guest officers operating on the territory of the host MS (art. 10b). Secondly, art. 19 provides for the intervention of the Court "to give judgment pursuant to any arbitration clause contained in a *contract* concluded by the Agency [emphasis added]" and even to resolve a dispute over the compensation of a damage for non-contractual liability. Finally, complaints may be lodged to the Ombudsman and form the subject of an action before the Court if they regard problems of "applicant processing" when dealing with transparency and communication issues (art. 28). Finally, it is important to mention that Frontex acts in accordance to the Charter of Fundamental Rights of the Union; under article 33 of the Frontex Regulation (as amended in 2011), in fact, the evaluation of the agency activities should be carried out also on the basis of the principles of the Charter and the way it was respected "pursuant to the application of the Regulation" (art. 33(2)(b)). This might imply a further ground for the jurisdiction of the Court.

It must be acknowledged that it is difficult to assess how the Court can enter in a judicial accountability relationship with Frontex because still no cases have been brought before the Court. On the other hand, the first quasi-judicial proceeding against Frontex has been initiated by the European Ombudsman, Mr. P. Nikiforos Diamandouros on 6 March 2012. As a matter of fact, this cannot be considered as a true judicial proceeding because it is, in fact, a "own-initiative inquiry" which might or

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[205] Jurisdiction of the Court in the AFSJ covers for the possibility to give preliminary rulings on matters relating to visas, asylum, immigration and the movement of persons.

might not become the subject of a judicial action[206]; however, this is the first inquiry of this kind and it is the first time that Frontex undergoes legal scrutiny from a recognised European quasi-judicial body. The inquiry concerns "the implementation by Frontex of its fundamental rights obligations" (OI/5/2012/BEH-MHZ). This can be considered as an information request to which the Frontex agency has a duty to answer[207] and also opens the way for the debate, not only between the Ombudsman[208] and the agency, but also among stakeholders willing to give their contribution, so that the debate phase is even more significant. For what concerns the sanctions, these are still difficult to define; in case the Ombudsman decides to proceed the sanction would be of a formal nature, otherwise the results of the inquiry would be rendered public and will have an informal sanctioning effect.

M. Busuioc affirms that some of the shortcomings deriving from the lack of clarity and lack of effective judicial power of the Court were planned to be overcome by the introduction of the Ombudsman, whose mandate is provided for in article 228 TFEU. As a matter of fact, "the rationale for the adoption of a European Ombudsman was rooted in the shortcomings of the Community judicial system and the Ombudsman's effectiveness as an extra-judicial mechanism for control over the executive" (Tsadiras, A., 2006, cited in Busuioc, M, 2009, p. 191). Moreover, from a democratic perspective, the European Ombudsman has a direct link with the European Parliament; however independent in the performance of his duties, he is appointed and reports to the EP. He is therefore a key figure in "making the EU accountable to its citizens" (Diamandouros, 2011) not only directly, through the three phases of information, debate and sanctioning – which may be expressed as public criticism, that is "a significant form of sanction in a democracy" (Diamandouros, 2006) but also through the EP, by reporting to it on a case-by-case basis and also annually on the outcomes of his inquiries. In conclusion, according to P. Magnette "the powers of the Ombudsman, limited as they are, give him the opportunity to combine the instruments of parliamentary scrutiny and judicial control in an original way. Moreover, given the hybridity of its status and role, the Ombudsman is well equipped to scrutinize those agents that cannot be submitted to

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[206] The European Ombudsman, however, cannot adopt legally binding decisions but can try to remedy the conflicts through negotiation and, in particularly difficult cases, the European Parliament can decide to bring the case before the Court. The threshold of access to the Ombudsman is very low (anyone can apply for his services), while to access the Court the requirements are very strict and the costs difficult to meet.

[207] Which it did on 17 May 2012, with a very detailed Opinion (Frontex, 2012).

[208] According to C. Harlow & R. Rawlings, in their *Promoting Accountability in Multilevel Governance: A Network Approach* (2006), the Ombudsman also "engages in standard setting for accountability structures and processes".

classic parliamentary controls without losing their independence, and thereby help to reconcile delegation with parliamentary democracy" (Magnette, 2003, p. 678).

3.4.4 Managerial accountability

Frontex' Management Board has a supervisory role and is supposed to hold the agency and its executive director to account; in M. Busuioc words: "management boards carry out two basic functions: they steer the organisation and they exercise oversight over the functioning of the agency by monitoring the work of the director" (2010, p. 59). As described in the section on "Financial Accountability" above, the Management Board has the power to establish and verify the budget, thus exercising control over it, previous to the external Court of Auditors; it also has the power to appoint the Executive Director[209], who has a duty to report to the Management Board regarding MSs operations at the external borders outside the framework of the Agency (art. 2(2)). For what concerns joint operations and rapid interventions (art. 3(4)), the Agency has a duty to transmit detailed evaluation reports to the Board along with the comments of the FRO and to inform immediately the Board in case of incidents. Moreover, article 33 of Frontex Regulation (2011) provides for the appointment by the Management Board of an independent external evaluator in order to assess the agency activity every five years (and after three years from inception)[210], with which it engages in information exchange and debate (this time acting as the "actor" in the forum-actor accountability relationship).

