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MORE THAN CONSULTATION

Civil society organisations mainstreaming fundamental rights in EU border management policies:
The case of Frontex and its Consultative Forum

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CHAPTER 1
One empirical case, three theoretical puzzles

"Facts, facts, facts" used to say Sergio Fabbrini to his students during his "European and International Politics classes" at the University of Trento in 2010, quoting his teacher, Karl Popper. The facts from which this research departs are first, the tragedies and, allegedly, human rights violations that are taking place almost every day at the borders of the European Union, second, the national and European security concerns regarding migration, voiced by a number of populist and nationalistic parties of EU member states, and, third, the controversial role of the EU external borders agency (i.e., Frontex or EBCG agency).

In 2015, during the week between April 13 and 19 alone, at least a thousand drowned in the Mediterranean Sea among migrants and people seeking international protection[1] and the number of deaths during the year arrived at 3,775. In 2016 the overall number of deaths in the Mediterranean rose even further, reaching 5,141 deaths, and did not diminish significantly in 2017, according to IOM[2], notwithstanding the unrelenting solidarity efforts of Civil Society Organisations (henceforth CSOs) that decided to engage in Search and Rescue operations in the Mediterranean (SAR). Indeed, the external borders of the European Union (EU) have been described as the deadliest frontiers of the world[3] and human rights abuses (e.g., *refoulement* and inhuman and degrading treatment) have been reported by international, European and local

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[1] For further reference on the shipwrecks that took place in April 2015 see: http://www.hrw.org/news/2015/04/19/eu-mediterranean-deaths-warrant-crisis-response (accessed 19 April 2015); http://www.nytimes.com/2015/04/20/world/europe/italy-migrants-capsized-boat-off-libya.html?hp&action=click&pgtype=Homepage&module=first-column-region&region=top-news&WT.nav=top-news&_r=0 (accessed 20 April 2015); https://www.amnesty.org/en/articles/news/2015/04/mediterranean-crisis-50-fold-increase-in-deats-amid-european-inaction/ (accessed 19 April 2015).

[2] IOM, "Missing Migrants" database, available at: https://missingmigrants.iom.int/region/mediterranean (accessed 20 June 2017)

[3] Martin Schulz, EP President, on 16 April 2015 said: "The Mediterranean is Europe's frontier and to this day it is the deadliest border in the world". Available at: https://www.theparliamentmagazine.eu/articles/news/eu-policymakers-blamed-refugee-deaths-mediterranean (accessed 17 April 2015). UN Secretary-General Ban Ki-moon also said, on 20 April 2015, that the Mediterranean has become "the world's deadliest route used by asylum seekers and migrants". Available at: http://www.france24.com/en/20150420-eu-mediterranean-boat-response-migration/ (accessed 20 April 2015).

organisations in the last decade or so (Human Rights Watch, 2011; ProAsyl, 2013; Amnesty International, 2014; FIDH, Migreurop and EMHRN, 2014). As Steve Peers, one of the leading EU law scholars on migration issues, points out in his blog: "The escalating tragedy of thousands of migrants' lives being lost every year during attempted Mediterranean crossings is one of the most difficult issues facing the EU's immigration policy"[4].

On the other hand, the prolonged crisis of the EU, coupled with the fear of new terrorist attacks reignited after the Charlie Hebdo shooting in Paris (January 7, 2015), has given rise to xenophobic and populist sentiments and parties at the national and at the EU levels (Durant, Cohn-Bendit, et al., 2013). This has reinforced the political appeal of a security approach more than a human rights approach towards migration policies (Ruzza, 2014). However, the process of securitization of migration has a long history that started at the national level in the 1980s – with the adoption of the 'immigration zero' objective (Sciortino, 2000) – and shifted towards the European level, with the Amsterdam Treaty, at the end of the 1990s, and was significantly reinforced by the post-9/11 fear of terrorism at the EU level. The idea of a securitized EU developed also due to the 'face' that the EU and member states alike have been increasingly presenting to migrants: following the leading example of other developed countries with a long history of immigration (e.g., USA and Australia), the institutions that are in charge of implementing immigration policies are usually Home Affair Ministries, police forces and border guards, that are competent in both security and migration fields[5]. The management of migration as a security issue and the deaths at the European borders have won the EU the appellative 'Fortress Europe'.

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[4] Peers, Steve (2015), "Trivialising migrant deaths: why words matter", in *EU Law Analysis* blog, 19 April 2015. Available at: http://eulawanalysis.blogspot.be/2015/04/trivialising-migrant-deaths-why-words.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed:+EuLawAnalysis+(EU+Law+Analysis (accessed 19 April 2016).

[5] In November 2014, the European Commission's Directorate General (DG) in charge with the management of migration-related issues was renamed "Migration and Home Affairs" (HOME) and was reorganized accordingly; the reorganization of this DG has not changed significantly its focus: it is still in charge of both security and migration issues. As a consequence, the main outputs of the DG HOME are both the European Agenda on Migration and the European Agenda on Security. For further reference see: http://ec.europa.eu/dgs/home-affairs/ (accessed 20 June 2017).

Coming to the last fact mentioned in the opening of this section, in 2004, the EU started to manage the operational cooperation of Member States at the external borders of Europe with the creation of an independent EU agency based in Warsaw, called Frontex. The creation of this agency was deemed necessary because as globalization made it easier for migrants and asylum seekers to flee their countries for Europe, the security concerns on migration had become European concerns since the entry into force of the Schengen Agreement (Guiraudon, 2000; Huysmans, 2000). Frontex (i.e., European Agency for the Management of Operational Cooperation at the External Borders) is an independent EU agency working in the highly sensitive field of EU internal security, that has been quickly growing in budget, equipment and human resources since its inception. Moreover, the agency's founding Regulation of 2004[6] was amended twice, in 2007[7] and in 2011[8], allowing the agency to acquire more competences in the field of border management, a field that is traditionally of exclusive national competence, including the ability to co-lead patrolling and return operations together with Member States. The establishment of such an expert-based agency was necessary after a number of networked forms of international cooperation among Member States (e.g., SCIFA, SCIFA+) proved inefficient in gathering the necessary information and in coordinating the control of the common external borders (Leonard, 2009; Neal, 2009). Frontex is currently involved in several patrolling operations in the Mediterranean, among which there is *Triton*, the EU operation requested by the Italian authorities one year after the tragedy of October 3, 2013 when at least 360 people lost their lives off the coast of Lampedusa, an Italian isle; this operation is headed by the *Guardia Costiera* (i.e., the Italian Coast Guard) and it has been supported by 21 member states of the EU.

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[6] Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349/25.

[7] Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, OJ L 199/30.

[8] Regulation (EU) 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 304/1-304/7.

Moreover, since its inception, in 2004, Frontex has not only been strongly blamed by migrant rights' advocates and human right activists, but it has also been questioned by the European Parliament and the European Ombudsman for its lack of accountability with regard to the respect of fundamental rights. The European Ombudsman has been concerned with Frontex "compliance with human rights standards and, in particular, with the requirements of the EU's Charter of Fundamental Rights" (European Ombudsman, 2013). Before the European Ombudsman own-initiative on Frontex, allegations were made that the agency pays insufficient attention to the need to respect human rights in border management activities. Several amendments to Frontex founding regulation, in 2011, were aimed to address these allegations. First of all, the EU Charter of Fundamental Rights is now binding on Frontex (art.1(2)); secondly, a Fundamental Rights Strategy for Frontex has been introduced; and, third, two human rights bodies have been added to the agency's structure: the Consultative Forum on Fundamental Rights and the Fundamental Rights Officer (art. 26a). Moreover, with the entry into force of the Treaty of Lisbon, art. 263 of the Treaty on the Functioning of the European Union (TFEU), the Court of Justice of the European Union (CJEU) has the competence to judge the legitimacy of EU agencies' decisions and activities. Nonetheless, in 2013 the European Ombudsman found Frontex still wanting with regard to the respect of fundamental rights, while there is still no CJEU case law on the matter. Frontex has acquired numerous competences (including quasi-operative competences) in border management since, especially with the evolution of the agency in 2016 into the European Border and Coast Guard Agency, while fully-fledged judicial control on fundamental rights has yet to be clarified and exerted.

It is for this reason that the establishment and the workings of the Fundamental Rights Officer (FRO) and, particularly, of the Consultative Forum on Fundamental Rights (CF) need to be explored. These two bodies are part of the agency but at the same time they retain some form of independence in monitoring the agency activities (i.e., FRO) and in assisting "the

Executive Director and the Management Board in fundamental rights matters"[9] (i.e., the CF). The FRO is an expert appointed by the Management Board of the agency[10] who has monitoring powers but who only reports internally to Frontex Management Board itself, the Executive Director and the CF. The CF is composed of 15 members, nine of which are representatives of civil society organisations advocating for migrant's rights and reports not only internally to the other bodies of the agency, but also externally through its publicly announced Annual Report and through hearings to the European Parliament.

It is worth mentioning, for the purposes of this study, that the presence of civil society organisations has been institutionalized within this EU agency as it has never been institutionalized before. Even if there are precedents in the creation of consultative fora composed of civil society organisations such as the Consultative Forum of the European Asylum Support Office (EASO) and the Fundamental Rights Platform supporting the Fundamental Rights Agency (FRA), Frontex CF is peculiar for two reasons: first, its composition, and, second, its ability to have a voice "from within" in an highly contested agency (Frontex CF, 2014). With regard to the composition, Frontex CF is the only place where international organisations (e.g., the Council of Europe and the United Nations High Commissioner for Refugees), EU agencies (i.e. EASO and FRA) and civil society organisations work together to give opinions and recommendations on fundamental rights to a EU agency that has a stake in the protection of migrants' rights. The civil society organisations represented in the CF thus have a unique opportunity to influence the agency that they have been accusing of violating human rights.

The situation presented so far can be summed up by evidencing the two contrasting priorities of the EU and the role played by the EU agency Frontex in this scenario. First, border

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[9] Regulation (EU) 1168/2011, art. 26a (2), first paragraph.
[10] Ms. Inmaculada Arnaez Fernandez was designated in 2012 as the first FRO of Frontex: she is a lawyer with a long experience with fundamental rights, humanitarian law and international relations and she has worked with international organisations such as the Organisation for Security and Co-operation in Europe (OSCE).

management is a high priority on the agendas of member states and the EU alike; second, the respect of fundamental rights is not only part and parcel of the narrative of the EU integration, but also it is paramount in a policy field (i.e., border security) that potentially impinges on third country nationals or stateless persons' rights; third, Frontex is a key player in this field and its importance is growing, considering also the ongoing talks about expanding its role and creating a fully-fledged European System of Border Guards (Monar, 2006; Carrera, 2010; Unisys, 2014). This situation is complicated by the growing numbers of fatalities at the borders of the EU, coupled with persistent questioning of Frontex accountability with regard to the respect of human rights during border operations.

The question that this work tries to answer is related to the role that civil society organisations have gained within the agency after 2011, through the establishment of Frontex Consultative Forum: whether and how do civil society organisations sitting in the Consultative Forum influence how Frontex frames fundamental rights? In essence, there are two possible scenarios concerning the presence of public interest groups within Frontex: on the one hand, it can turn out to be mere consultation and "window dressing" for the agency, on the other hand, it can turn out to be an effective way to lobby the agency and can even become a new avenue for agency accountability. The first scenario not only depicts the lobbying activity of CSOs' on EU bodies as scarcely effective, but also implies that EU bodies use the presence of CSOs in consultative fora as a means to increase their credibility vis-à-vis the public and as a shield against critiques (e.g., lack of consideration for fundamental rights in border operations). The second scenario, which will be explored by this study, describes CSOs working within EU bodies not only as able to influence these bodies, but also to possibly act as accountability fora.

The facts presented in this introduction and the empirical case that is the object of this work point to three puzzles that are present in the literature:

- Is civil society participation in the EU governance system "nothing but consultation"?

- How is it possible to hold effectively accountable independent agencies without undermining their independence?

- How can security and human rights concerns be combined when dealing with migration/border management issues?

These three questions hint at three theoretical puzzles that prompted this research and that set the stage for the empirical exploration. These are not to be considered as sub-questions, but as the starting points of this research. Hopefully, this study will inform and add empirical evidence to the debates that stemmed from these questions in the literature. Section 1 gave some background to these questions and explained why these are particularly relevant nowadays. Starting from the first question, the next sections address the three theoretical debates that inform, and are in turn informed by, the present study.

1.1. "NOTHING BUT CONSULTATION"?

With the entry into force of the Treaty of Lisbon in 2009, the participation of civil society in the every-day workings of the European Union has been recognized as essential to a well-functioning governance system (Finke, 2007). The current version of article 11 of the Treaty on European Union (TEU) states that, first, the voices of citizens and "representative associations" should be heard by EU institutions in "all areas of Union action"; secondly, EU institutions should be transparent and open in the dialogue with "representative associations and civil society" and, third, the European Commission "shall carry out broad consultations with parties concerned" when the EU is about to take action in any specific field[11]. Moreover, the need for more participation of civil society in policy-making at the EU level was already acknowledged by the 2001 Commission's White Paper on Governance, with the recognition of the development of new modes of governance such as the Open Method of Coordination (OMC).

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[11] Consolidated Version of the Treaty on European Union (TEU), art. 11, paras. 1-2-3, O.J. C 83/01.

The European Commission – later joined also by the European Parliament – was the first ally of private stakeholders and experts at the EU level: the Commission turned to civil society to gain leverage vis-à-vis the other EU institutions (i.e., the Council) in the legislative process (Kohler-Koch, 2009). After the entry into force of the Maastricht Treaty, in 1992, it was the whole EU governance system that turned to civil society (Freidrich, 2008): this Treaty signed the end of an era of slow integration while at the same time closing the "permissive consensus" phase, after which citizens of the member states would actively stall the integration process, thus showing the growing gap between citizens and European governance. As a consequence, the European Community (EC) aimed to increase its visibility and its ability to communicate its work to the European public; civil society has been considered as having the ability to bridge the gap between EC institutions and its citizens by "Communicating Europe" (Monaghan, 2008). The EC after 1992 also needed civil society to boost policy-making effectiveness by providing new creative solutions to policy-problems thus improving effectiveness. Lastly, civil society has since been a strong ally of the EU also to improve legitimation in three fundamental ways: by broadening inclusion, by demanding transparency from the European administration and by creating a European public space for debate (Weiler, 1995).

The last great revolution in the relationship between the EU institutions and civil society was brought about by the Lisbon Treaty, which opened extensive opportunities for civil society organisations (CSOs) to participate in the everyday work of EU governance: the legal framework of the EU now explicitly invoke a greater participation in the EU policy-making (art. 11 TFEU) and openness of the EU governance system through the principle of good governance (art. 15 TFEU); also, the principle of openness is to be applied not only to EU institutions but also to EU bodies and agencies (Kjaerum and Toggenburg, 2012). This implies that new access points to the European level of governance have been formally recognized and granted to civil society through the Lisbon Treaty.

However, after the great expectations on the benefits that the participation of civil society could have provided to the EU governance system in terms of input and output legitimacy, mirrored by the sprouting of literature on the "participatory turn" or "deliberative turn" in EU policy-making, a number of recent empirical works on the role of civil society within the EU have argued that the governance system of the Union has opened to civil society first and foremost for consultation purposes and "window dressing" (Kröger, 2008). According to supporters of participatory and deliberative democracy, the intensified inclusion of civil society in EU policy-making improves the democratic nature of the Union by giving voice to a higher number of stakeholders and minorities (more pluralism), by making CSOs work as "transmission belts" thus bridging the gap between EU institutions and EU citizens (more deliberation), and by facilitating the creation of a public sphere (more participation) (Habermas, 2001; Warren, 2001). The empirical conclusions of Kröger, against this rich theoretical background, point in the opposite direction: by looking at the relationship between CSOs and the European Commission in a number of policy fields (i.e., social affairs, health and consumer protection, environment and trade) she depicts civil society organisations as tools in the hands of the European Commission and she is straightforward in concluding that participation of civil society in the EU policy-making system is "nothing but consultation" (2008).

Kröger is not the only one who has had second thoughts about the added value of CSOs' participation in EU agenda setting, policy-making and policy implementation. A number of other problems have been uncovered while studying, from different perspectives, CSOs work at the EU level: first and foremost, CSOs representation issues – who do they really represent, and which voices are really conveyed to the EU level? – but also their potential bias caused by their dependence on EU funds – EU political agenda might become as an imposition to CSOs which are financially dependent on EU funds to survive – to cite just a couple of problems (Smismans, 2006; Ruzza and Della Sala, 2007; Heidbreder 2012; Kohler-Koch and Quittkat, 2013). At the international level, Kohler-Koch and Kotzian (2012) have been researching the

pros and cons of organised civil society participation through accountability mechanisms and their study describes a situation in which, in spite of the high expectations on the democratic improvement that civil society participation could have brought about, civil society scored poorly in affecting policy outcomes due to various reasons (e.g. lack of resources, shifting interest of the media, etc.) but in particular to the impossibility to sanction international organizations. Other recent empirical studies have uncovered some problems both in the legitimating role of organized civil society and in the normative strength of this claim. Warleigh concluded that: "NGOs are currently unsuited to the task of Europeanizing civil society thanks to their inability to promote the political socialization of their supporters" (2001), while Saurugger, more recently, focused on the analysis of the professionalization of civil society organizations, thus describing the emergence of possible issues of legitimacy regarding civil society representation (2006). Moreover, CSOs' representation at the EU level is severely hampered by a series of factors, listed by Ruzza (2004): the scarcity of resources, the inadequacy of technical and negotiating skills and "sometimes the willingness to mediate on principled positions" (2004: 5).

The present work aims to discard (or validate) this pessimist conclusion on the merely consultative role of CSOs at the EU level by exploring empirically the new political opportunity structures that CSOs are entering and shaping (i.e., Frontex Consultative Forum). Since the 1990s, the EU has been undergoing an institutional transformation while the public management organization has been reformed: this process is known as "agencification". The case for EU agencies is particularly stimulating as the so-called "agencification" process[12] of the EU is shaping a governance system in which independent and decentralized agencies take decisions away both from political debate and from direct and indirect democratic

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[12] The term "agencification" identifies the process whereby agencies of different nature (regulatory, executive, operative or information gathering) are created in a wide range of policy areas as a consequence of the increase in the executive competences of the EU and the need to coordinate the action of member states at the EU level (the pluralisation of the executive) (Shapiro, 1997; Curtin, 2006, 2007; Papadopulos, 2007).

representation. EU agencies are creating new opportunities structures for the participation of CSOs in the policy process: EU agencies usually consult with a large number of private and public stakeholders and recently formal bodies have been set up to include civil society organizations on a more permanent basis (e.g., Frontex Consultative Forum and EASO Consultative Forum). The creation of a space for interaction between EU agencies and public interest groups – other than deriving directly from the 'network model' of EU agencies' activities (Leonard, 2009) – has been either encouraged by the European Commission, or imposed by design through agencies founding Regulations, or, finally, sought voluntarily by EU agencies themselves (Koop, 2014).

The intuition from which this work departs is that, as the multi-level governance system of the EU is affected by crises and struggles to survive them, the opportunity structures for civil society evolve with the governance system while at the same time civil society provides new input for the EU decision-making system to evolve (Princen and Kerremans, 2008). To study this evolving and mutating relationship between civil society and EU governance a new approach to the study of influence should be tried. Charles Sabel and Johnatan Zeitlin have tried to capture the dynamic nature of the everyday practices of EU governance system by evidencing that (formal and) informal arrangements between the multiple levels of governance and their bureaucracies are balanced by a systematic learning of the system, through the widespread use of accountability mechanisms based on benchmarking, sharing best practices and revising means and ends in the light of the policy outcomes and the problems encountered (Sabel and Zeitlin, 2008). The question of whether civil society can enter these accountability mechanisms by becoming an accountability forum for institutions, bodies and agencies and thus influence their agendas, implementation practices and working methods is relevant against this multi-level and experimentalist governance background. This work aims to evaluate the influence of CSOs on the decision-making of a specific EU body: the EU agency in charge of the management of the external borders of the Union, Frontex. The influence, or power, of CSOs

on Frontex approach towards human rights is evaluated by exploring and analysing a possible new type of accountability relationship of this agency, called *social accountability*[13].

Chapter 2 discusses thoroughly the definition of influence and the potential effects of an accountability relationship between CSOs and EU agencies, while Chapter 6 analyses the relationship between Frontex and its CF from these perspectives.

1.2. HOLDING INDEPENDENT AGENCIES ACCOUNTABLE?

Is it possible to hold accountable an independent agency such as Frontex without undermining its independence? Here is the second puzzle, regarding the subtle balance between independence and accountability of EU agencies, which is directly linked to the first – security and fundamental rights – via the agency Frontex. As a matter of fact, Frontex, as any other EU agency, has been conceived as a new body of the emerging executive branch of European governance. It is a decentralised and highly specialised body that should support Member States and EU institutions – i.e., the European Commission and the Council – "in a rather autonomous fashion" (Curtin, 2006: 89). There are various definitions of 'agency' in the literature on public management reform (Pollit and Bouckaert, 2011), but to define EU agencies in particular, and to separate them for EU institutions and other bodies, it is necessary to stress their peculiar characteristics: EU agencies are "specialized, non-majoritarian bodies, established by secondary legislation, which exercise public authority and are institutionally separate from the EU institutions and are endowed with legal personality" (Busuioc, 2013: 21). As expert groups separated from EU institutions, they provide the perfect technical arenas for MSs to discuss, to acquire information, and to ensure the deliverability of policies that could encounter political blame at any other level of governance. While being legally subordinated to EU institutions, EU agencies' *raison d'etre* lies precisely on their independence (Majone, 1996; 2000): they

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[13] Social accountability is a form of accountability relationship established between an actor (e.g., EU institutions, bodies, agencies) and civil society organization. For a comprehensive description of this kind of accountability see Chapter 2 (Section 2.2).

work at arm's length from both the core executive and the 'petty national politics' and enjoy considerable policy and managerial autonomy (Geradin, Muñoz and Petit, 2005; Curtin, 2006, 2009; Busuioc, 2013).

European agencies are the very last-step in the chain of delegation flowing from citizens to public institutions (Gilardi, 2001) and their main characteristic is their independence from democratically elected institutions. Moreover, their activities affect European and non-European citizens' everyday lives. The combination of these facts regarding European agencies clearly evidences why accountability concerns have been raised in the literature; as Kohler-Koch and Kotzian put it: "accountability is important when public scrutiny is at its lowest, namely in the day-to-day affairs of [European] governance." (2012: 4). The issue seems all the more compelling when considering that the "agencification" phenomenon in the EU has gained momentum in the last twenty years and is shaping European governance (Shapiro, 1997; Curtin, 2006, 2007; Papadopulos, 2007). The picture is further complicated by the existence of European agencies that operate in fields such as internal and external security or taxation, which are core issues for national sovereignty.

The relationship between independence and accountability in the case of non-majoritarian agencies operating at the European level is particularly complex. The exercise of the executive powers delegated to European agencies, by either the Commission, the Council or the Members States, still need to be scrutinized to make sure that EU agencies follow what Max Weber would call the "reasons of state", referring to national bureaucracy. In EU terms, a vigilant eye should be kept on how EU agencies implement EU policies as their decisions can have a direct impact on individuals and member states[14]. The need to hold agencies accountable, meaning that the agency is obliged to provide information on its conduct, to engage in a debate

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[14] The European Commission, back in 2008, stressed the need for a more structured approach towards EU agencies, also in terms of their accountability, due to their impact on EU citizens lives (MEMO/08/159 Brussels, 11 March 2008, available at:
https://www.fsai.ie/uploadedFiles/Legislation/Legislation_Update/EU_PR_agencies_wayforward.pdf).

regarding its activities and to suffer consequences in case of wrongdoing, should be answered without hampering their independence. But how? Busuioc (2013) has described how EU agencies work, *de jure* and *de facto*, within a complex system of accountability relationships: political actors, such as the European Parliament and national parliaments, can exercise their ability to hold EU agencies politically accountable; (quasi-)judicial actors, such as the CJEU and the European Ombudsman, can enforce (quasi-)judicial accountability; management boards of the EU agencies can use managerial accountability; and, finally, the Court of Auditors and internal audit systems can hold agencies accountable on financial issues. However, every accountability relationship can experience problems: deficits such as the unwillingness or the lack of expertise of the EP and national parliaments to directly control EU agencies activities (Schillemans and Busuioc, 2015), or overloads, such as in the case of having too many bodies to which the agency should report to, thus wasting time and resources.

However, as EU agencies can have a direct impact on individuals, especially in sensitive fields such as internal security, accountability mechanisms to ensure that fundamental rights are respected are paramount and need to work smoothly. In the EU, there are a number of possible actors that could hold EU agencies accountable on this matter: the CJEU, the European Ombudsman and the European Parliament are the most relevant. However, agencies dealing with internal security, such as Frontex, are not formally endowed with operational powers and therefore judicial accountability is hardly enforceable. The decisions taken by these agencies, however, are not to be considered "value neutral or merely 'technical'" (Rijpma 2009): even though Frontex does not take legally binding acts, it sets political priorities through risk assessment, recommendations to member states, and training of border guards. The quality of its accountability is, therefore, very important.

This study proposes a specific type of accountability which might ensure agencies' independence while holding them accountable specifically on fundamental rights matters: social accountability. Similarly to corporate social responsibility for private firms, social

accountability is understood as the answer to the lack of trust in public institutions (Bovens, 2007b). Social accountability might enhance democratic legitimacy not only by strengthening control on EU bodies, but also by promoting trust through the development of more responsive institutions (Fisher, 2004). Moreover, in case of misconduct of an EU body traditional forms of accountability (e.g., political, judicial, managerial) would inevitably trigger sanctioning while social accountability could trigger mobilization of networks, learning and creation of solutions for the specific case. Civil society organizations' role in this framework could therefore be to help revise "means and ends" (Sabel and Zeitlin, 2008) of European policy-making, by experimenting and learning, in a bottom-up perspective; the consequence would be an increase in the overall legitimacy of the governance system by enhancing citizens awareness of and inclusion in European policy-making (Smismans, 2006: 307).

Although forms of horizontal accountability have been studied in the literature as possible proxies for democratic legitimation in national level agencies (Schillemans, 2011), this has never been explored at the EU level. Also, previous research on the accountability regimes of European agencies neglected social accountability, focusing on more traditional forms of accountability[15] (e.g., political, managerial, financial and judicial). The present study aims to enrich the empirical exploration of social accountability arrangements in the EU and at the same time evaluate whether the institutionalized relationship between CSOs and Frontex is effective in holding the EU agency accountable with regard to the respect of fundamental rights. The last sections of Chapter 6 address specifically this issue.

1.3. HUMAN RIGHTS VS. SECURITY?

As already mentioned in the first section of this introductory chapter, tens of thousands of migrants and refugees have been reported to have died while trying to reach the shores of the

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[15] The research into de jure and de facto accountability relationships of European Agencies has been initiated by Busuioc (2013), who also argues for a new form of accountability: the extra-judicial accountability vis-à-vis the European Ombudsman.

EU; UN Special Rapporteur for Human Rights, François Crépeau, in July 2013 said: "I regret that within the EU policy context, irregular migration remains largely viewed as a *security concern* [emphasis added] that must be stopped. This is fundamentally at odds with a human rights approach, concerning the conceptualization of migrants as individuals and equal holders of human rights" (United Nations Human Rights, 2013). The EU is currently trying to find a balance between the widespread security concerns and the evident humanitarian disasters that are taking place at the borders of the EU. This section addresses the last theoretical puzzle: "Is there a way to combine security and human rights concerns when dealing with migration/border management?". It does so by giving an overview of the evolution of the perception of migration in the EU and the consequent development of border management policies, nowadays explicitly targeted at combating a 'war' against irregular migration, and the parallel development of the mainstreaming of fundamental rights in migration and border control policies.

A brief account of migration policies in the EU can 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[16]. However, until the 1980s, policies addressing third country nationals concerned only their 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"

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

(Huysmans, 2000: 124), taking an 'illegal' connotation. In these years migration policies started to be Europeanised, at first mainly through intergovernmental cooperation[17], and to be associated with the control of irregular migration. The communitarisation of these policies – started with the Amsterdam Treaty – did not change the underlying assumptions that were formulated in the 1980s and which appear to be still rampant nowadays in the political and grass-roots debate. Indeed, 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[18]. With the advent of 2001 and the tragedy of 9/11, migration and terrorism became inextricably linked.

The idea of a 'Fortress Europe' is exemplified also by the institutions that are in charge of implementing migration policies at MSs and EU levels: armed forces and Home Affair Ministries are generally the institutions competent for the management of security issues and migration alike. At the EU level, in particular, the creation of the common market required a contemporaneous lowering of internal barriers and strengthening of the external ones (Huysmans, 2000: 127). Nowadays, the trend continues to show an expansion of financial and technical resources dedicated to the European agency for the management of the external borders (Frontex), the creation of the European Border Guard Teams and the establishment of extended highly technological control systems (i.e., EURODAC). The objective is to help MSs to improve the patrolling of their borders, repatriate irregular migrants and tighten the possibilities for smugglers, traffickers and terrorists to enter the Union.

The security continuum that is thus created links "border control, terrorism, international crime and migration", moving decision-making in this field away from the

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[17] 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.
[18] 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.

"traditional human rights and humanitarian field of policy making" (Huysmans, 2000)[19], into the field of high politics: security of the state and military or police control of the borders. As Anderson affirms "there are three modes in which internal security concerns have become amalgamated with immigration and asylum" (Chalmers et al., 2010: 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 actors in charge of migration policies; lastly, there is the criminalisation of migrants, who are frequently policed and might be kept in detention centres as criminals.

Securitisation is not the only trend that is shaping European migration and border control policies (Huysmans, 2000); another important trend is the externalization of migration control. Along with the securitisation of migration policies, the 'external dimension' of the JHA policies, aimed at controlling and restricting migration flows, became a reality during the 1990s. The practice of externalising the immigration controls, signing international agreements with 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[20]. In 1999, the external dimension of JHA policies was officially established, 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 (EEAS) and of the High Representative of the Union for Foreign Affairs and Security Policy, migration and mobility feature as key components of the Global

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[19] The tragic effects of the securitisation of EU migration policies have partly been described in the in the introduction of the present paper. For further reference see Amnesty International (2014).

[20] It is worth mentioning that in the 1990s another important push factor moved masses of desperate people to leave their countries: the Yugoslav wars.

Approach to Migration and Mobility (GAMM)[21] (European Commission, 2011) – managed by the EEAS and the High Level Working Group on Asylum and Migration[22].

The objective has been to engage non-EU countries in the control of migration flows. There are two main concerns of MSs described in the literature that might have led to this approach: 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). Indeed, 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 (Boswell, 2003). The externalisation of migration control is a de facto territorial extension of EU border controls: restrictive visa policies, the requirement of the strengthening of border controls for countries that wish 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. The year 2009 was the exemplification of the increased efforts of both the MSs and the EU to deflect migrants from the borders through the practice of externalisation: in May Italy diverted over 500 migrants to Libya (without assessing their protection needs) by signing a *refoulement* agreement with Muammar Khadafi's government.

The policies of migration control have experienced a great shift in the way they are handled; from being a national exclusive competence, to entering the realm of intergovernmental bargaining, to moving up to supranalisation, to end in the hands of foreign

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[21]Approved in November 2011, the GAMM has been translated into action via Migration and Mobility Dialogues in which policy tools known as Mobility Partnerships and Common Agendas on Migration and Mobility are the principal instruments for cooperation with third countries. Mobility Partnerships are described 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).

[22] 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*, available at: http://emn.intrasoft-intl.com/Glossary/viewTermByName.do?name=HighLevel%20Working%20Group%20on%20Asylum%20and%20Migration%20%28HLWG%29 [accessed 4 July 2016]).

policy administrators. This is what 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. 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[23] affects and fragments the action of the EU institutions[24].

1.3.1. HUMANITARIAN CRISIS AT THE BORDERS OF THE EU AND THE CREATION OF NEW POLITICAL OPPORTUNITY STRUCTURES FOR CSOs

In the span of my PhD days, I found myself crossing a significantly high number of borders. Every time I crossed a border and settled in a new country to carry out research or just to attend a conference, I realized I was becoming part of the so-called expats or "global nomads"[25], a group of people spending their lives crossing countless borders. On 13 March 2015, the newspaper The Guardian titled one of its articles as follows: "Why are white people expats when the rest of us are immigrants?"[26]. This question is not avoidable in times of rising tensions against the broadly defined "immigrants", especially in the European Union (EU).

What are the differences in treatment between an expat crossing the EU border and an immigrant crossing the same EU border? Fundamentally, it all comes down to the recognition of rights; human rights are usually granted to expats, while immigrants struggle to have the

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[23] According to Lavenex (2006), this approach of MSs is best described by the realist *frame*, presented in the next section of this Chapter.

[24] Exemplified by the 2011 Schengen-related events, described in more detail in the last section of this work.

[25] One of the blogs of the Wall Street Journal is titled: "Expat. For global nomads everywhere". Available at: http://blogs.wsj.com/expat/ [accessed 15 March 2015].

[26] Available at: http://www.theguardian.com/global-development-professionals-network/2015/mar/13/white-people-expats-immigrants-migration [accessed 15 March 2015].

same rights recognized, or, in the worst case, not to have them openly violated. The first places where this distinction becomes manifest are borders. "The EU's borders are its first point of contact with the external world. This is where the EU's fundamental rights' obligation begins," said FRA Director Morten Kjaerum. "Any action taken by the EU to help manage its external borders must comply with fundamental rights. Making fundamental rights part of the Schengen border control evaluations is already a step in the right direction. Security concerns at the borders must not overrule fundamental rights, which must be at the core of modern and integrated border management."[27]

The tragedies that have been taking place at the sea, land and air borders of the EU since 1992, coupled with the numerous evidences of human rights violations (e.g., push-backs, unmotivated detention, inhumane treatment, etc.), are urgent wake up calls to EU policy-makers (European Commission, 2013) and have mobilized numerous civil society groups that provide services to migrants and asylum seekers and advocate for their rights (Amnesty International, 2013; ProAsyl, 2013).

Human rights are a core value of the European Union (EU), together with the rule of law, human dignity and freedom. Article 2 of the Treaty on the European Union (TEU) provides the legal basis for these principles together with the Charter of Fundamental Rights of the European Union (hereinafter "the Charter"), which acquired binding treaty-like nature with the entry into fore of the Treaty of Lisbon, in 2009. But the human rights regime of the EU, that is composed not only of a set of norms but also of a number of actors, institutions and policy instruments, is still not completed and fully implemented (Ruzza, 2014). Among the institutions and actors that form the human rights regime in the EU, the EU Court of Justice plays a pivotal role as it was the CJEU that introduced human rights in the case law of the EU, by borrowing human rights

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[27] Available at: http://fra.europa.eu/en/press-release/2014/fundamental-rights-eus-borders-fra-reports-reveal-challenges-ahead [accessed 29 July 2015]

principles from the common constitutional traditions of the member states. Also, it is only the CJEU that has competence in ensuring that the Charter is correctly interpreted and applied[28].

Civil society is a fundamental actor in this regime and performs a number of roles: first, it provides information to policy-makers and governance actors via consultation practices and on-line surveys, for example supporting and advising at the EU level the Commission, the Fundamental Rights Agency, Frontex and EASO on specific fundamental rights issues. Secondly, civil society organisations diffuse fundamental rights principles by interacting directly both with the grassroots and with decision-makers, raising awareness at the local, national and European level on different forms of discrimination and human rights abuses. While raising awareness, CSOs also "put human rights into practice" (Ruzza, 2014: 72), though service provision to aggrieved minorities or individuals. A fourth role that CSOs perform in the fundamental rights regime is the monitoring of institutional compliance with fundamental rights principles and the mobilization and organization of dissent at the local, national and European level. Moreover, CSOs devoted to the advocacy of human rights aim to enhance their access to decision-makers in order to influence them on specific human rights issues. Thiel and Uçarer (2014) have shown how different policy fields have granted to different CSOs (immigration and asylum groups vs. human right-based groups) more or less access and how, consequently, CSOs strategies have changed to enter the closed circles of decision-makers.

What is clear from Thiel and Uçarer's study is that CSOs gain (or lose) access and the possibility to influence agenda-setting and decision-making with the evolution of the European governance system. The reason why this happens is that political opportunity structures evolve as policies and venues of decision-making change, mainly in response to crises. Political opportunity structures are "consistent – but not necessarily formal or permanent – dimensions

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[28] The CJEU expressed its negative opinion (18 December 2014) on the compatibility of the draft agreement of accession of the EU to the European Convention on Human Rights with the Treaties. The accession is expressly required by art. 6 TEU, but the negative opinion of the CJEU has stopped the process, thus impeding the acquisition of the role as court of last instance on matters of the EU related to the application of the Charter by the European Court of Human Rights (Opinion 2/13 of the Court of Justice of the European Union (Full Court)).

of the political environment that provide incentives for people to undertake collective action by affecting their expectation for success or failure" (Tarrow, 1994: 85). How the current "humanitarian crisis"[29] and "refugee crisis"[30] in Europe are affecting the political opportunity structures of CSOs at the European level is discussed in Chapter 2.

1.4. STRUCTURE

This work will draw from and, hopefully, add to the dilemmas and bodies of literature mentioned in this Chapter, particularly in Chapter 2. First of all, the literature on civil society participation in the EU will be dealt with by addressing the question "nothing but consultation or else?", by looking at the evolution of the political opportunity structures in the EU. Secondly, the literature on accountability of EU agencies in a multi-level and experimental policy field such as migration will be explored through the dilemma faced by EU agencies (accountability and/or independence). Lastly, the literature on fundamental rights will be touched upon from the perspective of how fundamental rights are shaped by practice and questioning the possibility of finding a balance with security concerns.

These bodies of literature will be hopefully enriched by this work, through the analysis of whether and to what extent civil society organisations sitting in the Consultative Forum influence Frontex' understanding of fundamental rights and how this close relationship can be potentially useful to enhance Frontex accountability, and thus legitimacy, on fundamental rights matters. Chapter 3 is devoted to the description and discussion of the methodologies used to address these main research questions. In particular, Chapter 3 retraces the three different steps of the analysis conducted: first, assess whether there has been an evolution of Frontex understanding through frame analysis, second, establish a correlation between the lobbying

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[29] The Secretary General of the UN, Ban Ki Moon defined the situation at the borders of the EU, and in particular in the Mediterranean, as a "humanitarian crisis" on 20 April 2015. http://www.un.org/apps/news/story.asp?NewsID=50637#.VT4J-yG8PGc (accessed 20 April 2015).
[30] For an overview of the refugee crisis, see the webpage of the European Commission devoted to the issue, available at: http://ec.europa.eu/echo/refugee-crisis_en (accessed 20 June 2016).

activity of CSOs within Frontex CF by measuring their influence, and, third, evaluate the potential for the emergence of a social accountability relationship on fundamental rights matters between the CSOs represented within Frontex CF and Frontex itself. The case study being an explorative research, the collection of data derives from official documents, both available to the general public and explicitly requested from Frontex for the purposes of this research, and expert interviews conducted with members of the CF, Frontex officers, and other relevant EU actors[31].

Chapter 4 presents the case study, by describing the renewed EBCG agency and its origins, but also its tasks and the legal framework from which it emerged, and the role and tasks of its Consultative Forum on fundamental rights. The recent developments, triggered by the so-called "refugee crisis" or "humanitarian crisis" of 2015, are addressed in this Chapter together with the past developments, namely contestations of Frontex accountability on fundamental rights matters, which led to Frontex Regulation revision of 2011. Chapter 4 concludes with the comparison of Frontex CF with consultative fora present in other EU agencies of the AFSJ, namely EASO CF and FRA Fundamental Rights Platform.

The object of Chapter 5 is to analyse the advocacy activity of CSOs that aim to mainstream fundamental rights into EU border management policies. With a view to do so, this Chapter describes the framework in which CSOs that decided to become members of Frontex CF operate, namely the EU fundamental rights regime. Chapter 5 then addresses the study of the CSOs that gained access to Frontex CF, thus trying to add a new case study to the literature discussion on CSOs' choice between lobbying EU actors from within or from outside, based on the analysis of these CSOs resources. The findings of this analysis point to a confirmation of the literature on advocacy groups strategy choice; CSOs selected to become members of the CF are all highly specialised and professionalised, have sufficient financial and human

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[31] The author wished to include participant observation to these methods, but it was not permitted to participate to either CF plenary meetings nor CF Working Groups meetings.

resources to be active at the EU level, and, for the most part, are well-embedded in EU-wide civil society networks. Moreover, this analysis evidences a deep ideological cleavage between CSOs that decide to gain access to EU actors and the ones that decide to choose to have a confrontational approach to EU actors, even if they have European-wide networks and are experts in the field.

Similarly to Chapter 5, also Chapter 6 is an analysis chapter and addresses the two main research questions of this dissertation: the first, on the influence on the ECBG agency of the advocacy activity of CSOs represented in the CF, and, the second, on the potential social accountability relationship that could derive from the interaction between the two parties. The analysis carried out to answer to the first research question is divided in three parts, following the logic and methodology described in Chapter 3. The first part, studying the evolution of Frontex' understanding of fundamental rights based on frame analysis, highlights an evolution of the agency framing of fundamental rights both in terms of fundamental rights' relevance in the agency activity and in their operationalisation. Once established that there has been an evolution, this evolution is matched with the activity of the CF and of the CSOs within it. Unfortunately, it is not possible to clearly distinguish the impact of the whole CF from the advocacy efforts of single CSOs, due to a lack of information in the minutes of CF meetings. However, the (self-)attributed influence method, triangulated with the result of the analysis of CSOs' official statements, gives a general understanding of the level of satisfaction of CSOs with the results of their lobbying activity. The second research question is addressed by analysing the requirements of each one of the three phases of the operationalized definition of accountability (i.e., information, debate, and consequences), to try to establish if Frontex CF, and the CSOs represented therein, could potentially function as an accountability forum for the EBCG agency with regard to fundamental rights matters. The findings of this analysis describe a situation which could be conducive to the establishment of a social accountability relationship, even if with some limitations.

The last Chapter closes the dissertation by recalling what triggered this research by relating to the expectations in the field on these issues, namely the quest for ensuring fundamental rights mainstreaming into EU border management and, thus, into the EBCG agency, and the three theoretical puzzles described in Chapter 1 (i.e., CSOs' consultation vs. deliberation; EU agencies' independence vs. accountability; border management's security vs. fundamental rights). It then reflects on the approach taken in this research on these puzzles on the basis of the findings of the case study, thus supporting the view that the case of the EBCG agency and its CF, even though unique in its composition, structure and mandate, is an example of an environment in which CSOs are more than just consulted, where there are the preconditions for the achievement of an accountability relationship (i.e., social) on fundamental rights, where mainstreaming fundamental rights directly within a border and coast guard force is possible. Chapter 7 concludes by attempting to pinpoint future implications for the work of Frontex Consultative Forum and the CSOs represented in it, and, possibly, to indicate future research avenues which might aim to generalise the findings of the present research by comparing the relationship of other consultative fora on their parent EU agencies and the implications of these relationships for the theoretical puzzles addressed in this study.

CHAPTER 2
Civil society organisations' participation into the EU governance system

This theoretical Chapter is divided into two main sections – i.e., Sections 2.1 and 2.2. The former is devoted to the discussion of the literature on CSOs' role in the EU governance system, focusing in particular on CSOs opportunities to participate in the governance of the external borders of the EU. The latter presents two ways of interaction between CSOs and EU actors, namely influence and accountability. This section, therefore, presents the literature addressing CSOs as advocacy groups, discusses the issue of CSOs influence on EU actors, and concludes by discussing the potential for civil society consultative bodies to become accountability fora, specifically for EU agencies.

2.1. ON THE ROLE OF CIVIL SOCIETY IN THE EU GOVERNANCE SYSTEM

In the last two decades, the study of civil society has seen a revival (Cohen and Arato, 1999) in the European Union. In this period, a number of substantial problems for the democratic nature of the EU governance system emerged: the crisis of representation, the rise of the executives or the "rise of the unelected" (Vibert, 2007), the difficulties in establishing a strong link between EU institutions and European citizens, and, in sum, the growing perception of the Union's democratic deficit (Cohen and Arato, 1999; Warleigh, 2001; Ruzza, 2004). The widespread assumption behind the need to study civil society in these circumstances is that civil society has in itself the power of mitigating different aspects of the alleged democratic deficit of the European Union, such as the absence of a public sphere and the need for more participation, deliberation and pluralism[32].

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[32] It must be noted that the results of empirical studies on the firmness of this assumption are still controversial, and will be discussed in this work.

The civil society that is referred to in this work acts in a multi-level EU governance system. Finke gives a concise description of civil society within this multi-level system, as "composed of voluntary groups, organizations and associations which articulate the variety of societal voices in the EU multi-level system." (Finke, 2007: 21) The actors that form civil society according to this definition have always confronted the state on specific policy issues; however, with the delegation of competences from states to the European institutions, some of the normative claims that were previously addressed to the state level by advocacy groups, organisations and associations shifted to the European level and adapted to the new practices of policy-making (Ruzza, 2004; Kohler-Koch, Rittberger, 2006).

The present study focuses on the sociological definition of a 'European civil society' as it has evolved to confront a multi-level EU system of governance. Keeping in mind the separation of civil society from state and market, it is argued in this work – in agreement with Armstrong (2002: 131) – that the European civil society is a "multiform, multidimensional and multilevel" actor, which can be inclusively defined as the sum of all the voluntary associations that are present in the public sphere, with a variety of ends: religious, political, cultural, environmental, etc. (Saward, 2010; Kohler-Koch and Quittkat, 2009). Here the conception of civil society is far from the weilerian idea of civil society as the locus where a European *demos* is created, while it focuses on civil society's corner stones – i.e., voluntary groups, associations, organisations -, thus highlighting its organisational nature (Kohler-Koch and Buth, 2009). Accordingly, in this study civil society and *organised* civil society will be used interchangeably. Moreover, in this study it is contended that the EU multi-level system of governance, as well as the EU multi-level administration – i.e., European, national, and local levels – have shaped a multi-layered system of organised civil society (Benz, 2015). The multilevel nature of civil society in the EU causes tensions among groups organised at different levels, especially in times of crisis, due to different access to funding opportunities in a situation of shrinking funds (Ruzza, 2014).

Associations, that "range from narrow specific to broader encompassing interests and from advocacy groups to member based umbrella organisations" (Kohler-Koch and Quittkat , 2009: 12), have taken different forms: non-governmental organisations (NGOs), advocacy groups, social movements, epistemic communities, trade unions, employers' organisations; consumers' and entrepreneurs' associations, but also research institutes and universities. However, the study carried out by Kohler-Koch and Quittkat (2009) has evidenced that in the EU arena, practitioners and officers widely consider general interest groups[33], and to some extent trade unions, to be part of civil society, while business interest associations and professional organisations are less easily associated with such definition. Their study evidences once more how difficult it is to define univocally civil society, but concludes that the latter is considered by the vast majority of the interviewees – chosen by Kohler-Koch and Quittkat among the research community – as a very weak political actor, but a social actor that is "institutionalised or in the process of being institutionalised" (Kohler-Koch and Quittkat , 2009: 15), and which is active in the life-world.

Civil society groupings, in particular at the European Union level, have come to be addressed as stakeholders, or interest groups, representing more or less 'diffused interests' (Olson, 1965). The European Commission has strongly supported the participation – mainly via consultation procedures – of CSOs in the policy-making process of the European Union exactly because of the interests that these organisations represent, in a system that, since the Maastricht Treaty, has been deemed to be in a 'democratic deficit'. In an era of crisis of representation, civil society organizations have been described in the literature as a means of 'bringing the citizen back in', acting as the missing link – or 'transmission belt' – between EU citizens and EU institutions, thus enhancing participation and deliberation at the EU level

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[33] General interest is defined as an interest "in the pursuit of a public good (such as social stability, environmental sustainability) or a universal value (such as human rights)." (Kohler-Koch and Quittkat, 2009: 13).

(Warleigh, 2001: 620; Mascia, 2004). Moreover, civil society has been deemed to give voice to aggrieved minorities, thus enhancing pluralism (Ruzza, 2004).

Indeed, since the "revival" of civil society, the literature has been concerned with two main functions of civil society: first of all, improving the legitimacy of the EU representation system by focusing on an enhanced participatory democracy (input-oriented approach), thus possibly helping overcome the 'no demos - no democracy' thesis (Smismans, 2003; Fung, 2003; Saward, 2010), and secondly, contributing to "effective governance and problem-solving" (output-oriented approach) (Warren, 2001; Finke, 2007; Heidbreder, 2012). Before the Commission's White Paper on Governance was delivered, the European Economic and Social Committee highlighted the prominent role that civil society organisations have in the EU: not only promoting participation and efficiency, but also providing a space of learning, "public awareness" raising and education (EESC, 1999; Warleigh, 2001), thereby becoming "schools of democracy" (van Deth, 2008: 335).

In view of this, the Commission has emphasised the positive role that CSOs might have on the overall democracy of the EU governance system, first of all, by gradually introducing the concept of 'civil dialogue' (Smismans, 2003), then through the words of Romano Prodi in 2000[34] and finally through the White Paper on Governance of 2001 (Armstrong, 2002; van Deth, 2008: 327). The latter, in particular, highlighted the positive effects of the engagement of EU institutions with civil society – i.e., closing the gap between European citizens and EU governance or between "society and transnational governance" (Armstrong, 2002: 114) – and

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[34] Here is Romano Prodi speech on this issue:
"We must recognize that there are new actors on the world stage - a new generation of civil groups and NGOs in which activists, mostly young, are campaigning for a wide range of social and environmental progress. These people must be brought into the decision-making process alongside experts in all fields…The challenge of democratic accountability faces Europe too, as we enter the new millennium. It is clear that representative democracy and the European institutional system as it has existed over the last half century are no longer meeting the aspirations of our citizens. They want a much more participatory democracy, one that gives them a real say in shaping their future. So, we are now re-examining the whole question of European governance. Within the next twelve months, the Commission will publish a White Paper, launching a wideranging public debate on how we can run Europe differently." (Prodi, 2000).

established the provision for more institutionalised processes of consultation (e.g., Open Method of Coordination).

The next section takes a closer look at these developments in the EU governance system and in the approach of the EU institutions towards the inclusion of civil society participation, framing them as political opportunity structures.

2.1.2. POLITICAL OPPORTUNITY STRUCTURES FOR CIVIL SOCIETY PARTICIPATION IN THE EU GOVERNANCE SYSTEM

The creation of a multi-level EU governance system opened new substantial opportunities for CSOs to participate to the policy process. The shift of policies from the national to the European level opened new venues and new possible pathways for interaction for CSOs active in the EU. As a matter of fact, the multiplication of the legislative and administrative venues at the different levels of governance (i.e., European, national, local) coupled with the introduction of new forms of governance at the EU level brought about new challenges but also new opportunities for CSOs mobilisation and participation, in a number of ways.

Since the very beginning of the European integration, the Commission has had a fundamental role in championing the involvement of CSOs to the policy-making process of the EU. At first, the European Commission turned to civil society in search of expertise, to provide output legitimacy for the economic governance of the EC, then to gain leverage vis-à-vis the other EU institutions in the legislative process (Quittkat and Finke 2008; Kohler-Koch, 2009). The support has been ensured by introducing consultation procedures with CSOs, mainly representing private but also public interests, which evolved over time. Quittkat and Finke have evidenced how the Commission has adopted during the 1980s a more reflective approach to the concept of "good governance": "the gradual extension is most noticeable in the change of terminology, from "consultation" (1960-70s) to "partnership" (1980-90s) and "participation" (1990-2000s)." (2008: 184). These three phases, or "generations" as Quittkat and Finke label them, in the approach of the Commission towards CSOs were marked by different levels of

formality of consultation procedures, shifting from an informal, bilateral and pluralistic inclusion towards a system of accreditation, culminating in the Transparency Register. Formality was very low in the 1960-70s and interaction was frequent especially with business groups, it increased with the already mentioned "European Social Dialogue"[35] aiming at discussing the social aspects of the internal market, and became a reality with the end of the "permissive consensus" on European integration marked by the failure of the Maastricht Treaty in Denmark.

At that point, the democratic legitimacy became a concern for the whole EU governance system (Freidrich, 2008) – i.e., around the year 2000 – and all the EU institutions decided to invest in the involvement of civil society in the European governance for three main reasons: to boost policy-making effectiveness, to increase public visibility of the EU, and, finally, to improve legitimation. The Commission pushed again for the inclusion of CSOs with its White Paper on Governance (2001), which triggered the so called "participatory turn" of European governance. Participation of civil society in EU policy-making was promoted with the introduction of a new and experimental system of governance: the Open Method of Coordination. This new form of governance, which is now used in the areas of European employment and social inclusion, has however encountered scepticism with regard to its application (de la Porte, 2002; Armstrong, 2005).

In the early 2000s new rules for more open and transparent administration were passed, such as the Regulation on public access to EU institutions' documents[36]. Since then, the Commission has initiated a number of legislative acts aimed at improving transparency and openness. The latest effort is the Commission's Better Regulation Agenda[37], which is evolving into an interinstitutional agreement among the European Parliament, the Council, and the

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[35] The European Social Dialogue was introduced with the Single European Act in 1986.
[36] EC Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents.
[37] European Commission, *Communication Better Regulation for Better Results – An EU Agenda*, COM(2015)215.

Commission itself[38]. The aim of the agreement is to improve the clarity, accessibility and overall transparency at all stages of legislative process, and to specify the limits of delegation of legislative powers to the Commission, in charge of passing "delegated acts". This has been coupled with the introduction, in May 2015, of a new Platform for public and private stakeholders' inclusion, called the REFIT Platform[39]. In view of ensuring inclusion of stakeholders over the entire life-cycle of the policy, the Commission encourages stakeholders to provide feedback on impact assessments (Bozzini and Smismans, 2015), launches public internet-based consultations, and makes available on its website an online contact form to the citizens who want to make suggestions[40].

Moreover, lines of funding were established at the EU level in order to foster CSOs in their role of service providers and policy implementers. The first and most significant of them was created with the Treaty of Rome: the 'European Social Fund'. In a system highly dependent on subsidiarity, in which welfare policies' implementation is increasingly privatised (Finke, 2007) and has to be adapted to the specific features of every Member State, EU level CSOs create trans-boundary networks and engage in competitions to accede to EU funding[41], thus following the policy guidelines established by the European Council every 7 years. It must be noted that this process has been criticised in the literature for allegedly creating a system whose intention is "to shun 'uncivil society' in favour of harnessing 'civil' society towards the (unchallengeable) objectives of the Union" (Armstrong, 2002: 129).

Another significant change for the involvement of civil society in the EU governance was brought about by the reform of public administration. Indeed, since the 1990s, the EU has been

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[38] Inter-institutional Agreement (IIA) on Better Law-Making (provisional text) of 15 December 2015, complementing the previous versions on better regulation. The first IIA on better regulation was endorsed by EU institutions in 1994.

[39] REFIT is the short version for Regulatory Fitness and Performance, a programme established to simplify regulation at the EU level. To access the documents see: http://ec.europa.eu/smart-regulation/better_regulation/documents/com_2015_215_en.pdf (accessed 12 February 2016).

[40] Available at: https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly_en#up (accessed 12 February 2016).

[41] Policy implementation by CSOs is a field of study for the so called "Third Sector approach".

undergoing an institutional transformation in the public management sector: this process is known as "agencification". The term "agencification" identifies the process whereby agencies of different nature (regulatory, executive, operative or information gathering) are created in a wide range of policy areas. This was deemed necessary due to the increase in the executive competences of the EU and the need to coordinate the action of member states at the EU level and has strengthened the process of "pluralisation of the executive" (Shapiro, 1997; Curtin, 2006, 2007; Papadopulos, 2007; Egeberg and Trondal, 2017). The phenomenon should be also considered in the wider process of rise of the executives and the unelected, at both national and European levels (Vibert, 2007). The "agencification" process[42] of the EU is shaping a governance system in which independent and decentralized agencies take decisions away both from political debate, and from direct and indirect democratic representation. At the same time, EU agencies are creating new opportunities structures for the participation of CSOs to the policy process: EU agencies usually consult with a large number of private and public stakeholders and recently formal bodies have been set up to include civil society organizations on a more permanent basis (e.g., Frontex Consultative Forum and EASO Consultative Forum). The creation of a space for interaction between EU agencies and public interest groups – other than deriving directly from the 'network model' of EU agencies' activities (Leonard, 2009) – has been either encouraged by the European Commission, or imposed by design through agencies founding Regulations, or, finally, sought voluntarily by EU agencies themselves (Koop, 2014).

Finally, the Treaty of Lisbon has opened yet new opportunities for CSOs to enter the policy-making system and influence policy-makers, because of deep changes in the European legal framework (Kjaerum and Toggenburg, 2012). This could be probably termed the fourth "generation" in the approach of EU institutions towards CSOs, in which the level of formality of the interaction between institutions and CSOs has reached the level of institutionalisation.

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[42] For a legal definition of the phenomenon at the EU level see: Hofmann and Morini, 2012; Busuioc, 2013; Scholten and van Rijsbergen, 2014.

The current version of article 11 TEU states that, first, the voices of citizens and "representative associations" should be heard by EU institutions in "all areas of Union action"; secondly, EU institutions should be transparent and open in the dialogue with "representative associations and civil society" and, third, the European Commission "shall carry out broad consultations with parties concerned" when the EU is about to take action in any specific field[43]. Moreover, article 15 TFEU elevates at treaty level the principle of good governance and openness, in view of the need for civil society participation[44] "to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible". Moreover, article 9 TEU affirms that the EU in "all its activities … shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies". It is interesting to notice how even though agencies are now recognized as part of the EU governance system and should be equally open and transparent as any other European body, the principle of participation does not apply to them (art. 11 TEU). So there is no express reference to the need of CSOs working in cooperation with EU agencies. Nonetheless, CSOs started to appear also in consultative fora within these European bodies[45].

The Commission seeking allies, the EU governance system seeking legitimation, the creation of funding lines for civil society at the EU level, the creation of the Open Method of Coordination, the rise of the executives and the agencification process (see Figure 1) can all be considered exogenous factors for CSOs involvement in EU governance. According to political opportunity theory[46], these exogenous factors have enhanced the prospect for mobilization and access of CSOs at the EU level, and thus the possibility for civil society to "affect mainstream

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[43] Consolidated Version of the Treaty on European Union (TEU), art. 11, paras. 1-2-3, 2010 O.J. C 83/01.
[44] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), art. 15, states: "to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible".
[45] For a detailed discussion on the presence of CSOs within EU agencies see Chapter 4.
[46] Tarrow defines a political opportunity structure as a "consistent — but not necessarily formal or permanent — dimensions of the political environment that provide incentives for people to undertake collective action by affecting their expectations for success or failure." (1994:85).

institutional politics and policy" (Meyer and Minkoff, 2004: 1457-58; Della Sala and Ruzza, 2007).

Figure 1 highlights the events that marked the developments in civil society participation in the EU governance system. These events can be considered as turning points for civil society inclusion: they indicate moments in which the European policy on civil society inclusion shifted towards a more participatory model. Whether this increase in inclusion has brought about policy change in specific issue areas is not the object of this research. The central question discussed in this work is whether and to what extent participation of CSOs in policy processes can trigger learning, which might in turn lead to policy change.

On a final note, the opening of new political opportunity structures does not imply that that inclusion of CSOs in the EU policy process is limitless. The creation of new political opportunity structures, such as the creation of new venues for participation, may exclude some CSOs from participation while advantaging others, for example the organisations that have enough resources (human and financial) to interact with the new governance bodies (Baumgartner, 2007). Moreover, CSOs that are already embedded in the system help shape new political opportunity structures (Princen and Kerremans, 2008), so that some political opportunities might not be open to every organization active in the same field. It is also important to notice that there are specific opportunities that are not political but that also influence the relevance of CSOs in their field and thus increase their chances of getting access. An example is provided by the so-called "news pegs". According to Amnesty International Canada's manual on Digital Strategy and Tactics, a news peg is a subject that reflects "the rhythms and accents of the news cycle, events beyond your control that are of societal significance and coincide with when the public tunes in to find information." (Amnesty International, 2013).

Figure 1: CSOs' POS in the EU governance

1957	1960-70-80-90s	1992	2000s	2001	2009
Treaty of Rome – establishment of the European Social Fund	Commission seeking efficiency and legitimation – first forms of consultation	Maastricht Treaty – EU governance system seeking legitimation, effectiveness, visibility	Rise of the executives - agencification	White Paper on Governance – Laeken Process – OMC – Regulation on access to public documents	Treaty of Lisbon – Charter on fundamental rights – participation and good governance principles

Source: author's own elaboration.

Summarising, the European multi-level and experimentalist governance system poses peculiar opportunities and challenges for CSOs to engage with the decision-makers and potentially influence them. On the bright side for CSOs, the multi-level system implies a multiplication of access points while the experimentalist nature of the so-called "new modes of governance" shapes new interaction patterns and political opportunity structures (Princen and Kerremans 2008; Klüver 2011; Klüver, Braun and Beyers, 2015). On the other side, in order to interact with the EU level, CSOs need to be highly organized, resourceful and well positioned if they want to gain access to the system and to face the complexity of specific EU policies (Beyers and Braun, 2014; Klüver, Braun and Beyers, 2015). Moreover, as the EU governance system keeps evolving in to answer to new challenges and crises, civil society is adapting to the new framework, while providing new input to decision-makers.

The next section presents the evolution of the presence of CSOs in a particular policy area: the migration policy field. Migration policies are an interesting case because of the high level of fragmentation of policy-making among the different levels of governance of the EU. Moreover, migration is now a particularly salient issue in EU and national politics, due to the significant increase in the number of migrants and refugees landing in the Schengen Area in 2014 and 2015. The salience of the policy-area is another important exogenous factor for CSOs

participation in EU governance. The decision of CSOs to participate to the policy-making process or to protest against it will be covered in the last sub-section (2.1.5).

2.1.3. ORGANISED CIVIL SOCIETY AND MIGRATION POLICIES IN THE EU

Migration policies in the EU system of governance are fully-fledged multi-level: they are indeed shaped by EU institutions (EU level), whose competences are included in the Treaty on the Functioning of the EU (Title V) establishing and regulating the Area of Freedom Security and Justice (AFSJ); they are also shaped by Member States' governments (national level), that both implement EU Regulations, Directives and Guidelines, and provide for the policy-making of the non-communitarised competences (e.g., the control of borders); they are, finally, shaped by local authorities (local level) that implement both national and European measures. As a consequence, the field of migration policies encompasses a wide range of social actors, operating at different territorial levels and with different functions.

The Stockholm multi-annual Framework Programme, which has been operating from 2009 until the end of 2014, has a specific provision for the role of civil society within the AFSJ. Paragraph 1.2.8 of the Stockholm Programme establishes that EU institutions should "hold an open, transparent and regular dialogue with representative associations and civil society" and the Commission should define mechanisms to make this dialogue effective and useful. For the post-2014 era, Art. 68 of the Lisbon Treaty provides that the European Council is responsible for setting the strategic guidelines for the Justice and Home Affairs field: on 26-27 June 2014, the European Council met in Brussels and delivered these strategic guidelines; in the guidelines, no mention is made of the role of civil society in this field[47].

The functions of civil society organisations can be generalised as follows: service provision, advocacy, policy formulation, implementation and monitoring (Banulescu-Bogdan , 2011; Thiel and Uçarer, 2014). Each of these CSOs functions appeal to different levels of

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[47] See European Council, *Conclusions*, EUCO 79/14, 27 June 2014. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/143478.pdf (accessed 12 April 2016).

governance and require different skills, knowledge and resources. Moreover, depending on the functions undertaken, CSOs might need to create trans-boundary (or transnational) networks. Table 1, drawn mainly from Banulescu-Bogdan's 2011 study, combines CSOs functions with their level of action, thus describing how CSOs interact within the governance system, specifically for the case of migration issues in the EU.

Table 1. Typology of Civil Society Organisations working in the migration policy field

Function	Description	Level of action
Service provision	Groups that provide operational assistance to migrants, (e.g., basic needs, legal services, integration aid).	Local level
Advocacy	Groups that advocate for specific migration-related issues and principles.	EU and transnational levels[48]
Policy formulation	Groups invited to participate in negotiations during the official stages of policy-making.	EU level
Implementation and Monitoring	Groups that are subcontracted to supplement or evaluate government policies.	EU, transnational and local levels

Source: author's own elaboration, adapted from Banulescu-Bogdan (2011: 4), with reference to Thouez (2004).

According to Thouez (2004), it is precisely this fragmentation – due to both the different functions that are performed and the different levels of governance that are involved – that

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[48] As Ruzza evidences "While it would be tempting to identify the centre [of advocacy coalitions' networked structure] with EU-level social movement organisation, this is not necessarily the case. Coalitions incorporate people based both in Brussels and other EU institutional centres, and people based in member states," (2004: 35). In Table 1 the centre of the network is taken into consideration, which is where the main function of the CSO is performed in the case of advocacy CSOs having a networked structure. The *transnational level* of action differs from the *EU level*: organisations and associations working across the borders of the Member States of the Union – defined as "umbrella groups" in Banulescu-Bogdan – do not necessarily interact with the EU level (even though they may apply for EU funding), but create "a stronger collective voice and a broader global reach" (Banulescu-Bogdan, 2011: 4).

makes CSOs less effective in this field with respect to others, such as environmental and human rights protection groups (Ruzza, 2004; 2014), especially when using their resources to shape policies through advocacy and dialogue. However, human rights protection and promotion has become one of the numerous aspects addressed by CSOs working in the field of migration, due to the intersectionality of migration issues. Even though service provision was considered to be the core function of civil society dealing with migration related policies, and it was performed mainly by religious associations (Thouez, 2004), nowadays, advocacy groups addressing human rights issues are rising in number thanks to the increase both in opportunities to enter the process of policy-making – opened by the EU and discussed in the previous section – and in the volume of migration flows.

The next sub-section aims at taking a step further and analyses CSOs decision to enter (or not) the professionalised advocacy system to promote their stances at the EU level. The focus of CSOs participation in EU governance shifts here from all CSOs, to CSOs that perform advocacy functions. These organisations are addressed in the literature as cause groups, public interest groups or diffuse interest groups (Weiler and Brändli, 2015).

2.1.4. CSOS AS INTEREST GROUPS IN THE LITERATURE

Advocacy and lobbying are core activities for a high number of CSOs working in the field of migration. Indeed, since the Arab Spring in 2011, migration has become a highly politicised issue and has attracted a high level of public attention in the EU. Preoccupations on terrorist threats coupled with the increasing flows of migrants coming from failed or failing countries, and the news of deaths at the borders have created a fertile ground for CSOs working in this policy field to push forward their agendas, especially at the EU level. But how do CSOs try to influence the EU governance system? What are their strategies? And how are these strategies selected?

Before delving into the questions that this section aims to answer, building on the extensive existing literature on interest groups strategies, a clarification on the distinction of

two widely used terms is necessary: advocacy and lobbying. These two terms are often used interchangeably, but they indicate two slightly different actions carried out by interest groups, both public and private, and even by government and administrative staff (Baumgartner, 2007).

The term lobbying has its roots in the Anglophone history of interest groups activity: in the UK, the "lobby" is a hall where members of parliament can be approached during the legislative process. Lobbying is therefore an effort of an individual or a group to influence the legislative process, at the policy formulation as well as at the decision-making levels, with a view to obtaining some specific result. The European Parliament, the Commission, and the European Council defined lobbying in the EU when trying to regulate interest groups access to policy-makers and EU administrators, with the establishment of the European transparency register in 2011[49] (Greenwood and Dreger, 2013). The Inter-Institutional Agreement (IIA) of 2011 establishing the European Transparency Register, indirectly defined lobbying by reference to the activities performed by the interest groups that interact with EU policy-makers and administrators:

> "The scope of the register covers all activities…carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the EU institutions, irrespective of the channel or medium of communication used, for example outsourcing, media, contracts with professional intermediaries, think-tanks, platforms, forums, campaigns and grassroots initiatives. These activities include, *inter alia*, contacting Members, officials or other staff of the EU institutions, preparing, circulating and communicating letters, information material or discussion papers and position papers, and organising events, meetings or promotional activities and social events or conferences, invitations to which have been sent to Members, officials or other staff of the EU institutions. **Voluntary** contributions and participation in

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[49] European Parliament decision of 11 May 2011 on conclusion of an interinstitutional agreement between the European Parliament and the Commission on a common Transparency Register (2010/2291(ACI)).

formal consultations on envisaged EU legislative or other legal acts and other open

consultations are also included." (par. 8) [emphasis added].

The activities explicitly excluded by the IIA, and by implication, not considered lobbying

activities in the EU[50] are three: the provision of legal and professional advice, the performance

of a role provided for in the Treaties (e.g. civil dialogue), and

"activities in response to direct and individual requests from EU institutions or Members

of the European Parliament, such as ad hoc or regular requests for factual information, data

or expertise and/or individualised invitations to attend public hearings or to participate in

the workings of consultative committees or in any similar forums." (par. 10(c)).

This does not exclude the possibility that an organisation working to provide information and

expertise to EU bodies can actually *influence* them. This is true particularly if the core function

of the organisation in question is *advocacy* (e.g., human rights advocacy organisations).

The verb to advocate means to argue in favour of someone or something. The advocacy

activity of public interest and cause groups is therefore slightly different from lobbying, even

though its envisaged outcomes are similar. Indeed, both activities are intended to trigger policy

change: lobbying by addressing directly or indirectly policy-makers and administrators,

advocacy by inducing a change in policy frames. According to Berckhout, policy change may

entail "changing existing policy, keeping the status quo policy, reducing government action or

seeking government recognition of a problem." (2013: 229).

Literature on interest groups in the EU evolved significantly over time and took very

different theoretical approaches: from an international relations' approach to European

integration, to theories of democracy in the EU, to a comparative politics tradition concerned

with interest intermediation, to finally exploring the role of interest groups in a multi-level

governance perspective (Eising, 2008). As EU studies turned to researching day-to-day

governance practices – i.e., the "governance turn" –, interest groups' researchers started

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[50] It is important to notice that EU institutions have defined interest groups by reference to their activities, thus
adopting a functional definition.

addressing the various steps of the influence production process, thus analysing mobilisation, access, lobbying strategies and influence on policy outcomes (Kohler-Koch and Rittberger, 2006). Specifically with regard to the research on interest groups influence, there are also a number of variegated approaches that have been taken to measure it (Dür, 2008a), which will be discussed in detail in chapter 3 of the present work.

This work builds on the literature regarding CSOs role at the EU level and, particularly, on how CSOs influence EU bodies. To do so, the next sub-section is devoted to wrapping up the review of the literature on civil society participation in EU governance, by exploring the strategies employed by public interest groups to exert influence at the EU level. The focus is specifically on the decision of advocacy CSOs to push forward their agendas, using insider and/or outsider tactics.

2.1.5 COOPERATION OR RESISTANCE? THE STRATEGY CHOICE FOR PUBLIC INTEREST GROUPS

The choice of how much to invest in working inside or outside of the "system" – i.e., the EU governance system –, also known as the choice between "gaining access" or "going public" is crucial for any civil society organization organized as an interest group and aiming to influence the policy-making process in the EU (Berkhout, 2013; Kriesi et al., 2007). CSOs act as interest groups when lobbying or advocating a diffuse interest or a specific cause, such as the promotion of migrants' rights. To do so, they interact with either policy-makers or the public (or both) to communicate their point of view and to exercise influence on a specific policy issue – e.g., human rights in border management policy. CSOs acting as interest groups are different from social movements for their nature as organized entities, and from political parties as running for elections is not present in their repertoire of actions (Berkhout, 2013). In the literature, the term "inside lobbying" is used to describe the lobbying efforts aimed at policy-makers and administrators, while "outside lobbying" is directed towards the media and, therefore, the public (Beyers, 2004; Weiler and Brändli, 2015). While inside lobbying includes

tactics such as legislative lobbying (directed at policy-makers), administrative lobbying (directed at administrative personnel), and litigating, outside lobbying focuses on contestation, with tactics ranging from issuing reports to street demonstrations (Baumgartner and Leech, 1998; Baumgartner et al., 2012).

The choice of how to allocate resources between inside and outside lobbying strategies is crucial as resources are limited. To give an overview of the factors discussed in the literature leading to a choice on how to best allocate resources between efforts of inside and outside lobbying, this work departs from the simplifying assumption that the goal of CSOs, whose core function is advocacy, is to maximize the effects of their advocacy and lobbying efforts in a specific policy area[51]. In light of this, CSOs make their choice with regard to both endogenous and exogenous factors (Baumgartner and Leech, 1998). The endogenous factors are usually referred to as the organisation resources, or policy goods, while the exogenous factors include the institutional setting in which the organization is active, together with the available political opportunities, and the specificity of the policy issue (Schattschneider, 1960; Ruzza, 2006; Berkhout, 2013; Junk, 2016).

Table 2 describes the process through which, first, social movements mobilise on a policy issue due to favourable political opportunity structures, second, institutionalise, and, lastly, choose whether to interact with EU actors or not. The ones that decide to "resist" and not to be involved with EU institutions have a limited range of strategies, as they can only employ outside lobbying tactics – also known as grass-roots lobbying, – generally trying to raise public awareness on specific issues (e.g. forming transnational networks, protesting, reporting through the media). The social movement organisations which decide to "cooperate" with EU actors, on the other hand, have a broader range of strategies, as they can make use of both insiders and

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[51] It has been argued that advocacy organizations might also see their survival as their main goal (Zald and Ash, 1966; Lowery, 2007); this implies that the choice on advocacy and/or lobbying strategies is dependent on how to raise funds and, therefore, on how to appease donors (Baumgartner and Leech, 1998; Armstrong, 2002). In the case of EU level CSOs, this might entail that CSOs get "captured" trying to satisfy EU funding requirements.

outsiders tactics. The present reconstruction of how public interest groups choose their strategies is focused only on the organisations that decide to interact with EU actors and is illustrated succinctly in Table 3.

Table 2: Lobbying strategy choice for public interest groups

Mobilisation of a social movement on policy issue

Institutionalisation

Public/diffuse interest groups, cause groups, social movement organisations

Cooperation   Resistance

Inside *and* outside lobbying strategies   Outside lobbying strategies
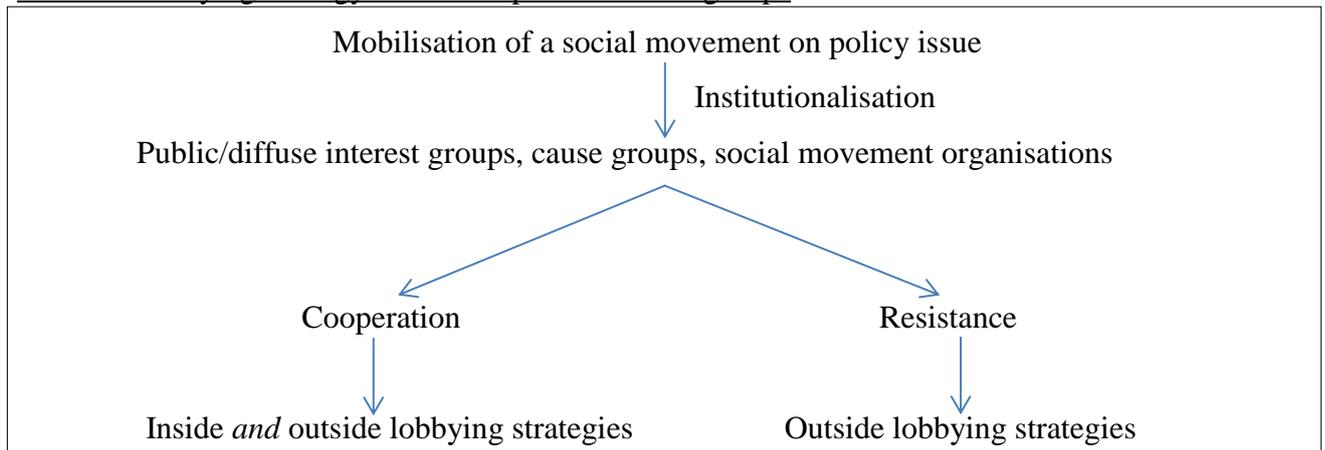
Source: author's own elaboration.

Table 3: Cooperation: How to allocate resources among the two types of strategies?

Endogenous factors: (organizational level)

- policy goods constitutive of the CSOs
  - financial and human resources
  - type of membership or organisational characteristics:
    - interest group type
    - geographical level of organisation
    - degree of conflict usually faced
  - type of represented interest
- policy goods preferred/(e)valued by the institutions, agencies, bodies
  - technical expertise
  - political support (including position in the network/coalition)
  - implementation and intermediation capacity
  - embeddedness
- organisational routines/routine behaviour

Exogenous factors:

- (institutional level) institutional setting
- (issue level) characteristics of the policy field:
  - level of lobbying competition
  - issue area (salience and complexity)
  - possibility of venue-shopping
  - issue-framing
- position in the network/coalition (both endogenous and exogenous)

Source: author's own elaboration.

One thing is certain: organisations rarely focus on a single strategy (Beyers, 2004). On the contrary, their repertoire of strategies is usually very broad. The traditional insider lobbying, mainly pursued by business interest groups, has been slowly but steadily flanked by "going public" strategies, particularly as a consequence of what Kriesi et al. term "increasing public orientation of politics" (Kriesi et al., 2007: 49). This mix of strategies has led some to conclude that "the conventional clear differentiation between social movement organisations and interest groups is untenable" (European Commission, 2006: 158).

Berkhout (2013) has proposed a comprehensive theoretical framework to explain the behaviour of interest groups which is based on the exchanges that the organisation has with media, its constituency, and policy actors. Similarly, Beyers and Braun (2014) individuate in the exchange – e.g., of resources, information – the reasons for EU actors and CSOs to create a relationship. In Beyers and Braun words: "interest groups exchange technical expertise and political information about their constituencies' support in return for access to the policy process, be it control over policy outcomes or monitoring information on the political process." (Beyers and Braun 2014: 95). In table 3, instead, are summarized the different factors, both endogenous and exogenous, that have been referred to in the literature as affecting interest groups strategy choice. These have been divided again by Junk (2016) in organisational level factors (endogenous) – i.e., pertaining specifically to the organisation nature, constituency and resources – institutional and issue level factors. The last two types are both exogenous but are different in the way in which they affect interest groups.

With regard to the institutional setting, studies have been conducted both at the EU and at the national levels. The former have evidenced how the EU as multi-level governance system on the one hand increases the chances to access the policy-making process because of the multiplication of venues and the possibility for venue-shopping (Beyers, 2004; Dür, 2008b); on the other hand, it creates a barrier to access for all the organisations that do not have enough resources and information to operate at different levels and/or to cope with the system

complexity, or as Baumgartner put it, multi-level advocacy "requiring simultaneous lobbying strategies at many levels may increase barriers to entry, excluding smaller actors" (2007: 483). The studies conducted at the national level instead have evidenced how electoral systems and forms of government make more valuable and easy to gain access to policy-makers or go public (Kriesi et al., 2007) – e.g., public interest group have better access in direct democracies (Switzerland), then in places where referendums are less used (Germany) (Weiler and Brändli, 2015).

Issue level factors are also exogenous and depend on the characteristics of the policy field. Among these, some scholars have studied how the level of lobbying competition affects the possibility of interest groups to gain access (Mahoney, 2008); however, the level of competition seems to be a determinant for access particularly for private interest groups, not public. Another policy field characteristics are the salience and complexity of the issue area considered; the more the issue is salient, the more public interest groups mobilise and the more policy actors are willing to interact with civil society to appease the larger public (Baumgartner and Leech, 2001; Mahoney, 2007, 2008; Klüver, 2011). However, the increase in access possibilities in this situation becomes a reality only if the issue is framed in the same way by public interest groups and in the public discussion, which is why issue-framing is also an important exogenous factor for the strategy choice of public interest groups. Finally, the literature has been concerned also with the study of how fragmentation of the policy field could affect access of public interest groups; Thiel and Uçarer (2014) have presented the differences in the choice of strategies between migration and human rights advocacy groups at the EU level: the migration policy field is highly fragmented, leading organisations to diversify significantly their repertoire in order to gain access, while the human rights field at the EU level provided for a specific venue[52] and, thus, made strategy diversification less necessary.

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[52] The main venue is the Fundamental Rights Platform, which is where CSOs advocating human rights interact with the Fundamental Rights Agency of the European Union.

The literature has been particularly prolific in analysing the impacts of endogenous or organisational factors on the strategy choice of public interest groups and advocacy organisations. First and foremost, literature has been concerned with organisations' financial and human resources. Considering the annual budget as the measure of groups' financial resources, Dür and Mateo (2013) have demonstrated that interest groups with higher budgets invest more in insider tactics; this happens notwithstanding the ability of groups to increase simultaneously the spending in both inside and outside tactics. The nature of the donors has also been considered, as funding coming from the constituency/membership base requires more outside lobbying than funding coming from big private donors or the public sector. Other organizational factors relating to human resources are staff size and organisation's constituency – i.e., the ones whose interest is represented by the group. Organisations with a constituency composed of individuals, as opposed to one composed of firms or other groups, use more outside lobbying strategies (Weiler and Brändli, 2015).

The constituency of the organisation also determines the type of membership or organisational characteristics: the type of interest group is an important determinant for the choice over outside or inside tactics, at the national but also European levels (Maloney et al. 1994; Dür and Mateo 2013). The big cleavage between public and sectional interest groups implies a different mix of lobbying strategies: more outside lobbying for cause groups than for private/sectional interest groups, with the exception of those cause groups and NGOs that "while becoming more institutionalized, lose grip on their base" (Ruzza, 2004). The members of the group also determine the level of radicalism of the organization, depending on the nature of the interest represented and their ideological view. Lastly, among the organizational characteristics there is also the geographical level at which the organization works, as seen in section 1.3 – i.e. European, national, local, transnational levels.

EU actors also have a preference towards specific organizational characteristics, thus influencing the choice of interest groups' strategies. High levels of technical expertise,

participation in coalitions, implementation and intermediation capacity, together with embeddedness of the organization are all factors that induce EU actors to grant access, and therefore the organisations endowed with these characteristics are more prone to use insider lobbying tactics. The network position can be considered both as an endogenous and an exogenous factor. According to Beyers and Braun (2014) gaining access for CSOs depends also from the "ties" that these organisations have with other interest groups, active at the same level of governance. The participation of a specific public interest group within a large network, gives the said group a strong advantage in using insider tactics. As a matter of fact, a group which has connections not only with like-minded organisations but also with other groups has the possibility to avail itself of a wide range of new information and expertise, which is shared within the network of "weak ties" – i.e., connections with organisations outside of the group coalition. The potential to offer more information is highly valuable to policy-makers and, therefore, the group which values "weak ties" is expected to gain more access compared to other groups. This hypothesis, however, has been tested only in the national arena.

Finally, the choice of strategies is determined by organisational routines, political mentalities and alliances (European Commission, 2006; Beyers and Braun, 2014). This implies that even though some strategies are not successful in terms of impact on EU actors and policies, the repertoire may not vary accordingly. As a matter of fact, the effectiveness of interest groups in changing policies may become a factor in the decision on the strategies to employ, if interest groups and advocacy organisations are aware of how to pursue lobbying and advocacy strategies successfully. The study of how effective the strategies pursued by interest groups are in changing policy and "What explains the relative influence of NGOs on the policy outcomes of IOs?" is the object of a different literature on interest groups and is addressed later in this chapter (Baumgartner et al., 2009; Tallberg et. al., 2018).

To conclude, literature and practitioners generally agree on the assumption that insider lobbying strategies are the first best option for interest groups vis-à-vis outside lobbying. In

Beyers and Braun's words "While outside lobbying and media strategies are certainly important, direct access to policymakers seems to count most in influencing public policy" (2014: 93). This is because gaining access is a sign for interest organisations that policymakers are available to make policy concessions to their constituencies (Bouwen and McCown, 2007; Baumgartner et al. 2009). However, there is no consensus over the locus where advocacy can be most effectively pursued, except for the consideration that "attempts to influence policies are most efficient when multiple tactics are used. For these reasons, most political interest groups use a mix of inside and outside strategies rather than specialising in the use of either of them" (Weiler and Brändli, 2015: 747; see also Beyers, 2004; Braun 2012).

It must be noted that lobbying and advocacy are usually studied in the form of legislative lobbying, addressed to policy-makers and government representatives. The incentive structure of nonelected officials to interact with interest groups may slightly change due to different needs in terms of legitimation (Braun, 2012). Moreover, according to Pérez Durán (2017) very little attention has been devoted by scholars to the role of stakeholders in the decision-making and activity of EU agency. The next section addresses these issues by examining the literature on CSOs' influence on EU actors.

2.2. THE INFLUENCE OF CIVIL SOCIETY ORGANSATIONS ON EU ACTORS

The crisis of the EU has taken many forms during the second decade of this century: it has materialised not only in the financial and economic realms but also in terms of territorial fragmentation[53]. The precarious situation of the Schengen Treaty may mark the end of freedom of movement of persons within the EU and a significant slowdown in the movement of goods. There is a lesson to be learned here regarding how the EU governance system has come to this

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[53] The crisis of Schengen, triggered by the Paris attacks (November 2015) and exacerbated by the refugee crisis (2015-2016), is threatening the freedom of movement of persons and goods through the reinstatement of border checks among member states.

breaking point. Majone (1996; 2000; 2014) has argued that the insulation of the EU political process and the strengthening of its elitist character, realised also due to the agencification process, has had a role in fuelling the dissatisfaction of public opinion[54]. The proposal put forward in this study consists in enhancing the possibilities for EU governance learning by analysing how a specific part of the EU executive sector (i.e., EU agencies) has opened up to the participation of civil society organisations (CSOs).

The solution proposed builds on the literature of the last years of the first decade of 2000 that warned not to couple too easily new modes of governance with an increase in the participation of public and private stakeholders which would have, in turn, enhanced the participatory character of the EU democracy (Kröger 2008; Smismans 2008). Against this background, this chapter presents a new way of understanding the interaction of CSOs with EU actors, with a particular focus on EU agencies. This Section (2.2) proposes a taxonomy of the interaction between CSOs and EU actors, which might shed light on old and new "modes of participation" (i.e., consultation practices, impact assessments, open method of coordination, social accountability). This Section also explores the possibility that the interaction of civil society organisations with the elitist institutional environment of EU agencies, in the form of influence and accountability relationships, engenders learning and thus enhances the reflexivity of these EU actors.

The following Sections address the issue of how CSOs interact with EU actors through the exploration of what CSOs' influence and accountability potential might entail in terms of learning for EU agencies. The first section (2.2.1) examines why influence is such a debated concept in the literature on interest groups. This is followed by an examination of the debate on the "grand theory" of the role of interest groups in political systems, in which influence and power are closely related concepts. Section 2.2.3 then proposes a revised definition of influence,

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[54] Majone argues that when redistributive policies are concerned, supranational insulation is no longer possible and democratic oversight is required (1997; 2014).

which better applies to CSOs' interactions with EU actors (e.g., consultation practices). Section 2.2.4 then focuses specifically on EU agencies, considered as CSOs privileged interlocutors for the purposes of this study, and elucidates how the discussion on accountability is essential to the object of this study – i.e., the presence of CSOs within Frontex. The possibility that CSOs might become accountability fora for EU agencies is thus explored theoretically by using the concept of social accountability. Section 2.2.5 proposes a taxonomy of CSOs and EU actors' interaction in the current framework of EU governance and explore the potential for CSOs and EU actors' iterated interaction to produce, as final outcome, mutual learning.

2.2.1. THE STUDY OF INFLUENCE: A SIREN CALL

Interest groups, both private and public, are united in their function to influence public policy (Eising, 2008). They recognise that their main aim is to voice their interests and to obtain resources for their constituencies and for themselves, in order to survive and keep pushing forward their claims. Moreover, they engage in formal and informal exchanges with decision-makers at the local, national, supranational, and international levels. In engaging with decision-makers, public interest groups need first to mobilise and face the crowded sphere that lies between the state, the market, and private life, namely, the social sphere. This is where interest groups choose to cooperate or to compete with other organisations by forming coalitions. At this point, interest groups are ready to interact with decision-makers to pressure them to embrace their cause, also by framing "the underlying dimensions that define policy issues" (Beyers et al. 2008: 1107), hoping that the policy outcomes will reflect their claims. This chain of actions is often referred to as the influence production process.

Influence is thus exercised in a social relationship between social actors. This Section, addresses specifically the social relationship between public interest groups[55] and EU actors,

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[55] Here the terms "public interest groups" and "civil society organisations" (CSOs) are used interchangeably. As Beyers et al. affirm "the key features or components which define an actor as an interest group [are] organisation, political interests, and informality." (2008: 1106). CSOs have all three of these features: whereas organisation is implied in CSOs' name, political interest can be inferred from their advocacy agendas and pursue their goals through the establishment of informal interactions. Therefore, following Beyers, Eising and Maloney's definition,

for two main reasons: one is empirical/analytical, while the other is normative/theoretical. First of all, the EU has been calling for more inclusion of civil society organisations in the EU governance system (as described in the previous section 2.1): it is hence necessary to assess what are the effects of this inclusion by analysing the relationship between EU actors and CSOs. Secondly, civil society participation is one of the main components of democratic theories of governance, which could benefit from new empirical insights. Moreover, studying influence means trying to open the black box of how social interactions affect decision-making. All these reasons make studying influence extremely appealing to social scientists, but at the same time, similarly to the call of the sirens for Ulysses, dangerous due to the difficulty in establishing a univocal causal link between the actor who exerts influence and the effects produced on the actor which is the target of influence.

Civil society organisations, in the form of non-governmental organisations (NGOs), epistemic communities, and advocacy groups, have been involved in the everyday life of the EU from the very beginning of the process of integration and have seen an increase in political opportunities ever since[56]. Environmental, gender, migration and human rights are some of the numerous policy areas in which public interest groups have established their ability to voice their claims. The advocacy function of CSOs active in the field of human rights has evolved significantly, since 2009, thanks to three main developments at the EU level, crystalized with the Treaty of Lisbon. First of all, the increased opportunity of accessing directly the EU decision-makers (art. 11 TEU). Secondly, the new information available at the EU level, thanks to the principles of openness and transparency enshrined in the EU Treaties (art. 15 TFEU)[57]. Finally, the recognition of treaty status to the EU Charter of Fundamental Rights.

CSOs which decide to advocate for a specific issue and lobby policy-makers, at all levels, are fully-fledged interest groups.

[56] See Section 2.1.2.

[57] Interestingly, while the requirements for openness and transparency (good governance principle) are explicitly targeted at EU institutions, agencies and bodies, in art. 11 participation is considered a principle to be enforced specifically by EU institutions (bodies and agencies of the EU are not mentioned).

These developments of the EU legal framework, along with the expanding opportunities given by the multi-level governance system, induced more CSOs to professionalise and to attempt to exert influence on EU decision-makers and bureaucrats (Klüver and Saurugger, 2013). Even though there is no record of the exact number of interest groups interacting with the EU[58], Greenwood has recorded a swift increase in the number of interactions among interest groups and the EU level starting in the 1990s (Greenwood, 2011). It has also been noted by Coen that "the rise of forum politics and the emergence of a distinct European public policy style helps to explain a 'bandwagon effect' pulling yet more interest groups into Brussels" (2007: 341). Thanks to these new opportunities, CSOs have shifted their attention from the national to the EU level, according to the moment of the policy cycle – i.e., agenda setting, implementation, monitoring – in which they are interested and depending on their resources, functions and ideology (Ruzza, 2004; Baglioni 2015).

Another reason for the relevance of the study of CSOs' influence is to answer to the question that all interest groups have to pose themselves at some point: is it worth it? As a matter of fact, the main objectives of interest groups are to shape the preferences of decision makers according to their own preferences and, consequently, to have an impact on policies or political and administrative decisions. However, assessing the outcomes of the exercise of influence has proven to be highly problematic as "the lobbying environment is one governed by uncertainty in goals, means and, especially, the relationships between them" (Lowery 2013: 2). Overall, the lobbying exercise has been described by David Lowery as an "addictive behaviour", that is triggered because "payoffs from altering the status quo may be very large indeed." (2013: 12). It must be noted that the activity of public interest groups is not only meant

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[58] The introduction of the Transparency Register by the European Commission, in 2011, has not changed this situation due to its non-mandatory nature. The Commission, however, is aiming to extend the reach of the Register by "committing to introduce more incentives to encourage registration" (Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implemention, 19/09/2014, OJ L 277, 19.9.2014, p. 11–24, point VI).

to influence decision-makers and achieve policy goals, but it also serves survival needs such as mobilising members and gaining resources (Dür, 2008b; Lowery, 2013).