Information is passed on to the Board both from the Executive Director and form "the Agency" according to the "Rules of Procedure", established by the Board itself. For what concerns the debate phase, instead, there is no clear pattern that should be instead further studied; M. Busuioc has found out that this phase is conducted mainly through informal exchanges of views and informal practices that differ for every agency. However, the expertise of the members of the Management Board – that are primarily representatives of the Member States – is essential to be able to ask the right questions to the Agency or its Executive Director and to decide on the issues reported by them, and, differently from other agencies, this is required in article 21 of Frontex Regulation (2011), thus enhancing managerial accountability. Another positive factor is the provision for the Executive Director to be always present during the Board meetings

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[209] The Board exercises disciplinary authority also on the Deputy Director who is a figure in charge of helping the Executive Director in accomplishing his/her mandate.
[210] See the already mentioned COWI evaluation report and a particular external evaluation of the Frontex Operational Office in Piraeus carried out from March to November 2011 by Blomeyer & Sanz.

(art. 23), and that the meetings can be attended also by "any other person whose opinion may be of interest"; those meetings are held twice a year, on an ordinary basis.

Finally, the sanctioning from the Board comes mainly in the form of the dismissal of the Executive Director and the Deputy Executive Director, which is possible without the consent of any other European body and with a two-thirds majority of all members with the right to vote.

Figure 4 – Synthesis of Frontex accountability relations: political (blue), financial (green), managerial (yellow), judicial (orange), professional (violet).
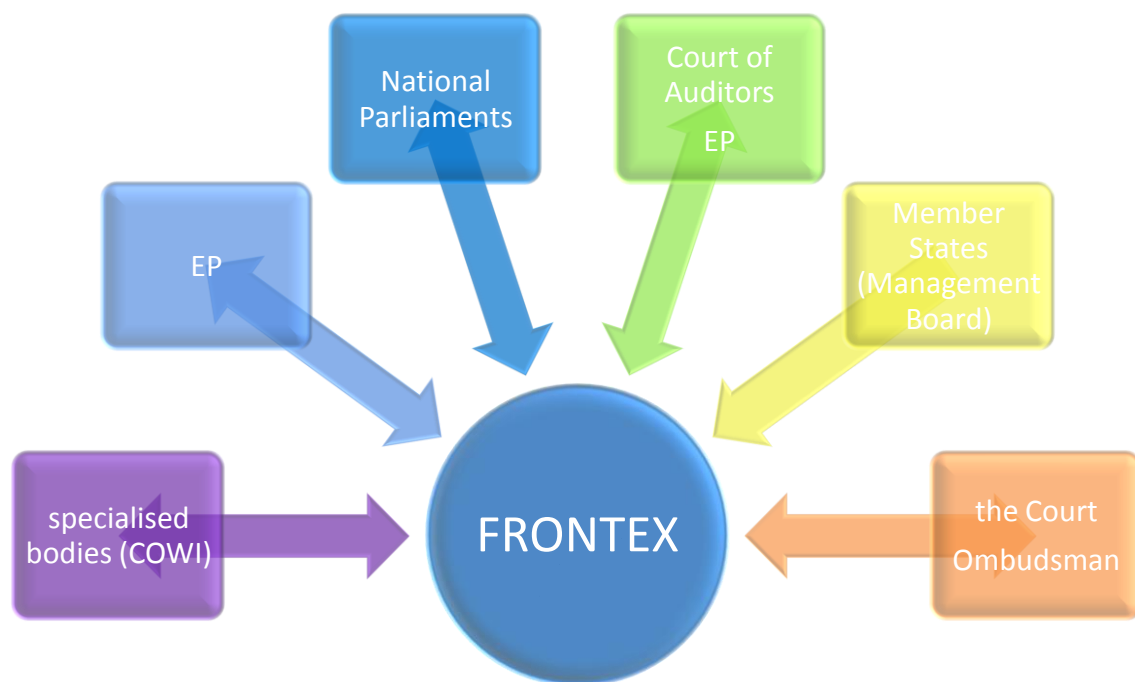
Source: Author's own elaboration

3.5 Dynamic accountability and Peer review

"The aim is to keep it as practical and non-political as possible" (Laitinen, 2008)

The previous section has evidenced a number of difficulties in the description of the accountability relationships that are in place between Frontex and the relevant forums, whose nature determines also the type of accountability relation. Multiplicity of forums concurring in the same type of accountability relationship (EP and national parliaments), unclear definition of the patterns of the relationship (especially in supposedly hierarchical arrangements such as the judicial accountability vis-à-vis the Court) and impossibility to hold the Agency accountable in a number of relevant fields due to lack of interest or knowledge by the account-holder; these are all problems that

were revealed by the application of Bovens' accountability models. The dynamic accountability model proposed by Sabel and Zeitlin, and described in Chapter 1, is presented as a way to overcome these problems; the peer review of Frontex will be therefore analysed in the light of this assertion.

To proceed in the analysis it is necessary to answer to two questions. First of all, what are the characteristics of dynamic accountability? And secondly, who are the peers? The answer to the first question is immediate: monitoring, reporting and peer review are the main characteristics of dynamic accountability along with the consequent redefinition of means and ends. As described in Chapter 1, European agencies see their autonomy directly legitimated by this accountability process. For what concerns the second question, it will require a more lengthy discussion which will be the object of the following section.

3.5.1 Who are Frontex' peers?

In this work the choice of the relevant peers will be made according to three main criteria: the expertise, which implies contingency or complementarity of the field of activity of the peer; the partnership, which implies knowledge of Frontex and the scenario it is constantly adapting to; and, finally, their interest in Frontex activity, particularly based on human right concerns. The choice of peers made by Sabel and Zeitlin was not conceived to inform first and foremost the analysis of EU agencies accountability; on the contrary, dynamic accountability has been mainly applied to policy fields such as the JHA, the EU external relations or the environment. What is more, the European Commission, when evaluating the reforms undertaken in the candidate countries during the Schengen evaluation process, drafts the final report on the state in question by making use, among the others, of independent reports from think tanks and NGOs (Sabel & Zeitlin, 2010, p. 311), thus making these sources a reliable starting point to analyse MSs and, all the more so, a European body such as Frontex. The Commission,

Expertise is necessary first and foremost to overcome the problems of lack of competence to deal with the high level of knowledge of Frontex, which, as other European Community agencies, was set up precisely because of the specificity of the border management issues and problems.

Partners cooperating with Frontex in its activity such as FRA and other EU agencies and bodies, along with international organisations (both civil society and governmental

ones) are either involved in operations and risk analysis studies conducted by Frontex[211], or are members of the Consultative Forum on Fundamental Rights, which means that are part and parcel of the structure of Frontex from 2011.

While the first two criteria are quite self-evident, the rationale behind the third requires a more thorough explanation. First of all, interest is fundamental to engage in a debate of any kind; secondly, the respect of fundamental rights is one of the core principles of democracy. When the process of peer-review comes into play, there is the necessity for peers to be first of all engaged in a debate, either upon request of an authority – such as the European Ombudsman – or because their interests – that in the case of civil society organisations coincide with the channelled interest of a group of citizens – are affected by the activity of the agency that needs review.

Frontex' peers[212], selected according to the delineated criteria, need to be described briefly before delving into their positions regarding Frontex and the performance of its duties.

FRA (Fundamental Rights Agency) is a European Agency, working in close relationship with Frontex; their cooperation arrangement was signed on 26 May 2010. FRA is now also part of the Consultative Forum on Fundamental Rights and its cooperation with Frontex includes helping Frontex in training officers of all levels in order to mainstream a humanitarian approach to border management; cooperation on joint operations (Article 3), risk analysis (Article 4), research (Article 6), returns (Article 7), work programmes and action plans (Article 9). FRA had also a significant part in the drafting of the Code of Conduct for the officers operating under the auspices of the EU, along with a number of other handbooks – all aimed at training European staff working in this field to fundamental rights – and the Fundamental Rights Strategy, adopted by Frontex on 31 March 2011, with its implementation plan (the Fundamental Rights Action Plan).

UNHCR is the UN Refugee Agency and is the only organisation which has a Senior Liason Officer in Warsaw, completely devoted to the preservation and the propping up

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[211] For a list of international organisations partner in Frontex operations and risk analysis studies, see: http://www.frontex.europa.eu/partners/international-organisations; while EU partners are listed here: http://www.frontex.europa.eu/partners/eu-partners/eu-agencies (accessed March 2012).

[212] The International Organisation for Migration (IOM) is another fundamental partner for Frontex; it is involved in joint return operations, training courses, the gathering of best practices around the world and it is the leading international organisation in the field. However, apparently, it never expressed a public opinion on Frontex mandate or its implementation.

of the relations with Frontex. Their partnership has been strengthened by the 2008 agreements that de facto provided a formal basis for the already established cooperation in the fields of regular consultations, exchanges of information, expertise and experience, inputs into training (particularly on international human rights and refugee law), and other activities.

ECRE (European Council on Refugees and Exiles)[213] is the network of the non-governmental organisations working to providing assistance to people seeking refuge and protection in Europe. It has been lately included among the nine civil society organisations composing Frontex Consultative Forum

Amnesty International Europe is currently included in the Board of the Frontex Consultative Forum on Fundamental Rights. Its cooperation with Frontex has not been particularly intense – it has not been listed among Frontex' partners yet[214] – but its peculiar expertise concerning the protection of human rights, its advocacy competences, not to mention its size, have been taken into consideration during the Board selections and judged as necessary to guide Frontex work.

Human Rights Watch, **Statewatch** and **Migreurop** are not directly partners to Frontex, and they are not even present (for the moment) in the Consultative Forum. These organisations have, on the contrary, harshly criticised Frontex over time. In the next future, however, with the re-appointment of the nine civil organisations represented in the CF, there is the possibility for them to enter in more active dialogue[215] with the Agency.

3.5.2 Reports and Opinions
In this section, an overview of all the opinions expressed by civil society organisations will be presented. A number of other reports on the activities of Frontex have been provided by scholars, in a multi-disciplinary approach; choosing not to deal directly with scholarly articles – even though they have been and will be mentioned – has to do with the necessity to focus on the impact of peers' reports on the public debate over the Agency which, in turn, might generate positive effects on democratic deliberation, it is therefore important to keep a democratic perspective in this study. As a matter of fact,

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[213] See website for further reference: http://www.ecre.org/about/this-is-ecre/in-a-nutshell.html (retrieved September 2012).
[214] See: http://www.frontex.europa.eu/partners/international-organisations (retrieved October 2012).
[215] It would be interesting to retrieve the information regarding which one, among the civil society organisations active in human-rights related fields, applied to become member of the Consultative Forum.

experts and scholars, whose public is restricted to scholars and possibly policy-makers, engaging in a debate with an Agency whose high level of expertise is at one time its *raison d'être* and limit to democratic legitimation, are not the best starting point to enhance the democratic legitimation of Frontex in terms of participation, especially because scholars do not have, most of the times, direct or 'first-hand' experience of the issues covered by their studies, which is one of the principles of the Directly Deliberative Poliarchy.