Nevertheless, pessimism has pervaded the study of the influence of interest groups in the EU, be it due to fatigue in trying to make sense of and measure the concept, or to the difficulties in bridging theory and empirical studies, or the hardships to finding a way to study and compare an emergent system of interest representation (in the EU) with an established one (in the USA) (Lowery and Gray, 2004; Coen, 2007; Beyers, Eising and Maloney, 2008; Kohler-Koch, De Biévre and Maloney, 2008; Klüver, 2013). Moreover, the literature on lobbying is highly fragmented, as suggested by the title of chapter 7 of Baumgartner and Leech's "Building a literature on lobbying, one case study at a time". Fragmentation has made comparison of influence studies difficult (Eising, 2008; Lowery, 2013) and has led to contrasting findings (Kluver, 2013; Baumgarter and Leech, 1998; Lowery, 2013). Particularly with regard to the impact of NGOs' lobbying activities on EU actors, Dür and De Bièvre effectively describe a diffused idea among scholars: their hypothesis is that NGOs' influence on policy outcomes is "heavily circumscribed, even if these groups manage to gain access to public decision makers" (Dür and De Bièvre, 2007a: 80), and the findings they present in the field of EU trade policies seem to confirm it.

However, while studies on the European lobbying system for private interest groups have advanced in terms of empirical analysis, public interest groups have received a lower level of attention in this niche field (Beyers, Eising and Maloney, 2008). Research on private interest groups enjoyed an improvement due to the systematic investigation of interest groups' influence in large-N studies. These studies pushed forward knowledge about the impact of private interest groups on policy outcomes in the EU and successfully bridged theory – i.e. élite pluralism – with empirical data (Coen, 2007). Public interest group influence, on the other hand, has had less substantial theoretical and analytical developments. This could be explained by the low number of public interest groups compared to private ones. Indeed, public interest groups

accounted, in the early 2000s, for about 20 percent of all interest groups active at the EU level (European Parliament, 2003); in 2015 they were about 30 percent of all the registered interest groups, while in 2016 only NGOs accounted for more than 25% of registrants (European Parliament and European Commission, 2016).

Notwithstanding the difficulties in defining and measuring civil society influence on EU actors, the importance of this theoretical and empirical exercise is evident, particularly nowadays at the EU level. A possible explanation for the circumscribed and inconclusive findings evidenced by the few studies carried out on the influence of CSOs on EU actors is that influence exerted by these actors has still to be fully understood. The constant evolution of the political opportunity structures and of the relationship among CSOs and EU actors might be a logical explanation for these findings. From a more theoretical and normative perspective, the question of what is the contribution of civil society in the EU governance system should be readdressed and re-examined to keep pace with these changes.

The next two sections follow the sirens' call and addresses the question: how can the influence of civil society organisations on EU actors be defined? Section 2.2.2 reviews some of the numerous attempts to define the elusive concept of *influence* first by looking at its fraternal twin, i.e., *power*, and then Section 2.2.3 provides an empirically workable definition of influence. The concept of influence proposed here describes a process in which actor A (e.g., CSOs) interacts with actor B (e.g., EU agencies) with the purpose of affecting actor B' decisions, to a certain degree.

2.2.2. FRATERNAL TWINS: POWER AND INFLUENCE

The research on EU interest groups' influence has solid foundations, which were laid down by pluralist and elitist theorists by studying the American society and its interest groups. As a matter of fact, the study of interest group behaviour has been at the very core of the question about who has power in America and how that power is organised. This implied

addressing the debate over grand theory, meaning "a framework for understanding the broader political system, not just interest group behavior" (Hojnacki et al., 2012: 92).

Dahl famously triggered the debate on community power that still divides pluralists and elitists, by asking "who governs", or who has power, and how power is understood and distributed in American democracy (1961). The terms *power* and *influence* are often used interchangeably; according to Dahl power is defined as a relation among people and "intuitively" it is "something like this: A has power over B to the extent that he can get B to do something that B would not otherwise do" (Dahl, 1957: 202-203). However, the term *influence* is preferred in the study of interest groups as it retains a slightly different connotation: influence implies that manipulation is the means by which A gets B to act according to her preferences, differently from the use of coercion and force which are instead part and parcel of the exercise of power (Lukes, 2005: 36). Manipulation implies a re-shaping and/or re-framing of a controversial issue and thus persuade the subject of the influencing effort to change its understanding of the issue itself in line with actor A's preferences.

Pluralist theory, in essence, contends that political power is distributed among a number of groups in the social sphere (e.g., political parties, interest groups, and classes) and that whenever a group emerges and mobilizes on a specific interest, it is in competition with the other interest groups. Policies are thus the result of bargaining and compromise among these groups, while the state is a neutral actor in the power game. Pluralism has evolved over time from the study of how, and with what resources, interest groups organize themselves and compete in the economic and social arena, to the study of interest mobilization (particularly of diffuse interests), and finally to the lobbying behaviour of interest groups, the role of institutions, and the analysis of the interest group population (Olson, 1965; Dahl, 1967; Baumgartner and Leech, 1998; Lowery and Gray, 2004).

Elitist theory, on the other hand, contends that power is concentrated in the hands of a small circle of rulers, and it is often hidden under the surface (Hunter, 1953; Mills, 1956). In

particular, elitists postulated that any social organisation is ordered according to a "power structure" that tends to be stable over time. Within this structure, power can be uncovered only on the basis of reputation: the question that elitists pose is, therefore, "who runs this community?".

According to the elitists, power can be also expressed through non-decisions (and non-decision making) and therefore is particularly difficult to capture empirically. Bachrach and Baratz define influence as "existing where A without resorting to either a tacit or overt threat of severe deprivation causes B to change his course of action" (1970: 30), thus separating the concepts of power and influence by showing that influence is exerted by means of persuasion or manipulation, while power entails coercion and/or force (Lukes, 2005: 36).

Lukes, a Marxist, provides an effective taxonomy of the studies on power, and proposes a new dimension for analysing what he terms "radical power" and influence – i.e., a "third face of power". What he defines the "first face of power" is embodied by the pluralists' view which assumes that power is visible in any relationship, and in a democratic society it is exercised through deliberation. The second face of power is purported by elistists; according to them, power is invisible because the ones who have power can set the agenda and thus stir the debate to their advantage, changing the terms of discussion. These two faces have in common the ability of actor A to force actor B to act in line with A's preferences, and coerce B by using either a stronger intellect (i.e, with the strength of the better argument) or a privileged position. Lukes adds a new dimension to this debate on power, namely a "third face". The third face of power implies the covert manipulation of actor B through the imposition of a specific way of framing issues in the public discourse by A; as an example, using the media as channel of influence in a closed economic system, A (i.e., business owner) manipulates public discourse to make B (i.e., consumers) believe that it is right to feel the urge to consume, and, as a consequence, B consumes and does not rebel against A. In sum, the first and second faces of

power are concerned respectively with decision-making and non-decision-making; the third face of power, instead, is concerned with preference formation (Robinson 2006).

This third and face of power seems to resonate the work of Foucault on power. Foucault argues:

> "in a society such as ours, but basically in any society, there are manifold relations of power which permeate, characterise and constitute the social body and these relations of power cannot themselves be established, consolidated nor implemented without the production, accumulation, circulation and functioning of a discourse....This is the case for every society, but I believe that in ours the relationship between power, right and truth is organised in a highly specific fashion" (lecture 1976).

Foucault observes a strong link between discourse and power, a link that becomes tangible (even if not visible) when the "dominant" discourse shapes both what is truth and what is right in our society. This is exactly what Lukes describes by looking at the third face of power: power is hidden in the discourse that actor A "imposes" on actor B, who is not aware of being part of a power relation.

In the next section the considerations on the faces of power inform the proposed definition of influence.

2.2.3. A DEFINITION OF CSOs' INFLUENCE

As shown in the previous section, many have attempted to define influence. In 1965, Cartwright identified three major aspects of influence: the agent exerting influence, the method of exerting influence, and the agent subjected to influence (1969). The identification of these three aspects was designed to help researchers to better understand influence, by underlining that influence is first and foremost the outcome of a social relationship. Thus, following Cartwright, influence is a social relationship established voluntarily between two agents, or actors, and it has both a conflictual and an informational character (Chalmers, 2011: 475). These

two aspects can be explained in terms of the logic of exchange[59]: policy-makers and administrators grant access to interest groups in exchange for information and political support, while interest groups receive information which they might use to expose publicly policy-makers and administrators' wrongdoings. In sum, asymmetry in a social relationship generates a power relationship.

Recognising the nature of influence as being embedded in a social relationship, and drawing from the narrow and empirically testable definitions provided by Lukes (2005) and Dür (2008a), for the purposes of this study influence is defined as *the ability of an actor A to shape a decision by an actor B, to a certain degree, in line with actor A's preferences, through persuasion, in the framework of an enduring/institutionalised interaction*.

In order to clarify this definition, each part of it is analysed separately:

1. *The ability of an actor A to affect a decision by an actor B*: actor A has the ability to change or shape actor B's decision. Change entails not only a reconsideration of actor B's decision but also that actor B does *not* change decision, if this is how actor A wants to affect actor B's decision; moreover, change may entail a shift in the way actor B frames specific issues. For the purposes of the present research the two actors involved in this influence relationship are CSOs (actor A) and EU actors (actor B);

2. *to a certain degree*: it identifies the scope of influence. The change in actor B's decision may be only partially in line with actor A's aspirations;

3. *in line with her preferences*: actor A's preferences need not to be considered as rational, but they need to be identifiable as part of her public agenda;

4. *through persuasion*: the means through which the preferences of actor A are conveyed to actor B are not only similar to the ones used in a deliberation process,

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[59] For a thorough debate on the logic of exchange, see 2.1.5.

but also, in line with Luke's third face of power, preferences of actor A are conveyed to actor B by a continuous interaction and actor B starts to believe that A's preferences are also his own;

5.   *in the framework of an enduring interaction*: occasional interaction might entail consultation that does not necessarily lead to influence.

This definition of *influence* is embedded in a specific framework, which is the social nature of the relationship that produces influence. This social relationship is non–hierarchical in nature and it exists in a multi-level governance system, system mostly stirred through non-hierarchical relationships among actors with overlapping competences. Engaging in a relationship in this system requires expertise; expertise that is used by actors that exert influence to produce evidence and support their arguments. This explains clearly why influence does not coincide with power (as in principal-agent relationships, where power is delegated). Moreover, influence is based on persuasion and the strength of the better argument (deliberation), while power can also imply coercion (power includes influence, but influence does not include power (Lukes, 2005)). Finally, influence as defined here entails the possibility that aspects of A input will not be incorporated in the decisions or actions of B. In sum, influence in this study is considered as a *process* or a *type of interaction*, not as an *outcome*.

The next Section discusses another type of CSOs and EU actors' interaction, namely social accountability. It does so by focusing specifically on EU agencies which are the EU governance actors that are most relevant for the purposes of this study.

2.2.4. EU AGENCIES AND SOCIAL ACCOUNTABILITY

In the literature, two main meanings of accountability can be distinguished: one focusing on "rendering account", which involves only information disclosure and justification of conduct by the accountor, and the other focusing on "holding to account", which also entails a relationship with the accountee, be it vertical – as in principal-agent relationships – or horizontal – with third entities (Bovens, 2007a; Brandsma and Schillemans, 2013). Another common

practice in defining accountability is the listing of a catalogue of different species of accountability mechanisms, such as legal, democratic, financial, and administrative. 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: 497; Bovens et al., 2014).

Drawing attention to accountability is not only an issue for scholars: in its White Paper on EU Governance, the European Commission, lists accountability as one of five principles underpinning good governance, democracy and the rule of law (European Commission, 2001: 10). Two other principles are transparency and responsiveness, and it is important to distinguish the accountability process from both of the concepts, because "within some EU policy, transparency has been viewed as interchangeable with accountability" (Fisher, 2004: 503). Transparency of the agency/accountor is considered to be 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: more specifically, it is "linked with the extent to which governments pursue the wishes or needs of their citizens" (Mulgan, 2000: 557).

The accountability deficit has historically been an important concern in the study of democratic systems of governance (Bovens et al., 2010: 957), traditionally taking the form of ministerial responsibility and judicial review, but it has particularly re-emerged with the booming in formal powers, numbers of staff and organisation complexity of executive branches both of states (Mulgan, 2000) and of EU governance (Curtin, 2007; Bovens, Curtin, and t' Hart, 2010).

European agencies have a particular position in the quest for accountability of the multi-level EU polity (Hofmann and Morini, 2012; Busuioc, 2013). 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 study, border control.

Their accountability is being studied due to the trend towards the delegation of ever-broader powers. According to Kohler-Koch "[a]ccountability presumes a principal–agent relationship of delegation and sees accountability as the appropriate mechanism of keeping the agent in line with the preferences of the principal" (2010: 1118). In the specific case of EU agencies, the delegation process has left these bodies without an ultimate principal, but with a number of principals none of which has the ability by itself to retrieve the delegated powers (Agné 2007). Furthermore, EU agencies are increasingly relevant in terms of accountability concerns because of the direct impact of their expanding competences on member states, regulators and individuals (Busuioc, 2013).

In the EU, legitimacy and accountability concerns have been increasingly answered by involving civil society organisations in the EU decision-making process or by institutionalising the presence of civil society organisations within EU bodies (Heidbreder 2012; Koop 2014). The accountability relationships that have been established between CSOs and these EU bodies can be categorised as social accountability relationships (Bovens 2007a).

The definition of social accountability has been developed mainly in connection with the emerging practice of private corporate responsibility, with the process of democratisation in developing countries, and in general with the accountability concerns deriving from global governance institutions (Malena et al. 2004; Scholte 2013). In particular, the World Bank has highlighted the importance of having governments directly accountable to their citizens in order to implement programs to reduce poverty in developing countries and has stimulated research on the issue.

The definition of accountability used in this study is the clear and empirically workable definition provided by Bovens: "Accountability is *a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences*" (italics in original) (2007: 450). In the present case of social accountability, the relation is between a EU agency

(i.e., the *actor*) and CSOs (i.e., the *forum*). As per Bovens' definition, when the forum is a public stakeholder (e.g., clients, non-governmental organisations, customers), the accountability relationship takes the name of *social accountability* (Bovens et al. 2014; Bovens 2007a). Within this relationship the agency is obliged to explain and justify its conduct vis-à-vis the civil society organizations that have an interest to pose questions and have the expertise to pass judgement on the agency's behaviour; according to the judgement of CSOs, the agency may face consequences, including both formal and informal sanctioning (e.g., media exposure for wrongful conduct).

Social accountability is a concept that is closely related to the idea of civil society acting as a "checking power" (Fung 2003). Instead of resisting and exposing illegitimate authority (as in World Bank studies), social accountability is a means for CSOs to expose the shortcomings of public authority, engage in a debate with public authority itself, and eventually sanction misconduct. However, empirical studies of social accountability mechanisms at work in the EU, outside of the private realm, have not been systematically conducted. The only relevant attempt at systematizing the role of CSOs in EU accountability is Kohler-Koch's study of 2010. She proposes a taxonomy of accountability relationships based on a double function of CSOs in accountability relationships – i.e., CSOs may act either as *actors* or *facilitators* of accountability – and a double significance of social accountability – i.e., *one-level* or *two-levels* accountability. In this framework CSOs are not only the ones that directly hold accountable EU actors, but they also facilitate the information flow from EU actors to citizens, so that citizens themselves can act as forum; moreover, CSOs are not only the forum to which EU actors have to render account, that is Boven's social accountability, but they also become the ones who have to render account to their constituencies.

For the purposes of this study, the two-levels accountability is not analysed, as describing how CSOs are accountable to both EU actors and their constituencies is incompatible with the aim of studying the influence of CSOs on EU actors. However, it is crucial to understand

whether CSOs act as a real forum of accountability for Frontex – i.e., *actor* in Kohler-Koch's words – or as facilitators, so that citizens can act as empowered forums. In the first draft of a paper presented in a Conference in Trento in 2013, Moravcsik describes the European voters in a clear way: "Europeans ... are functional pragmatists. They do not care much about the level of European 'demos', 'we-feeling', or 'community', which has not changed much in decades....In order to support EU action, Europeans require a concrete stake in its issues" (2013: 18). In sum, CSOs acting as facilitators of social accountability provide citizens with a tool to understand that they already have this "concrete stake", while CSOs acting as forum of social accountability open new opportunities for civil society participation in a democratic polity[60].

Previous research on the accountability regimes of European agencies has neglected social accountability, focusing on more traditional forms of accountability[61] (political, managerial, financial and judicial). These traditional forms of accountability seem, however, to be systematically flawed due to the peculiar position of EU agencies. Connected to the peculiar position of EU agencies, there are two main reasons why traditional forms of accountability are unsatisfactory: first of all, EU agencies are designed to be independent while they exercise an ever-expanding range of competences; secondly, traditional forms of accountability are based on the principal-agent theory which is hardly applicable in the case of EU agencies.

The relationship between independence and accountability in the case of EU agencies is particularly complex. While the need for agency oversight is undeniable, the requirement of independence of agencies themselves could be jeopardised by it. European agencies have their distinctive feature in non-politicisation and expertise, which position them far from 'petty national politics' and, therefore, their *raison d'être* lies precisely in their independence.

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[60] The democratizing role of social accountability, and its link with legitimation and effectiveness, is not discussed here as if falls outside of the scope of this study. However, there are few authors that address this issue, starting with Bovens in his now seminal article "New forms of accountability and EU-governance" (2007), but also Kohler-Koch (2010) and Moore (2014).

[61] The research into de jure and de facto accountability relationships of European Agencies has been initiated by Busuioc (2013), who also argues for a new form of accountability: the extra-judicial accountability, which designates the European Ombudsman as the forum of the accountability relationship.

Independence makes them the perfect technical arenas for member states to bargain without the national political pressures and to ensure the deliverability of policies that could encounter political blame at any other level of governance (Majone 1998).

It is, thus, necessary to strike a balance between the need to maintain autonomy and independence of agencies, on the one hand, and accountability and control, on the other (Magnette 2005; Busuioc 2013). Predictably, the literature is divided over the assessment of the relationship between agency's independence and accountability. Some consider that the accountability/independence dilemma is a zero-sum game or, at least, that these two agency features are negatively correlated (Gerardin et al., 2005; Scholten, 2014), while others support the view that accountability and independence are mutually reinforcing (Busuioc 2009). Overall, it is clearly established that too much transparency could hinder agency efficiency (Majone 1998). What is still open to debate is whether oversight through a social accountability arrangement – i.e., exercised by CSOs – could balance agencies' independence, which is one of the issues that this study aims to address.

The second reason why traditional forms of accountability are not fully satisfactory – i.e., when EU agencies are concerned – is that they imply the traditional principles of a principal-agent type of accountability. In the "classical" principal-agent notion, the principal – i.e., the delegating authority – establishes the limits of action of the agent and tries to set up mechanisms – i.e., accountability mechanisms – to avoid that the agent 'shirks' or 'slips' (Shapiro 2005). Shirking involves the agent trying to avoid pursuing principal's interests to maximize its own power/utility, while slippage occurs when the structure of delegation itself leaves room for manoeuvre to the agent in a way that the agent might act counter to the principal preferences (Kassim and Menon 2003).

There are three aspects that need to be addressed concerning the principal-agent theory as applied to EU agencies, which are overcome by using the theoretical framework of experimentalist governance (Sabel and Simon, 2006): first, principals lack the information and

knowledge to exact accountability; second, shirking and slipping are not only unavoidable but are built-in features of EU agencies; third, the chain of delegation that links EU agencies with their principals is broken.

First of all, the asymmetry of information between the principal and the agent is unavoidable[62]. EU agencies are born precisely from the necessity of decision-makers to leave to experts both the solution to specific problems and the coordination of activities among national administrations. Secondly, the discretion of the actor cannot be totally avoided not even with the highest level of detail provided by the rule-maker. Experimentalist governance[63] recognises the need of this gap between rigidity and ambiguity in the EU governance system which is created "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 and Simon, 2006: 398). Thirdly, the principal-agent perspective implies that principals can retrieve their delegated powers from agents, that is if the chain of delegation works properly. However, in the case of EU agencies this is impossible, as powers were not delegated, but created *ad hoc* (Pollak and Slominski 2009).

Social accountability can help solve some of the problems evidenced in this section by incorporating a "dynamic" feature. This dynamic twist to accountability has been proposed by Sabel and Zeitlin (2008) with their Directly Deliberative Poliarchy theory (DDP)[64](see also

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[62] Weber already presented in 1919, with his "Politics as a Vocation" the problem of omniscient bureaucracies that are at once fundamental to administrate complex policies and a threat for the political actor that does not possess an adequate of knowledge.

[63] An extensive discussion on the principles of experimentalist governance is presented further in this section.

[64] DDP or experimentalist governance is defined 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 and 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 and Zeitlin, 2012). DDP is a theory specifically conceived for the EU system of governance.

Cohen and Sabel, 1997). Dynamic accountability is defined as a relationship established among peers (e.g., experts), in the framework of an experimentalist governance, where means and ends are recursively redefined according to the need to address new policy challenges. According to Sabel and Zeitlin, this type of accountability has the potential to induce effective monitoring and increased dissemination of best practices. Similarly to Boven's definition of accountability, dynamic accountability is conceived as a *mechanism*[65] (or relationship) and not as an intrinsic value.

Experimentalist governance appears, according to Sabel and Zeitlin, in two cases: multipolar distribution of power and/or strategic uncertainty. A governance system based on a multipolar distribution of power is one in which "no single actor has the capacity to impose her own preferred solution without taking into account the views of the others" (Sabel and Zeitlin 2008: 280). Differently, a governance system with strategic uncertainty describes a system in which a governance actor is unable to pursue its goals due to lack of information and understanding of the matter. An experimentalist governance can thus be characterised both by an institutional/structural (i.e. multipolarity) and/or an actor-based features. EU agencies seem to fit both these criteria for experimentalist governance. They are positioned at the junction of a multi-level system of governance[66] in which power is distributed among actors both vertically and horizontally, while at the same time they act in arenas where strategic uncertainty is the norm.

In this framework, accountability has a highly relevant role; the very autonomy of the EU 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

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[65] 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".
[66] EU agencies are created as EU bodies but serve the purposes of harmonization of action by the Member States and collection and dissemination of best practices from and to the regional, national, and European levels.

"in which their results are compared with those of others employing different means to the same ends" (Sabel and Zeitlin, 2012). Civil society organizations become part of this revision of "means and ends" and trigger experimentation, reflexivity, and learning from a bottom-up perspective (Sabel and Zeitlin 2008; Smismans 2007).

Furthermore, experimentalist governance acknowledges "the ambiguity and complexity of frontline issues, and hence the need for a flexible response" (Sabel and Zeitlin, 2012); EU agencies, and Frontex particularly, have been established to organise a flexible European response to a number of regulatory and operative issues. This elevates the bureaucrat to a relevant actor in the shaping of policies that need to be as fit as possible to the single problem. Moreover, experimentalists support the view that a distinctive form of monitoring is usually required, which, in order to be effective, is different for every field in which it is applied. 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 and Zeitlin, 2012)

In sum, the independence and room for manoeuvre that EU agencies enjoy position them among the bodies of an experimentalist administration. In this system, independence is counterbalanced by transparency and accountability mechanisms that trigger the review of EU agencies' activities. In the case of Frontex, the agency is required to be transparent and accountable by EU law, as is any other body, agency or institution of the EU. With regard to review mechanisms, the agency needs to report annually on its activities to the public, can be summoned by the European Parliament for hearings, has been questioned by the European Ombudsman and has been assisted and monitored by CSOs and the Fundamental Rights

Officer. Moreover, human rights concerns, coupled with the need of expanded competences for the agency, have led to the rewriting of Frontex Regulation in 2011[67].

2.2.5. LEARNING AS AN OUTCOME OF FREQUENT INTERACTION

The outcome of CSOs interaction with EU actors, be it in the form of influence or accountability relationship, is learning. When these two kinds of social relationship have a recursive nature – i.e., are institutionalised – this in turn triggers (recursive) learning. In the iterated (i.e., institutionalised) relationship between CSOs and EU actors, CSOs engage in a dialogue with EU actors which can involve "at least" the provision of input (legitimacy) by CSOs to EU actors (e.g., information, creative solutions, expressing aggrieved minorities' voices), in exchange for access to the European decision-makers and administrators. "At best", the interaction between the two actors can take the form of an accountability relationship in which CSOs hold accountable EU actors in exchange for EU actors' output legitimacy. Indeed, due to their expertise and their ability to collect both inside and outside information on EU actors' activities, CSOs can debate and judge decision-makers' conduct and exercise their ability to blame and shame EU actors publicly.

The interaction between EU actors and civil society representatives is catalogued here (see Table 4) according to its *directionality* and its *frequency*: the former characteristic identifies the direction of the interaction (i.e., one-way or two-ways) and it might be considered as a "quality" indicator, while the latter points to the "quantity" of the interaction (i.e., occasional or regular/recursive). In the case of a one-way interaction CSOs provide information to EU actors without engaging in a debate with them, nor receiving in turn feedback or other information from EU actors themselves. A two-way interaction implies instead an exchange of views and information between the two parties. One-way interactions can occur either occasionally and rather formally between CSOs and EU actors (e.g., the large consultation

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[67] Regulation (EU) 1168/2011. A detailed discussion of Frontex review processes is provided in Chapter 4.

procedures initiated by the Commission), or regularly and rather informally between the two parties (e.g., EU actors have expert networks that provide the relevant information). Similarly, two-ways interactions can be either occasional or regular: an example of the former is the open method of coordination, while the latter might be exemplified by the interaction between CSOs and the EU agency Frontex.

Table 4: Forms of interaction between EU actors and civil society representatives at the EU level

	Occasional	Regular/recursive
One-way	Commission's consultation/impact assessments	EU actors activating their expert networks/networking and lobbying (providing information only)
Two-ways	OMC	CSOs within Frontex

Source: author's own elaboration

Repeated interaction might also lead to socialization, whereby actors are inducted into and come to internalize 'the norms and rules of a given community', as it has classically been defined in international relations and EU Studies (Checkel, 2005: 804). The phenomenon of socialization might also lead to capture[68] in the specific case in which EU actors act according to the interests of a specific group instead of the public good. In a social accountability relationship, the independence of the accountability forum (i.e., CSOs, for the purposes of this study) is a fundamental requisite. Indeed, an accountability relationship involves monitoring of EU actors by CSOs, which is possible due to, first of all, CSOs' independence, coupled with expertise and their ability to collect both inside and outside information on EU actors' activities, which leads to debating and judging EU actors' conduct and, finally, to exercising CSOs' ability to blame and shame EU actors publicly.

This interaction involves mutual learning, both of CSOs and EU actors. For the purposes of this study, attention is devoted particularly to EU actors' learning which is considered as a

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[68] This phenomenon is generally referred to as regulatory capture.

direct outcome of the frequent interaction and of a potential social accountability relationship and which can, in turn, become a proxy to establish the influence of CSOs on EU actors. In this sense, the third face of power is not used in a traditional way, to study how civil society is manipulated by policy-makers, but how civil society organisations can influence and thus manipulate policy-makers and regulators in this new institutional setting (i.e., EU agencies).

In sum, civil society organisations interact with international and supranational organisations in an institutionalised environment. The main reason to interact for CSOs at the European level is to influence EU actors, be it to change their policies and/or implementing measures, or to receive funds in order to keep working in the same field and pursue their own policy goals. CSOs gain access to EU actors, first and foremost by providing information and expertise, but also by enhancing their legitimacy and appeal of EU actors to the European citizens. CSOs activities include being in contact with policymakers, asking questions, monitoring on the ground EU actors' activities with the support of a network of local or national partners, and networking with other CSOs with similar agendas. Overall, there is a continuous process of learning for both sides that not only makes conflicts less harsh and less polarised but also solves problems that are common to both EU actors and CSOs.

2.3. CONCLUDING REMARKS

Chapter 2 has addressed several questions which are hardly new in the literature on CSOs' participation in the EU governance system and interest groups. In sum, the main questions on influence, and more specifically on the third phase of the influence production process[69] are: whether and to what extent CSOs influence decision-making in the European Union? Is the role of civil society organisations within EU institutions, agencies and bodies "nothing but

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[69] The influence production process is composed of four stages, as presented by Lowery and Gray: "Interest organizations must first be formed or, if already extant, mobilized for political action. The mobilized organizations then enter a population of interest organizations and seek to influence policy outcomes, sometimes competing or cooperating with other organized interests therein. The third stage entails the exercise or attempted exercise of influence as most often reflected in lobbying and/or campaign finance activity. And finally, policy outcomes reflect or fail to reflect these influence efforts." (2004: 164).

consultation"[70]? Dür and De Bièvre have effectively synthetized these questions into one: is it really all about "inclusion without influence?" (2007b)

Notwithstanding the fact that these are hardly new questions in the literature on interest groups, which dates back to the 1950s, influence remains an elusive and paradoxical concept: intuitively evident and hard to grasp empirically in all of its multifarious forms (Baumgartner and Leech, 1998; Beyers, Eising and Maloney, 2008; Dür, 2008b; Lowery, 2013). All the more so in the EU, where a European project has been funded precisely to respond to these and other questions regarding the activity of CSOs in the EU: the INTEREURO (Comparative Research on Interest Group Politics in Europe) Project, sponsored by the European Science Foundation[71].

This study, together with the majority of the literature on influence, has focused on a specific type of influence: influence on the legislative process and on its legislative outputs. The present chapter has evidenced the presence of another opportunity structure that CSOs are exploiting, namely to access the executive branch of EU governance. EU agencies are currently the target of CSOs lobbying efforts due to their quasi-executive powers and the almost complete absence of judicial review or judicial control over their actions. Consequently, CSOs interaction with EU actors is taking new forms and should be studied with new tools.

In Section 2.2 influence and accountability have been presented as social relationships, which trigger a process of learning for the actors involved. This interaction can imply at least an exchange of information between the actors, and at best can evolve into an accountability relationship. While repeated interaction leads to socialization of the actors, a form of interaction involving an accountability relationship (even if not completely voluntary) triggers a process of revision of "means and ends", thus leading a form of mutual and recursive learning (Sabel and Zeitlin, 2008). At the same time, a social accountability relationship in which means and

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[70] This is a reference to Kroeger's article "Nothing but consultation: the place of organized civil society in EU policy-making across policies" (2008).
[71] A special issue collecting the first results of the INTEREURO project was published by "Interest Groups & Advocacy" journal, June 2014.

ends are revised might prove to be an effective tool to hold accountable EU agencies while preserving their independence, as discussed empirically in Chapter 6. Chapter 3 explains the methodology used to carry out the empirical research, which is based on the theory discussed in this Chapter.

CHAPTER 3
Methodology and methods

"It seems you don't understand that words are the labels we stick on things, not the things themselves, you'll never know what the things are really like, nor even what their real names are, because the names you gave them are just that, the names you gave them"

(José Saramago*, Death With Interruptions,* 2005)

3.1. USING INTERPRETIVE METHODS

The study of language has its roots in the Aristotelian philosophy. Aristotele was fascinated by the role of story-telling: in particular, he focused on how stories were told effectively and how they were used to guide the moral conduct of listeners. Effective stories, or story-lines always have a specific structure: they present a situation, then there is a form of tension that builds among the characters or a problematic situation that the character have to face, and lastly the tension disappears and the characters are left with a new moral understanding on how to behave in similar situations. Any kind of audience is usually more prone to listen to stories than to a technical and detailed description of reality. So, let me start with a story in order to open the discussion on the methodology which best serves the purposes of this research on the influence of CSOs on Frontex' approach to fundamental rights.

This story has two characters: Etta and Maria. Etta comes from Nigeria, Maria comes from Romania. They both migrated to Europe in search of better conditions and they are both trained nurses. Maria arrived in Europe 15 years before Etta. Maria has strong feelings against "black people", whom she generally perceives as people coming from Africa, because she strongly believes that they steal jobs and are dangerous. Maria works at home as a caregiver when the health conditions of the person she cares worsen significantly and Maria is not able to carry out the job alone anymore. That is when Etta appears, willing to cover for the tasks that

Maria cannot perform. Etta has been working and living in multicultural environments and she is immediately friendly to Maria. Maria is afraid of Etta and she strongly opposes the presence of Etta in her workplace. Notwithstanding her fears, Maria is forced to work with Etta due to the conditions of the cared person. Maria is reluctant and struggles at first. Month after month, she starts to get acquainted with Etta and her understanding of multicultural environments. Discussing with Etta, as time goes by, the two become friends and Maria is introduced in Etta's community and changes her mind about people coming from Africa.

This story describes a very common situation in Italy nowadays, even though the outcomes are not always as successful. This is a story, and as such it as an initial situation, a moment of tension and a solution. What is the moral teaching here? The intention here is not to make a normative or an ethical statement, but to empirically look at the evolution of Maria's approach, or *frame*, towards Etta and towards the whole idea of people coming from Africa. At the beginning, Maria has a very specific way of framing Etta: she is dangerous, for a number of reasons, and she feels safe in reading reality through these discriminatory "glasses", or the espoused culture. After being compelled to work closely with Etta for some time, her approach towards people coming from Africa evolves. She learns to trust Etta, but she is still afraid when she meets black people in the street. At last, by the time Maria decides to meet Etta's community, she has significantly re-framed her way of looking at black people: that is when she becomes friend with them. This is a story on how Etta's understanding of multicultural environments influenced Maria. This is also a story on a conflict between two frames and how the two actors learned from each other and changed their frames thanks to a prolonged interaction.

A positivist approach to Maria's situation would not capture the evolution of Maria's understanding and the reasons why her understanding has evolved. There is no actor-structure interaction that can be analysed and measured, nor can we observe regularities in the evolution of the approach of "Marias" towards "Ettas" that can be generalised for the European Union:

every relationship has different outcomes and different starting conditions. An interpretive approach to the study of the relationship between Maria and Etta moves in the direction of searching the causes and explain the meaning of the social interaction. Even though this is a story that focuses on the psychology of the characters involved, it can be associated to more structural relationships, as every interaction among human beings affects the structures in which they act and the structures themselves become more evident through the study of social interactions.

The present study aims to answer a specific question: whether and to what extent have CSOs influenced Frontex human rights' understanding? To study the evolution of the meaning that the agency has attributed over time to human rights I employ an interpretive methodology. Frontex discourse is analysed to identify how human rights have been framed and how these frames evolved since the inception of the EU agency. In addition, this work aims to establish whether there is a causal relation between the possible frame evolution and Frontex interaction with CSOs sitting in Frontex Consultative Forum on fundamental rights (CF). The possible process of learning is analysed through the exploration of how Frontex and CSOs sitting in the CF have engaged in a dialogue on human rights and whether this dialogue has fuelled a convergence of Frontex' understanding towards CSOs' understanding of human rights at the borders of the EU.

This is a methodology and methods chapter. Methodology is a set of ontological (i.e., the reality of things) and epistemological (i.e., the knowability of things) statements; methodologies can be thus conceived as applied philosophies, while methods are tools that translate methodologies into practice. This chapter first justifies the choice of the methodological camp and, second, discloses the methods used to generate the data and to analyse them. Following the need to justify the rejection of the positivistic approach[72], the next

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[72] Political science these days is prominently concerned with positivistic methodology (Yanow and Schwartz-Shea, 2012).

section of this chapter is devoted to a more thorough discussion on the ontology and epistemology of antipositivism, or the interpretive approach to social sciences. The methodology discussion is concluded with this section and gives way to a discussion on methods. The third section is thus devoted to the clarification of the specific methods that I employ in the study of Frontex human rights' framing, namely frame analysis, coupled with a study on preference attainment. The term frame, which has been repeatedly used in this introduction, is defined and the place of frame analysis in the literature is clarified. The last section, finally describes step-by-step how data were generated, collected and analysed, and concludes with some limitations to the application of said methods.

3.2. INTERPRETIVE METHODOLOGY

The history of interpretive methods can be traced back to Weber, who is considered to be the father of anti-positivism or interpretivism applied to social sciences. His argument departed from the idea that social phenomena (including economics) cannot be approached and studied as natural phenomena, that is through the scientific observation of the object of study. Where positive philosophy implies that it is possible to study reality with our five senses, interpretive philosophers assume that with respect to social reality we require more than our five senses in order to study our reality. Collective action, according to Geertz, is suspended in "webs of significance...The analysis of [these webs is] therefore not an experimental science in search of law but an interpretive one in search of meaning" (1973: 5). In sum, anti-positivism posits that the social meaning of collective action is the object of social sciences, and this meaning cannot be unveiled by positive science which is "in search of law". Discourse[73] is therefore the privileged locus for the analysis of both the root causes of collective action and its meaning.

The epistemic community of interpretive methods is unanimous in sustaining that knowledge is situated and contextual, and thus meaning is contingent. This study is interested

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[73] Psychology or unspecified interaction is not to be considered as discourse.

in the structures that produce that knowledge and how the interaction among these structures and the people that work within them influences the production of knowledge therefore changing it. The richness of interpretive approaches lies in the ability of this approach to bring to light the context in which language is used, together with the why and the how. According to Yanow (2006) language is always value-laden and meaning-making and, as a social practice, draws on lived experience. As such language is never a transparent tool but has to be understood in its peculiar context and "web of significance".

Furthermore, interpretivists are in search of the subjective meaning of human artefacts, without forgetting that knowing is dependent on the researcher prior knowledge. The search of the meaning of an artefact is given, according to Goffmann and Mead, in a symbolic relationship in which the actors in this relationship bargain over their frames, or their understanding of the artefact. The ontological assumption is therefore that the reality cannot be studied as it is, but it has to be researched through the meaning that actors give to it. That is why interpretive methodology proceeds from the observation of the process of meaning-making, then develop with the interaction with the agents at the scene, and generate data for the analysis. The last step of research carried out with interpretive methods is the sharing of the analysis to the theoretical community in order to ensure reliability (Soss 2006).

According to Yanow, one of the strengths of interpretive research is to expose situations in which "words and deeds are not or are not likely to be congruent" (2006: 19). For the purposes of this study, interpretive methods are useful in examining whether Frontex understanding of human rights has really been influenced, and thus has changed, as a consequence of CSOs' presence. In a situation in which both Frontex affirms that it has acted in full respect of human rights, and human rights have been violated at the borders of the EU, interpretive methods give the researcher the tools to address this puzzle.

In the field of political studies, interpretive approaches have been employed to focus on "meanings that shape actions and institutions, and the ways in which they do so" (Bevir and

Rhodes 2004: 130). Even though interpretivism has been adopted in the study of governance and domestic policy (Bevir and Rhodes, 2004, 2006), foreign policy (Bevir, Daddow, and Hall 2013) as well as in International Relations (Wehner and Thies 2014), however, the interpretive approach has not had much impact on the study of the EU. This neglect is due partly to the difficulty in understanding what is meant by interpretivism and how it can be successfully employed, partly to the strong criticisms that it has received. Nonetheless, this study aims at bringing to light the analytical potential of this methodology and to push forward the debate on this methodology.

The use of interpretive methods has been mostly criticised due to its lack of verifiability, or trustworthiness. This is because interpretive methodologists want to "allow the relevant concepts to 'emerge from the field'" and then to interpret them (Yanow 2012: 38), therefore de-emphasising the need for comprehensive theorizing and underlining the relativity of empirical studies. In order to address this concern, a number of measures have been taken by qualitative and anti-positivist scholars. One of them is the inter-rater reliability test, a tool borrowed from psychology and literature studies. It tests the trustworthiness of the interpretation and the possibility to generalize it. In the field of political studies, it has been successfully employed by Gamson (1992) in its "Talking Politics".

Anti-positivism or interpretivism has not only had followers in sociology and policy studies but also in other social sciences, and – it may come as a surprise – even in economics. Lawson (2015) argues that social phenomena are not characterised by the kind of regularities that populate natural phenomena and that can be captured by mathematical techniques (see also Sebastianelli 2016). Lawson interestingly observes that: "Many economists use mathematical deductivist methods just because this is what is required of them, not because of any deep belief in their relevance or utility…Those with power allow almost no leeway for the undertaking of alternative approaches to formalistic modelling [and] act as very restrictive gate keepers" (2015: 139). In political science, as in economics, the dogma of positivism and the use of mathematics

to extrapolate regularities has become the norm and is hardly questioned. Nonetheless, a systematic justification of the use of positive mathematical tools should be required in a field where social reality is constantly changing and, thus, where regularities are extremely rare.

3.3. FRAMING IN THE LITERATURE

The origins of frame analysis can be traced back to the so-called 'linguistic turn' in social science (Rorty, 1991). Of particular relevance to the theoretical foundations of frame analysis are critical discourse analysis (CDA) scholars such as Fairclough and Wodak (1997), and the sociologist Goffman (1974; 1981). Critical discourse analysis and frame analysis differ only in their attention to detailed analysis of language. CDA considers language as having an effect beyond the boundaries of the 'text' itself (Burman and Parker 1993). Intertextual relations caught the attention of scholars who combined the linguistic methods with theories of power to form what became the influential Critical Discourse Analysis (CDA) school, which was particularly influenced by the philosophy of Foucault (1972) (Wodak 1989). For the CDA scholars, "discourse is socially constitutive as well as socially shaped" (Fairclough and Wodak 1997: 258). Frame analysis shares the same principles, particularly with regard to the construction of meaning, retains a similar belief in the potential for discourse to affect action beyond the text (Entman 1993), while, differently from CDA, it retains its methodological roots in detailed linguistic analysis.

Within sociology, Erving Goffman coined the term *frame analysis* to describe the process of analysis of the individual's "organisation of experience" (1974, 11). Goffman's aim was to "try to isolate some of the basic frameworks of understanding available in our society for making sense of events and to analyse the special vulnerabilities to which these frames of reference are subject" (1974, 10). Frame analysis is a discourse analysis method that is principally concerned with understanding how an issue is defined and problematised, and the effect that this has on the broader discussion of the issue. The term *frame*, which I repeatedly

used in the introduction to this chapter, is used in interpretive approaches to describe devices used by individuals and groups of people to "make-sense" of the world and to answer to the question: 'What is going on here?'. In other words, frames are sense-making devices. Frames surface in the language through metaphors and categories which are linguistic devices often used in story-telling and in everyday language.

For the purposes of this Chapter the *frame* and *framing* are used intercheangeably. Nonetheless, it must be noted that there is a difference between the two terms. The difference lies in the time of the analysis considered. A frame is a static picture of the understanding of an actor at a specific moment in time. Framing, on the other hand, looks at the process of frame creation (or re-framing) over time. Scholars that study frames imply that people do not change easily, so that frames can be studied as static, while scholars researching framing see the possibility for people's change and try to capture frame movement, even though change is very difficult to track. I place myself with the second category of researchers, as I try to research how Frontex' frames concerning human rights have evolved over time.

Frame analysis has been employed in different strands of literature: public policy, social movements, environmental dispute mediation, and linguistics. However, they all share a common origin. Bateson (1955; 1972) observed that monkeys would bite in two very different situations: during play-time and during fights. This observation spurred the question: how do monkey perceive the bites in different ways? The answer that Bateson found is that monkeys (as dogs for Goffman) employ meta-communication signs to signal a specific meaning, in this case to clarify the different use of bites. In other words, depending on their framing, superficially similar patterns of behavior proceed according to different rules.

Goffman (1974) placed particular importance on the relational aspect of the use of frames. According to him, individuals need frames to construct answers to the question 'what is going on here?', but at the same time frames are useful to the individual to position herself with respect to the construct. As a consequence, frames are fundamental to relate both to the situation (i.e.,

the facts or deeds) and to others. The relation with others and a different framing of the situation, can be the cause of conflicts. This was the starting point for the research of Schon and Rein (1977), who first introduced frame analysis in public policy studies, in particular in political intractable disputes.

Schon and Rein studied in 1977 disputes over 'facts' that were prolonged and irresolvable: in a word, intractable. Following from the ontological assumption that facts do not exist without a theory (Kuhn 1970), policy frames bring facts into existence. Schon and Rein have argued that hard data and facts are not enough to solve intractable policy disputes among groups, because data are read through frames which are their theoretical glasses, thus the positivistic fact-checking by itself does not determine the solution of the conflict. The only way to solve a dispute is for the social researcher to identify the competing frames on the policy issue, clearly show them to the parties in the conflict and proceed to a modification of the frames itself into more compatible ones, through a process of learning. According to Schon and Rein, empirical epistemology, or "knowing in practice" (Schon and Rein 1993), is the only way in which intractable policy disputes can be successfully solved.

Building on the work of Schon and Rein, this study approaches a subject which is quite contentious at present, which is Frontex' understanding of human rights at the borders of the EU. Frontex, as a security agency, is concerned both with security and with the respect and promotion of fundamental rights, according to its mandate. These two ways of framing the situation at the borders of the EU – i.e., security and respect of fundamental rights – are in a conflict which cannot be solved on the basis of facts only. This study aims to address this conflict over frames, by looking at how CSOs presence within Frontex is changing the EU agency framing of the situation at the border of the EU.

Furthermore, the frames that this study tries to bring to light are not only *rhetorical* frames but also *action* frames (Shon and Rein 1996). Drawing on the distinction made by Argyris and Schon (1978), in policy discourse rhetorical frames coincide with the espoused theory – i.e.,

what people say –; in this study, the rhetorical frames in conflict on the policy issue of external borders' management are the ones about security and human rights' protection. On the other hand, action frames can be understood as "theory-in-use" – i.e., what people do. It is worth noting that a policy practitioner who adopts a rhetorical frame regarding a specific policy issue, not necessarily has action frames that are in line with the same rhetorical frame. This study focuses only on rhetorical frames, as Frontex action frames have to be studied on the ground, where Frontex operations take place.

Some problems have been evidenced by Schon and Rein in studying frames. First of all, frames are obscured by actors who are in a conflict as frames are conceived by the actors themselves as taken-for-granted assumptions, which are therefore not easily recognisable. Secondly, every situation can be understood – i.e., framed – in different ways and every frame can explain a number of situations. Thirdly, it is difficult to distinguish between real and non-real shifts of frame. Moreover, frames are difficult to interpret because they are intimately linked to the person who expresses them; in other words, they depend on one's own personality and background experiences. Lastly, "it is possible to have reframing without controversy and controversy without reframing" (Schon and Rein 1993: 150). In this study the focus is on reframing, or better, on the evolution of Frontex frames on fundamental rights. The difficulties in studying frames, are addressed in this work by employing a set of methods described in the next section.

3.4. METHODS

This is an exploratory research and, as Babbie maintains "[t]his approach occurs when a researcher examines a new interest or when the subject of study itself is relatively new" (2015: 90). In this case, the subject of study is relatively new; notwithstanding the significant increase in studies addressing Frontex and its activity in the EU[74], no previous research has been

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[74] Google Scholar finds almost 7.600 studies on Frontex for the period 2010-2016 only.

conducted on the interaction between Frontex and its Consultative Forum on fundamental rights.