There are four main reports that have been produced by four different peers during the years of Frontex activity:

➔ European Council on Refugees and Exiles in cooperation with the British Refugee Council: "Joint response to House of the Lords inquiry on Frontex" (2007)
➔ Human Rights Watch: "EU's dirty hands" (2011)
➔ Migreurop: "Frontex report" (2011)
➔ FRA: "Annual report" (2012), with a chapter dedicated to "Border control and visa policy"

Of high relevance are also all the opinions sent to the European Ombudsman, who launched a public consultation, on 19 July 2012, to collect material regarding an inquiry proposed exactly on the basis of the compliance of Frontex to fundamental rights and international protection obligations. The need for this consultation mounted, according to the Ombudsman, due to the recent introduction of Regulation 1168/2011, extending significantly Frontex mandate, and the consequent increase in attention by the public (Diamandouros, 2012). The answers arrived – the deadline for submission was 30 September 2012 – from individuals, NGOs, and other organisations active in the area of fundamental rights protection; among them there are Amnesty International, Statewatch in collaboration with Migreurop, Jesuite Refugee Service, Red Cross, Caritas Europa, etc., but also FRA, associations of lawyers such as Trans Europe Experts and the Immigration Law Practitioners Association. Frontex has answered first to the open letter of the European Ombudsman, thus setting the stage for the debate; the publication of all the opinions received by the Ombudsman are now, the consultation being concluded, the perfect ground for debate with Frontex.

There are, however, a number of other reports concerned with Frontex' Regulations of 2004 and 2011. These are all substantial contributions to the development of the agency legislation – especially considering UNHCR report of 2011, due to the position of the organisation within the Agency – and are concerned both with the implementation of human rights and with the accountability of the Agency. Here are the ones that will be taken into consideration:

- Statewatch – "Cover-up!" EU border police, Regulation establishing Frontex (2004)
- Amnesty and ECRE – Briefing on Frontex proposed amendment (2011)
- Migreurop and GUE – "Frontex Agency: which guarantees for Human Rights? A study conducted by Migreurop on the European External Borders Agency in view of the revision of its mandate" (2011)
- UNHCR – Report on proposed Regulation 2011 (2010)

All of these reports are available on the internet and are accessible both to the European institutions, the media and, more generally, the public. Information gathering for their drafting has been carried out by these organisations differently according to the level of cooperation and therefore strength of the relationship, established with Frontex. On the one hand there are some organisations and EU bodies which have a privileged channel of communication with the Agency; the UNHCR[216], for example, as described by its Senior Liason Officer in Warsaw Mr Michele Simone[217] has a unique position: the deployment of a liason officer within Frontex headquarters determines the continuous interchange of formal – an annual strategic meeting – and everyday informal communications[218] - including consultative meetings, seminars and conferences in order to boost information sharing – and implies very tight bonds, even deriving from personal acquaintance. On the other hand of the spectrum of intensity of relationship with Frontex, there is the example of Statewatch; Ms Marie Martin, researcher at Statewatch, affirms that she has been "in contact with Frontex communication officer as well as with Frontex transparency officer. All exchanges were formal, happened by email, and were quite regular (about once every 3 months)"; this happened over the last

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[216] The other organisations that has a privileged position, even if not in terms of office location, is IOM.

[217] Semi-structured interview conducted on 31 July 2012 on the basis of a standard questionnaire; the same questionnaire was sent to Statewatch, Amnesty International, EMN, etc. but it did not receive answer except from Statewatch, that showed a strong interest in the research.

[218] Mr Michele Simone, however, reports that the vast majority of Frontex documents are classified and impossible to gain access to, even from his position, probably due to security reasons, but transparency definitely improved from the beginning of their cooperation.

year, while she was researching on the fundamental rights aspects of the Agency operations and activities.

However, these communication practices come in addition to the regular reporting that Frontex is committed to: Frontex, in fact, delivers reports four times a year (Frontex Quarterly Reports) on the objects of its study, that is risk analysis of border-related issues. Moreover, it publishes annually on its website all the relevant governance documents regarding financing and the more general work programme[219]. In addition, it is bound, as any other European body, by the Regulation on communication and transparency – Regulation (EC) No 1049/2001 – even though with a notable exception: Frontex *may* decide on its *own initiative* to communicate "in the fields within its mission" (art. 28(2), not modified by 2011 amendments); however, it is constrained by the next sentence, to give "objective, reliable and easily understandable information" on its work[220]. Nonetheless, this may well still mean that in case the public who is posing the question is not informed enough regarding the Agency activity, the answer may be vague enough not to hold the Agency truly accountable.

3.5.3 Common concerns for debate

Some common concerns on Frontex mandate and activity are clearly distinguishable in all the Reports and Opinions made available to the public by NGOs, EU bodies, individuals and other organisations. These core issues are the ones around which the question of Frontex legitimacy is currently debated. For the purpose of this work, more relevance will be given to the concerns raised regarding Frontex Regulation 1168/2011, as it has sought to solve some of the major problems of legitimation of the Agency and it constitutes the legal basis for Frontex mandate which might be necessary to revise again in the future in order to make it adequate to the ever-changing scenario of external border management. receipt

The most discussed issue at the inception of Frontex, was the legal basis chosen for 2004 Regulation and the fear of assisting to the rise of an unaccountable body empowered to affect individuals' freedom. According to Statewatch report "Cover up!" of 2004, but also to S. Carrera (2007), the choice of art. 66 TEC instead of 62(a) TEC – already mentioned in this Chapter – was definitely a way to keep Frontex in a low

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[219]All the cited documents are retrievable at http://www.frontex.europa.eu/about/governance-documents/.

[220] According to Marie Martin, Frontex activity is consistent with this provision; she got in contact easily with Frontex officers and encountered no delays in the receipt of a complete and accurate answer, usually the wait lasted few days.

accountability domain, justified only by the fact that it was not entrusted by the Commission with legislative, policy making or executive powers. Another concern linked with legal basis has to do with the "lack of legal certainty in some Frontex capacities" (Carrera, The EU Border Management Strategy. Frontex and the Challenges of Irregular Immigration in the Canary Islands, 2007, p. 18), e.g. its involvement in return operations – highly sensitive operations for what concerns individual liberties – in which its tasks were not clearly defined in Regulation 2007/2004, thus leading to a difficult, not to say impossible, judicial control. Article 9, providing for "Return cooperation" is among the most amended articles by Regulation 1168/2011: the most relevant innovation lies in the introduction of the Code of Conduct, a document written in collaboration with FRA and UNHCR; at the same time item 1 has been amended by specifying the conditionality of Frontex support of MSs return operations on the respect of the Charter of Fundamental rights. In general, however, "the question of responsibilities between MS' officers, the host MS border officers and Frontex personnel remains unclear and ambiguous" (EP Committee of Foreign Affairs, 2011, cited in Human Rights Watch, 2011). This is parts and parcel with the fundamental paradox which was and still is at the core of Frontex legal nature: its existence as a "spectre-like coordinating manager as well as an actor with legal autonomy[221]." (FRA, 2012, p. 13)

Mention to the Charter of Fundamental Rights has been introduced in a number of articles of 2011 Regulation. This might be associated with the continuous contributions to the proposal of the Commission that were arriving from the organisations active in the field of human rights' protection and promotion; it is important to underline that the debate on migrants' fundamental rights was fuelled by the events of the Arab Spring, that were considered in Chapter 2, and that scaled the attention of the public. A fundamental rights approach, in fact, was deemed to be lacking thus "undermining international legal obligations such as the non-refoulement of refugees and the protection of migrants' human rights (Amnesty International and ECRE 2010, Frelick 2009, Andrijasevic 2010, Carrera 2008, Carrera and Guild 2010, Jelpke et al. 2010; Pro Asyl 2010-2011; Trevisanut 2009)." (Perkowski, 2012, p. 3), in some specific fields of action of the Agency. The introduction of such an approach into Frontex Regulation

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[221] The legal autonomy of Frontex is provided for by its Regulation (para. 14, Preamble) that states that the Agency is an fully autonomous an independent Community body "with legal personality and exercising the implementing powers which are conferred to it".

was widely welcomed (FRA, 2012; Human Rights Watch 2011) as a significant improvement, but not as being enough.

Amnesty International has kept an out of line opinion concerning the way in which fundamental rights are being mainstreamed in Frontex activity and structure. In particular, the introduction of FRO and CF is not judged as a sufficient measure: they are non-independent bodies with no power to investigate directly. Amnesty's position is shared also by the GUE and Greens' party of the EP[222]. As a matter of fact the monitoring power of the FRO is very limited and not extendable to all Frontex operations but most importantly it does not have enforcement powers in case she discovers an operation seriously breaching fundamental rights.

Debate sparkled in particular regarding the following fundamental rights-related issues:

a. the processing of personal data;
b. the signing of working arrangements/cooperation with third countries (involving also activities outside the EU territory);
c. the co-financing of return operations;
d. the presence and contribution to joint operations and in particular operations set up at the Greek-Turkish Border (RABIT 2010 and Poseidon 2011).

The processing and storage of personal data, and the possibility to share them with other EU agencies – such as Europol – in order to increase efficiency in the fight against trans-national crime, is definitely one of Frontex activities under scrutiny. All the more so because this competence has been extended by the Commission with the 2011 Frontex Regulation[223]. Migreurop reports that Frontex, already back in April 2009, informed the European Data Protection Supervisor (EDPS) of its need to collect the personal data of migrants that were involved in return operations in order to be able to better organise the joint transfers; the EDPS answered affirmatively to Frontex request but added a clause "it should ensure compliance with Article 12 of the Regulation requiring data subjects to be informed, including about their right of access to data, *'except if the Member States provides the information'*" (Keller, Lunacek, Lochbihler, & Flautre, 2011, p. 20). The criminalisation of migrants is an ever present worry in

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[222] See: http://www.guengl.eu/showPage.php?ID=9858&LANG=1&GLANG=1 (accessed May 2012).
[223] See Annex I to have a comprehensive overview of the amendments introduced by the Council and the Parliament by Regulation 1168/2011 to the previous Frontex Regulation.

human-rights activists' minds and as such has to be individuated and defeated in order to abide by the principle of non-discimination enshrined in art. 18 of the Charter of Fundamental Rights.