Moreover, this is a case study research that, following Yin, "is an empirical inquiry that investigates a contemporary phenomenon in depth and within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident" (2009: 18). Frontex has become a sensitive subject with the Schengen/refugee crisis of 2015-16, especially in connection with the issue of the respect of human rights. To conduct research on such a topic is to deal with a fast-changing phenomenon in a fast-changing context.

Interpretive methods coupled with methods to measure influence are employed to answer the main question of this study: whether and to what extent CSOs sitting in the Consultative Forum have been influencing Frontex' framing of human rights. I apply these methods to data coming from primary sources, collected through expert interviews, and gathered by looking in particular at Frontex and CSOs' official documents, press releases and interviews. These sources are coded by analysing both text and non-logocentric (visual) material (e.g., photos in Frontex annual reports, videos made by Frontex).

3.4.1. GENERATING AND COLLECTING DATA

Primary data have been gathered through expert interviews. I conducted 15 interviews with members of the Consultative Forum, Frontex Heads of Unit and Fundamental Rights Officer over a time span of 1 year (from March 2015 to March 2016). The interviews lasted 1 hour on average, and were conducted mainly face to face, but also via Skype. The interviews were conducted mainly under the condition of anonymity, which is the reason why, for the purposes of this work, I refer to members of the Consultative Forum with numbers and to Frontex officers with letters. Direct quotes have been approved by the interviewees.

The interviewees have been chosen according to one main criterion: they are the main actors in the interaction which is the object of this study. Nine out of nine representatives of CSOs sitting in the Consultative Forum have been interviewed, together with a representative

of the international organisations sitting in the CF (i.e., UNHCR), a representative of FRA sitting in the CF, and three Frontex Heads of Unit (Operations, Legal Affairs and Training Units) and Frontex Fundamental Rights Officer. In addition, I interviewed a desk officer at DG HOME, who works for one of the European Commission representatives sitting in Frontex' Management Board. All the interviewees were first approached via email, which contained a general list of topics that the interview would address. Replies to these emails arrived mostly in a week's time (e.g., the majority of CSOs' representatives), but for some it was necessary to resend the emails requesting a meeting for an interview up to four times and four months.

Frontex staff has been particularly difficult to reach, as Frontex Heads of Unit's contacts and names are not available on Frontex website, nor are they easily retrievable from other Frontex staff. The snowballing technique became an option only after I interviewed the first two Heads of Unit, but I still could not reach more than one other Head of Unit. However, the interviewed Frontex officers can be considered as highly representative as they are the heads of the units which have been interacting the most with the CF, since its inception. This was confirmed by interviewed CF members.

Secondary sources employed in this study include Frontex official and quasi-official documents:

- Frontex Annual and General Reports from 2005 to 2016;

- Frontex Annual Risk Analysis from 2010 to 2016;

- Frontex training material;

- Frontex communication material;

- interviews and statements from Frontex Executive Directors (e.g., videos, press releases, articles).

Data are also collected by analysing Frontex Consultative Forum official documents and CSOs' statements:

- Consultative Forum Annual Reports from 2013 to 2016;

- Consultative Forum meetings' minutes from 2012 to 2016;

- statements of CSOs sitting in the CF concerning Frontex activity (i.e., position papers, agendas, press releases).

3.4.2. ANALYSING THE DATA

It is worth restating here that aim of this work is to analyse the influence of CSOs on Frontex' human rights framing. Framing has been employed in policy analysis by a restricted number of authors, but it has proven particularly useful in the case of analysing controversies (Schön and Rein, 1996), and the development of political ideas. This section both describes how the analysis has been conducted and explains the rationale for the selection of the methods of analysis.

The analysis is divided in two parts. The first part aims to establish whether there has been an evolution in Frontex understanding of human rights since the inception of the EU agency. Once proven that Frontex way of framing human rights has evolved, the second part of the analysis is devoted to the assessment of the causality link that binds the evolution of Frontex understanding of human rights and Frontex interaction with the Consultative Forum. The first part is carried out with frame analysis, the second part is operationalised by using a combination of attributed influence and preference attainment to compare the statements on human rights of the CSO sitting in the CF with Frontex' statements on the same issue. Both parts avail themselves also of the primary data collected through interviews, to triangulate findings. The interviews are also used to gather first-hand knowledge on how the interaction between Frontex and its Consultative Forum has evolved and to have a picture of how it works at the moment. This information is used in the next chapter – i.e., Chapter 4 – to present the case study.

The analysis of the frames begins by identifying the issue terrain and naming it. It then follows the recognition by the researcher of the competing frames on the policy issue analysed (if any) or the different frames employed by different actors. In addition, the researcher has to specify where the discourse occurs. The next step is about coding the frames and analysing how

these frames evolved. Finally, the question about why these frames have changed (i.e., re-framing) is asked, and exogenous factors (i.e., the presence of CSOs within the Consultative Forum) are analysed with the methods described further in this section.

Measuring the outcome of a specific social relation between an agent A exerting influence and the agent B subjected to influence, implies establishing a causal link between the input given by A to B and B's actions. Causal relationships in social research are traditionally studied by establishing dependent and independent variables (Babbie, 2015). However, for the purposes of this study, analysing influence through a set of variables is hardly possible. This is due to the endorsement of Lukes' description of the "third face of power", which affirms that actor A exercises influence on actor B by changing the dominant discourse in which B operates, thus changing actor B's understanding of reality, as discussed in Chapter 2. As a consequence, this section discusses and proposes other tools which are available for the study of the selected case and which are in line with the chosen methodology.

Following Dür (2008a), there are three main problems and three main techniques for the measurement of the influence of civil society organisations on EU actors. Starting with the problems that every scholar who has attempted at measuring influence has encountered, Dür lists the "existence of different channels of influence", "the occurrence of counteractive lobbying", and the existence of different stages of the policy process at which influence can be wielded (Dür, 2008a: 47). The first problem is linked with the decision of each interest group regarding its strategy: interest groups can use outside or inside lobbying strategies (or both) (Hansen, 1991; Kollman, 1998), they have to select the decision-makers that they want to address (Fordham and Mckeown, 2003), and they have to deal with the power structure of the policy field in which they act. Secondly, counteractive lobbying can mislead influence researchers as there might be another actor which is as powerful in exercising influence, but with a competing vision, and therefore the effects of both influencers may not be visible (e.g., public opinion influence vs. business group influence on policy outcomes) (Austen-Smith and

Wright 1994). The third and last problem, evidenced by Dür (2008a), is that an interest group, such as an umbrella organisation, may try to exert influence not only at different levels but also at different stages of policy-making (e.g., agenda setting, implementation).

The present study on the influence of CSOs on Frontex' understanding of human rights, takes into consideration these problems and is designed accordingly. In particular, the first problem is resolved by looking at the influence of CSOs that work at the EU level (e.g., Amnesty International European Office), and whose first-best option is to use inside lobbying tactics, as discussed in Chapter 2. Furthermore, with regard to the second issue on counteractive lobbying, this study design allows for partial or none influence findings, due to the very definition of influence proposed here, namely the ability of an actor A to shape a decision by an actor B in line with actor A's preferences, *to a certain degree*. The last issue discussed by Dür is irrelevant for the purposes of this study as the focus is not on policy outcomes but on Frontex officers' understanding of human rights.

The three main methods used to analyse influence in political science are process-tracing, the attributed influence method, and assessing the degree of preference attainment (Dür, 2008a). Process-tracing is widely used in small-N studies of policy analysis to research the evolution of a policy and determine the actors that were most influential on the policy outcome[75]. However, this method is, again, not applicable in the present case study; indeed, even though this is a study concerned with the evolution of Frontex approach to human rights, this evolution is not traceable directly through policy outcomes, but it has to be inferred from the change in the language of the EU agency.

The attributed influence method was first ideated by March in 1955. With this method influence is measured by way of surveys which are distributed to the groups that are parties in

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[75] There are five problems recognised by Dür for the application of process-tracing on small-N studies. First of all, it is difficult to gather enough empirical evidence to cover all the steps of the process. Secondly, researchers that deal with process-tracing risk over reliance on interviews. Third, assessing the degree of influence is a daunting task when lacking a yardstick. Fourth, attention is devoted mainly to the level of activity of lobbyists. Lastly, process-tracing is a method that allows for low generalizability (Dür, 2008: 50-52).

the influence relationship or to well-informed external observers. The surveys ask the groups and the external observers to "provide a self-assessment of its influence or a peer-assessment of the influence of other groups" (Dür 2008a: 53). The present case study takes into consideration the analysis of the self-perception of influence, but it employs it without recurring to surveys due to the small numbers of relevant actors. All the interviewees, instead, were asked a question regarding their assessment of influence presumably exerted by CSOs sitting in the CF on Frontex.

The last method described by Dür, assessing the degree of preference attainment, compares the outcomes of political processes to the ideal points of actors. What is measured is therefore "the distance between an outcome and the ideal point of an actor reflects the influence of this actor." (Dür 2008a: 56). In 2007, Mahoney applied this method to advocates lobbying the EU and, in order to assess influence, she matched policy outcomes with the preferences of the advocates. There are some advantages and disadvantages to the employment of this method. The advantages include the possibility to reveal influence even if nothing visible happens, which means that this method is more effective than process-tracing when influence is at work but is not revealed in the policy outcomes (Dür, 2008a: 56). On the other hand, the preference attainment method is based on the ability of the researcher to clearly determine the preferences of the actors who exert influence, which is highly complex (Dür, 2008a). An envisaged solution is to have large-N studies in which alternative solutions can be tested both quantitatively and qualitatively (Dür, 2008a).

For the study of the process through which influence is exercised on the specific issue of human rights, this study avails itself of the attained preferences method to triangulate the findings of the attributed influence. The attained preferences method is applied comparing official documents released by CSOs (i.e., CF annual reports, CSOs policy statements regarding Frontex) with official documents released by Frontex (i.e., Frontex annual reports, risk analysis, training material), in search for similarities. On a cautionary note, Frontex official documents

are not policy outcomes, but the official output of the agency, which reflects the agency vision on border management policies. Through this comparison it is also possible to analyse whether and how the EU agency has learned to address human rights differently, due to the work of CSOs within the Consultative Forum. The findings of the text analysis are informed also by the responses to the interviews.

This triangulation of methods, created by the combination of frame analysis, attributed influence and preference attainment methods, is enriched by the study of the potential social accountability relationship between Frontex and CSOs sitting in the Consultative Forum. As discussed in Chapter 2, a social accountability relationship is a form of iterated interaction in which CSOs can directly exert influence on EU actors; the outcome of a social accountability relation is the revision of EU actors means and ends and, thus, learning. The study of social accountability is operationalised following the Utrecht School (Bovens, 2007a; Bovens et al., 2010; Schillemans, 2011; Busuioc, 2013; Yang, 2014). Interviews are used to bring to light the three phases of accountability: provision of information from Frontex, debate between the CF and Frontex, and potential consequences in case of Frontex' misconduct. The determination of the presence (or absence) of the social accountability relationship is the last step of the research which could open new avenues for research into social accountability relationships in the EU.

3.5. LIMITATIONS AND CONCLUDING REMARKS

Even though interpretive methods do not enjoy a particularly high status in political science, especially in the EU, these methods have not only descriptive but also explanatory potential. By studying language, interpretivists try to establish what are the beliefs of actors (e.g., policy practitioners) and what is the context in which these beliefs operate. Moreover, interpretivism gives a new perspective on the reasons why actors "make the normative leap from is to ought" (Rein and Schon 1996: 91). Furthermore, not only it explains why and how a political actor's understanding of a policy issue is translated into a controversy with another

actor over a different understanding of the issue, but it also gives to the researcher a tool to help solving the dispute.

Nonetheless, there are limitations to this methodology which could be overcome by employing a set of methods to support discourse analysis (i.e., frame analysis) findings. For the study of influence, this chapter has described the advantages of using frame analysis in combination with attained preference and attributed influence methods. Also, the reliance on the interviews adds to the study, by giving accurate insights on the context of the study. The triangulation of findings from different methods of research ensure the reliability of the present study.

A limitation that is impossible to overcome by this study is the possibility that some actors (i.e., Frontex) have changed only their rhetorical frames, while their action frames remain the same. In other words, it is the question of whether the shift in Frontex' understanding of human rights has been reflected in Frontex actions or whether this shift has been used as a "fig leaf" by Frontex itself. As Schon and Rein would say: "Here the problem of evidence and interpretation is crucial" (1996: 100).

CHAPTER 4
Frontex (Border and Coast Guard Agency) and its Consultative Forum on fundamental rights

"This is a historic moment and I am very proud to see Frontex become the European Border and Coast Guard Agency. The new Agency is stronger and better equipped to tackle migration and security challenges at Europe's external borders. Its mandate has wider scope and new powers that will allow it to act effectively." (Fabrice Leggeri, 6 October 2016[76])

4.1. INTRODUCTION

These words were pronounced by Fabrice Leggeri, Frontex Executive Director, on the day of the inauguration of the new mandate for the new agency: on 6 October 2016, Frontex became the European Border and Coast Guard agency (henceforth, EBCG agency). Similarly to the decision in 2004 to set up the newborn Frontex in one of the newly accessed EU countries (i.e., Poland) to symbolize the willingness of the EU to support the efforts at the external borders of its newest members, the inauguration ceremony of the new EBCG agency took place symbolically in a small village at the border between Bulgaria and Turkey, named Kapitan Andreevo; this town is an obligated passage for the irregular migrants who want to enter the Schengen zone without risking their lives at sea. Both places, Warsaw and Kapitan Andreevo, have marked respectively the birth and the re-birth of the agency in charge of the management of the external borders of the European Union.

Frontex's transition to the EBCG agency has been both fast and widely supported. The dramatic rise in numbers of land and sea border crossings of asylum seekers and irregular migrants urged EU member states (henceforth MSs) to search for a quick response to the problem of coordinating actions at the external borders while keeping the Schengen area alive.

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[76] Fabrice Leggeri, Frontex Executive Director, at the inauguration ceremony of the European Border and Coast Guard agency at Kapitan Andreevo, on the Bulgarian border. Available at: http://europa.eu/rapid/press-release_IP-16-3281_en.htm (accessed 6 January 2017).

An evolved Frontex, with more powers and more resources (including equipment), has been considered by all parties involved – i.e., MSs, EP, Council, and Commission – a crucial part of the response, with a view to gradually establish an integrated management system for external borders, which has been on the EU agenda since the Laeken process of 2001[77]. Therefore, Regulation (EU) 2016/1624, repealing Frontex Regulation but building on the existing agency, was implemented in less than one year since the proposal of the Junker Commission for a European Border and Coast Guard[78].

Currently, the EBCG agency is endowed with new considerable powers: primarily, the ability to assess the vulnerability of MSs at their borders, and, secondly, the capacity to act as a fully-fledged European Coast Guard. The vulnerability assessment of MSs is a relevant step forward in the sovereignty shift from MSs to the EU. With the latest Regulation – i.e., Regulation (EU) 2016/1624 – while Member States continue to retain the ultimate responsibility for operations at their borders, the agency gains increased monitoring powers over the member states and leeway to intervene in emergency situations. However, Frontex main task remains to fight against irregular activities and security threats at the external borders, which now is extended formally also to coast guard operations in cooperation with the European Fisheries Control Agency, for example. More specifically, the agency's competences now include: carrying out joint operations (including return), setting up pools of experts to help member states deal with emergency situations, training officials, researching and developing new equipment for border and coast guards, cooperating but also gathering and sharing data with other EU agencies (e.g., Europol), signing working arrangements with EU neighbouring countries and even carrying out operations on their territories, contributing to the fight against

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[77] For a further discussion on the EU approach to integrated border management, see next Section (4.2.2).

[78] The Commission issued the EBCG Regulation proposal on 15 December 2015 and was approved by the European Parliament and the Council on 14 September 2016. The issuing of the Commission's proposal was prompted by calls from the European Parliament and the Council to strengthen the role of Frontex within the guidelines of the European Agenda on Migration (COM(2015)0240) to address the migration/refugee crisis and its future developments. For a discussion of the EBCG Regulation, see Section 4.3.

irregular activities and security threats at the external borders, and, carrying out patrol and search and rescue operations in the Mediterranean Sea, thus becoming a fully-fledged coast guard agency.

However, the renewal of Frontex did not stop the criticisms moved to the agency with regard to the respect and promotion of fundamental rights at the external borders of the EU. AI EU Office, ECRE and ICJ delivered a joint communication on the new Frontex Regulation, before it passed, stating that this Regulation would not change the main source of confusion on the attribution of responsibility on cases of fundamental rights violations, namely the blurred division of competences between Member States and Frontex. After the adoption of the Regulation, Amnesty International delivered a report specifically assessing the situation of the hotspot approach of the Commission at the external borders of the EU, and, as already Human Rights Watch did in 2011, Amnesty International claimed that grave abuses of migrants and refugees have taken place, this time in hotspots in Italy where Frontex is operating (Amnesty International 2016). Criticisms have been moved to Frontex and its new Regulation also by some members of the European Parliament, during a LIBE committee meeting on 17 November 2016, concerning the absence of a working individual complaint mechanism.

This chapter aims to describe and analyse Frontex and its Consultative Forum on fundamental rights as a case study. First, Frontex's history and legal bases are discussed, by analyzing the evolution of the agency in the framework of a European integrated border management, towards the creation of a common border and coast guard force. The newly born European Border and Coast Guard agency is, therefore, the object of the second section of this chapter, while the third addresses the unresolved issues of Frontex' accountability on the respect and promotion of fundamental rights, and the criticisms that it has been raising. Lastly, Frontex Consultative Forum is described and, lastly, compared with other European agencies' consultative fora.

4.2. FRONTEX HISTORY AND LEGAL BASES

The establishment of Frontex is inextricably linked with the removal of the internal barriers to the movement of people among the signatories of the Schengen agreements. In 1985, the first Schengen agreement was signed by Belgium, France, Germany, Luxembourg and the Netherland. A new agreement on the implementation of Schengen was then ratified in 1990 and established a passport-free zone among the participating countries. By 1999 the Schengen agreements were incorporated into the *acquis communautaire*, through the Amsterdam Treaty. Figure 2 illustrates the current situation of the Schengen area, which includes members which are also EU MSs (i.e., 22 countries), the four non-EU states that are signatories to the Schengen agreement, and the six EU states which either decided to stay or are still left outside of Schengen (i.e., Bulgaria, Croatia, Cyprus, Ireland, Romania and the UK).

Figure 2: The Schengen area
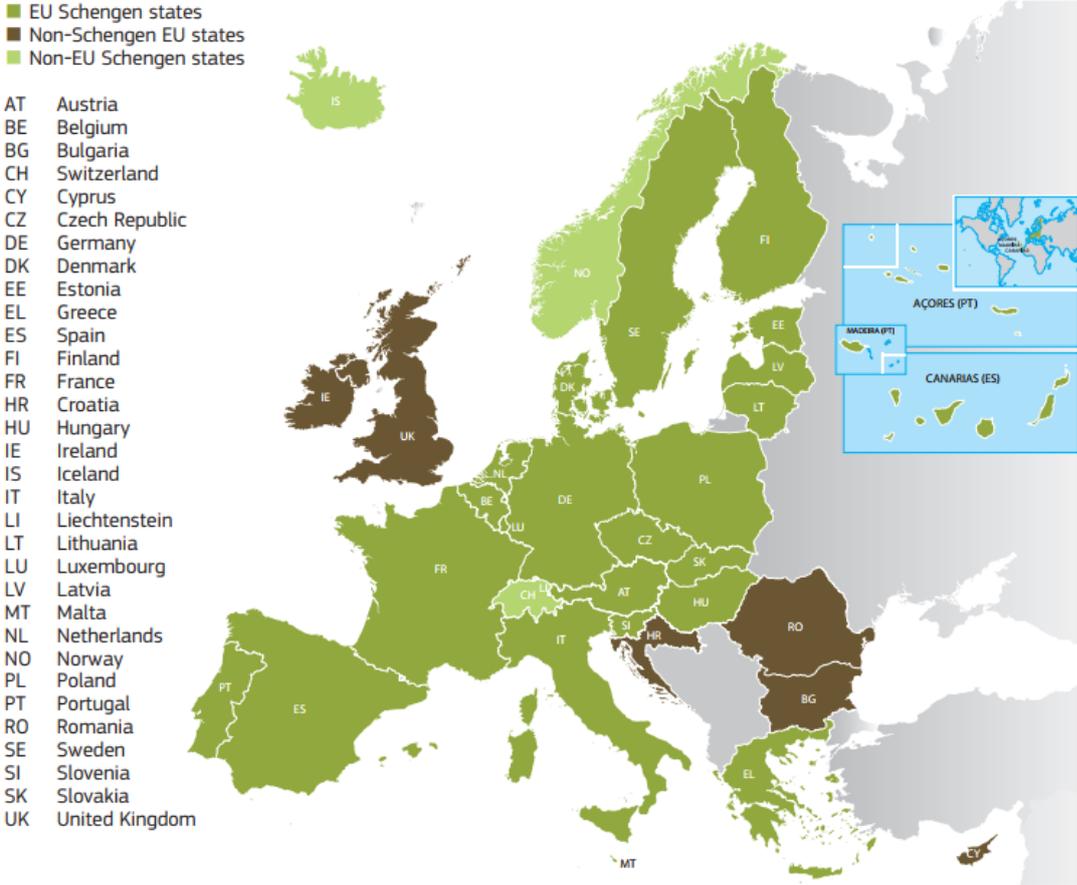
Note: The latest enlargement of the Schengen area took place on 19 December 2011, when Liechtenstein joined.

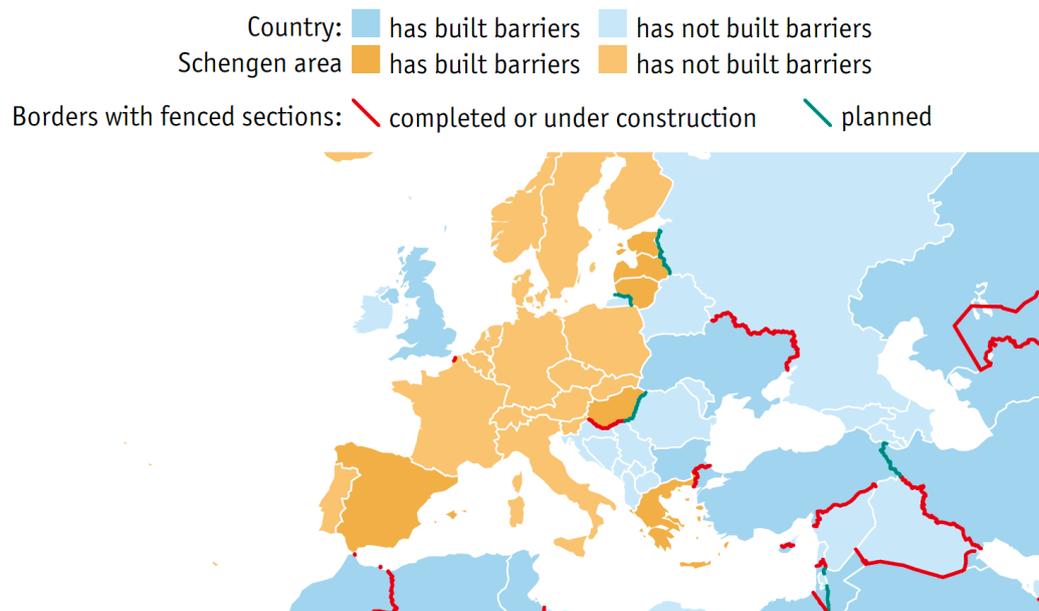Source: European Commission, Schengen brochure (2017).

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Surprisingly enough, the re-birth of the agency is inextricably linked with the reintroduction of internal border checks within the Schengen area. Indeed, since 2015, some states of the Schengen area – i.e., France, Malta, Germany, Austria, Denmark, Sweden, Norway[79],– have decided to reintroduce internal border checks in line with the Treaty of Lisbon and the Schengen Border Code, regulating the reintroduction of checks in specific cases (e.g., terrorism and immigration) and for specific durations (Guild et al. 2015). This move was aimed to combat terrorism (i.e., France), and to stop irregular migrants who crossed the external borders of the Schengen area, due to the inability of the "external" states to control their own borders and therefore the Schengen area as a whole. What has been also worrying the Commission[80] is that internal checks were reinstated along with the building of new walls and fences, not only at the external borders of the Schengen area, but also internally (see Figure 3). It is in this framework that Donald Tusk, President of the European Council, affirmed that it was crucial to strengthen the control of the external borders to save the Schengen area[81], thus reinforcing the need for a more operative border agency. The new border agency has therefore the objective to help preserving the freedom of movement of people introduced by the Schengen agreements by securing the external borders of the EU.

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[79] For an updated version of the countries which have reintroduced internal border checks, visit the dedicated European Commission webpage: https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en (accessed 20 February 2017)

[80] See the Commission reaction to the reintroduction of controls at the Brennero border between Italy and Austria: https://www.euractiv.com/section/justice-home-affairs/news/austria-plans-border-controls-at-brenner-pass-commission-concerned/ (accessed 13 June 2016). See also High Representative Federica Mogherini's speech of 30 January 2017, who was asked about USA President Donald Trump's ban to migration from specific countries: "we have in Europe a history […] that has told us that every time that one invests in divisions and wars, you might end up being in a prison, if you build all walls around you. And we have a history and a tradition and an identity based on the fact that we celebrate when walls are broken down and bridges are built." Available at: https://eeas.europa.eu/headquarters/headquarters-homepage_en/19488/Remarks%20by%20Federica%20Mogherini%20following%20the%20meeting%20with%20the%20Minister%20of%20Foreign%20Affairs%20of%20Norway,%20Mr%20B%C3%B8rge%20Brende (accessed 2 February 2017).

[81] Particularly striking was Donald Tusk's appeal to the European Parliament in Strasbourg, on 19 January 2016, to act quickly to save the passport-free Schengen zone: "we have no more than two months to get things under control. The statistics over the Christmas period are not encouraging, with over 2,000 arrivals to the EU per day, according to Frontex. The March European Council will be the last moment to see if our strategy works. If it doesn't, we will face grave consequences such as the collapse of Schengen." (available at: http://www.consilium.europa.eu/en/press/press-releases/2016/01/19-tusk-december-euco-report-european-parliament/, accessed 13 July 2016)

Figure 3: Boundary walls and security fences in the EU

Source: The Economist, 7 January 2016. Available at:

http://www.economist.com/blogs/graphicdetail/2016/01/daily-chart-5 (accessed 16 September 2016)

4.2.1. COMING TO THE IDEA OF A COMMON EUROPEAN BORDER AND COAST GUARD FORCE

The idea of a Community agency[82] in charge of the coordination of the activities of member states (MSs) at the external borders of the EU was already present in the first intergovernmental agreements of cooperation among the members of the Schengen area. The establishment of Frontex was considered, indeed, as "a compromise between upholding national sovereignty and creating greater communitisation of border control" (Perkowski 2012: 4). Since the abolition of the internal frontiers[83], member states participating to the Schengen Area agreed to increase the cooperation and coordination of national police and judicial authorities, to preserve the balance between freedom and security of their citizens. But the breakthrough moment for the set-up of a European agency came with the unprecedented flow

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[82] 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, 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).
[83] The Schengen Agreements entered into force in 1995.

of migrants crossing the Mediterranean Sea and landing on the shores of the Canary Islands, from the year 2000 onwards. This increase in the arrivals coupled with the post-9/11 terrorism-phobia and the completion of the most significant enlargement of the Union (2004), created the perfect environment for the *ad hoc* set up of Frontex. The emergency situation[84] pushed for a prompt establishment and required the agency to start deliver already in 2005[85].

Indeed, Frontex did not appear as a completely new institution. The Sea Borders Centre, supported by the expertise of the CIVIPOL Conseil[86], is a clear example of previous operational cooperation of MSs, supported by the EU; its aim was to prevent and combat illegal immigration across the maritime borders of the European Union[87]. Moreover, proposals for ad hoc EU Sea Borders Centres were pushed forward by Greek and Spanish authorities; however, these Centres[88] were to remain 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: enforcement of joint operations, outlining of risk analysis (in cooperation with the Risk Analysis Centre in Helsinki, Finland), prevention of illegal entry through the checks at border-crossing railways; creation and support of an information system (Statewatch 2003: 8). Other Centres were set up by the member states and,

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[84] "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: 15).

[85] 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)

[86] 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 "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" (2003: 2).

[87] 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).

[88] The Western Sea Borders Centre (Madrid, Spain) and the Eastern Sea Borders Centre (Piraeus, Greece).

in particular, the Air Borders Centre (Rome, Italy), the Ad-hoc Training Centre for Training (Traiskirchen, Austria) and Centre of Excellence (Dover, United Kingdom)[89].

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 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 SCIFA whose tasks include: issuing strategic guidelines regarding immigration, frontiers and asylum; 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 to support the COREPER and the Council in preparing for discussion on immigration, frontiers and asylum[90], the Common Unit ceased to function in 2004, when 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 could have been chosen, namely article 62(a) TEC covering for "measures on the crossing

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[89] Further information on Frontex origins are available at: http://frontex.europa.eu/about-frontex/origin/ (accessed 13 November 2017).
[90] SCIFA's mandate was lastly prolonged by COREPER in September 2014, after three years from the previous confirmation (2011).

of the external borders of the Member States"; art. 62(a) would have given the EP the possibility to express itself on the matter standing on an equal footing with the Council (Statewatch 2003), thus enhancing the democratic control on the establishment of the Agency. The amending Regulation (1168/2011) was instead passed with the full involvement of the EP in the process, through the ordinary legislative procedure.

Frontex started to operate in 2005, in Warsaw, as a specialised and independent European body. Setting this strategical agency in one of the new Member States was not an arbitrary choice[91]; indeed, Frontex is the first European agency to be located outside of the territory of the first signatories of the Treaty. This can be considered as a relevant symbol both to affirm the decentralisation trend of European governance and to recognise the importance of "new" member states[92] in the implementation of the border management policy. Situated at the external borders of the EU, these countries found themselves in charge of carrying the burden of "old" Member States' concerns about migration and security issues while still struggling to integrate. The set-up of Frontex was considered, in this perspective, a way to support financially, but also with human resources and expertise these countries.

Other than the "emergency response" (Carrera 2007), the rationale of the creation of this agency lies also in the prospective institution of a European Border Police force (Monar 2006). In 2005, a G5[93] 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."

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[91] Council Decision of 26 April 2005 designated Warsaw as 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).
[92] 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.
[93] 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).

(Hobbing 2005: 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. The 2011 Regulation made this project more easily achievable with the establishment of the European Border Guards Teams (EBGT)[94]. Renewed interest in the creation of a supranational border force has been driven by the Commission, which financed a feasibility study for its creation in 2014 (Nielsen 2014). This was the last attempt at finding a common understanding on a European border guard agency before the EP and the Council prompted the Commission to propose a revision of Frontex Regulation, i.e., the EBCG agency Regulation, on December 15, 2015[95].

The agency evolution followed the growing concern of Member States regarding migration and border management issues. The most evident indicator of its expansion is the amount of resources allocated by the European Union for the accomplishment of its tasks (see Graph 1). In 2005 its initial financial resources amounted to 6 million, for the first year of activity (1 May-31 December 2005), rising to 19 million in the second (Frontex, 2005a; 2006a). The expenses for 2005 and 2006 were covered by the General Budget of the Union – i.e., Commission section – with an annual subsidy, plus Norway and Iceland's contributions[96]; 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

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[94] 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 posed the following two questions to its fellow MEPs: "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?".

[95] A full report on the "legislative train schedule" of the 2016 revision of Frontex Regulation is available at: http://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-revision-of-the-frontex-regulation (accessed 30 October 2017). A thorough description of the "new" EBCG agency is provided further in this Chapter.

[96] 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.

MSs: the External Borders Fund[97] which expired in 2014 and has been substituted by the Security Fund. Frontex funding boomed for the first time in that year reaching 44 million EUR (Frontex, 2007a) and kept rising over the years, peaking in 2011, halting in the next three years, to peak again in 2015 and 2016, respectively with 143 mln and 254 mln of total budget. Not surprisingly[98], in a period of zero growth and budgetary restrictions, Frontex saw an increase in MSs' contributions to Frontex coordinated activities (Frontex, 2012a; Eurasylum and Ramboll 2015). The human resources have increased with the same pace, from a first year of struggling to recruit personnel[99] to 500 staff members in 2017, and foreseen to rise up to 1000 staff members by 2020[100].

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[97] 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 established 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.

[98] According to COWI's 2009 evaluation of Frontex: "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: 8).

[99] Several issues hampered Frontex' staff recruitment at the beginning at the agency's mandate, in particular the low salary for highly skilled staff (due to a salary "correction coefficient" applied to Warsaw that keeps salaries particularly low) and the absence of an "headquarter agreement" with the Polish Government (COWI A/S, 2009). See also: "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 10 September 2015).

[100] From Frontex webpage "What is the staff and the budget of the agency?". Available at: http://frontex.europa.eu/pressroom/faq/about-the-agency/ (accessed 15 November 2017).

Graph 1: Frontex budget with indication of the contributors and their amount of contribution to Frontex budget (2005-2017)
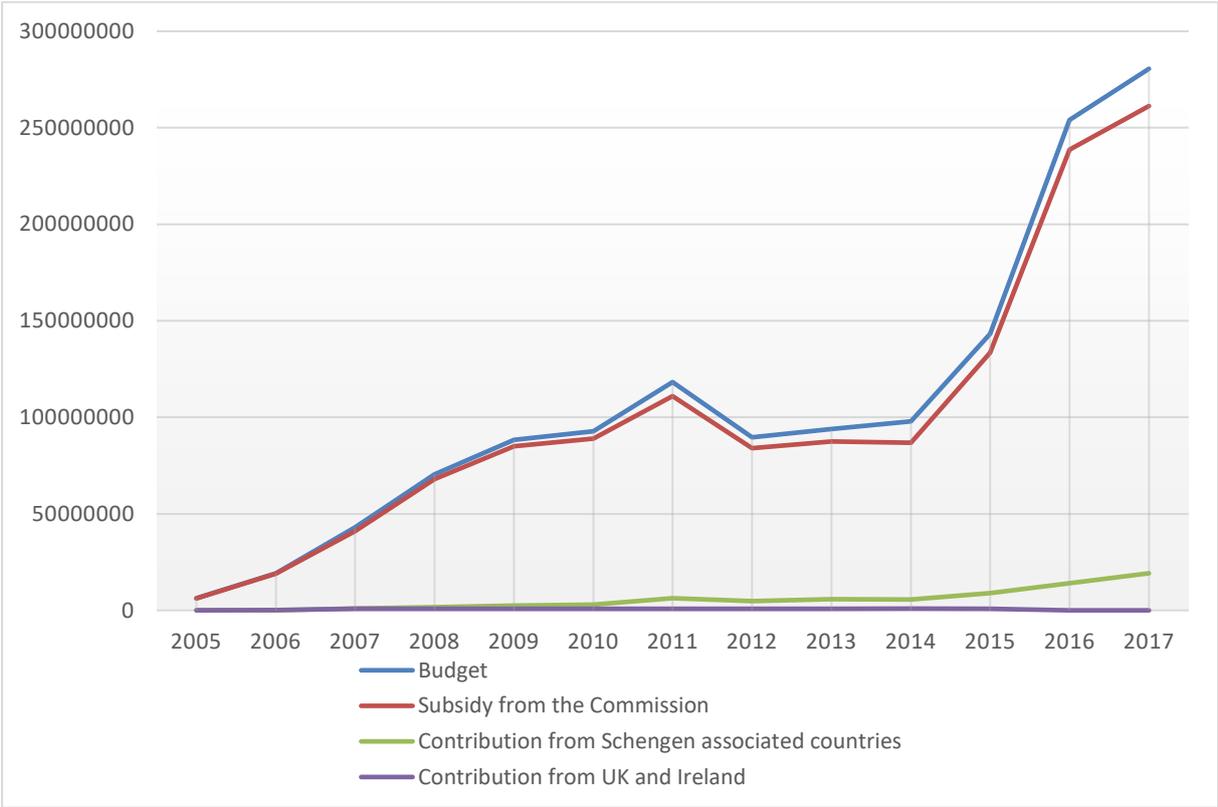
Source: author's own elaboration of Frontex data from 2005 to 2017 (budgets)

The motives behind this steep increase in Frontex resources, and competences, are numerous, but can be narrowed down to three overarching and interconnected reasons: the migration or refugee crisis, the (undue) focus on border management instead of asylum policies, and the willingness to set-up a fully-fledged integrated border management system[101] (Campesi, 2015; Carrera et. al., 2016; Carrera and den Hertog, 2016; Rijpma, 2016). The crisis stemming from the drastic increase in numbers of irregular entries and asylum requests, particularly in 2015 and 2016, was the trigger of the search for a coordinated solution. The inability of member states and the EU to manage the consequences of this inflow, aggravated by the enforcement the Common European Asylum System (CEAS) which has its foundations in the Dublin

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[101] See European Commission, A European Agenda on Migration, COM(2015) 240 final, Brussels, 13.5.2015, p. 17. Refer also to the European Global Strategy, "Shared Vision, Common Action: A Stronger Europe, A Global Strategy for the European Union's Foreign and Security Policy", June 2016, which states that "Common Security and Defence Policy (CSDP) missions and operations can work alongside the European Border and Coast Guard and EU specialized agencies to enhance border protection and maritime security in order to save more lives, fight cross-border crime and disrupt smuggling networks.

Regulation, has been one of the main concerns of both policy-makers at the national and European levels and EU citizens. However, the search for a solution has been less focused on completely rewriting the Dublin Regulation, or on truly enforcing the principle of "shared responsibility"[102], and more on keeping migrants and asylum seekers out of the EU borders by tightening border controls and signing international agreements with Turkey[103] and Libya[104].

4.2.2. THE EU INTEGRATED BORDER MANAGEMENT APPROACH

The Lisbon Treaty recognizes the definition of Integrated Border Management[105], a term that started to appear only recently[106] in political debates at the international level and which was introduced at the European level in 2001 by the European Commission (European Commission 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

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[102] The "shared responsibility" concept proposed by the Commission in its Agenda on Migration of 2015 has both a border management and asylum aspects. Shared responsibility in border management led to the creation of the EBCG agency, together with asset sharing, joint exercises and dual use of resources. The asylum aspect of shared responsibility, instead, is concerned with relocations of refugees across Schengen states. Relocations of asylum seekers across EU countries has proven to be ineffective over the past year, as shown by the numbers provided by the European Commission: only 3699 asylum seekers were relocated from Italy and 9553 from Greece to other member states, compared to the 160000 who were first agreed. Member States that pledged to take in asylum seekers from the first countries of entry determined by the Dublin Regulation (i.e., from Italy and Greece), are not honouring their pledges. Data retrieved at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf (accessed 24 February 2017).

[103] The EU-Turkey agreement was first signed in 2015 in the form of a Joint Action Plan and then it was enforced on 18 March 2016 as the EU-Turkey Statement. This was considered to be, as the "First Report" on the implementation of the agreement states, "decisive action was taken by European leaders to break the cycle of uncontrolled flows of migrants creating an unsustainable humanitarian crisis." (COM(2016) 231 final).

[104] On 3 February 2017, the European Council concluded on the necessity to close an agreement with Libya to curb migration flows directed towards Europe and departing from the Libyan coasts, and Italy acted on this understanding by signing a memorandum of understanding with the NATO backed government of Libya. For a discussion over the early phases of EU-Libya cooperation on migration issues, see Hamood (2008).

[105] Hereinafter IBM.

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

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[107] 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, not members of the Schengen Area. A successive INTERREG Community initiative was thought to "help the regions on the EU's internal and external borders overcome the problems resulting from their isolation"[108] especially through financial aid[109].

However, while the term was still far from being coined, the legal tools for its development were laid down by the Schengen Agreement and especially in the 1990 Convention implementing it. 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).

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[107] 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.

[108] 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].

[109] 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.

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[110]. 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" (Hobbing 2005: 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 (European Commission 2002). What was still missing, as evidenced

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[110] 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".

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[111]). Another important step forward was the introduction of the External Borders Fund[112] 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)[113]. 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.

A finally more detailed definition of Integrated Border Management (Jorry 2007) in the EU was provided officially during the JHA Council meeting in 2006[114], with the adoption of a the comprehensive "border management strategy", that was rendered fundamental by the 2004-2007 enlargement waves[115]. 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

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[111] 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.

[112] 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." (European Commission website. Available at: https://ec.europa.eu/home-affairs/financing/fundings/security-and-safeguarding-liberties/external-borders-fund_en (accessed 5 October 2016)).

[113] 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.

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

[115] 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.

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[116]. 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 sum, the Council defined border management as covering "all border related threats".

In 2008, a Commission initiative[117] 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 agreed 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 Program (RTP). The first was meant to tackle the problem of the so-called overstayers – TCN remaining on the European territory exceeding

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[116] 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.

[117] 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).

their visa –, by introducing a register; the second allowed 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 on the necessity to carefully evaluate new measures, especially in the light of their costs. However, these concerns did not stop the gradual introduction of EUROSUR (European Commission, 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 and divert people trying to reach the European shores (Hayes and Vermeulen, 2012) by establishing a common framework for information exchange and cooperation[118], setting up national coordination centres for border surveillance, which will exchange information among themselves and Frontex via a protected communication network (Europa.eu, 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: 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

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

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 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.

Since 2016, the European IBM has been integrated into the mandate of Frontex through articles 3 and 4 of the EBCG agency Regulation. It must be noted that Regulation 2016/1624 not only expanded Frontex competences, and partially also its mandate, but also created a European Border and Coast Guard which is the sum of the agency and "the national authorities of Member States which are responsible for border management, including coast guards to the extent that they carry out border control tasks" (Art. 3). Therefore, cooperation among border and coast guards of EU member states is now mandatory and it has been established at the EU level; since 2016, border management is no more an issue of intergovernmental cooperation, as the SCIFA and TREVI models suggested at the beginning, thus constituting a significant step forward in the path towards supranationalisation. The agency is the cornerstone of this system and has the power to establish a technical and operational strategy for IBM, through a decision of the management board based on a proposal of the executive director (Art. 3). The current European IBM performs all the competences listed for Frontex (see next Section), including search and rescue operations and sharing data, return and analysis of risk, and cooperation among intra-EU partners and extra-EU partners.

4.3. FRONTEX RELOADED: THE RE-BIRTH OF A EU AGENCY

The entry into force of Regulation 2016/1624 did not create a new agency, it just led the agency one step closer to a fully-fledged European force (Rijpma 2016). Frontex evolution has been fast, from its inception to the current EBCG agency. However, the competences of the agency still do not cross the boundaries set by the principle of sovereignty of the member states, which remain solely responsible for the control of their borders in order to secure and safeguard internal security and maintain law and order. It is for the same reason of continuity that the agency is still to be referred to as Frontex, even officially[119]. However, the tasks of the reloaded agency have been significantly expanded with the 2016 Regulation and this is why the EU legislators decided to give it a new name: the European Border and Coast Guard agency.

The EBCG agency Regulation states specifically which are the aims of the renewed agency:

> "The key role of the Agency should be to establish a technical and operational strategy for implementation of integrated border management at Union level; to oversee the effective functioning of border control at the external borders; to provide increased technical and operational assistance to Member States through joint operations and rapid border interventions; to ensure the practical execution of measures in a situation requiring urgent action at the external borders; to provide technical and operational assistance in the support of search and rescue operations for persons in distress at sea; and to organise, coordinate and conduct return operations and return interventions."

The EBCG agency, therefore, has not been endowed with new executive powers, which remain in the hands of Member States which second their national experts to Frontex. However, it keeps and enhances its operative – i.e., coordinating operations – and regulatory roles – i.e.,

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[119] From Regulation (EU) 2016/1624: "(11) The tasks of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union should therefore be expanded. To reflect those changes, it should be renamed the European Border and Coast Guard Agency, which will continue to be commonly referred to as Frontex. It should remain the same legal person, with full continuity in all its activities and procedures."

supporting the Commission in the application of legislation relating to the borders. Regulation 2016/1624 introduces a new monitoring role for Frontex, thus the ability to monitor MSs through the Vulnerability Assessment tool and the ensuing right to intervene, in case a MS fails to comply with Frontex recommendations based on the assessment (Rijpma 2016).

The competences of the agency currently cover eleven different areas, but the agency's work can be better understood as managing the external borders of the EU from the analysis of risk to the operations at the land, air, and sea borders. Figure 4 lists and describes all of Frontex new competences and compares them with the previous mandate. The agency's work therefore departs from the monitoring and analysis of the vulnerability of the EU external borders and their risks. This analysis then informs MSs' actions at their borders, and MSs can decide to request Frontex intervention. The agency then provides to the requesting MSs personnel and equipment, both seconded by other member states and its own, to be deployed at the borders or on the territory of the requesting MS. Moreover, now Frontex has the power to constantly monitor and patrol also the Mediterranean Sea, as part of its coast guard functions. In addition, Frontex can sign working arrangements with national authorities of third countries, and specifically Turkey, but also Senegal and Sudan. It must be noted that Frontex does not only tackles migration related issues, but it is concerned with criminal activities at the EU borders in general. In order to carry out operations, the agency fosters research and innovation in border management technologies (e.g., biometric scanners, unmanned vehicles for patrols), and trains and prepares training tools for border and coast guards. Lastly, there is the respect of fundamental rights; fundamental rights are described here as being "at the heart of all activities undertaken by the agency" even though it is listed last among Frontex competences in Figure 4, which is an official Frontex infographic.

Figure 4: Main tasks of the EBCG agency

Risk analysis and vulnerability assessment

The agency collects data on the situation at and beyond Europe's external borders. The data is used to identify trends in irregular migration and patterns in cross-border crime.
NEW The agency conducts annual stress tests to assess the ability of each EU member state to face challenges at their external borders.

Operations

The agency deploys border and coast guard officers along with vessels, aircraft, helicopters and other equipment to assist countries requiring support at their borders.
NEW In emergency situations it can quickly deploy border and coast guard officers from the rapid reaction pool of at least 1 500 officers.

Returns

The agency assists the member states in the return of migrants who are ineligible to stay in the EU. The decision as to who should be returned remains the exclusive responsibility of the national authorities of the EU member states.
NEW A pool of monitors, escorts and return specialists will be created. The agency may also play a role in the organisation of voluntary departures.

Situation Monitoring

The agency enables swift data exchange between border authorities of EU member states, the European Commission and other agencies. It provides situation and crisis monitoring, delivering early alerts and updates about the events at the external borders.
NEW To assist in this task, the agency deploys liaison officers to the individual member states.