Another highly thorny issue is the competence of Frontex to sign working arrangements with the administrative bodies of third countries, to deploy liaisons officers on their territory and even to organise with them operations conducted outside the EU territory. The most striking and debated example is that of operation Hera (I and II), conducted between the Canary Islands and Senegal. S. Carrera and Amnesty International have discussed the situation in detail, individuating one main problematic issue: breaches of the principle of non refoulement. These are not to be excluded in the Hera operations, where Frontex, while operating in the Senegalese territorial waters, expressed its satisfaction that 100% of all intercepted migrants had been sent back to Senegal. At no point was the notion of asylum or international protection mentioned and it remains unclear and surprising why no one, amongst intercepted irregular migrants, was in need of international protection.

Return operations are consistently being regarded by human rights organisations dealing with migration issues as the worst tool among European migration policy instruments. Repatriation agreements are currently one of the main tool to deal with irregular migration in Europe – as mentioned in Chapter 2 – and Frontex was deemed to be the "expulsion agency" by the first Statewatch report of 2004. From the detailed testimonies given by UK IMB representatives[224] participating to a joint return operation coordinated and supervised by Frontex, these operations are not only lacking a clear division of competences between MSs and Frontex, but are also the situations in which migrants' rights are more frequently abused. Migreurop builds on similar stories, told over time by a number of national border guards that were deployed in these operations, to accuse Frontex to try to "capitalize on the joint flights" (Keller, Lunacek, Lochbihler, & Flautre, 2011, p. 17), instead of taking care of the best interest and of the treatment of the people transferred, which is one of the principles for the correct application of a human right perspective to operations, according to FRA[225].

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[224] In a letter forwarded to the European Ombudsman as an answer to the inquiry on Frontex compliance with human rights, the IMB (Independent Monitoring Board) members appointed by the government of the UK, tell the story of multiple abuses, both of major and minor entity, towards third-country nationals being returned to their countries of origin.
[225] "A closer look at the existing fundamental rights landscape also reveals that it is increasingly important not only to consider the duty bearers – that is, states – but also the rights holders – that is,

In addition, Greece's situation (Syrri, 2012; Human Rights Watch, 2011; Keller, Lunacek, Lochbihler, & Flautre, 2011; Frontex, 2012)   presents, by far, the most debatable and preoccupying features in the whole history of European border management. Greece, in fact, is a MSs both lacking the means to cope with its vast borders, and incapable of abide by the European norms concerning protection and asylum. Human Rights Watch has denominated the situation a "protection crisis". Also UNHCR denounced asylum crisis situation in Greece together with FRA and a number of other organisations and authorities, such as the House of Lords of the UK. The now verified situation of violation of fundamental rights has been detected over these three years by all human-rights organisations and also by the European Court of Fundamental Rights, which even took the decision not to allow the Dublin II System to be enacted for applicants that entered the EU via Greece, until further notice. Frontex, by the time the violations were taking place[226], did take part in the support of the operations by both organising and providing equipment for the operations accused of perpetrating the violations, even though primary responsibility lays with the Greek government and Greek border police forces. However non judicially accountable, Frontex has been continuously and comprehensively reviewed by its peers concerning its operations in Greece, even though "the operational framework for operations led by the Agency does not make it possible to monitor the circumstances in which those operations take place" (Keller, Lunacek, Lochbihler, & Flautre, 2011, p. 18). It must be noted that Frontex has however adopted a high level of transparency and reporting, specifically for this media-relevant case. However the process of dynamic accountability in this case has not proved compelling enough for the Regulation to be revised in the direction of the solution of the ambiguity of Frontex participation to joint and rapid intervention operations.

An additional problem peculiar to the situation of refugees and people seeking protection is the absence of truly harmonised protection standards in Europe; this factor contributes to the impossibility to evaluate Frontex according to them; Frontex partnership with EASO is supposed to change things and to finally strike a balance between protection and security. A desirable outcome of this agreement is the possible

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individuals. Their experiences and perceptions must be taken into account to guarantee that the European fundamental rights structure makes a difference on the ground and does not become an end in itself." (FRA, 2012, p. 11)

[226] Violation of migrants' rights are still taking place but for the purpose of this work only the period of 2010-2011 has been taken into consideration.

arranging of new benchmarks, in close cooperation with the other stakeholders – human right based bodies and national authorities alike –, according to which it will be easier to keep Frontex and MSs accountable in the management of the external borders.

Frontex, as in a good system of deliberation, answered to Human Rights Watch report "EU's dirty hands", through its website, in the section "news"[227]. The substance of the answer regards Frontex recognising the reconstruction of HRW for what concerns the Agency knowledge of the despicable and illegal situation, but contesting the accusations of complicity with the Greek government in the violation of migrants' rights and inhuman and degrading treatment, on the basis of repeated reports done to the Greek authorities requesting the situation to change and providing solid proposals to make this happen. Moreover, the Agency stressed that "at the practical level abandoning emergency support operations such as RABIT 2011 is neither responsible, nor does it do anything to help the situation of irregular migrants on the ground."; and again, in a view of cooperation with HRW, Frontex Executive Director Ilkka Laitinen affirmed: "With regard to the HRW recommendations, we will give them serious consideration – in fact, the content of this report will be discussed at the next Frontex Management Board meeting together with the action plan for our Fundamental Rights strategy".

3.6 Dynamic accountability and human rights

"The problem of the division of powers between the Agency and the States [...]
represents the main 'black hole' in the functioning of FRONTEX in relation to respect
for fundamental rights." (Keller, Lunacek, Lochbihler, & Flautre, 2011, p. 20)

The European Agency for the Management of the External Borders of the EU is a rather complex compromise between the need of Member States to de-politicise the issue of border management and the will of the Commission not to lose the grip upon the European dimension of the issue; at the same time it is a compromise also between the intergovenamental method and the supranational method; but it can also be said it to be a compromise between the need for security of European citizens and the duty to protect the rights of third country nationals; even concerning the principle of solidarity Frontex can be seen as a compromise: between the voluntarism of MSs which may decide whether to take part to Frontex operations or not (now slightly diluted with Regulation

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[227] Article of 20 September 2012; retrievable at: http://www.frontex.europa.eu/news/frontex-s-reaction-to-hrw-report-r3ZMxE (accessed 20 September 2012).

1168/2011) and the burden-sharing idea without which integration in the Union area could not be possible.

Differently from J. Pollack and P. Slominski's conclusion regarding the accountability of Frontex described from an experimentalist governance perspective[228], in this chapter it has been provided evidence for the affirmation that experimentalist governance standards are perfectly working, at least as long as fundamental rights come into play. According to the interviewed M. Martin (Statewatch) "Frontex is absolutely not accountable about fundamental rights violations which are allegedly committed during its operations. [...] In any case, disciplinary procedures remain purely internal and it is anyway the responsibility of Frontex's Executive Director to take decisions if such issues happen."

Under the recently adopted amendments to Regulation 2004/2007, reporting mechanisms have been established whereby violations of human rights should be reported automatically. However, such process once again remains purely internal as the report would be submitted to the Executive Director who would then be the only one to decide whether the operation should be suspended, in whole or in part. The establishment of a non-independent Fundamental Rights Officer de facto follows the same logic. Moreover, Frontex lacks binding human rights frameworks specific to the Agency: Annex II of Council Decision 2010/252 on Search and Rescue at sea is non-binding, and it was recently annulled by the ECJ due to the application of the wrong procedure to pass it[229]; the Code of Conduct for all persons participating in Frontex activities is, by its very nature, non-binding.

The revision of the Regulation in the light of peer-review processes, that were carried out thanks to the constant monitoring and the continuous reporting, is an achievement *per se* and has to be acknowledged. On the other hand, Migreurop clearly evidences throughout its report that Frontex is *de facto* lacking transparency and that monitoring its activities is often a difficult task, and this opinion is shared by Amnesty International

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[228] The two scholars distance themselves from the experimentalist governance perspective exactly when assessing the accountability of Frontex; according to them "important (supra-)national actors are sidelined and relevant legal rules are ignored". (Pollak & Slominski, 2009)

[229] The Parliament, in fact, as sustained by S. Busuttil – EP rapporteur for the Frontex Regulation 1168/2011 – and the Advocate General Paolo Mengozzi, was wrongfully excluded from the legislative process; as a matter of fact, the modifications introduced by the Council Decision to the Schengen Borders Code were as fundamental as to "constitute a major development in the SBC system" (Judgment of the Court (Grand Chamber) of 5 September 2012); therefore Parliamentary approval was required to adopt such changes that even included the conferral of enforcement powers on border guards. For further reference see: http://migrantsatsea.wordpress.com/ (accessed 11 September 2012).

and ECRE[230]. This accusation holds true notwithstanding the fact that Frontex was never judged responsible for lack of transparency or communication – which is the only field in which the Court has, without doubts, jurisdiction – and that the interviewed researcher, Marie Martin, who is working for Statewatch, judges positively Frontex transparency[231]. This schizophrenia is induced by the intrinsic deficit of the agency, deriving directly from its history: the mix of an intergovernmental modus-operandi and the supranationalisation of its control has brought to a blurred definition of competences between Member States' competent authorities and the Agency.

This is why it is so important to have peers to monitor and review its operations. Of course, for dynamic accountability to properly work it is necessary that the Agency does its part by always respecting the requirements of transparency and reporting. But since the responsibilities are blurred it is also difficult for the Agency to decide what is in its competence to report and what is not. Only by eliminating this fundamental fault it will be possible to make the right use of dynamic accountability. However, in the case of human rights violation, it is not possible to use the "flexible" approach proposed by Sabel and Zeitlin; as a matter of fact, while it can be a good starting point to bring to light the breaches and the causes of the breaches themselves, it is not enough to ensure that this type of crime is adequately punished. As a crime, in fact, it has to undergo, without doubts, judicial proceeding.

In conclusion, the formal requirement of peer-review, the re-setting of benchmarks and the consequent rewriting of the legal framework for Frontex activities, would be the right tools not only to enhance public scrutiny but also to catch the attention of the judiciary which might find useful basis for judicial review in the evidences provided by the peers, particularly for the human rights-related concerns that require a less flexible approach than the one prescribed by the dynamic accountability.