Coast Guard Functions

NEW The agency supports the cooperation of law enforcement authorities, EU agencies and customs at maritime borders. Vessels and aircraft deployed in its operations also collect and share information relevant to fisheries control, detection of pollution and compliance with maritime regulations.

Cooperation with non-EU countries and international organisations

The agency develops cooperation and signs working arrangements with non-EU countries and international organisations to exchange information about trends in migration and cross-border crime and provides assistance in capacity building.
NEW The agency can carry out operations on the territory of non-EU countries neighbouring at least one participating member state, if it requires assistance due to high migratory pressure.

Combatting cross-border crime

The agency focuses on preventing smuggling, human trafficking and terrorism as well as other forms of cross-border crimes.
NEW The agency shares intelligence gathered at the borders on persons suspected of involvement in criminal activities with national authorities and European agencies.

Research and Innovation

The European Border and Coast Guard Agency facilitates cooperation between border control authorities, research and industry.
NEW The agency assists the member states and the European Commission in identifying key border security technologies and draws up and implements the EU framework programmes for research and innovation activities in the border security area.

Training

The agency develops harmonised curricula and training standards for border guards in all EU countries. It conducts various courses to share knowledge and best practices, including capacity building programmes in non-EU countries.
NEW The agency delivers training on integrated border management and the coast guard functions to border and coast guards across the EU. It also trains experts who will carry out vulnerability assessments.

Respect for fundamental rights

Respect for fundamental rights is at the heart of all activities undertaken by the agency.
NEW Complaint mechanism – Any person who has been directly affected by the actions of staff involved in an activity of the agency can submit a written complaint regarding possible violations of his/her fundamental rights.

Source: Frontex website. Available at:

http://frontex.europa.eu/assets/Documents/European_Border_and_Coast_Guard_Agency_Main_Tasks.pdf (accessed 20 December 2016).

Regulation 2016/1624 also integrated other Regulations which closely relate to the work of the agency: the Eurosur, the sea borders, and the Schengen Borders Code Regulations. Eurosur is short for "European Border Surveillance system" which is an information exchange system which links Frontex with border and coast guard forces of the MSs and other AFSJ agencies "with the purpose of detecting, preventing and combating illegal immigration and cross-border crime and contributing to ensuring the protection and saving the lives of migrants" (Regulation (EU) 1052/2013). The surveillance of the sea borders operated by Frontex in joint operations has been regulated through Regulation (EU) 656/2014, which was deemed necessary to establish clear rules of engagement with intercepted vessels at sea and search and rescue operations carried out by the agency; these rules were already introduced by Council Decision 2010/252/EU[120], which was concerned specifically with the respect of the principle of *non-refoulement* in sea operations. Moreover, the EBCG agency does not operate in a vacuum: the Schengen Borders Code establishes the rules governing the movement of persons across borders and is, therefore, the framework in which Frontex works. This is complemented by common standards and procedures for returning illegally staying third country nationals, which were first lied down by Directive 2008/115/EC and are now referred to in the EBCG agency Regulation.

Moving to how Frontex operates, the agency structure is very similar to other European agencies and consists mainly of a Management Board (MB), an Executive Director (ED) with his/her deputy and executive support, and, until June 2017, three divisions, organised according to the tasks performed: operations, capacity building and risk analysis. On 14 June 2017, Frontex MB adopted a new organigram, increasing the divisions from three to five to meet the requirements of the 2016 Regulation (see Figures 5 and 6). The structure is, since 2011, completed by the two bodies in charge of Frontex Fundamental Rights Strategy: the

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[120] Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 111, 4.5.2010 p. 20.

Fundamental Rights Officer (FRO) and the Consultative Forum (CF). As seen in the beginning of this section, the 2016 Regulation also formalized the presence of specific offices in charge of liasing with Brussels and Turkey, due to the implementation of the EU-Turkey statement in 2016[121], and one in charge of data protection issues, necessary due to the increased powers of the EBCG agency in managing and processing the personal data of people crossing the external borders of the EU.

Figure 5: The structure of Frontex (till June 2017)
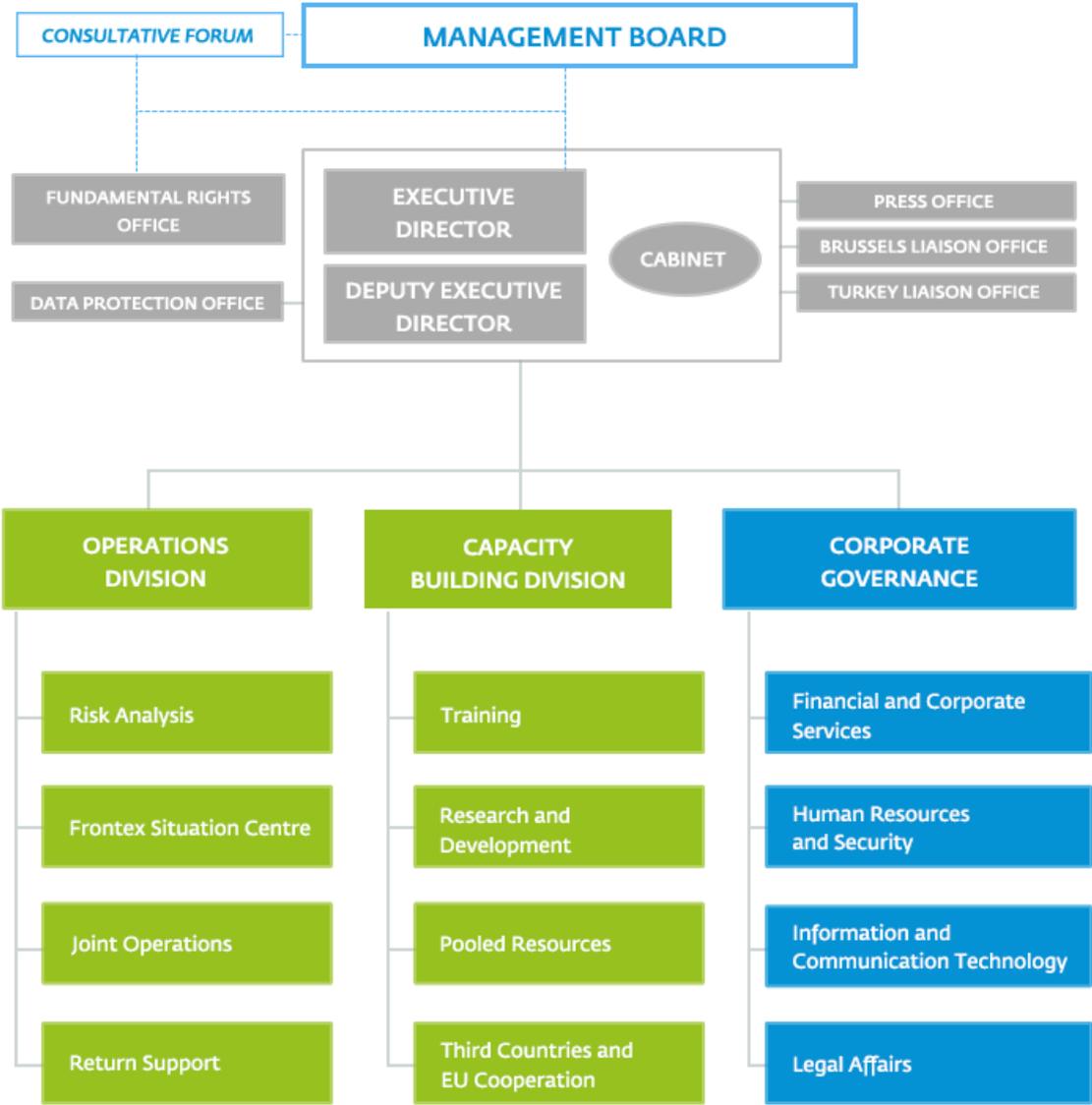
Source: Frontex website. Available at: http://frontex.europa.eu/about-frontex/organisation/structure/ (accessed 20 February 2017).

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[121] For an overview of the proceedings of the European Council during which the EU-Turkey statement was passed (18 March 2016), see: http://www.consilium.europa.eu/en/meetings/european-council/2016/03/17-18/ (accessed 18 March 2016).

Figure 6: The structure of Frontex (after June 2017)
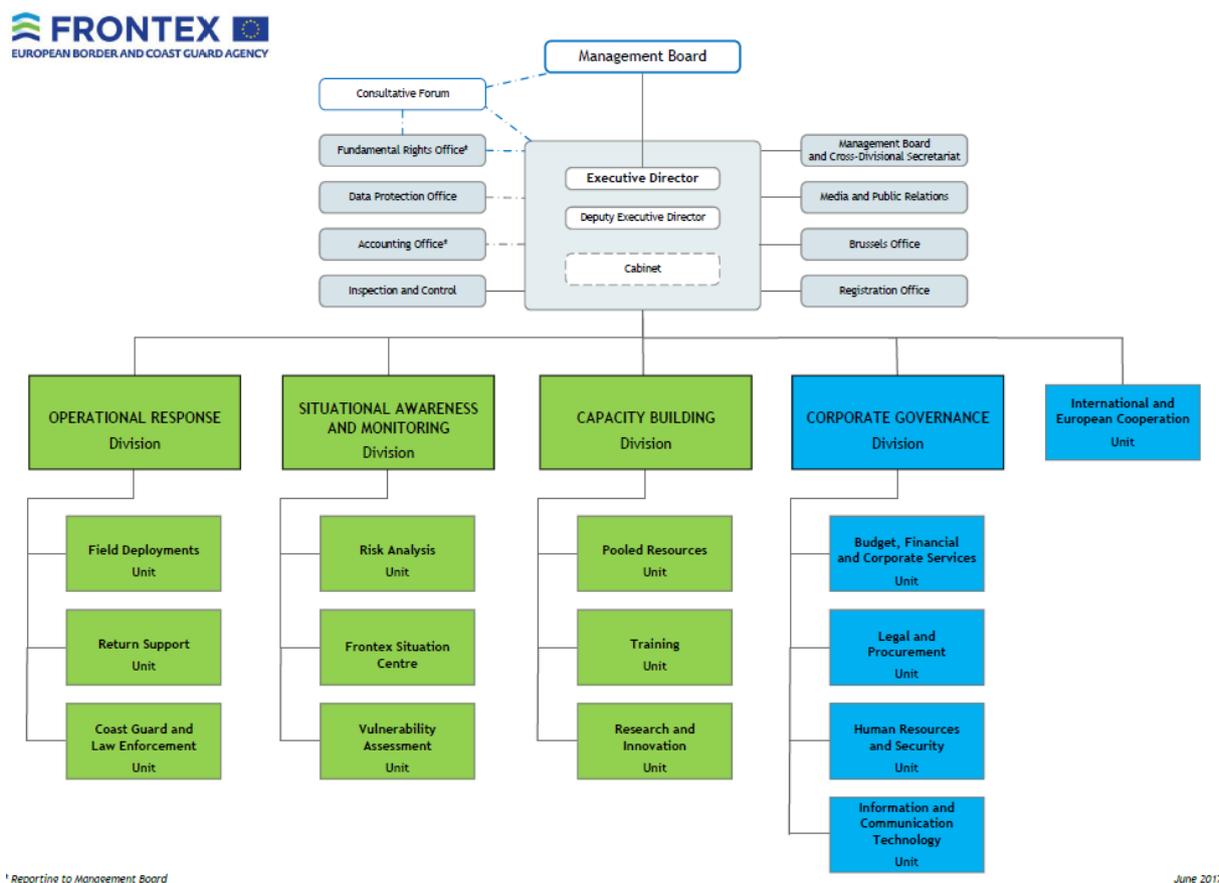
Source: Frontex website. Available at: http://frontex.europa.eu/assets/Frontex_Organisation_chart-June_2017.pdf (accessed 3 July 2017).

The main body of the agency is the Management Board; it is Frontex body where MSs and the Commission are represented and has the competence of overseeing the work of the agency. It is constituted by the "operational heads of the national services responsible for border guard management or their representatives"[122] 25 EU Member States that are signatories of the Schengen acquis, plus Iceland, Lichtenstein, Norway, Switzerland and UK and Ireland[123], and two members of the European Commission. Representatives for Ireland and UK may also be invited to participate to the meetings of the Management Board, if they so require, for specific collaborations with the agency. All major decisions of the agency have to be taken in agreement with the Management Board; it adopts all the main documents of the agency – the programme

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[122] Regulation (EU) 2016/1624.
[123] These latter two are invited to the meetings, which are held five times a year, but have no right to vote, while the other non-EU participants retain a limited power to vote.

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. The introduction of Regulation 2016/1624, increased further the Management Board competences by introducing the task of establishing "a technical and operational strategy for European integrated border management" (article 3).

Already in 2011, the Executive Director had been given 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. However, the suspension or termination of a Joint Operation is considered to be as a measure of last resort. As Amnesty International reports, "Frontex can follow up [fundamental rights violations'] reports through a range of measures which include addressing the member state concerned, discussing the matter with the management board, reporting to the Commission, withdrawing or reducing financial support, and taking disciplinary measures." (Amnesty International 2014: 16)

The new agency has four main objectives for the period 2017-2019, which go under four different headings, which are, in order: awareness, response, development, and performance. Concerning awareness, the agency's goal is to gather situational pictures of the external and internal borders of the freedom of movement area to understand which are the possible impacts on both security of borders and internal security. The second goal for the agency is to play a key role in the implementation of an integrated border management system, thus supporting member states in the control at the external borders, and in emergency situations. The third is the development of best practices, competences, and capacities, through training, interoperability and coordination with other agencies and border forces of countries of origin and transit. The last multi-annual goal is to achieve results in line with the applicable law, namely Regulation 2016/1624, but also with the need to respect and promote fundamental rights

in the conduct of Frontex mission at the external borders; the performance goal also includes financial performance.

Frontex new multi-annual plan also includes six strategic directions or action areas which will be followed to fulfil these goals. In the field of Integrated Border Management, the agency is, first, committed to establish and enhance operational and technical aspects of IBM through the Vulnerability Assessment tool, which will not be used restrictively for migration issues but for border management at large. Another important part of Frontex work to enhance the European IBM system is to strengthen the inter-agency cooperation. Second, Frontex is devoted to reinforcing the maritime dimension of the work of the agency itself, together with the Search and Rescue dimension, which is reflected in the new mandate. Third, Frontex will help the Commission deploy new hotspots by providing migration management support teams. Also, the agency will develop pools of seconded national guards (e.g., escort, monitor) and technical support to MS. Fourth, Frontex is committed to develop a coordinated and integrated approach to return operations also with regard to fundamental rights. Fifth, cooperation with Member States and third countries will be strengthened by deploying liason officers (i.e., Turkey, but also within the EU) and operating directly in third countries (origin or transit countries). Finally, Frontex is committed to remain efficient in managing new and old technical equipment and the staff.

The future of the agency, planned in this multi-annual document, was discussed by Fabrice Leggeri, Frontex Executive Director, with the LIBE committee of the European Parliament, on 17 November 2016. As per Frontex 2016 Regulation, this was the first time the EP had to be informed by Frontex Executive Director about the multi-annual work programme of the agency. MEPs addressed a number of questions to Leggeri, most of them directed at understanding what would change with the entry into force of the 2016 Regulation, particularly concerning the respect and promotion of fundamental rights at the borders. According to this Regulation, the EP is to be kept informed about the agency activities both through regular

reporting and direct access to information for MEPs. This occasion was the first to test the Regulation and the idea, enshrined therein, that "(14) The extended tasks and competence of the Agency should be balanced with strengthened fundamental rights safeguards and increased accountability", for the LIBE committee. MEPs' questions targeted specific issues, including return operations and the risk of incurring in push back situations, the individual complaint mechanism and the national contact points system that should enforce it, and, finally, the situation of hotspots in Italy, denounced by Amnesty International. Fabrice Leggeri discarded all the accusations of alleged push backs and violations of human rights during Frontex operations, including in the hotspots, by saying that Frontex has never received any report from its officers about similar situations and that NGOs' reports are being looked into; moreover, he claimed the total transparency of the agency and its willingness to report incidents. As an example, he presented to the LIBE committee an incident occurred on June 11, 2016 when firearms where used; he affirmed that on that occasion Frontex officers were the first to report the incident and that their involvement was limited to their being aimed at during the cross-fire. Finally, he described the intense work of Frontex to ameliorate return operations' conditions, starting with the creation of three pools experts specifically trained for return operations.

4.4. CONTESTING FRONTEX FOR ITS ACCOUNTABILITY ON THE RESPECT AND PROMOTION OF FUNDAMENTAL RIGHTS

The need for more accountability concerning the respect of fundamental rights in all Frontex activities was triggered by the tragedies that have been taking place at sea, land, and air borders of the EU since 1992, coupled with the numerous evidences of human rights violations (e.g., push-backs, unmotivated detention, inhumane treatment, etc.)[124]. Indeed, since its inception in 2004, Frontex has been not only strongly blamed by migrant rights' advocates and human right activists, but it has also been repeatedly questioned by the European Parliament

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[124] Fundamental rights violations at the external borders of the EU have been proven by two leading ECtHR sentences, namely Hirsi Jaama v Italy and M.S.S. v Belgium and Greece.

and the European Ombudsman regarding the respect of fundamental rights at the external borders of the EU. The European Ombudsman has been concerned with Frontex "compliance with human rights standards and, in particular, with the requirements of the EU's Charter of Fundamental Rights" (European Ombudsman, 2013). Even before the European Ombudsman own-initiative on Frontex, allegations were made that the agency pays insufficient attention to the need to respect human rights in border management activities (Human Rights Watch 2011).

From the very beginning of Frontex activities, the agency has faced harsh criticisms on various levels. Already in June 2007, before the entry into force of the amendment of Frontex Regulation, introducing RApid Border Intervention Teams (RABIT) – i.e., Regulation 2007/2004 – Frontex then executive director, Ilkka Laitinen, was urged to write a statement titled "Frontex – facts and myths", and published on Frontex webpage[125]. This first statement sums up the whole "defence line" that Frontex has had and still has when it comes to public opinion mistrust in the actions and wills of the agency:

> "I would like to remind that Frontex activities are supplementary to those undertaken by the Member States. Frontex doesn't have any monopole on border protection and is not omnipotent. It is a coordinator of the operational cooperation in which the Member States show their volition. If some of our critics think it is not enough they should fix their eyes on decision takers, as Frontex only executes its duties described in the Regulation 2007/2004."

Ilkka Laitinen was adamant in affirming that while member states have solely responsibility on border protection, Frontex is merely supporting and supplementing the coordination of border management operations. At the same time, he clarifies that EU decision makers are responsible for the decision on Frontex mandate and political steering, not Frontex itself. These two defence points have a common thread: Frontex is not an agency with either

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[125] Available at: http://frontex.europa.eu/news/frontex-facts-and-myths-BYxkX5 (accessed 07 March 2015).

executive or regulatory powers, and therefore it should not be held accountable for or even considered capable of exerting these powers.

However, there is a specific set of critiques to Frontex with regard to the respect and promotion of fundamental rights, which have never been fully addressed neither by the EU legislators nor by the agency itself and which might worsen with the 2016 Regulation. First of all, the division of responsibilities during operations in alleged cases of violation of human rights has always been blurred. While in the first years of the agency the cause was attributable to the poorly specified division of competences, the entry into force of Regulation 2016/1624 has improved the understanding of "who does what". However, it still remains to be clarified which actor shall be deemed responsible in case of fundamental rights violation. This is mostly due to the absence of cases brought before a court of justice, either national or European, involving Frontex officers. The absence of cases could be directly linked to the second critique that has been always moved against Frontex: the absence of a fully-working individual complaint mechanism. The individual complaint mechanism should be a key and easy accessible tool for individuals who want to complain about any sort of fundamental rights' violations, abuse, or inhuman treatment. A third issue is the effectiveness of the FRO work, since her inception. More specifically, the work of the FRO might be hindered should the Executive Director of Frontex decide not to act upon her signalling of grave breaches of fundamental rights during Frontex activity. The Executive Director, in fact, remains ultimately responsible for the termination of Frontex operations in cases of grave violations, but he also has the duty to take other, less drastic measures, in sensitive cases.

Moreover, even after the big leap forward of the introduction of the FRO and the CF with the 1168/2011 Regulation, Frontex latest evaluation[126] established that there are still some

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[126] Evaluation of Frontex under article 33 of Regulation (EU) 1168/2011, carried out in 2015.

deficiencies concerning the mainstreaming of fundamental rights within the agency activities. In particular, the report highlighted four issues:

- […] The role of the Consultative Forum as an advisory body should be strengthened through more exposure to the Agency's activities.

- […] The Codes of Conduct should be translated to relevant languages.

- […] A guideline concerning the roles and responsibilities with regards to fundamental rights should be developed.

- […] Human resources for the monitoring of fundamental rights by Frontex should be increased. (Eurasylum and Ramboll 2015: 12)

Frontex multiannual programming for 2016-2019 reflects partially the concerns raised by the evaluators, by establishing two priorities with regard to fundamental rights: first, to enhance strategic cooperation with Frontex' Consultative Forum on Fundamental Rights, and, second, to embed the respect for Fundamental Rights in the culture of Frontex (Frontex, 2015e). In order to address these priorities, the agency foresaw the allocation of 580863€ for fundamental rights, including the activities of the Consultative Forum, which is 0,2% of the total budget of the agency and the lowest percentage of the budget dedicated to Frontex activities, as shown by Table 5.

Table 5: Activity based draft budget 2016

Governance Level Activities	Direct costs			Total Indirect costs	Total cost 2016
	Staff	Operational	Total Direct costs		
1. Joint operations	6 637 351	186 352 000	192 989 351	15 594 876	208 584 227
2. Risk Analysis	3 851 779	1 800 000	5 651 779	1 936 874	7 588 653
3. Management of Pooled Resources	1 256 100	1 100 000	2 356 100	686 386	3 042 486
4. Training	1 560 400	5 000 000	6 560 400	994 504	7 554 904
5. Research and Development	1 219 456	1 100 000	2 319 456	544 646	2 864 102
6. EUROSUR	1 940 597	11 300 000	13 240 597	1 662 681	14 903 277
7. Situational monitoring	1 786 744	1 898 000	3 684 744	969 969	4 654 714
8. External and public relations	1 771 834	1 649 000	3 420 834	840 940	4 261 774
9. Fundamental Rights incl. Consultative Forum	330 089	110 000	440 089	140 774	580 863
TOTAL ACTIVITIES	20 354 350	210 309 000	230 663 350	23 371 650	254 035 000
			91%	9%	100%

* The activity "8. External and public relations" covers a mix of cooperation with third countries, international organisations, with EU institutions or agencies, external communication, and events such as European Day for Border Guards;

Source: Frontex multi-annual programme 2016-2019. Available at: http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Work_programme/2016/Programme_of_work_2016.pdf (accessed 27 January 2016)

Frontex Programme of Work for 2017 is not more specific than the multi-annual programming on the priorities with regard to mainstreaming fundamental rights in the activities of the agency. The first priority listed is concerned again with enhancing cooperation with the CF and integrating CF's recommendations in Frontex activities; the second, highlights the need to embed fundamental rights in all of Frontex activities and in the (communication) culture of the EBCG agency, by renewing Frontex fundamental rights strategy (Frontex CF, 2017: 38; 92). Frontex Fundamental Rights Strategy was first introduced in 2011, setting out a human rights framework for its activities. The appointment of a FRO and the CF followed suit, and was supposed to create a system to monitor compliance with the Strategy. Finally, the last objective is slightly more specific and postulates the need to provide a complaints' mechanism in order to monitor and ensure the respect for fundamental rights in Frontex activities and joint operations. Specific attention is given in this Programme of Work to training Frontex staff to

address vulnerable groups and child protection issues, also thanks to the cooperation with the Fundamental Rights Agency and EASO.

In sum, the claims put forward by civil society organisations[127] and other European institutions, including the EP, the European Ombudsman and the ECHR[128], still have not received a satisfactory answer. Amnesty International claimed that the "lack of a clear mechanism for investigating reports of human rights abuses from joint operations or operational areas where Frontex is present and the inability to handle individual complaints means that this human rights framework is, in practice, of limited discernible impact" (Amnesty International 2014: 16). As clearly evidenced by the EBCG work programme this concern still has to be addressed effectively, together with the little transparency in informing the public concerning how allegations of fundamental rights violations are addressed by the agency. Also concerns related to push-backs have still not been addressed completely; notwithstanding the entry into force of Council Decision 2010/252/EU and then of Regulation 2013 on sea borders, following "some Member States, Members of the European Parliament, human rights organisations and academics [which] had questioned whether fundamental rights and the rights of refugees were being respected during sea operations coordinated by the Agency, particularly on the high seas" (COM(2013) 197 final 2013/0106), Amnesty International has denounced push-backs in Greece during Frontex Poseidon Land and Sea operations, denounces which have not been followed suit (Amnesty International 2014). The latest unaddressed concerns are specifically on the role of Frontex within the Commission's hotspot system, particularly in Italy (Amnesty International 2016).

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[127] See "Border agency accused of failing migrants' rights", available at: https://euobserver.com/justice/122244 (accessed 19 May 2015) and comments on Frontex triggered after the tragedy of April 19th 2015, available at: http://www.watchthemed.net/media/uploads/page/12/Ferries%20not%20Frontex.pdf (accessed 25 April 2015).
[128] In 2011, the ECHR stated: "The Assembly is concerned about the lack of clarity regarding the respective responsibilities of European Union States and FRONTEX and the absence of adequate guarantees for the respect of fundamental rights and international standards in the framework of joint operations coordinated by that agency." (Hirsi Jamaa and others v. Italy, ECHR)

4.5. FRONTEX CONSULTATIVE FORUM ON FUNDAMENTAL RIGHTS

In 2011, Frontex Regulation[129] was amended introducing significant changes for the protection of fundamental rights. Two new bodies were added to Frontex structure, trough article 26(a): the Fundamental Rights Officer (FRO) and the Consultative Forum on fundamental rights (CF). These two bodies have complementary competences and work in close cooperation: the former is formally endowed with monitoring powers while the latter mainly provides expertise on fundamental rights to Frontex Management Board and Executive Director. Article 70 of Regulation 2016/1624 reaffirmed the decision to include the CF in Frontex's structure with the mandate "to assist the executive director and the management board with independent advice in fundamental rights matters", and specifically on Frontex Fundamental Rights Strategy and Common Core Curricula for the training of border and coast guards, which was the same mandate of 2011, with the addition to the establishment of the complaints mechanism.

The Consultative Forum started to perform its activities in 2012 and released its first mandatory annual report in 2014. It started by meeting formally twice a year in Warsaw and informally in Brussels, as all the seats of the organisations represented in the CF are Brussels-based. Then, in 2015, the CF started to work formally also in thematic Working Groups (e.g., Working Group on Return) and its work became more structured, as its annual reports, and the plenary meetings in Warsaw increased to three per year. Also, since 2014, CF members have started to travel to the borders of the EU, where Frontex operates, first visiting air borders operations (i.e., airports), then also land and sea borders, in Greece, for example. In the performance of its activities, the CF acts as a fully independent body; it must be noted that Frontex does not remunerate CF members' work within the CF, even though it reimburses travel expenses. Another relevant aspect of the CF work within the agency is that Regulation

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[129] Regulation (EU) 1168/2011, amended by Regulation (EU) 2016/1624.

2016/1624 (and Regulation 1168/2011 before that) established that CF members "shall have *effective* access to all information concerning the respect for fundamental rights, including by carrying out on-the-spot visits to joint operations or rapid border interventions subject to the agreement of the host Member State, and to hotspot areas, return operations and return interventions." [emphasis added] (art. 70(5)). Compared to Regulation 1168/2011, the capacity of the CF to access Frontex information has formally improved: article 26a, in fact, stated more vaguely that "The Fundamental Rights Officer and the Consultative Forum shall have access to all information concerning respect for fundamental rights, in relation to all the activities of the Agency."

The selection of the members of the Consultative Forum is mostly regulated by Frontex Regulation. The CF in its first composition lasted from 2012 to 2015; in 2015, there was a new selection of CF members, but they mostly remained the same. Three members are permanent and explicitly mentioned in the Regulation: the European Asylum Support Office (EASO), the Fundamental Rights Agency (FRA) and the United Nations High Commissioner for Refugees (UNHCR). Frontex Management Board selects three other members among international organisations, namely the Council of Europe (CoE), the International Organization for Migration (IOM) and the Organization for Security and Co-operation in Europe - Office for Democratic Institutions and Human Rights (OSCE ODIHR). These three organisations have renewed their membership by an exchange of letters between Frontex and the executive management following an invitation from the Frontex Management Board. Finally, nine civil society organisations complete the composition of the CF and, according to Frontex Regulation, they are selected based on a public and open call for expression of interest to become members. However, neither the specific criteria for selection, nor the full list of CSOs which participated to the open call for expression are publicly disclosed by Frontex Management Board and Executive Director. The mandate of the new members lasts three years, so the CF's members current mandate will last until 31 December 2018.

The international institutions and civil society organisations that have (or have had) their representatives sitting in the CF are[130]:

• AIRE Centre (member from 2015)

• Amnesty International European Institutions Office (AI EIO)

• Caritas Europa (member until 2017)

• Churches' Commission for Migrants in Europe (CCME) (member until 2015)

• Council of Europe (CoE)

• European Asylum Support Office (EASO)

• European Council on Refugees and Exiles (ECRE)

• European Union Agency for Fundamental Rights (FRA) - Aydan Iyiguengoer, CF Chair

• International Catholic Migration Commission (ICMC)

• International Commission of Jurists (ICJ)

• International Organization for Migration (IOM)

• Jesuit Refugee Service Europe (JRS) - Stefan Kessler, CF Co-Chair

• Organisation for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights (OSCE / ODIHR)

• Platform for International Cooperation on Undocumented Migrants (PICUM)

• Red Cross EU Office

• Save the Children (member since 2017)

• United Nations High Commissioner for Refugees (UNHCR)

The activities of the CF are agreed jointly by Frontex – namely its Executive Director – and its Management Board. CF main task is to foster the creation and amelioration of human rights related documents such as Frontex' Fundamental Rights Strategy and the Code of Conduct for the national border guards involved in Frontex operations. However, the first

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[130] A detailed description of the CSOs represented within Frontex CF is available in Chapter 5.

Annual Report of 2013 evidences that the task of the CF was not limited to giving recommendations on Frontex main fundamental rights' documents, but reached a number of areas of Frontex activity such as training, risk analysis, strategic planning and, last but not least, joint operations. The first grasp on the actual work of the CF, provided by the mentioned 2013 Annual Report, left many doors open for the development of broader and more numerous CF activities, and this proved to be true with the 2014 and 2015 CF reports.

The advocacy groups sitting in the CF have thus gained the ability to have a voice "from within" in a highly-contested agency (Frontex, 2014e), and, differently from advocacy groups which are not part of the CF, they have full access to Frontex documents, within the limits of the CF mandate (i.e., assisting Frontex in fundamental rights matters), interact frequently with Frontex officers[131], and release annually a detailed account of their work within Frontex (i.e., CF annual report). It must be noted, however, that the CF is an internal body of Frontex and, as such, faces numerous limitations in his work and particularly in its ability to publicise its activity. The only available public documents on the work of the Consultative Forum are the Work Programmes, the Annual Reports, and the CF Working Methods. According to Regulation 1168/2011, and the internal regulation of the CF, documents produced by the Consultative Forum cannot be made public without the previous approval of Frontex Management Board and Executive Director.

Frontex new Regulation also states the independence of the CF from Frontex[132] at the very beginning of the already mentioned Article 70[133]. The independence of the CF is ensured by the voluntary nature of the activities performed by the members of the Forum, as reinstated in the CF latest Work Programme: "These organisations [i.e., members of the CF] contribute

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[131] Two or three meetings per year are mandatory (i.e., CF plenary sessions), but the CF works mostly in Working Groups divided per thematic areas (e.g., return), and advocacy groups' members also interact frequently and informally with Frontex officers.

[132] A thorough discussion on the independence of Frontex CF is present in Chapter 6.

[133] Article 70, Regulation 2016/1624: "1. A consultative forum shall be established by the Agency to assist the executive director and the management board with *independent* advice in fundamental rights matters." [emphasis added].

their work on a voluntary basis in accordance with the principles of independence, transparency, mutual respect, informed participation and collegiality." (2017: 2) Indeed, CF's members continue to receive their salaries from their organisations, where they continue to perform their jobs, while they receive reimbursements from Frontex for their travels and accommodation expenses related to their work within the agency, namely for the three annual plenary meetings, Working Groups' meetings, and missions.

4.6. CONCLUDING REMARKS: CONSULTATIVE FORA IN THE EU AGENCIES OF THE AFSJ

The EBCG agency has experienced an exponential growth in importance within the governance of the AFSJ and has played a strategic role as locus where member states learned to cooperate and to agree upon the management of the common external border of the Schengen area. The evolution of the agency over a bit more than a decade has been astonishing: from its rusty start in 2005, with its difficulties to even find staff members who were willing to relocate to Warsaw, to its 2016 renovation into a European Border and Coast Guard agency – i.e., the first truly European armed force – in charge of not only coordinating but also monitoring member states' operations at the borders of the EU. This spectacular growth in competences and thus in resources has been fueled by the increasingly tense and politicised situation of the EU borders. If Frontex was deemed necessary by member states in 2004 to ensure a proper management of the future common Eastern European border, in 2011, member states renewed their commitment to the agency as they were being faced with the effects of social unrest that spread in the Maghreb countries, which pushed an increasing number of people to cross irregularly the African-European border with dire consequences. Meanwhile, the political pressure exerted by the increasing deaths at sea, land and air borders of the EU, culminated in 2015-2016 with the death at sea of almost 9,000 people in two years[134], coupled with the reports

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[134] In 2017 the number of deaths has not decreased significantly. According to IOM "Missing migrants" project, in the Mediterranean only, in 2015 3,775 people died, while 2016 5,141 deaths were recorded; in 2017 the number

of CSOs of human rights violations at EU borders allegedly committed by member states with the complicity of Frontex, pushed for a reform of fundamental rights guarantees and tools within the agency which was enforced in 2011 and reaffirmed in 2016 with the establishment and consolidation of the FRO and of a body of consultation on fundamental rights where CSOs are represented.

The AFSJ has a long history of consultation with CSOs about fundamental rights. Indeed, two other agencies of the AFSJ are supported by their own consultative fora where CSOs are represented, as per their regulations. In particular, the Fundamental Rights Agency (FRA) has hosted the so called Fundamental Rights Platform (FRP) since the very beginning of its activity in 2007, as the European Asylum Support Office (EASO) which was also set up together with an EASO Consultative Forum in 2011, following the experimentation carried out with the FRP. These two consultative fora are not in themselves bodies of either FRA or EASO, but they meet every year (at least once) to share with the two agencies their knowledge and insights on specific issues. Before the setup of these consultative fora, the Social Platform was the only stage for a stable and institutionalized consultation between CSOs and EU institutions and bodies, in the absence of a formal process of recognition of CSOs that can access the dialogue with the EU bodies and institutions (Cullen 2010). The Transparency Register has been set up and reformed specifically to remedy the absence of this recognition, both for CSOs and private interest groups. However, the purpose and mode of establishment of consultative fora aimed to support AFSJ agencies retain specific connotates and have to be studied and compared as a different formation from the Social Platform.

The FRP has been studied since its inception due to its uniqueness at the time of its set up and as an example of extensive consultation of civil society actors by a EU agency (Kjaerum and Toggenburg 2012; Thiel 2017). Thiel defines the FRP as an "internal consultation network"

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has reached 3,116 deaths in the Mediterranean (last update 21 December 2017). All the statistics of the "Missing migrants" project are available at: https://missingmigrants.iom.int/region/mediterranean (accessed 29 December 2017).

as the FRP is composed of a network of CSOs that advocate for fundamental rights in several fields, including anti-discrimination organisations covering for example religion, gender and disability issues, but also Roma organisations and groups advocating for migrants and undocumented people's rights, trade unions and employers' organisations, universities and research centers[135]. The network is active at every level of governance in Europe – i.e., local, regional, national, transnational, and European – and grass-roots organisations are also present. The selection of the members of the FRP used to be regulated by FRA Director which issued open calls for FRP applications and set the criteria for selection according to FRA Code of Conduct. Membership in the FRP used to have a three years duration. According to Kjaerum and Toggenburg, in 2012, FRA had accepted 90% of applicants as Platform participants and presented among the reasons for rejection the absence of reply to the FRA written request for clarification, formal reasons and in few cases the overrepresentation of a specific thematic area (2012: 15).

Currently, there is no membership to the FRP and no call for applications open to CSOs, but there is a FRP database which counts 542 registered organisations[136]; CSOs can register at any time and their registration lasts for the period of the validity of FRA Multi-Annual framework, that is for a maximum of 5 years[137]. The FRP is not a body of the FRA, but it is defined by FRP Terms of Reference as a "working method"[138] used by FRA for the "exchange and pooling of knowledge" and the awareness raising of the general public on fundamental

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[135] Art. 10 of FRA founding Regulation (Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights) is devoted to "Cooperation with civil society; Fundamental Rights Platform". Para. 3 of this Regulation states that FRP "shall be open to all interested and qualified stakeholders" limited only by the list made in para. 1: "non-governmental organisations dealing with human rights, trade unions and employer's organisations, relevant social and professional organisations, churches, religious, philosophical and non-confessional organisations, universities and other qualified experts of European and international bodies and organisations."

[136] Members' list last updated 31 July 2017.

[137] The first multiannual framework of FRA covered the period 2013-2017, the second will cover the period 2018-2022. This document defines the thematic areas that FRA addresses, also with the support of the FRP, and is drafted by the European Commission and then approved by the JHA Council and the EP.

[138] FRP Terms of Reference are available at: http://fra.europa.eu/en/cooperation/civil-society/about-frp (accessed 12 July 2017).

rights (FRA, 2017). The criteria of acceptance of CSOs within the FRP database include experience in the field of fundamental rights, presence and activity in at least one of EU member states, and a level of professionalisation necessary to meet the standards of financial and organizational transparency required by the EU. FRP organisations meet formally and informally on several occasions and in different compositions; the plenary meeting used to be held once a year until 2014 (7th annual FRP plenary meeting), whereas currently consultations take place on a thematic base and the Advisory Panel helps FRA gather the relevant CSOs for ad hoc consultations. The FRP elects among its members 6 CSOs that, together with 5 supplementary organisations selected by FRA Director among FRP's organisations, become part of the Advisory Panel of the FRP. The Advisory Panel organizes and supports the FRP together with FRA's Director.

On the other hand, the EASO Consultative Forum was set up at the same time as Frontex CF and can be considered as the result of what used to be the FRP before 2011 and what was to become the Frontex CF. EASO's CF has not particularly been an object of study so far. According to Art. 51 of EASO founding Regulation, which regulates the CF work, EASO has to open the consultation with "interested parties on the widest possible basis" (EASO CF, 2012: 5). Therefore, similarly to FRA, EASO set up an online EASO Consultative Forum Register (ECFR) in November 2011, where registration is open to all interested organisations and bodies. Presence in the register does not imply necessarily EASO request for consultation, which happens on thematic basis. The selection of organisations and bodies to be consulted follows several criteria including expertise, degree of involvement at national and EU level and presence in an already established network (i.e., embeddedness), and finally relationship with EASO or with implementation of EU measures related to asylum[139]. However, being registered gives to interested organisations the possibility to participate in EASO CF plenary meetings

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[139] Selection criteria are available on EASO website at: https://www.easo.europa.eu/easo-consultative-forum (accessed 20 November 2017).

which are held once a year and to contribute to make suggestions to the Management Board on the Work Programme and annual report of EASO, including follow-up measures to the annual report. EASO CF currently counts hundreds of members among international governmental organisations, NGOs, but also academics and members of the tribunals and courts; UNHCR is a mandatory member of the CF as well as of EASO Management Board, even if without voting rights in the latter.

The last plenary meeting of EASO CF was held Brussels on 17 November 2017[140], far away from EASO's headquarters in La Valletta (Malta), which was in principle elected as location for EASO CF plenaries. Oher methods of consultation include expert meetings (e.g. Country of Origin Information meetings), workshops, seminars, specific consultations (including open online consultations) and practical cooperation activities in a "continuous two-way dialogue" (EASO CF, 2012: 8). According to the only EASO CF operational plan available online (2012), the two-way consultation process is ensured through EASO Executive Director and Management Board commitment to take into consideration EASO CF input[141]. The Executive Director of EASO chairs EASO CF plenary meetings. Lastly, EASO CF has an Advisory Board, similarly to FRP, and is supported also by several thematic networks (e.g., exclusion from asylum network). Regional thematic meetings have been also held recently with interested members of EASO CF (e.g., Trapani meeting in 2017).

Frontex CF, EASO CF and FRP share similarities and differences, but the reason why the present study focuses on Frontex CF and its relationship with Frontex is specifically the uniqueness of this body in terms of structure, number of involved actors, membership, method of consultation, and follow-up. Similarly to Frontex, EASO is an operative agency; this implies

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[140] The agenda and summary of the work done during the last EASO CF plenary meeting is available at: https://www.easo.europa.eu/civil-society/easo-consultative-forum/2017-consultative-forum/consultative-forum-plenary-2017 (accessed 20 November 2017).
[141] "[F]eedback and suggestions will be consolidated by EASO and published on its website. The Executive Director also addresses the annual meeting plenary meeting of the Consultative Forum to inform how, and to what extent, were taken onboard by EASO, taking into account the independent role and specific responsibilities of the Agency." (EASO CF, 2012: 9)

that consultation with CSOs, international organisations and other interested actors stems from very practical necessities: information on and knowledge of the field are highly relevant assets for these agencies. FRA is not an operative agency, which implies a less "predatory" approach of the agency vis-à-vis the consulted actors. The structures of FRP and EASO CF are very similar and significantly different from Frontex CF; while FRP and EASO CF count hundreds of members among interested actors (including private interest groups and academia) which need only to register in order to join these bodies, Frontex CF has a very limited number of members (i.e., 15), which are *selected* by Frontex among a definite set of actors and according to specific criteria (i.e., CSOs, international organisations, EU agencies). Moreover, while FRP and EASO CF are *mechanisms* for exchange of information between the agencies and civil society, Frontex CF is an independent body of the agency as per Frontex Regulation and has its own Chair and Co-Chair. The frequency of interaction is also different: on the one hand FRP and EASO CF are consulted at least once a year and then on ad hoc basis, on the other hand, Frontex CF meets at least three times a year in plenary meetings – always held at Frontex Headquarters in Warsaw – plus in Working Groups meetings, focus groups with Frontex officers, etc., not only answering to ad hoc requests from Frontex but also developing its own agenda. Lastly, Frontex CF has to report annually on its activity and publicise the publication of this document, whereas FRP and EASO CF have no such obligation. Interviewee 7, whose organisation is also part of EASO CF, gives a further clarification on the difference between working in Frontex and EASO CFs.

> "We are also members of the Consultative Forum of EASO but this is a completely different experience because this consultative forum meets only once a year. They have set up several groups of experts – whether they are working or not I have no idea – and the EASO Consultative Forum is much, very much bigger, and comprises a lot of very different organisations, therefore is not as effectively working as Frontex Consultative Forum. And it does not come up with joint recommendations or joint positions. It is just for discussing

asylum and related issues. Interesting, sometimes, but I have a hard time assessing the impact of that CF on the work of EASO."

It is interesting to notice that among FRA, EASO and Frontex there are inter-agency agreements which, among other things, imply their participation in each other's consultative fora. The working arrangement between FRA and EASO, for example, was concluded in 2013[142] and its Article 12 on "Consultation activities" covers the participation of the EASO in the FRA's Fundamental Rights Platform[46] and FRA's participation in the EASO Consultative Forum. Frontex Regulation

In conclusion, the choice of Frontex relationship with its CF as case study has been clearly made to evidence the presence of a peculiar and evolving interaction between highly professionalised CSOs at the EU level and this operative EU agency. This seems a very interesting point of departure to re-discuss Kröger's statement about CSOs involvement in EU level decision-making: "nothing but consultation" (2008). Moreover, this study could be relevant also to address the question, raised again by Kröger in the same article, of whether CSOs can provide input legitimacy to EU governance and, more specifically, to the "agencified" type of European governance. The next two chapter (Chapter 5 and Chapter 6) analyse in detail the relationship between Frontex and its CF and the implications of this interaction on Frontex understanding of and on Frontex accountability on fundamental rights. Chapter 7 finally addresses also Kröger's "nothing but consultation" and EU governance input legitimacy issues.

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[142] Working agreement between EASO and FRA, Strasbourg, 11 June 2013. Available at: http://fra.europa.eu/en/cooperation/eu-partners/eu-agencies (accessed 24 March 2017).

CHAPTER 5
Fundamental rights' advocacy in the EU border management policy field: what role for CSOs?

5.1. INTRODUCTION

Increasing attention has been devoted in the last decade to the situation at the borders of the European Union, and, more specifically, at the Schengen borders[143]. The so-called "refugee crisis" of 2015 has marked the climax of an increasing European tension on the management of the external borders. After 30 years since the inception of the Schengen agreement that abolished the borders among its signatories, EU member states and Schengen members have started to rebuild internal frontiers and increased controls internally. Building fences has been the outcome of both a perceived "invasion" of refugees and irregular migrants (de Haas, 2008), whose numbers grew steadily in the last decade (Frontex, 2016e), and a mismanagement of irregular arrivals at the Eastern and Southern borders of the EU. While populist parties have been building their consensus over the criminalization and fear of migrants, which recently lead to the so-called "Brexit" vote, CSOs acting as advocacy groups have taken a strong position against this view and in favour of the protection and promotion of migrants' rights.

In this particularly turbulent period, CSOs lobbying for migrants' rights have expanded their presence at the EU level. With the growing importance of agencies in the EU executive space in terms of competences and resources (i.e., agencification), advocacy groups have started to direct their lobbying, hence advocacy efforts, towards EU agencies, particularly in the Area of Freedom Security and Justice (AFSJ). Currently, advocacy groups are represented in a number of consultative bodies and platforms of EU agencies such as the Fundamental Rights Agency (FRA), the European Asylum Support Office (EASO), and the European Border and

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[143] EU and Schengen borders do not coincide as the EU member states are not all signatories to the Schengen Agreement of 1985. The EU member states that are not part of Schengen are: Ireland and the UK (even though the UK might leave the EU soon). There are also states which ratified the Schengen agreement but are not part of the EU, namely Switzerland, Norway, and Iceland.

Coast Guard agency (EBCG), also known as Frontex[144]. The role of these bodies and platforms is generally to assist EU agencies in gathering information on fundamental rights issues. As presented in Chapter 4, the most controversial EU agency in this scenario is the 12 years' old agency Frontex, which is also the agency in which the presence of CSOs is more substantial in terms of competences, interaction with the agency, and ability to retrieve information on the activity of the agency.

Aim of this chapter is to establish how human rights advocacy groups lobby Frontex from within (i.e., in the CF). This study addresses this issue by, first, examining how the fundamental rights regime works at the EU level, highlighting the role of CSOs and of another EU agency, namely the Fundamental Rights Agency (FRA); indeed, FRA has a privileged position both towards civil society, as it was the first EU agency of the AFSJ to host a civil society consultative platform, and towards the EBCG agency, as it has both a bilateral cooperation agreement and it sits in Frontex CF. Secondly, the Chapter describes the role of CSOs particularly in the field of the management of the EU borders and delves into the case of Frontex Consultative Forum on fundamental rights. CSOs represented within Frontex CF are thus analysed to determine the factors and the rationale for their strategic decision to gain access to Frontex, thus both cataloguing the CSOs represented in the Consultative Forum according to their resources and policy goods, and studying the reason for their lobbying strategies' selection. Literature on advocacy groups access based on the study of resources is seemingly confirmed by this case study, even though the analysis of campaigns carried out by CSOs that chose to lobby Frontex from outside highlights the need to consider also the ideological cleavage among advocacy groups when it comes to strategy choices. Lastly, the role and the strategies of CSOs within the Consultative Forum (e.g. cooperation or competition among CSOs or with other members of the CF) is described by carrying out a content analysis of the

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[144] I will use the terms "Frontex" and "EBCG agency" or "the agency" interchangeably in this chapter.

minutes of plenary meetings of the CF, its annual reports and other official documents released which can give an insight on the CF work.

5.2. THE EU FUNDAMENTAL RIGHTS' REGIME

Since the introduction of the Charter of fundamental rights of the European Union (the Charter) into the *acquis communautaire*, with the Treaty of Lisbon of 2009 (Article 2 and 6 TEU), fundamental rights have become a cornerstone of the EU foundations, and legally binding for all EU institutions and bodies. The mainstreaming and respect of fundamental rights has been applied ever since in all areas of EU reach, including the Area of Freedom Security and Justice (AFSJ), which is the policy area including border, asylum, and migration issues. In 2014, during the seventh annual Conference of the European Fundamental Rights Agency, Dimitris Avramopoulos – i.e., Commissioner for Migration, Home Affairs and Citizenship – affirmed that:

> The protection and the promotion of the fundamental rights of migrants, regardless of their status, is not optional. The Charter of Fundamental Rights reminds us that the European Union is founded on the universal values of human dignity, freedom, equality and solidarity. It is the guiding line of our mission in migration, home affairs and citizenship.[145]

As such, migrants, including non-EU citizens and stateless persons, are to be protected by the Charter of Fundamental Rights, regardless of the recognition of a status of international protection or of a permit to stay on the territory of the member states of the EU.

The enforcement of the Charter in the EU is ensured through three main institutions: the European Union Court of Justice (EUCJ), the European Ombudsman, and the European Court of Human Rights (ECtHR). The first two are EU institutions, while the third is an international institution, created and signed by the members of the Council of Europe in 1953 to enforce the principles laid down by the European Convention for the Protection of Human Rights and

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[145] The full speech is available at: http://europa.eu/rapid/press-release_SPEECH-14-1601_it.htm [accessed 14 June 2016].

Fundamental Freedoms (ECHR). The latter complements the Charter by guaranteeing fundamental rights in cases where the Charter does not apply. Since the entry into force of the Treaty of Lisbon, the EU was obliged to access the ECHR under article 6(2) TEU, so that this international agreement would be applied not only in the EU signatory countries, but also to the EU as a whole. However, the process of accession was halted, not without scandal, in 2014 by the Court of Justice of the European Union: in its opinion, the Court of Justice affirmed that access of the EU to the ECHR is incompatible with EU law[146]. As a consequence, the Convention still applies to all EU signatory countries, while the provisions of the Charter are addressed to the institutions and bodies of the EU and to EU member states, exclusively when implementing EU law. The Lisbon Treaty also provided for the extension of the mandate of a quasi-judicial figure: the European Ombudsman. While the European Ombudsman cannot adopt legally binding decisions, she can receive complaints and help solving controversies now involving EU institutions, bodies, offices or agencies in all of EU policy areas, including matters of the common foreign and security policy (Art. 228(1) TFEU; Busuioc 2013: 222).

Overall, as Ruzza (2014) claims, the EU fundamental rights framework can be described as a collaborative governance regime where the EU Fundamental Rights Agency (FRA), the EU Court of Justice (CJEU), the European Commission and the European Parliament and Council cooperate to implement the Charter of fundamental rights. There are several instruments employed to pursue the goal of fundamental rights mainstreaming, namely FRA publications, European Commission's impact assessments and annual reports on the application of the Charter, and the "EU annual report on Human Rights and Democracy in the World"

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[146] For a summary of the major obstacles to the EU accession to the ECHR, please refer to the press release of the Court of Justice of the EU of December 18, 2014, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-12/cp140180en.pdf (accessed 28 December 2016). Among other problems, the Court highlights the issue of the creation of judicial review powers for the ECtHR over matters of the EU common foreign and security policy (CFSP); indeed, the Court does not have power to review the legality of certain matters of the CFSP in the light of fundamental rights and with the accession to the ECHR this power would be delegated to an international, non-EU court. As a consequence of the halt to accession, there still are acts adopted in the framework of the CFSP whose legality is not reviewable in light of fundamental rights by a judicial court; it must be noted, however, that since the entry into force of the Lisbon Treaty the European Ombudsman has seen its mandate extended to the CFSP.

issued by the Council of the European Union. In particular, FRA publications are not binding but provide insights and policy advice to member states and EU institutions alike in different policy areas (e.g., gender, Roma, migration issues). These European institutions and the FRA also created a strong network with the Council of Europe, the European Court for Human Rights, national human rights institutions and civil society organisations with the aim to mainstream fundamental rights in EU and national policies.

Adapting to fundamental rights the definition used by the European Commission for "gender mainstreaming", mainstreaming of fundamental rights involves:

> "the systematic integration of [fundamental rights] in all policies [. . .] with a view to promoting [fundamental rights] and mobilising all general policies and measures specifically for the purpose of [realising them] by actively and openly taking into account, at the planning stage, their [impact on fundamental rights]." (De Schutter 2005: 43-44)

Mainstreaming fundamental rights in the EU thus does not require creating new specific rules or tools for policy-making but implementing fundamental rights requirements at every stage of policy-making itself, so that fundamental rights become integrated in the culture and way of functioning of EU institutions, agencies and bodies. Mainstreaming fundamental rights is "an integral part of all public policy making and implementation…it does not simply require that such legislations and policies do not violate fundamental rights. It is pro-active, rather than reactive" (De Schutter 2005: 44).

Mainstreaming is complementary to monitoring fundamental rights as it provides for the incorporation of fundamental rights at every stage of policymaking and particularly during planning, or *ex ante*, to influence the implementation of policies, while monitoring ensures that the mainstreamed fundamental rights have been properly protected during the implementation phase, or *post hoc*. The role of monitoring the implementation of fundamental rights has not been entrusted to a single body, agency or institution of the EU, but to national bodies and

ombudsmen, and to the judicial system both at national and EU level. Civil society organisations have claimed this role and are currently very active in monitoring fundamental rights, especially in the policy fields of border management and asylum.

It is interesting to notice how the first Frontex documents delivered after Regulation 1168/2011 introduced measures to ensure and strengthen the protection and promotion of fundamental rights in Frontex activities, do not use the term "mainstreaming" fundamental rights, but "streamline"[147] fundamental rights or "horizontal integration of fundamental rights throughout all [Frontex] activities and at all stages" (Frontex, 2011e: 1,6). Ilkka Laitinen, former Executive Director of Frontex, in a training module guide developed with FRA and UNHCR in 2011, wrote: "This is also my personal conviction and one of the tangible outcomes of Frontex' concerted efforts to streamline fundamental rights into all our activities is this Fundamental Rights training for its staff" (Frontex, 2011d: 3). The term "streamline" appears also in Frontex Fundamental Rights Strategy (2011e): "Fundamental rights shall be streamlined into Frontex staff policy development where knowledge and experience in this field are also taken into account as selection criteria in recruitment" (par. 26) and "This creates opportunities for Frontex to promote and streamline the respect of fundamental rights into cooperation activities with the Third Country" (par. 30). The term "mainstreaming" is used later in Frontex response letter to the EU Ombudsman[148], and in Frontex report for the Office of the High Commissioner for Human Rights (2014e)[149], but hardly in Frontex governance documents. In

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[147] "Frontex is leading by example in preparing and delivering training on fundamental rights in cooperation with FRA and with the support of UNHCR, to its own staff. Fundamental rights shall be streamlined into Frontex **staff policy development** where knowledge and experience in this field are also taken into account as selection criteria in recruitment." (Frontex, 2011b: 6; emphasis in the original).

[148] "This comprehensive document was based on the fact that Frontex considered that respect and promotion of fundamental rights are unconditional and integral components of effective integrated border management. Hence, it was meant to serve to mainstream fundamental rights into all activities of Frontex and thus promote the respect of fundamental rights in the European border-guarding culture." (2012, Annex 1: 1).

[149] "Frontex is continuously taking further steps to enhance compliance with the obligation to mainstream fundamental rights during operational activities. This commitment helps Frontex to effectively promote and protect the fundamental rights of all migrants, especially of those persons in a particularly vulnerable situation, including unaccompanied and separated children." (par. 11) and "Frontex has adopted concrete measures to train border guards on fundamental rights and refugee law. These training initiatives are of utmost importance to mainstream fundamental rights perspective into the daily Frontex activities, both at headquarters and in the operational areas

sum, the concept of mainstreaming fundamental rights into Frontex activities is not clearly defined, even though there is a general understanding of the need to prioritise fundamental rights in Frontex' culture (Frontex, 2015d).

5.2.1. THE FUNDAMENTAL RIGHTS AGENCY AND ITS RELATIONSHIP WITH FRONTEX

A crucial role in this regime was envisaged for the FRA from its establishment in 2007, with Council Regulation (EC) 168/2007. Main tasks of the Fundamental Rights Agency are to collect and analyse data on fundamental rights as listed in the Charter (see Figure 7) and specifically in policy areas that fall within the scope of the EU mandate (e.g., gender equality, racial discrimination). As Figure 7 shows, FRA work is supported by and based on consultation with partners, which include civil society. Even though the agency was founded on the ashes of the European Monitoring Centre on Racism and Xenofobia, which was tasked with monitoring member states on these issues, the FRA does not have the competence to monitor the compliance of MSs and EU institutions, agencies and bodies with regard to fundamental rights.

The rationale for the disappearance of monitoring is inextricably linked with the reasons for the creation and, therefore, the nature of the European agencies in the AFSJ, which are all information gathering and networking bodies[150] (Sokhi-Bulley, 2011). Indeed, agencies have been described as attractive tools in a "new" European governance of fundamental rights by De Bùrca as they provide for a "soft, flexible, iterative and comparative dimension" (2005: 29). It must be noted that some argue that the FRA retains what has been called a "surveillance" or "observatory monitoring" power (in a Foucaultian understanding) over EU actors and member

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and ensure understanding of the obligation to render assistance and refer protection cases to the competent authorities" (par. 27).

[150] The only notable exception in the AFSJ is Frontex, whose 2016 Regulation introduced monitoring powers of the agency over member states compliance with its recommendations with regard to the management of their borders, although FRA has a monitoring duty specifically for member states implementation of the Convention on the Rights of Persons with Disabilities.

states alike in the implementation of EU law, which does not "build on the normative bindingness of its findings, but rather has a disciplinary effect", similar to the surveillance conducted in Foucault's *Panopticon* (Sokhi-Bulley 2011: 686-689; Engstrom and Heikkilä 2016). However, both the representative from FRA and Frontex officials interviewed denied completely the ability of FRA to monitor – as intended by the European Commission in strictly legalistic terms – Frontex protection of fundamental rights, which is instead the exclusive competence of Frontex Fundamental Rights Officer.

Figure 7: Fundamental Rights Agency work

Source: FRA (2014). *What we are. What we do. How we do it.*, booklet. Available at: http://fra.europa.eu/sites/default/files/fra-2014-booklet_en_0.pdf

Even though the FRA was welcomed by scholars as a potentially crucial tool for the development of a fully-fledged fundamental rights regime at the EU level (Alston and De Schutter, 2005), the results have not been deemed up to the expectations. Indeed, even though the agency still retains a significant potential in terms of ability to mainstream the rights listed in the Charter (Toggenburg, 2013), the current mandate of FRA hinders the possibility of the agency to act as a complement to the judicial system and to actively setting and promoting its own agenda in the EU, especially with the advent of the EU economic crisis (Hinarejos, 2016; Chalmers and Trotter, 2016). However, in terms of networking, the ability of the FRA to

involve civil society organizations active in the field of human rights protection and acting transversally on multiple or single thematic issues (e.g., migration, racial and/or gender discrimination issues) has set the stage for a closer involvement of CSOs in the work of AFSJ agencies. The tool created for the constant cooperation among FRA and civil society is called Fundamental Rights Platform (FRP) and it's the first example of a consultative body at the EU level specialized in the protection and promotion of the fundamental rights enshrined in the Charter[151].

In the field of border management, the FRA has established a particularly close relation with another agency, which is the object of the present study: Frontex. It must be noted that the cooperation among AFSJ agencies is envisaged in all their founding Regulations, and the same agencies already had established a network in 2006 to foster bilateral and multilateral cooperation and synergies in areas of common interest, such as strategic and operational work, external relations or training (i.e., Justice and Home Affairs Agencies Network[152]). However, the establishment of this FRA-Frontex cooperation was not merely imposed on the two agencies from above: it could be argued, elaborating on Busuioc's consideration on the willingness of agencies to be held accountable (2015), that reputation, other than sharing valuable information, can be considered as a key factor in the choice for Frontex cooperation with FRA. In this sense, Frontex could shield accusations of being unaccountable for the protection of fundamental rights during its operations, by showing good will through the cooperation with FRA aimed at streamlining fundamental rights.

The history of the FRA-Frontex relationship is peculiar for four main reasons: first, it started quite early; second, it has proven to be a particularly close one; third, it was recognized as essential for Frontex work and reputation; fourth, and finally, the majority of CSOs that are

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[151] For a presentation of the FRP in comparison with other JHA agencies' consultative fora, see Chapter 4.
[152] As of 1 January 2016, and for one year, FRA acted as Chair of the network. For a detailed description of the mandate of the network and its activities, see: http://ec.europa.eu/justice/about/files/jha_agencies_en.pdf [accessed 22 July 2016].

represented in Frontex CF are also present in FRA Fundamental Rights Platform (FRP). The Cooperation Agreement between the two agencies was formalized in on 26 May 2010, but was in place since FRA became operational in 2008, and established that the overall objective was to create a framework for cooperation aimed at "strengthening the respect of fundamental rights in the field of border management and in particular in Frontex activities" (Art. 1)[153]. Moreover, the FRA was mentioned in Frontex Regulation of 2011 as a strategic partner also within Frontex Consultative Forum on fundamental rights; indeed, FRA is one of the three compulsory members of the CF, and this strong link has been reaffirmed with Frontex Regulation of 2016. Finally, it must be noted that the decision of the EP and the Council to introduce, with Regulation of 1168/2011, the presence of two fundamental rights bodies in Frontex structure, one of them including compulsorily the FRA, was determined by the concerns that an operational agency like Frontex raised with regard to the mainstreaming of fundamental rights in its activities, concerns that placed Frontex in the spotlight of public opinion. Also in this case, however, the FRA does not act as monitoring body, but collects data and information on fundamental rights protection at the border of the EU, in cooperation with the other organisations represented in the CF, to advise Frontex on fundamental rights. Finally, FRA has a close relationship with CSOs that advocate for fundamental rights in the policy field of border management not only as an EU agency which needs to consult with them, but also as their partner in consulting Frontex.

With the overall goal of "strengthening the respect of fundamental rights" at the EU borders, the FRA-Frontex agreement focuses on four main areas of Frontex activity, namely Joint Operations (including Return), Risk Analysis, Research, and Training on fundamental rights (both for Frontex staff and for seconded national border guards). There have been three main phases of FRA-Frontex cooperation: the first before 2010, the second from 2010 to 2012,

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[153] The text of the Cooperation Arrangement is available at: http://fra.europa.eu/sites/default/files/fra_uploads/891-Cooperation-Agreement-FRA-Frontex_en.pdf (accessed 22 July 2016).

and the last one from 2012 onwards. Drawing from the interview carried out with a member of FRA - who also chaired the Consultative Forum for the CF first two years of work[154], – before the signing of the cooperation agreement, an informal bilateral cooperation between the two agencies was already in place. During these first two years of cooperation, the FRA worked on Frontex documents (e.g., operational plans, operational guidelines, reports following operations, evaluation reports) to suggest how to streamline fundamental rights in every stage of Frontex' operations (i.e., planning, implementation, evaluation), and in particular to:

> "ensure that fundamental rights are considered as key underlying principles in all these operational planning, implementation, and evaluation tools… so a lot was around really trying to frame and set the language right when it comes to all kinds of sea land and border operations, trying to highlight the particular vulnerability of certain persons or certain groups in such operations" (interviewee 11)

Even though access to these documents was not automatic for every operation, it was granted for those operations identified together by FRA and Frontex. The revisions that the FRA proposed to these documents were meant also to ensure at some stage that specific recommendations made by FRA would automatically be taken into consideration whenever Frontex was to plan, implement and/or evaluate any operation in the future. In particular, FRA could revise four evaluation reports concerning four different Frontex maritime operations, which took place between 2009 and 2011 (FRA, 2013).

With the formalisation of the cooperation in 2010, the FRA could not only work on documents that Frontex provided, but also go to witness Frontex operations and training,

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[154] The interviewee is also one of the only two members of FRA staff who work in the asylum and migration sector and they are both involved in the cooperation with Frontex (i.e., the first is more concerned with Training, the second more with Operations). Interviewee 11 confirmed a general trend among the members of the CF: the time spent on CF related work is about 15-20% of work hours; interviewee 11, however, also includes in this percentage also the time employed address bilateral cooperation issues that survive along CF duties (i.e., Working Group on Return in 2016). Moreover, interviewee 11 exceptionally devoted 100% of her work hours to Frontex CF for the CF's first two years, as Chair of the forum; at that time her tasks included creating CF structure by engaging all CF members equally, brief some of them about Frontex work and functioning so that CF recommendations could immediately result as useful tools for the operational nature of Frontex, and invest in the creation of a trustful environment.

therefore moving from theory to practice. In particular, FRA representatives were able to join Frontex pre-deployed briefings for specialized officers which were carried out immediately before the deployment of an operation. With regard to training, FRA took also part in the training of border officers, especially at air borders. It must be noted that according to interviewee 11, at the time of the interview FRA never received nor requested classified documents from Frontex, even though the FRA-Frontex working arrangement states that "For the purpose of this Arrangement, exchange of European Union (EU) classified information is limited up to the level RESTRICTED / RESTREINT UE" [emphasis in the text] (Art. 14); this is another sign that FRA is not treated and cannot operate as monitoring body as it is not granted granted full access to Frontex documents.

Since 2012, the FRA-Frontex bilateral agreement coexists with the presence of FRA within the Frontex Consultative Forum on fundamental rights. When the CF became operational, FRA participated in a small review meeting with Frontex to decide what matters should remain at the bilateral level and what should be moved to the CF. FRA and Frontex agreed that research on specific border points, including the collection of data and the analysis should remain at the bilateral level, as, for example, provide research results on selected air borders. The main areas of cooperation however were moved to the CF, as the revision of the Core Curriculum for border guards to streamline fundamental rights and the creation and conduction of specialized training tools for border officers (e.g., training module on how to deal with trafficked children). According to interviewee 11, the establishment of the CF "was very beneficial", as FRA could cooperate with other experienced organisations with different backgrounds, information and resources, and feed the conversation with valuable input drawn from the bilateral cooperation with Frontex. The main weakness of FRA-Frontex relationship

– as well as the relationship CF-Frontex[155], as discussed in Chapter 6 – was and remains cooperation in the field of Risk Analysis.

Lastly, it must be noted that FRA did not refrain from publicly criticising certain aspects of Frontex activity during this bilateral cooperation. When asked about FRA independence in objecting to Frontex actions, interviewee 11 affirmed that "because of the good relations that we established, at least I felt far more comfortable in being very outspoken when it comes to criticism". FRA published in 2013 a report titled "EU solidarity and Frontex: fundamental rights challenges" in which it highlighted fundamental rights challenges in every area of Frontex activity, and particularly regarding Frontex cooperation with third countries and sea operations. Moreover, in May 2016, before the 2016 Frontex Regulation was passed and enforced, FRA told LIBE members[156] that refoulement of potential asylum seekers was one of its main concerns regarding Frontex activity.

In 2005, De Schutter argued that the FRA could play a crucial role in mainstreaming fundamental rights at the EU level. More than ten years later, it is possible to argue that FRA alone cannot be effective in mainstreaming fundamental rights in every field of action of the EU. This applies especially in such a technical and highly politicised policy area as border management, where FRA employs two staff members who can only work part-time on borders and fundamental rights. This is why the creation of efficient networks with civil society actors is crucial. The next section analyses specifically the presence of CSOs within Frontex CF.

5.3. CSOs in the EU fundamental rights regime: the case of CSOs within Frontex Consultative Forum

As discussed throughout this work, another important actor has emerged with increased strength, particularly after the entry into force of the Treaty of Lisbon, in the EU fundamental

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[155] The other members of the CF interviewed, both representing CSOs and international organisations, agreed on this point.
[156] Meeting held on 30 May 2016.

rights regime, namely CSOs[157] (Ruzza, 2014). The opening of participation opportunities in the governance of the EU, coupled with the elevation to treaty-like status of the Charter, created a unique environment for the work of human rights groups at the EU level, particularly for advocacy groups active in the human rights' field. However, human rights advocates at the EU level were historically organized around non-discrimination issues (e.g., gender, age), while the issue of third-country nationals' rights remains a recent issue (Thiel and Uçarer, 2014). Nonetheless, their presence at the EU level has been strengthened as practices of consultation in the fundamental rights regime have become increasingly institutionalised (Cullen, 2010; Ruzza, 2014; Thiel and Uçarer, 2014), and particularly within the JHA agencies, such as in the FRP of FRA and Frontex CF, as discussed in Chapter 4.

CSOs which are, or were, members of the CF are the main subjects of this work. What are these organisations? Where are they from? What are their visions and missions? In order to answer these questions, and before looking at these CSOs' strategies and at how they cooperate within the CF, it is necessary to know more about their aims, constituency, structure and history. A description of these organisations, in alphabetical order, follows. Moreover, Table 6 summarises the main fields of expertise of the CSOs described, the main focus or target group of their work and their advocacy strategy.

Advice on Individual Rights in Europe Centre (AIRE)
AIRE Centre is the newest member of the CF. It was selected in 2015 and was the only new member selected by Management Board decision for the second mandate of the Forum, replacing CCME. AIRE is the only non-Brussels' based organisation among CF members and the only one which is not involved in a Brussels' based network of CSOs active in the field of fundamental rights advocacy for migrants. The law Centre has expertise in case litigation before European Courts (i.e., ECtHR and CJEU) where it was involved in some of the most relevant

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[157] For a thorough discussion of the role of CSOs in the EU and their emergence as important actors in the EU governance system, please refer to Chapter 2, Section 1 of this work.

European cases in the field of asylum and migration (e.g., Hirsi v Italy) always striving for the full respect, protection and promotion of European law rights. With the same goal, AIRE is also focused on providing legal assistance to marginalised people, training lawyers and legal advisers in the voluntary sector on human rights matters and advising trainers and researchers on fundamental rights matters in the EU. Within the CF, AIRE has so far not been particularly proactive, according to the representative interviewed, due to the shortage of staff and resources; indeed, AIRE currently employs only four lawyers – i.e., excluding the Senior Lawyer and Founder of the Centre – and two legal consultants. However, within the CF, the two representatives of the Centre are part of the Operations and Training Working Groups and one of them also participated in a mission visit to Frontex operation Poseidon in 2016. AIRE has also brought its expert advice in the focus group organised by the CF on rights of the children at the EU borders, even if not directly taking part to Frontex VEGA operation at the air borders, AIRE Centre's rationale to join Frontex CF was multifaceted. The interviewee affirmed first that AIRE decided to apply for the CF "because it fell directly into the area of our activity. We are an organization with a very long tradition of involvement in asylum matters.". More in detail, AIRE representative described the specific areas in which the organisation wants to have an impact, namely training, advocacy and policy setting:

> We have been involved in capacity building on asylum both for decision makers and also
> for judges, so we thought it could be a very good area to maximise our impact if we could
> participate in the training aspect of the CF. It also triggered a bit our interest in terms of
> advocacy and policy setting; of course, you know you can write all the letters you want but,
> in the end, it is really a lot easier to see how an organisation works from the inside and try
> to exchange views with policymakers who then organise the framework that the CF is.

Finally, AIRE applied also to know better the agency and collect information directly from the source:

> we are one of the organisations that does strategic litigation in asylum matters before the
> European Court of Human Rights and a lot of the cases that we have litigated recently have

non-refoulement at sea and land borders which is an area that Frontex was often being allegedly accused of or allegedly involved in. So, we would relish the opportunity to find out, inside, whether this is indeed the reality or... you know, just try to get to know the different actors that often take part in a case.

AIRE Centre was the newest member of the CF (second mandate of the CF only - 2016) until Save the Children substituted Caritas in September 2017.

Amnesty International European Institutions Office (AI EIO)

AI EIO is a Brussels' based organisation which lobbies European institutions and bodies to mainstream fundamental rights in both EU and Council of Europe (CoE) policies. AI EIO has numerous branches active at the national and local levels in Europe, which provide funding for the work of the organisation, which does not accept government or political parties' funding for independence reasons. According to the information received during the interview with AI EIO representative, the organisation is one of the very few European and international human rights advocacy establishments which not only denounces fundamental rights abuses, but also carries out inhouse research with the support of its numerous local branches. Moreover, on Frontex website, AI EIO is presented as providing "comment, background and analysis on the human rights implications of EU and CoE decisions", and "monitor[ing] the institutions' performance"[158], which is particularly interesting considering that the CF as a whole does not have the mandate to monitor Frontex activities. This gives to the organisation a strong leverage vis-à-vis the institutions it interacts with, including Frontex, both in terms of knowledge and expertise. At the time of the interview, in 2015, the advocacy of AI EIO in the field of migration and asylum focused specifically on Search and Rescue operations (SAR) at sea and on the borders of the EU. More recently, in 2016, the attention of the organization on migration and asylum came to include also fundamental rights abuses immediately within the EU borders, namely hotspots in Italy (Amnesty International 2016a). AI EIO works in partnership with a

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[158] Available at: http://frontex.europa.eu/partners/consultative-forum/members/ (accessed 15 July 2017).

wide network of NGOs active at the European level, and has its own website where it publishes press releases, briefs and reports.[159] AI EIO does not publicise its specific goals, but Amnesty International published its triennial strategic goals at a global level, which underlined the will of the organisation to focus on holding accountable human rights abusers and "responding to conflicts and crises by pushing international institutions to act effectively, protecting people from the irresponsible arms trade and seeking to ensure that international borders are never closed to people who need aid or refuge. (Amnesty International 2016b: 14). Within the CF, AI EIO has been part of the Working Group on Operations. At the time of the interview, a substitute of the AI representative in the CF affirmed that AI would participate in a mission to Operation Triton at Frontex headquarters in Catania.

Caritas Europa

"United in fraternity for more solidarity in Europe", this is Caritas Europa motto (Caritas Europa 2016). Caritas Europa is the umbrella organization of around fifty Caritas organisations in Europe and outside Europe; it is faith-based (Christian Catholic) and has a Secretariat located in Brussels. Its mission is to "fight poverty and social exclusion; and to promote true integral human development, social justice and sustainable social systems in Europe and throughout the world" (Caritas Europa 2016: 4). Through the Brussels' Secretariat, Caritas Europa also advocates for the rights of people in need to achieve "a more just and inclusive civilization" while promoting "analysis, innovation and mutual learning" (*ibidem*). In the CF, at the time of the interview in June 2015, Caritas Europa was involved in two Working Groups: Training (appointed rapporteur of this WG in 2014) and Operations. According to Caritas representative:

> "I think this was also one of the shifts we did few years ago, 3/4 years ago, going more into
> this direction of looking into EU external borders, looking actually at what is really going
> on in the Mediterranean Sea, so that was also one of the reasons we actually decided to
> apply. We are also part of lobby structures here in Brussels and…partially being involved

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[159] See http://www.amnesty.eu/ (accessed 15 July 2017).

in actually saying 'there should be a CF', we then felt also maybe we should then apply although we weren't really sure about the involvement, what to expect until then."

When acting as lobbyist at the EU level, Caritas usually consults its members to gather knowledge and consensus on specific issues. Caritas withdrew from Frontex CF in 2017 and was replaced by Save the Children (September 2017).

Churches' Commission for Migrants in Europe (CCME)

CCME is an organisation that represents 28 Christian churches in 18 European countries. Its mission is: "to serve the churches in their commitment to promote the vision of an inclusive community through advocating for an adequate policy for migrants, refugees and minority groups at European and national level. In the fulfilment of this mandate it is responding to the message of the Bible which insists on the dignity of every human being and to the understanding of unity as devoid of any distinction between strangers and natives."[160] The CCME is the CSO, member of the CF, which has had the longest relationship with Frontex, since before the agency inception; back in 2002, according to the representative of CCME interviewed, CCME was one of the few organisations called to comment on the Danish proposal about an European border guard[161]. CCME was also present at the moment of the inception of the agency, with a first meeting in Brussels and then in Warsaw, as the representative reports. CCME decided to become a member of the CF because:

"We are in favour of Frontex as increasing diversity and sensitivity. Diversity training for border guards is fundamental, that is why we engaged with Frontex. It is useful to have Frontex deploying European border teams as this increases diversity and sensitivity. With regard to policing and control functions and the mandate beyond the borders of Frontex… we have raised concerns."

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[160] From CCME website, available at: http://www.ccme.be/areas-of-work/ (accessed 30 November 2016).

[161] Commission Communication to the Council and the European Parliament entitled "Towards integrated management of the external borders of the Member States of the European Union". COM (2002) 233 final.

At the time of the interview, between the first and the second mandate of the CF, CCME was involved in almost three Working Groups: Return and Training but also Operations, as the representative took part to one of the first CF missions during Frontex operations, at the Greek-Bulgarian border. Members of CCME, according to the interviewee, had expertise on return operations as they were also involved in monitoring activities during these operations (i.e., not during Frontex Joint Return Operations).

European Council on Refugees and Exiles (ECRE)

ECRE is an umbrella organisation which groups ninety-eight NGOs in forty countries across Europe, with the aim of "protecting and advancing the rights of refugees, asylum seekers and displaced persons" (ECRE, 2017a). The organisation carries out research, lobbies European institutions, bodies and agencies and monitors human rights violations, while informing the public and proposing solutions. ECRE's activities benefit mainly from EU and other international organisations' funds. In its Strategic Plan for 2017-2019 ECRE identifies a number of changes for the worse in the attitude of the EU and its institutions and actors towards human rights in the field of asylum. It also registers a change in the attitude towards CSOs, whereas CSOs have less opportunities to get access to EU institutions and bodies (ECRE, 2017b). Frontex is mentioned in the Strategic Plan within the Legal and Policy Research activities of the organisation, and more specifically: "To strengthen ECRE's engagement with EASO/EU Asylum Agency and Frontex so as to ensure the promotion of protection-sensitive border management and improved asylum processes across Europe". As for its advocacy activity, ECRE focuses for 2017-19 specifically on return and the rights of refugee children; these priorities will affect also the work of the organisation within the CF. For the period 2014-2016, ECRE chose as main strategic issue the access to international protection, as ECRE's representative interviewed affirmed. According to the same interviewee, the reasons why ECRE entered the CF were several, including the use of an additional strategy to mainstream fundamental rights and learning how Frontex works from within:

"we see it as an additional channel, as a way to bring to the attention to the agency issues

that are important for our members, it is also a way for us to better understand how Frontex

works and be the voice of our members in all the activities that Frontex develops and with

all the stakeholders involved there.[162]"

To achieve these overall objectives ECRE participated, during the first mandate of the

CF, in the Working Groups on Joint Operations and Risk Analysis and cooperated at some point

also on Return.

International Catholic Migration Commission (ICMC)

The ICMC is a Catholic-based NGO whose declared mission is to "protect and serve uprooted

people, including refugees, asylum seekers, internally displaced people, victims of human

trafficking, and migrants - regardless of faith, race, ethnicity or nationality."[163] Its activities

include assistance to vulnerable people through programs which comply with humanitarian

standards and "Catholic social teachings", advocacy at the EU but also international and

national levels and church networking. The ICMC was the only CSO which did not participate

in the second mandate of Frontex CF. Unfortunately, it was not possible to interview the

representative of the ICMC neither while the organisation was part of the CF nor after it left the

forum, at the end of the first mandate (i.e., September 2015)[164]. The activities of ICMC within

the CF were limited to the Training Working Group, together with Caritas Europa, IOM,

UNHCR, CoE and EASO[165].

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[162] The interviewee added that: "Our approach as an organization is to try to engage with institutions; we did not see any principled reason not to participate in Frontex (we are also within CF of EASO and FRA platforms), On the contrary. We saw this as an additional channel on the one hand to bring to the attention of the agency specific concerns and also to try to influence as much as possible the way Frontex activities and operations are being organized and designed, in the perspective of ensuring that access to international protection is at the forefront of everything that Frontex does with member states

[163] From ICMC website, available at: https://www.icmc.net/about-us/vision-and-mission (accessed 22 November 2017).

[164] The document that officialised the end of the first mandate of the CF and the beginning of the second was the Management Board Decision No 29/2015 on the composition of the CF. Available at: http://frontex.europa.eu/assets/Consultative_Forum/MB_Decision_29_2015.pdf (accessed 12 July 2017).

[165] EASO, however, works mainly bilaterally with Frontex.

International Commission of Jurists (ICJ)

According to its website, "the ICJ is one of the world's oldest international human rights and Rule of Law-related NGO. It continues to provide in-depth legal expertise to back its efforts in the development, promotion and clarification of international standards. It continues to advocate with governments, the legal profession, and civil society in order to insure implementation of these standards at the international and national levels."[166] ICJ is an NGO based in Geneva, even though it has opened, since 2012, a European Institutions office in Brussels which is independent from ICJ but shares mission and value of ICJ and cooperates on Frontex CF. Its main activities are litigation and advocacy, but also training and dissemination of good legal practices at the international level. The role of the ICJ in the CF is mainly to support the work of the forum with regard to every legal issue that might be part of the forum's discussion, be it the "accountability of Frontex for violations of human rights" (ICJ, 2017: 39) or legal issues on the Code of Conduct for Joint Return Operations. According to ICJ representative interviewed, ICJ applied to enter the CF to learn more about Frontex to try to support the work of the forum with legal expertise and, more in general, to change things from within Frontex. In the first mandate of the CF, ICJ representative worked in two Working Groups: Return and Operations, and briefly also Training. The ICJ had little to no previous experience of working with Frontex but was already in contact with two other CSOs which would become members of the CF and another EU agency: Amnesty International, ECRE, and FRA.

Jesuit Refugee Service Europe (JRS Europe)

JRS is an "international Catholic organisation with a mission to accompany, serve and advocate on behalf of refugees and other forcibly displaced persons. JRS undertakes services at national

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[166] From ICJ website, available at: https://www.icj.org/history/part-three-from-the-1990s-into-the-21st-century/ (accessed 22 November 2017).

and regional levels with the support of an international office in Rome."[167] Founded in 1980, its activities include advocacy and human rights work with a specific focus on refugees, exiles, and internally displaced persons. JRS programmes are found in 51 countries. While JRS lobbies for and promotes human rights legislation, and contributes to research on refugees at the University of Oxford, JRS Europe, which acts as a regional office, focuses on European asylum policies and advocating "for the respectful and fair treatment of all migrants affected by European policy, and defends their access to procedures that guarantee the basic rights enshrined in international law."[168] Within the CF, JRS Europe's representative has been Co-Chair for two terms, since the beginning of the CF work in 2012. As a Co-Chair JRS Europe's representative has had two main tasks: first, to ensure, together with the Chair, that the CF is able to do its work, which includes prepare, follow up, and organise meetings and make sure that members do what they committed to do; second, to represent the CF either in meetings or vis-à-vis the ED and the MB, internally, and the EP, the European Commission or the general public, externally. In addition, JRS Europe has taken part to the CF Working Groups on Return and Risk Analysis.

Platform for International Cooperation on Undocumented Migrants (PICUM)

PICUM is a network of more than 140 organisations "working to ensure social justice and human rights for undocumented migrants." Its network includes a wide range of non-profit and non-governmental organisations (NGO) among which there are "voluntary, migrant-led and grassroots organisations, trade unions, health care providers and international networks." (PICUM, 2016) Moreover, PICUM remains open to individuals who wish to support the work of the network, in any form (e.g., lawyers, researchers, undocumented migrants). Thanks to this variety of inputs, PICUM can count on a broad range of experience and expertise thus creating a platform where to engage policymakers and the general public on the issue of undocumented

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[167] From JRS website, available at: http://en.jrs.net/about (accessed 21 November 2017).
[168] From JRS Europe website, available at: https://jrseurope.org/about (accessed 21 November 2017).

migrants' realities. In 2015, at the time of the interview, PICUM had only one staff member who could follow the work of Frontex CF, a person who was selected based on the thematic area of competence, in this case migration policies and borders. In the CF, PICUM's representative has been involved from the very beginning in two to three Working Groups: Risk Analysis, Operations, and Return. According to the representative of PICUM interviewed (2015), risk analysis is a WG where the work is slower compared to others, such as, for instance, Training and Operations, due to the reluctance of Frontex to cooperate in this field with the CF. PICUM had an important role at the beginning of the cooperation between Frontex and the CF on the VEGA Children operation; according to PICUM representative, Frontex took the initiative to actively involve specifically CSOs, together with national border guards, in air borders' operations to improve the protection of children's rights at the EU borders. In this period, PICUM also worked as "rapporteur" or organisation in charge of the informal task force established thematically within the CF on the VEGA Children operation. One of the aims of PICUM, shared with the other members of the CF and particularly with other CSOs, was to push in the direction of having CF recommendations' change from optional to binding for Frontex, which is still the direction towards which the CF is moving and one of the areas where it is making progresses (see Chapter 6, Section 6.3.4).

Red Cross EU Office

The Red Cross EU Office represents the interests of National Red Cross Societies in the EU and the Norwegian Red Cross but also those of the International Federation of Red Cross and Red Crescent Societies (IFRC) towards the EU and its institutions. The EU office works mainly on the basis of the practical insights and technical expertise of its members with the aim to advocate for vulnerable people's rights at the EU level and to make their voices heard. Moreover, the EU Office declaredly scrutinises "European developments that could impact the implementation of our members' work, as well as supporting them to elaborate and coordinate

joint proposals to access EU funding."[169] Within the CF, Red Cross EU Office has a one declared goal; in the words of its representative interviewed: "[our goal is] more broadly to make sure that Frontex operations and border controls are in line with fundamental rights and take into account the specific needs of migrants and their specific vulnerabilities". In order to do so, it cooperated in CF's Return and Risk Analysis working groups. The reasons why Red Cross EU Office applied to become member of the CF are multiple, including particularly expertise and advocacy priorities, but overall the timing of Frontex call for expression of interest to join the CF was crucial. According to Red Cross representative,

> Since 2011…EU national societies have been working together on identifying policy recommendations to facilitate access to the EU for people in need of international protection. Among these policy recommendations one was specifically on Frontex…At the same time the European ombudsman started its enquiry and it was decided that we would input this enquiry with recommendations and concerns that we had, and I think it happened more or less at the same time. [170]

In sum, timing and expertise were the main drivers for Red Cross EU Office decision to become member of the CF, which had no prior direct contact with Frontex except for the analysis the EU office carried out and the information national societies collected on the agency due to the shared field of work.

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[169] See Red Cross EU Office's official website at: https://redcross.eu/about/learn-about-our-work (accessed 11 November 2017).

[170] Red Cross representative, on the rationale for applying to become members of Frontex CF, added: "So, not only the role of Frontex and its activities were subject of policy recommendations and specific messages from national societies, but we also have several EU national societies that are active at the borders at international borders, be it, for example, the Italian Red Cross, but there are many others that are doing similar or different activities at the borders. So, we have expertise within our network on the way in which border control takes place and the vulnerabilities of migrants at these locations. Not only sea borders but also air borders, we also have national societies that are engaged there. So, both because of the expertise of national societies, as well as of advocacy priorities, let's say, we wanted to take part in the CF to try to support more operations and practices that take into account the vulnerability of migrants and seek to reduce these."

Table 6: Expertise and focus of CSOs sitting in the CF

CSO	Expertise/tasks	Field/target group	Advocacy strategy
AIRE	Case litigation, research, training and advocacy	Human rights Law in Europe/vulnerable and marginalised people	Not going public: litigation and access
AI EIO	Research and advocacy	Human rights in Europe	Access and going public (campaigning)
Caritas Europa	Service provision (humanitarian action), advocacy, networking (within the organisation)	Relief to vulnerable people	Access and going public
CCME	Service provision (humanitarian action), advocacy	Vulnerable people	Access and going public
ECRE	Research and advocacy	Refugees and exiles/asylum	Access and going public (campaigning)
ICMC	Service provision (humanitarian action), advocacy, research and networking (within the organisation)	Refugees, migrants, vulnerable people	Access, going public, service provision
ICJ	Case litigation, research, training and advise	EU law and specifically EU fundamental rights law	Going public (limitedly), litigation and access
JRS	Service provision (humanitarian action), advocacy, networking (within the organisation)	Refugees' rights and the EU asylum system	Going public (limitedly) access and service provision
PICUM	Research and advocacy	Undocumented migrants	Access and going public (campaigning)
Red Cross EU Office	Service provision (humanitarian action), advocacy,	Vulnerable people	Access, going public (campaigning) and service provision

Source: author's own elaboration.

5.3.1. CSOs SITTING IN THE CF: RESOURCES AND STRATEGIES

As discussed in Chapter 2, the choice of how to allocate resources between inside and outside lobbying strategies is crucial as advocacy groups' resources are limited. In an effort to maximise the effects of their advocacy activities in specific policy areas, CSOs decide how to allocate their scarce resources according to a number of factors, namely exogenous and endogenous factors including on the one hand funding, staff and other resources, and on the other the complexity of the policy issue, the institutional setting and the level of competition among lobbyists in the field. This section describes and analyses the exogenous and exogenous factors which led nine CSOs to gain access to Frontex Consultative Forum and draws from interviews to these CSOs' representatives to extrapolate the motives for their choice to gain access or go public. Moreover, this section provides an overview of the CSOs that chose outsider tactics to advocate for the protection and promotion of fundamental rights at the borders of the EU, and of their relationship with the organisations which gained access.

The CSOs represented in Frontex Consultative Forum are not particularly diverse in terms of resources. To study thoroughly these CSOs, resources that are constitutive of the organisation and resources and policy goods that are particularly appreciated by EU actors and bodies are labelled endogenous factors (see Table 7). As evidenced by Table 7, all of the organisations have substantial financial resources, mainly coming from EU funding and a small staff that can range from 2 to 14 people, partially employed part-time. Indeed, these organisations have European or worldwide networks but their EU offices, all based in Brussels, are usually small in terms of staff numbers. This implies that employees of these CSOs might have multiple tasks within their organisations and limited time to do so. Indeed, according to Interviewee 8, the selection of the representative to send to the CF or any other EU institution, depends on the thematic focus that they cover in their organisations. Each member of CSOs

interviewed is specialised in a specific thematic area and covers all the activities (mainly advocacy) that require expertise in that area[171].

However, CSOs sitting in the CF are different in terms of interests represented and ideological backgrounds. Till 2015, four faith-based organisations have been represented in the CF[172], all of them Christian. Some organisations advocate for human rights, others for migrants and refugees' rights, while others focus specifically on undocumented migrants. In addition, some organisations usually employ litigation as a mean to advance human rights in the EU and have a legal background, while others are mainly service providers and have more direct experience on the ground.

Among the policy goods or resources that EU actors value to grant access to CSOs, there are CSOs' technical expertise, their ability to mobilise political support for specific policies and actions, and their political intelligence, meaning their implementation and intermediation capacity and embeddedness. Overall, the CSOs sitting in the CF are the biggest NGOs and umbrella organisations in the field and their endorsement is highly valuable for EU actors. At the same time, some of these organisations are newer than others in the field: for example, the AIRE centre and PICUM are relatively new actors at the EU level but have swiftly gained momentum and credibility among civil society platforms advocating for human and migrants' rights at the EU level (Cullen 2015). Moreover, all of these organisations gather information and expertise – e.g., legal, research – from their networks, and information and technical expertise are highly valued by EU actors to inform and legitimise EU decision-making.

With regard to the exogenous factors, the agencification process created a new institutional opportunity for public interest groups to gain access to EU actors. However, while the already complex multi-level system of governance creates new access points for CSOs, it

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[171] For a thorough presentation of CSOs' selection process to become members of the CF see the section of this Chapter titled "Who got in and who remains out and why?".
[172] From 2015 the composition of the CF has slightly changed: the ICMC (faith-based) left its place to the AIRE Centre (not faith-based).

also increases the challenges for CSOs to be able to cope with such a system. Moreover, the issue areas of border control, migration and asylum are currently among the most politicised and complex policies in the EU (Thiel and Uçarer 2014), thus making it very complex for poorly organised and scarcely resourceful organisations to remain updated and informed. Indeed, in this field competences are blurred and actors change rapidly considering the need for swift response in a continuously evolving situation. Moreover, policy-making in these policy fields is made even more complex by the multiple legal arrangements: international treaties (e.g., the Schengen agreement and the United Nations Convention relating to the Status of Refugees) overlap not only with EU regulations and directives on asylum and border control, but also with national control of borders and legal migration policies. According to the interviews conducted with the members of the CF, there is no interest in competing among CSOs in this multi-actor and multi-layered area, meaning that public interest groups cooperate actively when it comes to migrants and refugees' rights.