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[230] In their joint Briefing of 2010 concerning the Commission's proposal for amendment of Frontex Regulation, the two organisations affirm that there is a strong necessity of "effective implementation of the requirement to give access to prompt, objective and reliable information on its activities" (ECRE & BRC, 2007).

[231] As a matter of fact, in her opinion, "the issue at stake is the articulation between transparency and accountability, namely *when* is the Agency transparent (if it is transparent once all decisions have been made it does not change much in practice) and *to whom*".

CONCLUSION

"I feel that freedom, justice and security of the individual as such (or rather "individual on the move") even after two years since the entry into force of the Lisbon treaty and the Charter is currently not yet central enough for the EU policies, legislation and agencies, which are still more focused on the intergovernmental cooperation for the security of the Union as such rather than on promoting common European standards of Freedom and Justice." (Cataldi & Serra, 2011)

In a governance system in which the 'unelected' (Vibert, 2007), that is to say non-majoritarian bodies, are mushrooming both at the national[232] and at the regional level, Frontex is definitely one with a spectacular increase in competences and in human and financial resources. The worries regarding the need to keep this Agency accountable have been examined in the last Chapter, leading to the conclusion that, while Bovens' categorisation of accountability mechanisms offers always an incomplete overview of the complex system of the relationships that are in place to hold the Agency accountable, thus rendering accountability effective for one aspect but not for all the aspects at the same time, peer review is a precious tool to keep the Agency accountable, by monitoring, asking to report and giving opinions that might lead to a change in the standards set for evaluation but, most of all, for the legislative framework. This holds true aloof from the fundamental rights and right to international protection domains, in which peer review is essential to open the 'black box' of division of competences between MSs and the Agency, but not to do justice in case of violations.

To reach these conclusions this work moved from the description of the "new" European governance, shaped by the presence of agencies that have an ever growing impact on policy-making in the AFSJ and specifically in the field of border management, and assumed the perspective of the Directly Deliberative Poliarchy as the most apt to frame it. All the more so, the DDP (or experimentalist governance) gives prominence to deliberative processes thus opening a new possibility for the EU to consider its level of democracy. However, before introducing the tool of accountability as a "democracy enhancer", it was necessary to determine – by reviewing the existing literature on the issue – whether the theories of the democratic deficit of the EU are consistent with the "new" European governance system. It emerged that a form of democratic deficit exists but not on the basis of the analogy with the nation state; the

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[232] In the UK only there are around 200 non-majoritarian bodies (Vibert, 2007).

problem lays instead in the alleged accountability deficit of non-majoritarian agencies. As a consequence, the description of the taxonomy of accountability mechanisms proposed by M. Bovens was provided, together with the alternative model of Sabel and Zeitlin's dynamic accountability. A discussion of the pros and cons of the two models led to the conclusion that dynamic accountability and peer review are the perfect tools to analyse agencies' accountability, and, therefore, Frontex accountability.

Moreover, Frontex is an Agency operating in a very complex field of policy-making. In Chapter 2 the background of the AFSJ and border management policies, with their tortuous evolution, was meant to inform the research on the Agency. It provided, also, a number of elements to better understand how experimentalist governance has made its way into these policy fields, and to describe Frontex activities therein: information about the legislative framework, the description of the nature and size of migration flows, but, most of all, the explanation of how the relationship between MSs and European Union institutions changed over time in the border management field, which significantly marked the division of competences in Frontex activity, are all fundamental building blocks for the comprehension of the rationale behind Frontex establishment. Moreover, Frontex is deeply rooted in the "shifting" nature of external borders management: from being only a policy concerned with the AFSJ, to being externalised and to involve Foreign policy matters (that have proven as an issue for concern to Frontex' peers, i.e. through working arrangements with third countries).

As indicated in Chapter 1, this field of research, connecting accountability and democracy in the European governance framework, is still developing and has a lot of potential[233]. Moreover, there are still very few empirical studies concerning Frontex. It would therefore be important to gather first hand data and information on this Agency in order to test its accountability against, first of all, the dynamic accountability model – whose initial research has been the object of this work –, but also against different theoretical frameworks, in order to validate (or reject) this present work, with the only aim of searching for the one accountability mechanism that can actually improve the democratic legitimation of the agency and render it less opaque concerning fundamental rights issues.

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[233] See CONNEX research project, footnote 53.

From the experience gained during this research, it seemed quite clear that the gathering of first hand information could be best achieved by carrying out semi-structured interviews. In particular, for future researches of this kind, I would definitely recommend semi-structured interviews over the written questionnaire, due to the relevance of small details in this field, that the researcher may not be aware of, and which can come out more easily during discussions.

These information might also be useful to have a clearer picture of Frontex relationships vis-à-vis international organisations and peers and providing useful insights to the reviewers, hoping also for their employment as tools to "bridge" previously non-cooperating organisations, active in the same field, and of the "platform" sharing best practices. In this sense the creation of a Consultative Forum of Human Rights is an incredible opportunity, provided it is a truly independent body (not constrained by Frontex' structure) endowed with monitoring powers.

Personally, I hope that the study of accountability mechanisms can truly lead to a constant revision of the practices at the borders of Europe, because, for the time being, the deaths and deprivations that are suffered by the "criminals" of migration are definitely not acceptable and absurd, especially in a system that calls itself democratic[234].

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[234] For further reference see the documentaries that have been released during the seven years of operation of Frontex: footnote 146.

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