Table 7: Resources of CSOs sitting in the CF

CSOs in Frontex Consultative Forum	RESOURCES or POLICY GOODS					
	policy goods constitutive of the CSOs			policy goods preferred/(e)valued by the agency		
	financial and human resources[173]	type of membership/ organisational characteristics	type of represented interest and ideological views	technical expertise	political support	political intelligence
Amnesty International European Institutions Office (AI EIO)	800,000 € - 899,999 € (total 1,900,000); no EU funding in 2015; private funding; staff 11 - full time 7.8	NGO European level, with network at international, national and local levels	human rights of all minorities advocacy	legal expertise; in-house research; collection of first hand data; receives information from local organisation worldwide	worldwide presence	already present at the EU level in other civil society organisations' platforms
Caritas Europa	1,000,000 € - 1,249,999 € (total 1,977,387); 742,632 € EU funding in 2016; mainly private funding; staff 14 - full time 9.2	NGO European level, with network at international, national and local levels	service provider (faith-based organisation)	collection of first hand data; receives information from local organisations worldwide	worldwide presence	already present at the EU level in other civil society organisations' platforms

[173] Data available on the Commission Transparency Register, accessed September 2017. The first number in this column represents the estimate of the annual costs related to activities covered by the transparency register.

Churches' Commission for Migrants in Europe (CCME)	25,000 € - 49,999 € (total 430,888 €); 13,873 € EU funding in 2016; mainly private funding; staff 2 - full time 1	umbrella organisation	migrants' rights advocacy (faith-based organisation)	receives information from local organisations worldwide	strong European network	already present at the EU level in other civil society organisations' platforms
European Council on Refugees and Exiles (ECRE)	1,000,000 € - 1,249,999 € (total 1,810,540 €); 400,000 € EU funding; mainly private funding; staff 13 - full time 8.5	umbrella organisation	refugees and exiles rights advocacy	legal expertise; in-house research; collection of first hand data; receives information from local organisations worldwide	publication of highly visible reports	already present at the EU level in other civil society organisations' platforms
International Catholic Migration Commission (ICMC)	(not registered until 2016) 56,307 € (total 1,281,856 €); 824,245 € EU funding; mainly public funding; staff 2 – full time 0.8	umbrella organisation	migrants and refugees' rights advocacy at national and international level (faith organisation)	long history of working in the field as service provider and advocate (coordinator of Catholic churches' action)	faith-based organisation with worldwide presence	already present at the EU level in other civil society organisations' platforms
International Commission of Jurists (ICJ)	200,000 € - 299,999 € (total 7,978,563 €); 305,011 EU funding; all public funding; staff 4 - full time 3.5	NGO European and international levels	human rights advocacy (legal perspective)	legal expertise; in-house research	legal advice	already present at the EU level in other civil society organisations' platforms

Jesuit Refugee Service Europe (JRS)	613,184 € (total 1,119,319 €); only private funding; staff 6 - full time 5.8	umbrella organisation	refugees' rights advocacy; service provider (faith-based organisation)	receives information from local organisations	faith-based organisation with worldwide	already present at the EU level in other civil society organisations' platforms
Platform for International Cooperation on Undocumented Migrants (PICUM)	900,000 € - 999,999 € (total 994,705 €); 637,359 € EU funding; mainly public; staff 8 - full time 8	umbrella organisation	undocumented migrants' rights advocacy	legal expertise; in-house research	legal advice	already present at the EU level in other civil society organisations' platforms
Red Cross EU Office	600,000 € - 699,999 € (total 313,200,000 €); 29,400,000 € EU funding; mainly private funding; staff 17 - full time 17	NGO European level, with network at international, national and local levels	- coordinating relations and communications between members and the EU institutions. - information capturing and sharing, advocacy and positioning, coordination and fund-raising.	collection of first hand data; receives information from local/national/regional organisations; service provider	European and worldwide network	already present at the EU level in other civil society organisations' platforms
The AIRE Centre	(not registered in the Transparency Register) staff 13 – 4 lawyers	NGO European and national level	service provider (EU law litigation and legal support); marginalized and vulnerable individuals' rights advocacy	experience in litigation specifically in EU law matters	European network	NOT present at the EU level in other civil society organisations' platforms

Source: author's own elaboration

What is not present in Table 7, but emerged clearly from interviewing CF members, is that some of the CSOs represented in the CF had a longstanding relationship with the agency, while others did not. This implies that, similarly to FRA and UNHCR, CSOs' relationship with Frontex either transitioned from bilateral cooperation to institutionalised access or kept both functions. Among the CSOs that were already in contact with the Commission – i.e., before the establishment of the agency - and with Frontex – i.e., before the establishment of the Consultative Forum – there were the CCME and the Red Cross. On the other side, the ICJ had never cooperated with Frontex on any matter before becoming a member of the CF, while it was consulted by the FRA, more or less one year and a half before the ICJ applied to become a member of the CF, to help Frontex structure a border guard training and establish indicators to evaluate the training itself[174]. Similarly, also the AIRE Centre – i.e., the other CSO in the CF with expertise in law matters together with ICJ – did not have previous contacts with the agency other than studying for cases which were presented before the ECtHR in which Frontex was a relevant actor (e.g., Hirsi v Italy).

The literature on the choice for inside lobbying tactics is confirmed by this analysis on several grounds. First of all, as previous research predicted/concluded, the financial resources of the CSOs analysed which chose insider lobbying tactics are significant, and even though donors are mainly privates, thus pushing CSOs to use mainly outside lobbying, it must be noted that Frontex, especially before 2015, was hardly known to the general public or even to the CSOs' constituency, so that "going public" strategies were more frequent on general issues, also tackled by the same CSOs analysed here, such as violation of fundamental rights at the borders or asylum seekers' treatment in the EU. Human resources are not numerous at the EU level, but this is due to high level of specialisation of the organisations which implies that all the organisations have an EU office, staffed with very few and very specialised people who

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[174] Interview with ICJ representative.

work very closely with each other and with the relevant EU officers[175]. It can be concluded that the presence of an EU office located in Brussels is in itself a sign of a clear decision to pursue insider lobbying tactics; however, this does not imply that lobbying through access is the only activity of CSOs' EU offices.

Another important factor registered during interviews is time. Time has never been explicitly considered in the literature as a relevant resource/policy good influencing the choice for inside or outside lobbying tactics. However, time constraints coupled with the exiguous number of people employed in the EU offices, and in the specific policy area of migration and asylum – not to mention the even more specific border management policy area – have a considerable impact on the strategy choice of CSOs. EU offices of the CSOs interviewed are staffed either with full time or part time employees who work at the same time on different policy areas or with different actors and sometimes follow multiple EU-wide public advocacy campaigns. This implies that in terms of regularity in performance, CSOs are less able to prepare and perform at their best at all times, compared to international organisations such as the UNHCR, for example, which appoints a dedicated liason officer for the relationship with Frontex, which includes CF's duties. Interviewees were asked individually how much time they could devote to the work in the CF. The answers were varied, and the time spent on average on CF work spanned from 20 to 30+ working days per year, with some of the interviewees declaring that, overall, they devote up to 2 hours per day or 10% of their work to the CF (see Table 8). All interviewees agreed on the fact that CF work usually "goes in peaks", as ECRE representative defines it[176].

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[175] It might not come as a surprise but EU offices of the CSOs analysed are very close to the European Parliament and therefore very close to each other, i.e., 5-10 minutes away, walking distance.

[176] ECRE representative further specifies why the work in the CF requires not frequently but suddenly a lot of time for CSOs: "For instance the guidelines on the debriefing and screening, well it took quite some time because you need to analyse, if possible you need to try to touch base with people within our own network, that have kind of intelligent things to say about that, you know you want to use that potential as much as possible. But it really depends. Of course, because this is something that we do on top of everything else, it's clear that of course, if we have to choose, that's the first thing that is going to… that we have to drop of course; if we need to work specifically on a Commission Proposal and all of a sudden comes up and my input is needed there, well… And that is the kind of problem that I am sure Doris and all the other have told you exactly the same thing."

Table 8: time devoted to the CF work

Interviewee	Time	Working group
AIRE Centre	"It really varies, basically. We participated to a week-long mission last year and we devoted a couple of days also to provide training at the annual conference of Frontex and we attended… I would say around 15 to 20 working days per year. But this is an estimate, a very rough estimate. So, I'm thinking, I have already spent 10 days in the preparation of the actual field mission, 4 days in the actual… it's more, it's 25 to 30 working days. Because if you also include attendance to Consultative Forum meetings, it's more, it's much more. More than 30 days, actually. You can say 30+ days.[177]"	Training and Operations (since 2016)
Caritas Europa	"It is a bit difficult to say because it also really depends on how active you become or not, but I mean for the meetings only it is maybe… 3,6,9 days per year. Plus, if you are more active or you want to do some comments and things, you actually want to do some work, it would be maybe… 20 more days throughout the year, like this is I think what I was doing, and I could have done much more but this is what we can do."	Training and Operations
CCME	"2 days per month was what we thought at the beginning; but then the meetings were more and longer, plus the informal and WGs plus reading writing preparing… 2013: 5/10 days per month (also due to the visits and follow up); 2014: 3/5 days; 2015: 1 or 2 in the first half but the second half will be more intensive"	Return and Training; Operations also in 2013-14
ECRE	"I find it really difficult to say, you know, to really say 20%, 30%... it doesn't make much sense because it also goes in peaks, I would say. But it depends…It's very difficult to combine… I mean if you want to do this properly you would need to have almost, not a full time probably, but like a half-time or something, a person that really then can follow up everything."[178]	Joint Operations and Risk Analysis; some work done also on Return

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[177] AIRE representative underlined that the work devoted to the CF by each representative adds to the everyday duties of CSOs' representatives: "all activities in Frontex are completely unfunded, so whatever time that we manage to devote would be on a voluntary basis or with the permission of the Director [of the organisation]".

[178] ECRE representative also explained the difference between the initial "not realistic" approach of the organisation, wishing to know everything that was researched and discussed by the other members of the CF, to a later, more focused approach, which also impacted time management: "[having a person who follows up on

ICMC	n.a.	Training
ICJ	3 weeks to 1 month per year (excluding meetings)	Return
JRS	"it very much depends. Sometimes there can be weeks where there is nothing to do with the CF. And other weeks that I work in the context of the CF for four days a week. On average, I would say 2 hours per day"	Co-Chair since 2012; Return and Risk Analysis
PICUM	The interviewee reported that the desk research conducted in preparation of CF work and meetings is part and parcel of the ordinary work within PICUM. On average, the time dedicated to CF work amounted to 10% of the interviewee work hours.	Operations and Risk Analysis
Red Cross EU Office	"It's quite limited, it's in addiction to all the other tasks that I have. I think that it is not sufficient considering the level of the challenge and there is a lot that we could or should do. And it is indeed a very time-consuming exercise because of the complexity of the topic and the quantity of documents which are produced both by Frontex and other Frontex "observers", let's say. So, it is difficult to quantify how much time I can spend on it. I try at least to attend all CF meetings and prepare for them"	Return and Risk Analysis

A clear example of the reason why time, as a resource, is so relevant was provided by Interviewee 4, describing the difficulty in providing input to a document which is highly technical and is the outcome of a multi-actor effort, such as Frontex Programme of Work:

"For instance, the annual Work Programme of Frontex. In the beginning we thought that that was the most important thing to do. But the problem is that it is organized in such a complex way…the annual Work Programme of Frontex does not only depend or does not only have to take into account the agenda of the Management Board but also of the institutions [i.e., European Commission]…If you would have to organise yourself in order to usefully provide input…in the process of adopting the working programme of Frontex,

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everything] that's simply not realistic and that's also what we have learned, through these first two, three years that we have been working there, that the level of ambition at the beginning was far too high, like, you know, we wanted to see everything, in order to comment on everything, and it's simply not possible. Also, there are issues where is very difficult for an organization like us but also to the others to really get involved."

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it's almost a full time job, because the time for providing that input, the window of opportunity is so short. By the time you have actually understood what they want to do with the Work Programme, you know, it gets so complicated. And I think most organisations, well… I, in any case, have no ambition any more to try to think that we can change the Work Programme of Frontex as such. It seems like a waste of time and energy if you try to do that and it distracts you from other stuff where you could be much more effective and could actually provide more useful impact."

The same problem of time constraint was evidenced also by a Frontex Head of Unit (Interviewee B) who complained about having a small window of opportunity to request the support of the CF in the specific case of the European Ombudsman's own-initiative enquiry on Frontex.

In conclusion, this analysis shows how CSOs that have gained access to Frontex CF are all but one – i.e., the AIRE Centre[179] – quite resourceful and have vast networks mainly at the EU but some also at the international level (e.g., Caritas, Red Cross); but the reason why they chose to lobby Frontex from within is still not fully clear. This is why, during the interviews to the representatives of the CSOs sitting in the CF, carried out mainly towards the end of the first mandate in the CF, they were asked why they decided to enter the CF and whether they were considering re-applying for the second mandate. The answers were mixed: while one representative said, "Come on, it is the lobbyist dream to get a foot into the door!" (interviewee 7), others were more cautious and specified that they needed to review their three years' work in the CF "to decide whether it was worth it or not" (interviewee 4) by evaluating the impact of their work as members of the CF. The assessment of the added value provided by investing in continuing to work within Frontex was considered by CSOs highly problematic; the investment made by these organisations of three years of work within the Forum and the expertise acquired

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[179] The present study does not analyse the case of Save the Children within the CF as the research has been updated until September 2017, when Save the Children was nominated by Frontex Management Board to replace Caritas Europa.

was difficult to balance vis-à-vis the elusive results of mainstreaming fundamental rights in Frontex activities. Notwithstanding this common difficulty in performance evaluation, overall CSOs considered themselves satisfied with the experience within the CF. Indeed, while all of them agreed that "more could have been done" (interviewee 3) and that human resources and time are too scarce, the success stories of the CSOs working in the CF seem to have been worth another mandate, since all but one member of the first composition of the CF re-applied for a second mandate; it is interesting to follow what happens with Frontex CF's third mandate, especially because its second mandate has coincided with the so-called "refugee/migration crisis" in the EU[180].

Interviews evidenced also that the CSOs analysed still use their outside lobbying tactics (or "going public" strategies) whenever their inside lobbying does not succeed, for example on the crucial issue of instituting a fully working complaint mechanism for human rights violation[181]. According to Interviewee 1, if CSOs act "from outside" or going public, they can use their leverage on policymakers which need to be re-elected and do not wish to receive bad publicity. However, Frontex is a non-elected body and, therefore, political pressure through the awareness raising of the electorate does not have the same effect it has on elective bodies. Moreover, Interviewee 1 further elaborated on the importance for CSOs to gain access to Frontex by affirming that "from within" CSOs can raise directly the awareness of Frontex officers vis-à-vis fundamental rights protection and promotion.

Finally, some of the interviewees agreed that working with Frontex is useful in terms of reputation towards other EU actors, but at the same time they struggle with their reputation

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[180] This work has been updated until September 2017. The third composition of the CF is to be decided by the end of 2018 – i.e., the mandate of the current CF ends by 31 December 2018. It is important to highlight that in September 2017 Save the Children substituted Caritas as a member of the CF, following a public call launched by Frontex. According to Interviewee 10, the substitution was made necessary as Caritas withdrew from Frontex, but no explanations were given for the withdrawal.

[181] A complaint mechanism for human rights violations has been formally introduced with the establishment of the European Border and Coast Guard agency. However, the agency is still far from instituting a fully functioning individual complaint mechanism.

towards grass-roots CSOs and part of their networks (interviewees 1 and 4). This last issue, raised by the interviewees, is discussed later on in this Chapter to bring to light who remained out of Frontex CF and why. The next section, instead, is devoted to the important requirement of CF and its members' independence towards Frontex.

5.4. INDEPENDENCE OF CSOS AND CF FROM FRONTEX

According to Art. 70(1) of Frontex Regulation 2016/1624: "A consultative forum shall be established by the Agency to assist the executive director and the management board with *independent* advice in fundamental rights matters." (emphasis added) The issue of independence of this consultative body is highly relevant in this context as it feeds directly into the issue of whether the CF could act as an actor which could hold Frontex accountable on fundamental rights matters, or which could influence the agency without falling prey of the need to remain into Frontex' good graces to survive, thus ending up in a cooptation phenomenon. According to Interviewee 7, "we are giving advice and recommendations to the Management Board and the Executive Director, but we are not to respond to them; they cannot give us orders". However, there are some structural limits to CF independence, posed by the same Frontex Regulation 2016/1624, and more specifically art. 70(2) states: "On a proposal by the executive director, the management board shall decide on the composition of the consultative forum and the terms of the transmission of information to the consultative forum. The consultative forum shall, after consulting the management board and the executive director, define its working methods and set up its work programme." *De jure*, this implies that Frontex management board and executive director retain the ultimate control over the way in which the CF works and how much it is allowed to know about the agency's activities. *De facto*, Frontex management board and executive director have used their powers to select the CF members but, according to CF members, never openly hindered the work of the CF. Curiously enough, on

Frontex website the CF is not only present within the structure of the agency, but it is also listed among the "partners" of Frontex.

It is important to notice that CF members, and particularly CSOs representatives, consider themselves as fully independent from Frontex. In 2015, when asked about who sets the agenda of CF meetings and work, one of the interviewees affirmed:

> "CF sets the agenda itself but takes into consideration requests made by the Executive Director and the Management Board. But let me be very clear. Together with the FRO we are independent. We are advising, giving advice and recommendations to the executive director and the management board but we are not responding to them. They cannot give us orders. If they want to kick us out they can kick us out but that's it.[182]" (Interviewee 7)

This view was shared by the majority of CF's members, with someone feeling however less at ease to talk about CF work and mentioning that it was best to follow the CF Co-Chair opinion, and JRS Europe's representative, in what was possible to disclose. However, with regard to their work and their ability to speak about Frontex, interviewees from CSOs affirmed that they feel overall free to express criticism towards Frontex, notwithstanding the relationship established with Frontex. Some, similarly to FRA representative in the CF, went as far as saying that they felt even more at ease to criticise Frontex due to the established close relationship.

The independence of the CF depends however also on the nature of the funding of its activities and the resources available. Financially, CF members rely on the salaries that they receive from their organisations, as are not paid by Frontex for their work within the CF. CSOs' representatives only receive travel expenses reimbursements which may be required, for

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[182] Interviewee 7 further elaborated on the liberty that CF members have to disclose information discussed within the CF: "We are bound by the rule of professional secrecy. We cannot disclose every detail of our meetings and of our discussions. On the other hand, we are obliged by the regulation to publish every year an annual report so people can see what we did and what was the impact. We would not disclose every letter coming from Management Board or Executive Director immediately to the media or to the university, simply because this would hamper our work. But, at least, we do report quite freely about what we have done and what we have recommended and what was the reaction."

example, for CF plenary or Working Groups meetings, focus groups with Frontex staff in Warsaw, or visits to Frontex operations.

According to one of the interviewees, when asked about the independence of the CF from Frontex, for the CF to become Frontex's watchdog in fundamental rights matters, the personal independence of its members has to be coupled with a structural independence of the body, which is not the case for Frontex CF even though its members are fully independent (interviewee 6). According to the same interviewee, Frontex accountability on fundamental rights matters would benefit more from a watchdog body than from the CF as it is.

5.5. WHO GOT IN AND WHO REMAINS OUT AND WHY?

The decision over who gains access to Frontex and who does not is a combination of CSOs' will and resources (both endogenous and exogenous) and selection criteria deviced by the EU agency. This section therefore analyses on the one hand the selection process of the CSOs represented in the CF and, on the other hand, describes who remains out, the reasons for the antagonism and the relationship between these two groups of CSOs. These issues are addressed while trying to get a sense of the relevance of the combined efforts of the two different approaches to fundamental rights advocacy in the field of migration to achieve the same result: mainstreaming fundamental rights.

The selection process for the members of the CF was opened first in 2011, then in 2015 and will be reopened in 2018, through a public call for applications[183]. The selection follows a number of criteria, as set out first in Frontex Regulation 1168/2011 and then in the EBCG Regulation of 2016. In June 2017, an extraordinary call was opened to fill the vacancy left by

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[183] The text of the public call for applications is available at: http://frontex.europa.eu/assets/Attachments_News/CF_call_documents/Background_doc_for_public_call_FINAL.pdf (accessed 30 June 2015); Frontex Management Board decisions on the composition of the CF are available at: http://frontex.europa.eu/assets/Attachments_News/CF_call_documents/MB_Decision_12_2012_on_the_composition_of_the_Frontex_CF.pdf (2012) (accessed 9 September 2015), and http://frontex.europa.eu/assets/Consultative_Forum/MB_Decision_29_2015.pdf (2015) (accessed 9 September 2015).

Caritas Europa, which withdrew from the CF on 31 January 2017 with an official letter sent to Frontex. The selection criteria are listed by Frontex as follows: expertise, relevance, extent, approach, accountability, and commitment[184]. These are similar to the requirements listed for the selection opened in 2015, which, according to interviewee 9 and 6, were not available to the CF members till the day the call for application was launched. In 2011, the criteria were not clearly specified, as that was the first attempt of Frontex to integrate into its structure a heterogeneous group of organisations focusing on fundamental rights' aspects of the agency activities. Interviewee 3 affirmed that criteria of selection for the first mandate of the CF were not made public and a list of organisations not selected was not provided. As for the list of organisations not selected by Frontex to become part of the CF, this was not made available for any selection process, even upon request.

On the CSOs' side, the decision to apply for the first time to Frontex call for applications was generally tentative, according to the majority of CSOs that were selected to join the CF. For instance, Interviewee 2, representative of an umbrella organisation, reports that not all the members were convinced with the idea of applying for a spot in Frontex CF:

"some of the members were quite reluctant to actually join. But we still thought to give it a try and we actually see what it can bring. And, of course, what we were worried about what was the public image, [the association] with Frontex, but also really being used as, like, a fig leaf, you know, or something to cover actually noncompliance with fundamental rights in practice."

Indeed, this passage highlights the two main worries of CSOs towards the decision to become involved in the CF: while some CSOs were concerned about the resulting public image after the association with the agency or the loss of support from members of their networks, others were more concerned with the potential futility of their work within Frontex. Overall,

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[184] The eligibility criteria are listed in the public call for application publicised on Frontex website, available at: http://http//frontex.europa.eu/news/frontex-consultative-forum-on-fundamental-rights-public-call-for-applications-for-civil-society-organisations-1Wg9qU (accessed 12 September 2017).

interviewees reported that, at various degrees, they did not know what to expect from the CF membership.

Nonetheless, a number of CSOs applied to the public call by compiling a form and sending it to Frontex secretariat[185]. The application form of 2015 includes information about not only the applicants' history and organisation structure but also field of expertise, approach and extent, exactly the three indicators that in Table 7 are labelled "policy goods preferred/(e)valued by the agency", namely technical expertise, political support and political intelligence. This confirms the literature on CSOs' access, even in the scarcely researched field of EU operative agencies, that similarly to regulatory institutions select CSOs based on the same indicators.

Aside from the applicants to the CF which were not selected by Frontex, not disclosed by the agency, there are also a number of organisations and grassroots movements that decided to base their campaigns, and even their existence, on the resistance against Frontex. The next section maps the resistance against Frontex based on a web search covering the period from Frontex inception, in 2004, till 2017.

5.5.1. RESISTANCE AGAINST FRONTEX: A MAP OF MOVEMENTS AND GRASS-ROOTS ORGANISATIONS

The grassroots organisations advocating against Frontex for its alleged violations of fundamental rights at the EU borders have been organising several EU-wide campaigns since 2008. Among these campaigns, promoted by coalitions of organisations, there is the "Frontexit" campaign, frequently cited by CSOs' members of the CF during our interviews, which started as "Frontexplode"[186] and rebranded in 2013 when the Migreurop network took over the

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[185] The form for the 2015 application is available online at: http://frontex.europa.eu/news/frontex-consultative-forum-on-fundamental-rights-public-call-for-applications-for-civil-society-organisations-RijS5Y [accessed 30 June 2015].

[186] For a description of the Frontexplode campaign from an insider perspective, see the article "Frontexplode – the campaign", available at: http://w2eu.net/frontex/frontexplode/ (accessed 12 August 2015). See also Frontexplode website at: http://frontexplode.eu (accessed 12 August 2015).

initiative and funded it with the support of the European Programme for Integration and Migration (EPIM), an initiative of private fundations[187]. Frontexit has grown to become not only an active player in advocating for the protection and promotion of fundamental rights at the borders of the EU, but also a network that pulls together intelligence on the activities of the agency, aims to litigate cases before the CJEU and ECtHR, and raises awareness and concerns about Frontex activities at large through events, videos, and reports.

While Frontexit is a campaign organised across multiple EU countries, there are also local initiatives against Frontex. Among the local initiatives there are "Catania no Frontex" launched by the national network "Rete Antirazzista Catanese", which appeared when Frontex opened its second headquarter in Catania due to the growing importance of the Central Mediterranean route, and also "Lesvos calls against Frontex", which was triggered by the crisis in Greece in 2014, which was contained through the EU-Turkish agreement. A demonstration that started as a conference organised by a local CSO in Warsaw (2010), grew to become and international demonstration called the "Anti-Frontex Days", the first of which took place in 2012; this demonstration has taken place every year in May in Warsaw (see Figure 8) on the occasion of the "European Day of the Border Guard", till 2016.

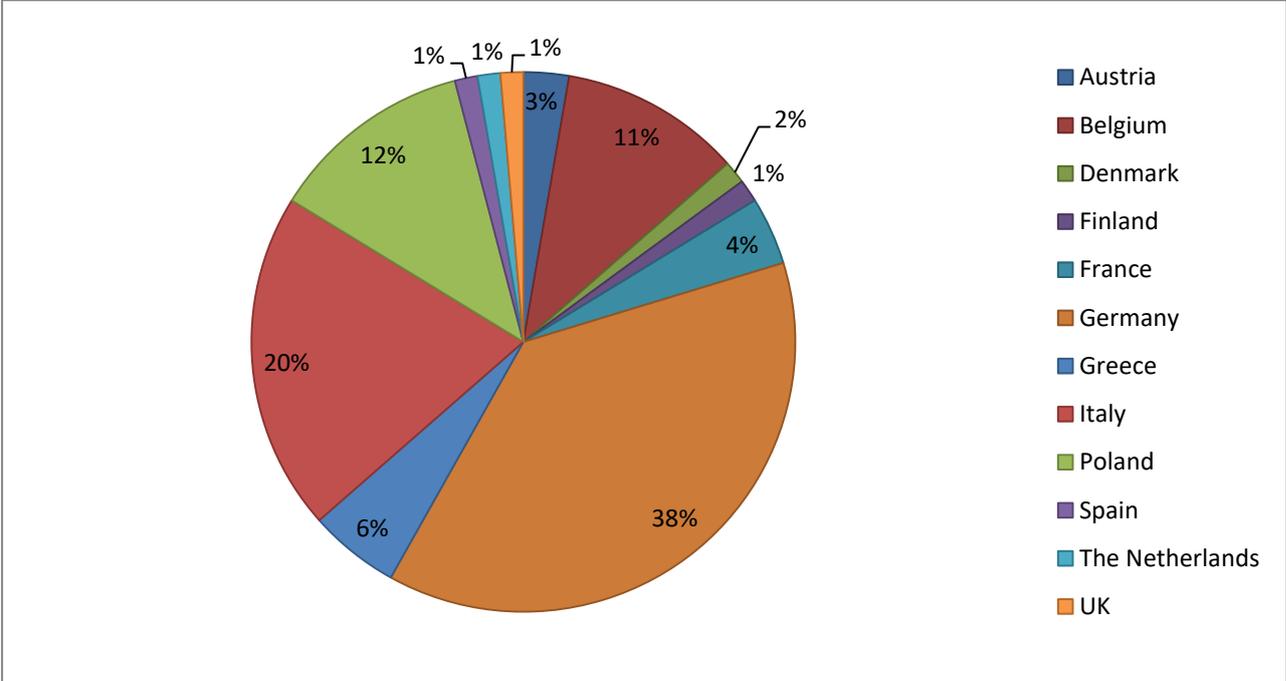Figure 8: Leaflet distributed for and during the Anti-Frontex days in Warsaw in 2015

Source: migracja.noblogs.org (accessed 21 May 2015)

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[187] More information about EPIM are available at: www.epim.info (accessed 11 November 2017).

Demonstrations have taken place mainly in Warsaw, Brussels, Berlin and Strasbourg but also in Catania and the Greek islands where Frontex presence has been more visible, and where local organisations created networks to express their dissent against Frontex (e.g. Catania no Frontex and "Lesvos calls against Frontex"). Other symbolic places were airports and training facilities for Frontex officers (e.g., Lübek). As shown in Graph 2, Germany has the highest share of events organized to criticize Frontex. The reason for this disproportion between Germany, one of the countries with less direct experience of Frontex work compared, for example, to Italy, Greece, or Spain, might lie in the presence of more information in the media about Frontex and the longstanding history of German civil society organisations in channeling dissent. It is interesting to notice that several events against Frontex have been organized in the Mediterranean area, with Italian organisations cooperating with Tunisian organisations, for example (2011, 2012, 2017). One demonstration against Frontex took place also in Tunis in 2013, marking the launch of the campaign "Frontexit".

Graph 2: Geographic distribution of CSOs' resistance against Frontex (2005- September 2017)

Source: author's own elaboration

Table 9: Mapping the opposition against Frontex

Campaigns
- Frontexplode and Frontexit   - The Charter of Lampedusa (i.e., grassroot movement conducive to a Charter of migrants' rights and against every form of militarization of the borders of the EU)   - Anti-Frontex Days
Slogans
"Freedom not Frontex"   "Ferries not Frontex"   "Frontex Kills!"   #stopfrontex (Twitter)
Reports
- Human Rights Watch (2011), "The EU's dirty hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece"   - Pro Asyl (2013), "Pushed Back. Systematic human rights violations against refugees in the Aegean Sea and at the Greek-Turkish land"   - Amnesty International (2011), "Frontier Europe. Human Rights Abuses on Greece's borders with Turkey"   S. Keller, U. Lunacek, B. Lochbihler, H. Flautre (2011), "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"   - Migreurop, EMHRN, FIDH (2014), "Frontex between Greece and Turkey. At the border of denial", Report of the Frontexit campaign
Databases
Statewatch Observatory on Frontex

Source: author's own elaboration.

This panoply of campaigns, events, research, and movements have all been triggered by the work of Frontex at the EU external borders (see Table 9). As shown in Graph 3, the activity against the agency has been at its highest in 2011 and again in 2014, two crucial dates for the life of the agency and for the arrival of migrants on the European costs. While 2011 signed the beginning of a steep increase in the flow of migrants coming from North African countries following the Arab Spring, 2014 signed the beginning of the so-called European refugee crisis.

In parallel, 2011 was the year in which the agency mandate was changed to introduce a fully-fledged Fundamental Rights Strategy together with the FRO and the CF, and the crisis of 2014 triggered the reform of the whole EU asylum system (CEAS) and culminated in the inception of the European Border and Coast Guard agency in 2016. This correlation suggests that while the events of 2011 and the demonstrations from anti-Frontex movements and CSOs' coalitions urged policymakers to introduce new fundamental rights safeguards within the structure of the agency, the events of 2014 and the new surge in CSOs dissent towards Frontex pushed policymakers in the direction of further harmonising border management practices. Even if in different ways, both the first (2011) and the second (2014) grassroot push for reform produced an effect on Frontex vis-à-vis fundamental rights issues. Indeed, also the last case might be considered as a way to solve the agency accountability issues with regard to the protection of fundamental rights at the borders. The following long passage of the interview conducted with Interviewee 7 seems particularly explicative of the position of CSOs that decided to lobby Frontex from within vis-à-vis the ones that ask for the agency disappearance. Interviewee 7 explained that if Frontex did not exist:

> "then we would have to deal with 28 border guards of 28 member states…Then we would have utterly no possibility to have any influence at all on the activity of the Greek Coast Guard, or the Italian Guardia di Finanza, and so on. So, in my view, but it is not speaking on behalf of the CF, but in my very personal view, the only step forward can be to establish a real border guard agency that would also be responsible for more than coordinating, but actually doing the border guarding activity. So that the individual border guard would not remain a border guard, or a member of the national border police, but would be a member of the European border guards, or border guard teams. In that way we would have a clear responsibility. And that would not harm the possibility to influence what is actually happening at the borders, not only for NGOs, but also for the European Parliament, for instance. Of course, border guard body should be under strict democratic control of European Parliament, you cannot just set up a big agency and leave the Parliament out of

any possible way of controlling it. But in an ideal Europe, so to speak, it would be one

agency with one clear chain of command and with a clear role of Parliament and of the

Commission that can stop operations."

In sum, Interviewee 7 believes that lobbying and holding accountable one single agency, fully

responsible for the management of the external borders of the EU would be overall much easier

for CSOs than dealing with 28 national and one European border forces with a blurry division

of competences and responsibilities.

Graph 3: CSOs resistance over time: number of demonstrations, debates, and gatherings
against Frontex (2005 – September 2017)
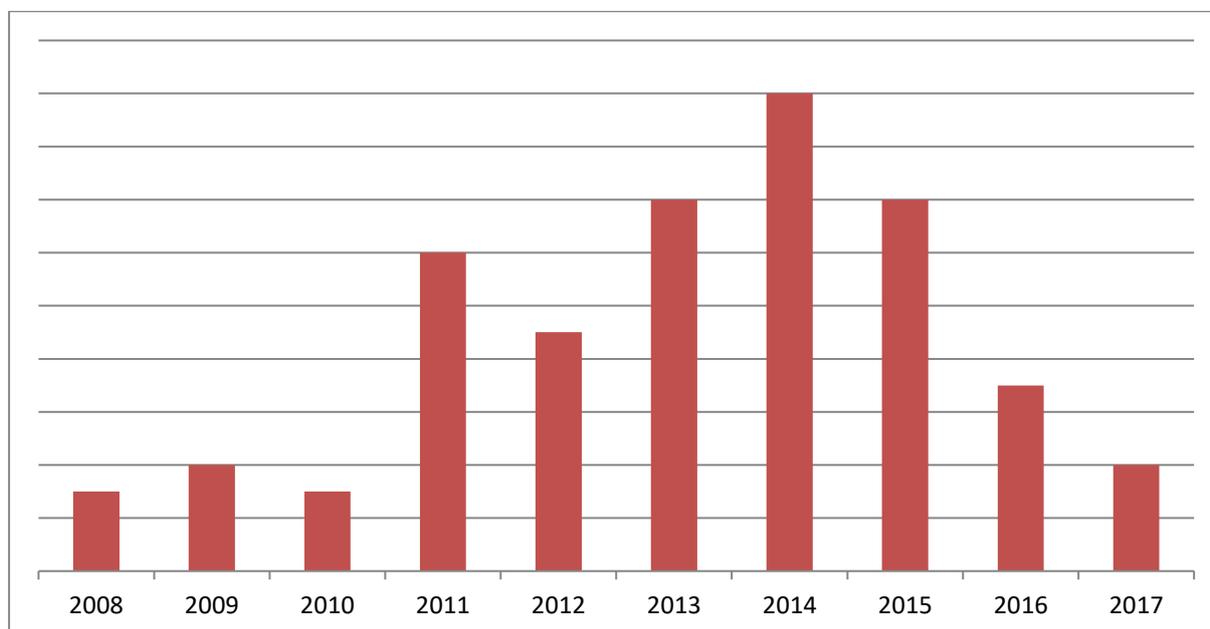
Source: author's own elaboration

The division among highly professionalized CSOs working at the EU level and in close

cooperation with EU actors versus transnational networks of grassroots organisations highlights

a general phenomenon in the European civil society. Civil society is becoming more and more

"multi-level" in order to cope with the different levels of governance. The multi-level approach

is necessary to cope with different bureaucratic and expertise requirements, but there is also an

ideological and resource cleavage between the CSOs that look for access to lobby policymakers

from within and the ones that remain outside. The ideological distance perceived by the

participants of campaigns such as Frontexit from members of CSOs that lobby Frontex from within is undeniable. Interviewee 7 mentioned what it means as an NGO advocating for fundamental rights to be working together with an agency whose actions might impact negatively the human rights of people crossing the EU borders,

> You know, for an NGO it is demanded that we are never satisfied. You always want more. And I would say, if I don't speak only about me but also about my colleagues, sometimes it is difficult to assess whether we can be satisfied or not, because you may have had some progress on this or this detail, but then you hear the news about the last tragedy and then you wonder… 'Yes, good, I put an article in the code of conduct for joint return operations,' but looking at 500 people who have already died since the beginning of the year… is it really something that we have achieved? And there is another thing: it is not only Frontex or sometimes not even Frontex at all that has to do with a certain tragedy. Sometimes it's member states, only member states.

Interviewee 7 concluded his thought by discussing, in relation to the idea of lobbying Frontex from outside, the relationship of his organisation with the Frontexit campaign:

> On the other hand, you may know that there is a campaign that goes on since some years, which started in France, called 'Frontexit'. And I must confess sometimes some arguments they have are really good; on the other hand, I always wander, and they were never able to answer me this question, what would I really achieve if we abandoned Frontex?…A nightmare, really a nightmare."

Another CF member, representative of a CSO, confirmed that even though CF members do not antagonise Frontexit campaigners, their views on how to improve the fundamental rights protection at the borders of Europe is completely different: while Frontexit CSOs advocate for the disappearance of the agency, CF CSOs work for the amelioration of the agency itself (Interviewee 1).

Such distance between CSOs within the EU can be interpreted as sign of a segmentation of CSOs in Europe, and therefore of the creation of a multi-level civil society. Moreover, the

ideological divide between local and EU level CSOs could be interpreted as an additional criterion guiding CSOs' selection of their level of activity, adding to the other two that were described in this chapter: the different functions that CSOs perform, and the different resources, or public goods, that CSOs manage to mobilise. It remains open for future research to investigate whether the ideological cleavage identified in this work is a way for local level CSOs – with few resources and transnationally organised – to express "sour grapes" towards EU level CSOs and institutions, originating precisely from their lack of access.

5.6. CONCLUDING REMARKS

Chapter 5 explored empirically the strategy choice of some CSOs active in the fundamental rights regime at the EU level, and particularly in the field of border management. The analysis focused on CSOs that decided to exploit the new opportunity created by Frontex Consultative Forum to gain access to the border management agency, while also mapping the resistance of other CSOs against the agency. CSOs which gained access share a high level of professionalisation and expertise, and they also generally have an established network at the EU level, both with other CSOs and with institutional actors, and considerable financial and human resources; in addition, the majority of these organisations have an EU office with its own staff (usually small) based in Brussels. The exception in this picture is one of the newest members of Frontex CF, namely the AIRE Centre; nonetheless, this organisation has a high level of expertise in fundamental rights legal matters and litigation in the field of migration, asylum and border control, thus meeting the requirements of the EBCG agency to join its consultative forum. Overall, these results confirm the literature on CSOs' access based on the logic of exchange between EU actors and CSOs, described in Chapter 2 (Section 2.1): while CSOs provide resources that are valuable to Frontex (e.g., expertise, political support), Frontex grants access and exchanges information with CSOs.

With regard to CSOs that contest Frontex from outside, it was impossible to establish whether some of them applied to become part of the CF and their applications were not accepted by Frontex; indeed, Frontex CF failed to provide information on the list of CSOs that answered to the call for applications. Nonetheless, mapping the campaigns and events organized against the EBCG agency (e.g., Frontexit) was useful to evidence that the majority of these organisations and movements have a strong ideological divide with CSOs that gained access to the agency. This ideological distance between CSOs that decided to contest Frontex from outside and those which work in Frontex CF was further confirmed by the CSOs representatives interviewed.

It must be notices that CSOs that lobby Frontex from within still employ "going public" strategies as complementary forms of advocacy, even though this type of strategies is more effective on political and representative institutions as it handles a political leverage, while Frontex is a non-majoritarian body that works at arms-length from representative institutions (Interviewee 1). Nonetheless, "going public" strategies used by both CSOs that gained access to Frontex CF and those who remained outside are considered by some interviewees representing CSOs members of the CF as necessary to raise the awareness of the public on EBCG activity and to have more organisations monitor the protection of fundamental rights at the EU borders.

Overall, this Chapter has evidenced how gaining access to Frontex CF is a great opportunity for CSOs to lobby the agency from within. Whether this lobbying activity is successful, and thus whether it is worth for CSOs to choose this resource-intensive inside strategy, is discussed in the next Chapter.

CHAPTER 6
Influence and accountability: CSOs and Frontex

6.1. INTRODUCTION

Influencing and holding accountable are two crucial ends of CSOs' interaction with policymakers, institutions, bodies and agencies at all levels of governance. CSOs' means to these ends are mainly two: getting access to governance actors and establishing a long-lasting relationship with them.

This Chapter is devoted to the analysis of whether and to what extent CSOs sitting in Frontex Consultative Forum on fundamental rights influence and hold accountable Frontex with regard to the issue of fundamental rights' protection and promotion. In a sense, all the data collected during this research enterprise come together in this last analysis chapter. The analysis on influence is divided in two parts. The first part answers the question of whether there has been an evolution in Frontex understanding of human rights since the inception of the EU agency. Once established that Frontex' understanding of human rights has evolved, the second part of the analysis is devoted to the assessment of the causality link between the evolution of Frontex understanding of human rights and Frontex interaction with the Consultative Forum and the CSOs represented within it. The first part is carried out with frame analysis, while the second part is operationalised by using the attributed influence method. The findings of these two parts of the analysis are triangulated with data retrieved from expert interviews.

Finally, the analysis of the potential accountability relationship between CSOs sitting in the CF and Frontex is carried out by describing how the three parts of an effective accountability relationship – i.e., information, debate, consequences, according to Bovens – unfold both in theory and in practice. The Chapter closes with the analysis of a possible outcome of this established relationship, be it only a consultation relationship, an influence relationship or an accountability relationship between CSOs sitting in the CF and Frontex: recursive learning.

6.2. A TALE OF INFLUENCE?

The first part of the analysis is devoted to studying whether there has been an evolution in Frontex' understanding of fundamental rights, since the inception of the agency. A frame analysis has been conducted on Frontex official documents in order to establish first, whether there has been an increase in the attention devoted to fundamental rights in Frontex documents, and, second, whether there is a change in the way in which fundamental rights are understood by the agency and what are the rhetorical manifestations of this change.

To analyse the increase of Frontex attention over time on the issue of fundamental rights it is possible to run a simple count of all the times that the string "fundamental rights" or "human rights" appeared. The results, represented in Graph 4, are clear: in the first three years of Frontex activity, human rights are never mentioned. The first year in which both the strings "fundamental rights" and "human rights" appear is 2008, after the Treaty of Lisbon was signed[188] and the Charter of fundamental rights was becoming binding on all EU actors. However, it is only after 2011 that fundamental rights are consistently present in Frontex discourse, namely after the amendment of Frontex Regulation, with the introduction of art. 26(a). The double usage of "human rights" and "fundamental rights" has never disappeared but the "fundamental rights" string is conclusively the most used in Frontex official documents, especially after 2011. After 2014, however, there appears to be a steep decrease of use of both "fundamental rights" and "human rights" in Frontex annual General Reports. There might be numerous reasons, but what is striking is that 2014 signalled the beginning of the so called "refugee crisis" or "migration crisis" which has led the EU and its member states to a more securitarian approach towards border management and migration policies (Jeandesboz and Pallister-Wilkins, 2016; Carrera, Blockmans, Gros, Guild, 2015)

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[188] The Treaty of Lisbon was signed on 13 December 2007 and it entered into force on 1 December 2009.

Graph 4: Use of "human rights" or "fundamental rights" in Frontex annual reports

Use of "human rights" or "fundamental rights" in Frontex annual reports
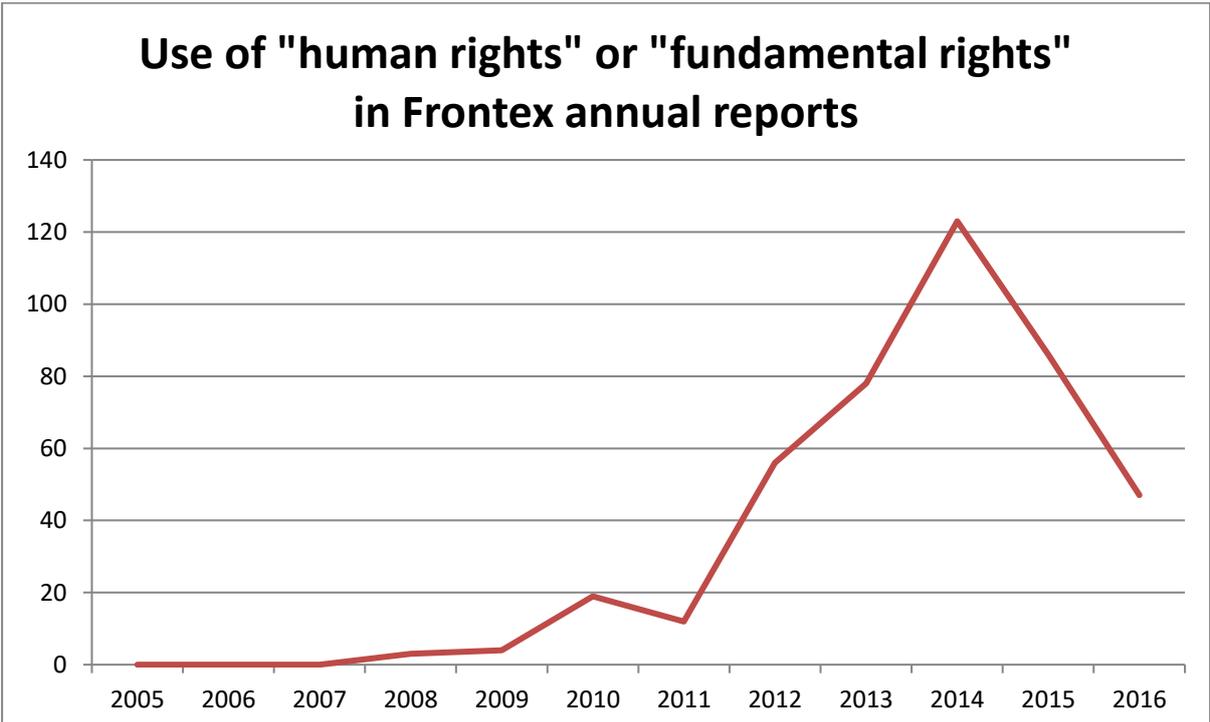
Source: author's own elaboration.

Moreover, in another preliminary attempt to assess how relevant fundamental rights have been in Frontex discourse since the agency inception, a word frequency count has been carried out on all Frontex annual reports from 2005 till 2016[189]. The results are encouraging: with "Frontex" being the first, "rights" appears among the first twenty most used words in these documents. The word "security", in comparison, scores only fifty-second. However, counting how many times Frontex has used the word "rights" or the string "fundamental rights" does not tell much about how Frontex interest in fundamental rights has evolved and in which areas. It does tell however how strongly the agency is trying to send the message that fundamental rights are paramount in its work, even though security and border control remain its ultimate concerns, based on Frontex mandate (Figure 9).

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[189] It must be noted, however, that the other main documents delivered annually by Frontex, namely the Annual Risk Analysis, have very poorly been concerned with fundamental rights issues. Until 2012, no mention was made of risks concerning fundamental rights at the external borders of the EU.

Figure 9: Word frequency cloud in Frontex Annual Reports (2005-2016)

Source: author's own elaboration with NVivo 10.

6.2.1. THE EVOLUTION OF FRONTEX UNDERSTANDING OF FUNDAMENTAL RIGHTS

The second step in this analysis consists in coding Frontex official documents – i.e., Annual Reports, Work Programmes, and communication material – and analysing how the concept of fundamental rights evolved for the agency. The frames identified are related to the different ways in which Frontex expresses its concern and attention for fundamental rights. For example, fundamental rights are mentioned by Frontex among its values since 2008, but the way in which Frontex frames fundamental rights among its values changes over time, particularly acquiring a different relevance over the years. Other significant frames identified regarding fundamental rights and evolving over time are: fundamental rights as a training issue, fundamental rights of people in distress at sea, fundamental rights of refugees, fundamental

rights as part of a cooperation strategy, fundamental rights as a legal issue, to name the most relevant. A small inter-rater reliability test (with 10 raters) has been conducted to ensure that the frames identified by the author were a reliable interpretation of the texts. The raters' lowest percentage of recognition of frames was 60%. Overall, the frames identified evidence a tendency of Frontex to treat fundamental rights more and more as a specialised field of knowledge.

Fundamental rights are mentioned for the first time in Frontex Annual Report of 2008 to specify what the value of "humanity" – officially endorsed by the agency – entails. Here is how the concept of fundamental rights as one of Frontex values has changed over time:

> Frontex identifies HUMANITY, OPEN COMMUNICATION, PROFESSIONALISM, TEAM WORK, and TRUSTWORTHINESS as values which shall be endorsed, shared, lived and performed by each member of staff and respected by Frontex' partners. Those five values will form the foundation of Frontex' activities at all levels. Full respect and promotion of fundamental rights, belongs to the value "Humanity". It is the most important corner stone of modern European border management. (Frontex, 2008c: 10, emphasis in the original).

> Full and sincere respect of Fundamental Rights is a firm and strategic choice of Frontex. It *will be demonstrated* through the values of the agency in all its operational and administrative activities and when developing the capacity of the Member States. (Frontex, 2009c: 4, emphasis added)

> Full and sincere respect of Fundamental Rights is a firm and strategic choice of Frontex. This *is demonstrated* through the values of the Agency in all its operational and administrative activities and when developing the capacity of the Member States. (Frontex, 2010c: 7, emphasis added)

> Despite all these changes, some things remain the same: the need to maintain Frontex's vision, goals and values by ensuring quality in everything we do; the commitment and

professionalism required to deliver constant and reliable support to the Member States; and

an *unfaltering recognition of the importance of* fundamental rights at every stage of

operations will all stand us in good stead for whatever challenges the future may hold.

(Frontex 2011c: 5, emphasis added)

These excerpts evidence that in the first years of Frontex activities the agency was still

unsure about how to deal specifically with fundamental rights. A general commitment to the

"full and sincere respect" of fundamental rights, substituting the "respect and promotion of

fundamental rights" formula, was introduced among the values of the agency but without

further specification. The small shift from the future tense to the present tense, from 2009 to

2010, did not add much to in terms of how fundamental rights were "demonstrated through the

values of the agency in all its operational and administrative activities and when developing the

capacity of the Member States". Not much differently, in 2011 in the foreword of Frontex

Annual Report, Illka Laitinen – i.e., Frontex Executive Director at the time – presented

fundamental rights in the same vague and grandiose way: "an unfaltering recognition of the

importance of fundamental rights at every stage of operations will all stand us in good stead for

whatever challenges the future may hold".

What changed significantly in 2012 was the introduction, in Frontex Annual Reports, of

a dedicated annex: the Fundamental Rights Progress Report, which was not expressly envisaged

by the amended Frontex Regulation of 2011. While in 2010 and 2011 fundamental rights

already had their own section under the heading "Developments", from 2012 the General

Reports also introduced fundamental rights in sections devoted to specific activities of the

agency. This meant, from 2012-2013 onwards, operationalising these rights and attributing

them to specific categories, thus framing fundamental rights not only as general values but also

attributable to a specific set or category of people, namely women, victims of trafficking,

women and victims of trafficking, unaccompanied minors, minors and victims of trafficking,

people in distress at sea, and returnees. One clear example of the way in which Frontex specifies

and operationalises fundamental rights framed as "humane treatment" is the requirement for returnees of "medical personnel [..] on every flight, and, if the escorting officers are not able to communicate with the returnees, interpreters should also be on board" (Frontex, 2013c: 19), thus acknowledging the need for specific assistance for returnees.

Frontex issue specific Code of Conducts for Frontex officers – i.e., on activities at the borders and on joint return operations (also by air), – have been created specifically to catalogue all the measures that have to be taken during Frontex Joint Operations, including all the measures that are deemed necessary to respect fundamental rights during said operations. In these documents, fundamental rights are framed as operative measures, clearly identified and simply explained for Frontex officers to abide by them. One clear example is the introduction, with the Code of Conduct on Joint Return Operations by air of a medical examination of the returnee which has to produce a "fit-to-travel" document prior to the return flight, otherwise the returnee cannot be returned.

It remains, however, paramount Frontex understanding of fundamental rights as legal provisions. In Chapter 2 of the Code of Conduct on Joint Return Operations, fundamental rights are listed under the heading of "general principles" guiding the conduct of Frontex officers during return operations, such as:

> "human dignity, right to life, the principle of non-refoulement, the right to asylum, the prohibition of torture and of inhuman or degrading treatment or punishment, the right to liberty and security, the rights of the child, the rights to the protection of personal data and nondiscrimination, and the right to respect for private and family life… without discrimination on any grounds such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation" (Frontex, 2013: 8)

The legal understanding of fundamental rights has opened the way for the use of these rights as a justification for the enforcement of securitarian measures at the borders of the EU, which is

clearly evidenced by studies made at the borders since the beginning of the so called "refugee crisis" in 2014 (Aas and Gundhus, 2015; Pallister-Wilkins, 2015). Also in Warsaw, however, the discourse on fundamental rights has been used in a similar way. Even before the "crisis", fundamental rights have a history of being used by Frontex, on the one hand, to highlight the security needs of EU citizens and, on the other, to enhance the security of people crossing the EU external borders irregularly, thus justifying measures aimed at controlling and securing EU borders. Here are two examples of these two extremes, which evidence how the tension between security and fundamental rights was present in Frontex activity since the beginning of its mandate, and towards what direction the agency was inclined:

> "FRONTEX complements and provides particular added value to the national border management systems of the Member States and to the freedom and security of their citizens." (Frontex, 2005c)

> "with the aim to enhance the control of the area between the West African coast and the Canary Islands, thus diverting the vessels using this migration route and contributing to the reduction of human lives lost at sea during the dangerous long journey." (Frontex, 2006c).

More recently, the brochure "Twelve seconds to decide. In search of excellence: Frontex and the principle of 'best practice'" (2014d) – used by Frontex as an advertisement and information tool on its activities at the beginning of the "crisis", – addressed directly the issue of having detractors underlining the "anti-immigration role" of the agency and its lack of accountability with regard to the protection of fundamental rights. It did so through the words of Inmaculada Arnaez, Frontex FRO, who gives a clear explanation of this legacy and the implications of Frontex difficulties in the arena of protection and promotion of fundamental rights; according to was is reported by Frontex, Arnaez believes that this situation stemmed from the ambiguous language with which the Schengen Borders Code of 2006 was drafted, and in particular 'The preamble says that border control 'should help to combat illegal immigration.' But there is no such thing as 'illegal' immigration. It is not illegal to seek asylum, for instance. And why the

defensive language, if asylum seekers are as welcome as we say they are; why must immigration be 'combated'?" (Frontex, 2014d: 103).

In sum, the frame analysis conducted on Frontex official documents clearly evidences an increase in the attention towards fundamental rights by the agency coupled with the technicization of fundamental rights, aimed to applying them during Frontex operations. However, Frontex still retains the use of fundamental rights as a way to justify the use of containment measures towards irregular migration, which is a legacy from the past and an approach generally shared with member states and EU institutions, particularly since the inception of the "crisis".

6.2.2. CF OR CSOs' INFLUENCE?

The last part of the analysis feeds from this frame analysis and answers to the question of whether it is possible to establish a causal link between the Consultative Forum work and the evolution of Frontex's understanding of human rights, and, therefore, whether CSOs have successfully managed to influence Frontex. The study of CF's annual reports, coupled with interviews conducted also with Frontex's Heads of Unit, gives further insights on the effects of CSOs presence within Frontex. Interviewees both from Frontex and the CF were asked about their perception of CSOs influence on the agency's understanding of fundamental rights.

Specific documents were produced by Frontex together with the CF. A first example is the Code of Conduct for Joint Return Operations, cited previously. But the most successful of these documents is the "VEGA children handbook", used by Frontex to harmonise the behaviour of border guards towards children at the air borders (i.e., airports) of the EU by training them and raise their awareness on the issue. According to both CSOs' representatives and Frontex staff, this specific document has contributed significantly not only to the mainstreaming of child rights at the borders, but also to the establishment of a fruitful cooperation between the agency and CSOs sitting in the CF. As a matter of fact, CSOs'

representatives were invited into the field throughout the whole period of the production and implementation of this document, first to observe and gather information, and then to gradually introduce and experiment changes in selected airports.

CSOs contribution to mainstreaming fundamental rights within Frontex activities was overall positive, according to the self-assesment of CSOs' representatives and the peer-assessment of Frontex staff. The possibility to create stable avenues of communication between CSOs' representatives and Frontex staff, as well as the establishment of informal working methods, such as focus groups and a frequent exchange of views and information via email or phone, outside of Frontex Regulation's explicit mandate, evidences the interest of both parties to work together in a productive manner. However, both Frontex staff and CSOs lamented the absence of a full disclosure of information from both sides, for example concerning CSOs' contacts in North African countries, and Frontex collection of risk analysis data and its debriefing activities at the borders. This highlights that, so far, there have not been problems of cooptation and that CSOs retain their independence.

In sum, even though it is hard to say conclusively that insider tactics have been effective in mainstreaming fundamental rights in Frontex's activities, it is possible to affirm that there has been an evolution in Frontex understanding of fundamental rights and that this change has been influenced also by the close cooperation with CSOs. Surely, CSOs have greatly contributed to the operationalisation of the concept of fundamental rights at the borders of the EU. Whether or not this operationalised concept is effectively employed on the field, is a matter for a different study.

Even though Frontex understanding and communication on fundamental rights has improved, there are still numerous doubts about Frontex management of situations in the field, during operation, in which fundamental rights of migrants are endangered. By merely counting the usage of the string "fundamental rights" or "human rights", there is no doubt that fundamental rights are now higher in the list of Frontex concerns compared to the first years of

Frontex activity. What strikes as controversial is the possibility of emptying of the content of these operationalised fundamental rights on the field, which is also the major concern for CSOs' both inside (Interviewee 3) and outside the CF (Moreno-Lax, 2018). Overall, the use of a humanitarian rhetoric does not prevent Frontex or the seconded national border guards to possibly disregard fundamental rights at the EU borders, especially in the absence of an effective judicial control or a fully working individual complaint mechanism. This is why it is so important to also carry out a qualitative analysis of Frontex discourse, to understand at which level the system of fundamental rights protection breaks down.

However, one question remains unanswered: how can we establish a clear link between the role of CSOs, members of the CF, and the influence exerted on Frontex, excluding the contribution of the other actors present in the Forum? As a matter of fact, this is possible only by using proxies such as CSOs' objectives at the beginning of the close cooperation with Frontex, which can be inferred both from the interviews conducted and from CSOs' policy statements retrieved mainly through their websites. The material which could have been fundamental to establish this link, namely CF meetings' minutes and CF annual reports, do not contain this information. Unfortunately, CF minutes, collected from the second till the tenth meeting (from January 31, 2013 to May 12, 2016), do not include any indication of the different opinions of CF members but only report the conclusions reached. Moreover, while CF members feel generally free to use the information exchanged during the CF meetings with their organisations, even if not with the general public, they cannot explicitly refer to who contributed specific information and the positions held by other members, as these fall under the "Declaration of adherence to professional secrecy"[190] that every CF member has to sign at the beginning of his/her mandate. More specifically, the Working Methods of the CF revised in

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[190] The text of the declaration is not publicly available. It must be noted that while some members refer to this declaration as the "Chatham House rule", others consider that the secrecy covers only the sensitive data discussed within the CF, which de facto are not often discussed. The latest CF Working Methods harmonise these interpretations.

2017, state: "Individual opinions shared during discussions and deliberations with Frontex as well as information provided by Frontex shall remain confidential. The confidentiality of internal discussions and deliberations among the members shall also be respected by all members vis-à-vis Frontex and any other external parties." (par. 4.4)[191]

From the interviews conducted, it became evident that single CSOs frequently do not have a detailed agenda and a clear list of objectives to be reached in the relationship with Frontex, other than the CF Work Programme agreed with the other members of the CF. Especially during the first mandate of the Forum, CSOs' objectives were mainly set collectively among the members of the CF, according both to the priorities of the agency and the considerations of the CF over the ability of the agency to respect, protect and promote fundamental rights in its activities. Indeed, the agenda of the CF is set up not exclusively following Frontex MB and ED requests for support, including ad hoc requests, but mainly by initiative of the members of the CF who act upon consensus, within (the limits posed by) the mandate stipulated in the European Border and Coast Guard Regulation and in accordance with CF Working Methods (2017). Moreover, there seems to be small differences in the views and approaches of different members of the CF towards Frontex; several interviewees from CSOs, when asked about the relationship with other members of the CF, underlined the irrelevant distance between the common objectives of CSOs and the views of international organisations and FRA, while EASO was repeatedly mentioned as having a sui generis approach to the work of the CF:

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[191] See also Title II of the document approved in 2014 by the MB and the ED titled "Revised Working Methods and Modalities for the Transmission of Information", available at: http://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Revised_Working_Methods_and_Modalities_for_the_Transmission_of_Information.pdf. In a previous version of the Working Methods of the CF, the MB decided that "Individual opinions and discussions of the CF Members shall remain confidential (so called "Chatham House Rule")" (art. 3.4 Annex I of the "Management Board decision of 2012 on the working methods of the Frontex Consultative Forum and the modalities of the transmission of information to the Frontex Consultative Forum". Available at: http://www.statewatch.org/observatories_files/frontex_observatory/2%20%20MB%20decision%20on%20the%20working%20methods%20of%20the%20CF.pdf.

"I think that with most CF members we share the same objectives and there is not that may difficulties in reaching common ground or common positions. You know what the composition of the CF is: there are CSOs, but there are also international organisations as well as other EU agencies. So, I think that in these different categories there are diverging views as to what the role or the responsibility of the CF is, but in particular when looking at the role of EU agencies, EASO and FRA, within the forum. But when it comes to CSOs, I think we all have the same objectives and with this in mind it is not difficult to find a common voice." (Interviewee 9)

When asked specifically about differences between the views of these three "blocks", Interviewee 9 underlined having no evidence of not sharing the same general objectives with regard to the work of the CF with international organisations and FRA. It was only mentioned that the difference with international organisations lies mostly in the available resources – e.g., international organisations have more than one representatives present at CF meetings – and in the physical location of their headquarters[192] (Interviewees 7 and 9). The only example of organisation not actively participating in the CF work, mentioned also by other interviewees, is EASO, which is de facto acting as an observer:

"All members of the CF, perhaps with the exception of EASO, work very closely together. This also includes international organisations and FRA…we share more or less the same attitude and the same goal that is improving human rights situation at the external borders…EASO, especially in times in which the CF had critical positions against Frontex and the member states, they felt uncomfortable in their role of EU agency to criticise another EU agency or a member state" (Interviewee 7).

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[192] This does not apply to the AIRE Centre, which is based in the UK, the ICJ, and the ICMC which are both based in Geneva. The ICJ, however, also has a ICJ-European Institutions office based in Brussels which cooperates closely with ICJ with regard to the work within the CF. The location of CSOs has been very relevant because it allowed CSOs to organize informal meetings among themselves, before CF formal meetings, especially during the first mandate of the CF, as reported by Interviewees 7 and 8. Interviewee 6 also mentioned that while CSOs, which he called specifically NGOs, had more or less the same level of interest, expertise (even if in different fields), and attendance to the CF meetings, international organisations and EU agencies had either expertise and ability to deal with Frontex which was unreachable by NGOs, or were not involved as much as NGOs in the CF activities. Another very active international organisation mentioned by various Interviewees has been the Council of Europe.

The presence of a common voice but the absence of a definite and measurable list of lobbying objectives for CSOs emerged specifically when CSOs' representatives were asked directly what were their objectives at the beginning of their mandate within the CF and two evaluative questions: "Do you think your work has been successful within the CF?" and "Are you thinking about applying again/to remain a member of the CF for another mandate?". Only Interviewee 10 clearly defined what she considers "success" with regard to her work in the CF, namely: "I would frame success in a picture of… what contributed the most to our activities and helped us in fulfilling our mission and also for us to pass our messages". It is possible to summarise the position that all CSOs regarding having specific and measurable objectives for their work in the CF with the effective words of Interviewee 9 (see Chapter 5 for CSOs' general aims and main reasons to enter Frontex CF):

> "Our recommendation is more broadly to make sure that Frontex operations and border controls are in line with fundamental rights and take into account the specific needs of migrants and the specific vulnerabilities. So, it is quite big. And there are many different areas of activities that can be worked on in order to advance this agenda. I think that when we joined the forum we didn't have any specific expectations or objectives apart from making sure that our contribution and participation in the Forum would not be instrumentalised or that we would not be consulted just for the sake of being consulted. We wanted to be engaged only if this engagement was to be useful, let's say. When joining we did not have specific objectives that we wanted to measure."

As for the overall success of CSOs' lobbying activity within the CF, as discussed at the beginning of this section, all CSOs agreed on the positive impact of their work on Frontex. The biggest success stories presented by all CSOs are the VEGA children operation together with the Code of Conduct on Joint Operations, and Joint Return Operations.

Finally, some of the interviews conducted helped also establish the difference in terms of influence between the CSOs that work from inside Frontex from the ones that lobby Frontex

from outside. Interviewee 6, for instance, affirmed that the influence on the Code of Conduct for Joint Return Operations could not have been possible for the CSO he represents without lobbying the agency from within. Moreover, he added that, in his experience, lobbying Frontex only from the outside, as other CSOs do, might have not influenced the agency at all. This implies that having CSOs with "a foot in the door" (i.e., within the agency) is the most effective way to translate the concerns of grassroot organisations into practical recommendations. Moreover, some CSOs sitting in the CF have kept their ability to work from within the agency not only through the CF but also by cooperating with the agency on specific matters, similarly to the Fundamental Rights Agency. One example above all is ECRE, which, according to a Frontex Head of Unit, has been working as a "co-business partner" both within and outside the CF on specific issues, spanning from legal to training (Interviewee B); the same interviewee also affirmed that specifically CSOs work well in the CF because they are aware of the challenges of practitioners while understanding Frontex work and Frontex mandate, thus creating an environment of "team work".

Following the work of Michalowitz, that CSOs within Frontex exert a "technical" type influence (Michalowitz 2007). With technical influence Michalowitz refers to the effect of lobbying focused on "changing details of a legislative act that do not run counter to any other stakeholder's interest and do not touch the core contents of the legislation." (2007: 136), while being unable to change the core contents of the legislation at other levels of governance.

It might be concluded that the relationship between Frontex and the CSOs represented in its CF is both recursive and a two-way type of interaction, thus confirming the theoretical hypothesis on frequency and directionality of the interaction discussed in Chapter 2.2. This type of interaction is triggered by both the willingness of some CSOs to exert influence on Frontex from within and from Frontex interest in a positive reputational effect. However, the way in which this interaction unfolds reveals a great potential for more than an encounter of distinct interests, especially considering that this relationship has not been limited to what was first

envisaged by Regulation 1168/2011, as confirmed by all interviewees, including Frontex officers. More specifically, this recursive and two-way relationship not only establishes a direct channel for CSOs to influence Frontex, but it also creates the preconditions for a form of accountability which is analysed in the next sections of the present Chapter, namely social accountability.

6.3. A TALE OF ACCOUNTABILITY?

What happens once influence has been exerted? What kind of control over the influenced behavior can be exerted? Is there a kind of control on fundamental rights which can at the same time be effective and avoid undermining the independence of the agency? This section aims to address these questions, starting by recalling briefly the theory behind social accountability and by analysing Frontex social accountability vis-à-vis CSOs members of the CF.

The type of accountability usually referred to in the literature is the so called "principal-agent" accountability. This type of accountability exists if the principal delegates one of its competences or powers to the agent and the agent is directly controlled by the principal in the implementation of its delegated powers. In the case of Frontex, as was clarified in Chapter 2, no specific competence of the EU was delegated to the agency, but it was created *ad hoc*. Moreover, the agency lacks a univocal principal whereas it answers, directly and indirectly, to the ECJ, the Ombudsman, the EP, but also to the Commission and participating member states regarding the issue of fundamental rights protection and promotion. There is a panoply of different accountability relationships among Frontex and these actors which can be only loosely defined as the agency's principals. This is why this work addresses only one specific type of accountability, namely social accountability, in which the "principal" is substituted by a "forum" which does not delegate powers to the agency but is nonetheless able to hold it accountable. The forum of the social accountability analysed in this Chapter is composed by civil society actors and, more specifically, by CSOs that are members of the CF.

As already presented in Chapter 2, according to Bovens there are three stages in every accountability relationship between an actor (i.e., Frontex) and a forum (i.e., for this specific case a social forum: CSOs members of the CF): information, debate, and consequences. Every stage, or phase, has one or more requirements that need to be satisfied, fully or partially, for the relationship to be defined as an accountability one. Following this repartition, and analysing whether the requirements are met by the actor and the forum, it is possible to establish whether the relationship between Frontex and the civil society members of the CF can be defined as social accountability. The analysis of this potential social accountability relationship is carried out both *de jure* and *de facto*, following Busuioc's (2013) analysis of accountability at work in EU agencies. This analysis also adds to Busuioc's work by describing the social type of accountability for EU agencies, which was overlooked in her study.

6.3.1. INFORMATION

The main requirement for the information stage is the following: the actor is *obliged* to inform the forum about his or her conduct; in case of failure to provide information or incident, the actor should provide explanations or justifications.

Formally, according to former Frontex Regulation of 2011 "the Consultative Forum shall have access to all information concerning respect for fundamental rights, in relation to *all the activities* of the Agency" (art. 26a(4), emphasis added). In the most recent Regulation the substance of the requirement of information has not changed but the 2016 Regulation further specifies that the CF access to all information shall be "effective". More specifically, article 70(5) states that:

> "Without prejudice to the tasks of the fundamental rights officer, the consultative forum
>
> shall have *effective access* to all information concerning the respect for fundamental rights,
>
> including by carrying out on-the-spot visits to joint operations or rapid border interventions
>
> subject to the agreement of the host Member State, and to hotspot areas, return operations
>
> and return interventions." (emphasis added)

However, the modalities for the transmission of information from Frontex to the CF were revised twice since the CF was established. The latest publicly available MB decision on the modalities for the transmission of information are linked to the CF working methods of October 2014[193]; these were revised by MB decision on 8-9 February 2017 in a meeting held in Valletta, Malta, but the content of this decision is yet to be disclosed. The modalities for the transmission of information of 2014 describe Frontex information as categorized according to the level of security clearance: unclassified, sensitive unclassified, and EU classified information. Thus, the information requested by the CF should be processed according to this classification: the unclassified information is to be transmitted immediately to the CF, while the other two types of information should be released in compliance with "Article 11d of Frontex Regulation referring to the Commission's rules on security as set out in the Annex to Commission Decision 2001/844/EC, ECSC, Euratom and with the relevant Frontex rules" (title II, par. 2.2). According to the same document, the information shall be transferred via the CF Secretariat or during CF meetings. Finally, in case the information received from Frontex is considered "insufficient by the CF for its proper functioning" (title II, par. 3), the CF can ask for additional information and it is for the ED to decide whether the request can be satisfied or whether it is unjustified. There is no mention of what happens further, once the ED has deemed the request unjustified.

With regard to Frontex' areas of competence in which the CF shall be consulted, and therefore has the right to receive information, there were "the further development and implementation of the Fundamental Rights Strategy, Code of Conduct and common core curricula" (art. 26a(1)), now translated into: "the further development and implementation of the fundamental rights strategy, on *the establishment of the complaints mechanism*, on codes of conduct and on common core curricula." (Art. 70(3), emphasis added). Moreover, Article 34(4)

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[193] Full texts regulating the modalities of transmission of information from Frontex to the CF are available at: http://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Revised_Working_Methods_and_Modalities_for_the_Transmission_of_Information.pdf (accessed 12 September 2017); MB meeting approving methods of transmission of information from Frontex to the CF available at: http://www.statewatch.org/news/2017/may/eu-frontex-mb-minutes-63rd-meeting.pdf (accessed 12 September 2017).

adds a new area of competence to which the CF can contribute, namely Frontex relations with third countries: "In performing its tasks, in its relations with Member States and in its cooperation with third countries, the Agency shall take into account the reports of the consultative forum…and the fundamental rights officer."

In practice, according to the CSOs' representatives interviewed and other members of the CF (i.e., UNHCR and FRA), the information requested is usually transmitted by Frontex formally, in writing, and quite easily, also via the Fundamental Rights Officer, but there are still areas of activity of the agency for which information is not always timely and complete. The main area where information is more difficult to be retrieved for the CF is risk analysis (Interviewee 2). Moreover, when the information is delayed or incomplete there is often no motivation or justification delivered by Frontex, therefore reducing the transparency of the agency vis-à-vis the CF (Interviewee 6). This might change with the introduction, in the latest Frontex, Regulation of the word "effective" when it comes to the agency provision of information to the CF. According to Interviewee 10, however, the change brought about by Frontex 2016 Regulation is not particularly visible; more specifically, when asked whether information flowing from Frontex has become "effective" also in practice, Interviewee 10 highlighted that more proactivity has been shown by Frontex, even though this has entailed so far only the increase in the emails sent to CF members to inform them about the latest news published on Frontex website (September 2017).

It is interesting to notice how information exchange is understood as a two-way process by Frontex, according to CSOs interviewees: information flows from the agency to the CF but the agency is also expecting CSOs to provide all the available information they have on specific matters. As an example, during the interview, Interviewee 2 referred to an open invitation issued by Frontex to all members of the CF to submit contacts and relevant information to the agency regarding North African countries.

Overall, the information phase of the social accountability relationship between Frontex and its CF seems to be in place and to be in good health, both de jure and de facto, notwithstanding the presence of some limitations. In particular, the absence of a clear mechanism when there is a (rare) refusal to produce information from the part of Frontex, and therefore to provide reasons for the refusal, impinges on the ability of the CF to produce relevant opinions and recommendations. This is especially plausible in cases where the CF could be very useful in recognizing emerging fundamental rights issues, especially in a fast-changing agency and policy area such a s Frontex and border control. Moreover, the ability of the CF to understand the reasons for Frontex decisions to disclose incomplete or delayed informations, or not to disclose them at all, could help solve (or avoid) misunderstandings between the two, which could even be at the basis of the refusal to produce complete and timely information, as underlined also by Interviewee 6.

6.3.3. DEBATE

After the information phase, the debate phase involves the possibility for, or the faculty of, the forum (i.e., the CF and its members) to interrogate the actor and to question the adequacy of the information or the legitimacy of the conduct; this requirement can also be described as the answerability of Frontex vis-à-vis the CF.

De jure, the first Working Methods of the CF (2013) established that: "The CF may act in the form of an opinion at the initiative of the MB or the ED when being consulted on certain matter. The CF may also act in the form of a recommendation at the initiative of the CF Members." With the recent amendment of the Working Methods, the modalities of expression for the CF have been aligned with the everyday practice of the forum; the CF can issue opinions and recommendations at its own initiative or at the request of the MB or ED, thus making the distinction between own and Frontex initiative less relevant. The debate phase can therefore be triggered by an opinion or a recommendation issued by the CF. It is then the Management Board

and/or the Executive Director that have to reply, and, according to the 2014 formulation "On the request of the CF…[they] may submit a reply in writing to the CF presenting their views and actions undertaken following the CF opinion and/or recommendation." (Working Methods of the Frontex Consultative Forum, 3.5) In 2017, the CF Working Methods were revised to introduce the new requirements of the 2016 EBCG Regulation. In particular, working groups and meetings with MB members and Frontex staff have been formalised, thus institutionalising new avenues for the debate phase[194]. At the same time, the follow up rules for Frontex are more strictly regulated. Paragraph 4.5 of the 2017 CF Working Methods reads:

> "In line with the European Border and Coast Guard Regulation, the Consultative Forum expects the Executive Director and the Management Board Chair to ensure *appropriate* follow up to its opinions and recommendations as well as to *send feedback at regular intervals* to the Consultative Forum, via the Secretariat, presenting their views and actions undertaken following the Consultative Forum's opinions and/or recommendations." (emphasis added)

Similarly to the information phase, the changes introduced with the EBCG Regulation strengthen at least formally the position of the CF within Frontex, without undermining the independence of the forum itself. The words "appropriate" and "effective", the former referring to Frontex follow up to the CF opinions and recommendations and the latter to the information provided by Frontex to the CF, might not have an application in practice, but signal that there has been an evolution specifically concerning these two highly contentious issues (i.e., follow up and information). Indeed, since its 2013 annual report, the CF has repeatedly pushed for something more than a consultative role that might be ignored by the agency; according to Interviewee 8, signs of change were already visible in 2015, when CF recommendations were increasingly considered not as optional.

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[194] "Following invitation by the Chairs, any Management Board member or one representative authorised by each member may participate in working level meetings. These should also be attended by the Fundamental Rights Officer, the Secretariat and Frontex staff nominated by the Executive Director, depending on the Agenda." (CF Working Methods, 2017).

In the everyday work of the CF, according to the members interviewed, the forum rarely passes formal written opinions and recommendations, preferring in person exchanges that resemble more open discussions with Frontex staff. The introduction of focus groups where interested Frontex officers participate – including MB members and ED – was particularly supported by CF members and de facto established another effective locus for debate (Interviewee 8). The most common ways for the CSOs representatives and the other CF members to discuss fundamental rights issues concerning Frontex activity are exchange of emails and phone calls alongside the more formal debate moments such as plenary and working groups meetings. The follow up is therefore usually straightforward during formal and informal meetings and focus groups, but also delivered by Frontex to the CF Chairs by letter/email (Interviewee 10), but follow ups might be considerably delayed depending on the issue discussed and/or Frontex issues related to chain of command and control. Overall, all members of the CF interviewed consider the debate with Frontex as open and fruitful.

6.3.4. CONSEQUENCES

In Bovens' definition of an accountability relationship, consequences can be divided into formal and informal. As discussed in Chapter 2, social accountability is mainly about informal consequences, including informing the public of the misconduct of the agent or acting as an alarm trigger for the agent's principals. The requirement for this phase is that the forum *can* pass judgement on the conduct of the actor and the actor *may* face consequences.

Since its inception, the CF has a duty to prepare and "make publicly available" an annual report of its activities (previously art. 26a(2) of Regulation 1168/2011, currently art. 70(4) of Regulation 1624/2016). This report of the CF activities is also a report of its accomplishments and failures, usually related to the level of agreement found with Frontex on fundamental rights issues and the level of integration of the CF opinions and recommendations within Frontex activity. These reports can therefore be easily understood as a tool for the CF to sanction Frontex

through public opinion, at least de jure. Art. 34(4) of the 2016 Frontex Regulation also specifies that: "In performing its tasks, in its relations with Member States and in its cooperation with third countries, the Agency shall consider the reports of the consultative forum referred to in Article 70 ('the consultative forum') and the fundamental rights officer". Moreover, at least in theory, the CSOs represented in the CF, as single entities detached from the CF, may choose to use the information debated within the CF, even if within the limits posed by the non-disclosure agreement, and communicate it to their constituencies and to the public.

In practice, the CF cooperates closely with the FRO and particularly when follow up to recommendations is concerned (Interview with Frontex FRO). Indeed, the FRO can access all information and visit operations, also to make sure that CF recommendations have been taken on board by Frontex units and/or officers, and thus she can report back to the CF. With the news of the follow-ups, either received from the FRO or through the ED or the CF Secretariat, the CF has published its reports every year since 2014, covering the activities of the previous year, not without some disagreements with Frontex. Indeed, the annual report of the CF has to be presented to and discussed with the MB and the ED before being published. This, however, has never affected the ability of the CF to publish the report presented to Frontex steering bodies without any revision; the second annual report, issued in 2015 and covering the activities in 2014, makes it abundantly clear. The report was significantly delayed due to a divergence of views between the CF and the ED over its content; nonetheless, the quarrel was resolved by publishing the full report containing a statement, published as foreword, written by Frontex Executive Director, at the time Ilkka Laitinen, specifying that some of the recommendations, opinions and remarks presented by the CF in the report itself fell outside of Frontex mandate and misconceived the nature of the agency and therefore could not be addressed by the agency[195].

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[195] "Following the discussion on the annual report, the Management Board requested the Consultative Forum, to redraft and clarify certain misunderstandings contained in the report. As the annual report was not subject to

Aside from the annual report, single CSOs or coalitions of CSOs, while being members of the CF, have continued to publish their views on the activity of the agency. Indeed, CSOs delivered statements with regard to the proposals of the EBCG Regulation, but also the Regulation on the rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex (AI, ECRE, ICJ, 2013; 2016). ECRE has always been particularly prolific by reporting news and issuing statements to inform the public about potential fundamental rights issues arising from Frontex activities at the borders of the EU (Pro Asyl 2013)[196]. Also Amnesty International has had a relevant role in denouncing abuses at the borders of the EU; in particular, the latest report "Hotspot Italy" revealed abusive conditions in Italy in hotspots where Frontex is present and carries out activities such as identification, screening and debriefing (AI, 2016; Interviewee A). Caritas Europa was vocal about its role within the CF during its first mandate within Frontex, while it continued to issue statements about border management, and indirectly about Frontex throughout the two mandates[197].

Moreover, when considering the ability of the CF and its members to communicate not only with the public but also with Frontex' "political principals", such as the European Parliament, the Commission and EU member states, it is interesting to notice that the CF has numerous occasions to be heard directly. Since the inception of the forum, CF Chair and Co-Chair[198] have participated in several hearings before the LIBE committee of the EP[199], mainly

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amendments, the Management Board and Executive Director of Frontex deem it necessary to make the following written statement and express diverging opinions concerning certain contents of the report

[196] See also ECRE's website which displays more than fifteen entries on Frontex since 2013, in the "News" section. Available at: https://www.ecre.org/?s=Frontex (accessed 10 August 2017).

[197] See Caritas Europa website: http://www.caritas.eu/news/migrants-not-illegal-caritas-and-ngos-say-in-frontex-report and http://www.caritas.eu/tags/frontex (accessed 04 June 2017).

[198] CF Chair and Co-Chair are selected by the CF itself, according to the criteria laid down in the CF Working methods, and usually represent on the one hand international organisations and EU agencies and, on the other, CSOs sitting in the CF. CF Chair and Co-Chair are elected every two years.

[199] Available at: http://fra.europa.eu/en/news/2013/european-parliaments-libe-committee-discusses-fundamental-rights-frontex-operations (accessed 27/06/2013);
http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/discussion_paper_frontex_/discussion_paper_frontex_en.pdf (accessed 13 February 2016); http://fra.europa.eu/en/event/2014/fra-takes-part-libe-

by being summoned directly by the EP itself. During these hearings, either at the presence of Frontex ED or not, CF Chair and Co-Chair present and discuss the annual report, or MEPs summon the CF representatives to debate on specific issues. It is worth remembering that, single CSOs have also direct links with the Commission, having mainly their headquarters in Brussels to lobby the EU legislative process. Moreover, the Commission is also represented within Frontex MB, together with the other political principals of the agency, namely EU member states. The CF has witnessed and pushed for a multiplication of the occasions to meet with the MB; not only the Chair and Co-Chair of the CF go to the MB to present and discuss their annual reports but also MB representatives, usually the Chair or Vice-Chair are present in all CF plenary meetings. This is not to mention focus groups meetings, where MB members and member states' experts sit together with CF members, which have become a praxis since 2015 and were institutionalised in the CF Working Methods in 2017. Finally, the majority of the CSOs sitting in the CF also have national branches of their organisations, thus having the opportunity to push their claims forward also with national and local policy-makers. This multi-level structure is particularly important not only to advocate for fundamental rights at all levels of governance, but also when it comes to monitoring the activity of the agency and of the member states at the borders and to collecting data, not as member of the CF but as single organisations.

These examples of indirect forms of sanctioning (i.e., annual reports, recommendations made public by CSOs, hearings and meetings with EU and national representatives) do not exclude the presence of more direct sanctioning mechanisms, even though the current study is focused on a social form of accountability which the literature assumes to be concerned mainly with indirect sanctioning or with legal litigation. The strongest form of sanctioning for grave violations of fundamental rights within Frontex operations is to shut down the operation

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committee-hearing-frontex. (accessed 29 June 2017); http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+COMPARL+LIBE-OJ-20170629-1+02+DOC+XML+V0//EN (accessed 29 June 2017).

concerned. The only one who has the power to do so is Frontex ED, who might act as a consequence of grave violations detected by Frontex fundamental rights monitoring mechanism. According to Inmaculada Arnaez, Frontex FRO, she is part of the overall monitoring system, not the only one responsible. The CF is explicitly not a monitoring body, even though CF members can visit Frontex operations, have access to Frontex documents related to fundamental rights issues, discuss with the FRO eventual fundamental rights incidents' reports, and act as a complementary body to the FRO. However, it is a whole different matter to understand whether the monitoring mechanism of the agency has either de jure or de facto a sanctioning mechanism which might be related to the work of the CF. It remains to be noted that this form of formal sanctioning (i.e., the shutdown of Frontex operations) has never occurred. On this issue Frontex Fundamental Rights Strategy states:

> "Frontex aims to prevent possible violations of fundamental rights during its operations by, on one hand, developing the requisite knowledge and skills of participating officers and, on the other, implementing proper monitoring mechanisms based on reporting to the competent authorities and sanctioning, applying a zero tolerance policy." (Frontex, 2011e: 1)

In spite of the "zero tolerance" approach declared in Frontex Fundamental Rights Strategy of 2011[200] the extreme measure of shutting down an operation was not used even in Greece (i.e., Frontex operation Poseidon) before 2015, where fundamental rights violations were denounced repeatedly by numerous CSOs and acknowledged by the German Ministry of Interior[201].

As for the monitoring mechanism, Frontex Regulations prescribe its establishment since 2011. Regulation 1168/2011 states that the agency "shall put in place an effective mechanism

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[200] Frontex Fundamental Rights Strategy should be amended by November 2017. The current version is available on Frontex website at: http://frontex.europa.eu/publications/?c=general (accessed 24 August 2017).

[201] In 2011, German Ministry of Interior suspended Dublin procedures involving transfers to Greece following a court decision which declared that asylum seekers in Greece incurred in violations of fundamental rights. The suspension of Dublin procedures to Greece ended on 15 March 2017. Available at:
https://www.ecre.org/germany-suspension-of-dublin-procedures-to-greece-set-to-end-on-15-march-2017/
(accessed 24 August 2017).

to monitor the respect for fundamental rights in all the activities of the Agency" (art. 26a(1)). The most recent EBCG Regulation mentions monitoring first and foremost as a new competence of the agency, not related to human rights but to the control migratory flows and member states' management of their borders (art. 11-12-13); it is also mentioned in relation to forced-return operations. The monitoring mechanism of the application of Frontex Fundamental Rights Strategy is currently a multi-actor system and the FRO is the only actor mentioned by the Regulation who has a clear role in it. Indeed, she "shall have the tasks of contributing to the Agency's fundamental rights strategy, of monitoring its compliance with fundamental rights and of promoting its respect of fundamental rights…The fundamental rights officer shall so report on a regular basis [to the MB and the ED] and as such *contribute* to the mechanism for monitoring fundamental rights" (art. 71, emphasis added); this implies that the FRO is not herself the monitoring system: she is part of it, or a tool within it. Frontex, in theory, retains ownership of the monitoring activity over fundamental rights matters. In Regulation 1168/2011, this was even clearer: FRO had to support Frontex in the establishment of the monitoring system and, by her own monitoring and with her independent role, contribute to it. As a matter of fact, the need of the FRO to report regularly to the MB and the ED points to the other big actors in Frontex fundamental rights monitoring system. In particular, the ED has a crucial role; art. 68(2) establishes that "[t]he European Parliament or the Council may invite the executive director to report on the carrying out of his or her tasks. This includes reporting on the implementation and monitoring of the fundamental rights strategy".

To clarify who are the other actors of Frontex fundamental rights monitoring system, together with their roles and responsibilities, it is necessary to look at Frontex Fundamental Rights Strategy and to complement it with the information received during the interview with the FRO. According to the Fundamental Rights Strategy, the monitoring system starts with a reporting mechanism established in all joint operations, including return, which has "to ensure that any incidents or serious risks regarding fundamental rights are immediately reported by

any participating officer or Frontex staff member and can be acted upon" (Frontex, 2011e: 5). At this stage, the monitoring mechanism relies "heavily on the commitment of national borderguard services to report but also on the involvement of external stakeholders" (*ibidem*).

Within this system, the CF is excluded, at least in theory. The monitoring role is clearly given to the FRO in Frontex Regulation, while the CF - whose work is complementary to the FRO – can observe but not monitor Frontex work in order to assist Frontex ED and the MB on fundamental rights matters (Interviewee Inmaculada Arnaez, FRO). However, Frontex Fundamental Rights Strategy leaves the door open for a role of the CF in the monitoring system, by stating that:

> "[i]n addition to the concrete incidents, the monitoring of JOs should also focus on more general consequences or impacts of the JO on fundamental rights, which shall feed into the evaluation and revision process in view of future JOs. In operations which are particularly challenging from a fundamental rights point of view, Frontex will endeavour to include **persons with a qualified fundamental rights expertise** among participating staff."
> (Frontex, 2011e: 5; emphasis in the original).

Even though this paragraph clearly alludes to the FRO, she is not explicitly mentioned, thus leaving room for CF members, along with other experts, to become part of the system as "persons with a qualified fundamental rights expertise". De facto, CF members have the possibility to visit Frontex operations (i.e., twice a year in 2015 and 2016) and even actively take part in some of them, as in the case of the "VEGA children" operations in which members of the CF have been actively involved in the projects. These operations have been carried out primarily in selected airports (i.e., air borders) of the EU, and lately also at the land and sea borders, as interviewees both from Frontex and the CF referred.

Overall, Frontex does not have a single definition for "monitoring", especially in fundamental rights matter. Frontex FRO shaped her work around a definition that she endorsed, namely the definition of the UN High Commissioner for Human Rights (OHCHR). This

definition involves the active collection of information on the ground, its verification, and the "immediate use of information to address human rights problems"[202] (OHCHR 2001: 9). According to the FRO, the agency never questioned her declination of "monitoring". However, in practice, a comparison between the work of the FRO and the activity of the CF does not evidence clearly that the CF does not "monitor" Frontex activities, but it only observes them. What has been confirmed by interviewing CF members, and particularly the ones who joined the CF working group on Joint Operations, when the first visits to operations were organized, in 2014-2015, CF members were "focusing on trying to understand how it works in order to allow us to give specific recommendations that would fit within the context of how these operations are being organized." (Interviewees 3 and 4). More recently, CF mission visits to operations have been described as a way for CF members to gather more intelligence on specific fundamental rights issues during Frontex operations (Interviewee 10). This modus operandi seems more closely related to the definition of "observation", according to the same OHCHR manual for human rights monitors' training, which defines it as "the more passive process of watching events such as assemblies, trials, elections and demonstrations. It is an aspect of human rights monitoring which requires an on-site presence" (OHCHR 2001: 9). Nonetheless, after a few years of CF work and visits on-site, the need to observe to understand how Frontex operations work may pave the way for other considerations and purposes for CF's visits. As Interviewee 4 put it:

> "now it comes down to how can we, as a CF, assess whether [our work] has an impact or
> not. And that is also linked to the kind of, I would say, ambiguity of the role of the CF as
> such: is it a monitoring mechanism or is it an advisory body?…And that's the key problem.

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[202] The full definition of monitoring according to OHCHR is the following: "'Monitoring' is a broad term describing the active collection, verification and immediate use of information to address human rights problems. Human rights monitoring includes gathering information about incidents, observing events (elections, trials, demonstrations, etc.), visiting sites such as places of detention and refugee camps, discussions with Government authorities to obtain information and to pursue remedies and other immediate follow-up. The term includes evaluative activities at the UN headquarters or operation's central office as well as first hand fact-gathering and other work in the field. In addition, monitoring has a temporal quality in that it generally takes place over a protracted period of time." (OHCHR 2001: 9)

And that's also why these visits to the Joint Operations are always presented as 'it's not monitoring, it is a way for us to understand better how it works so we can better advise you on how you should ensure fundamental rights compliance'". (June 2015)

It is worth underlying that visits to Frontex operations by the CF are, however, always dependent on the will of the host member state which can decide whether or not to allow them. On the other hand, it is difficult to assess how much Frontex can have a role in the decision of the host member state in allowing the CF visit.

In sum, even though it is the FRO who evaluates Frontex operations regarding fundamental rights and reports directly to the ED, especially for what concerns the day-to-day activities of the agency, she cannot be constantly on the field to collect data; during her interview, in 2016, she reported to be able to visit operations once a month[203], due to lack of qualified staff and time, and to receive the rest of the information through Frontex[204]. The CF de facto also evidences fundamental rights issues in Frontex activities and operations, based on the information received both by Frontex and collected through visits in Joint Operations, even if the visits are rarer – i.e., two or three times a year – and the CF recommendations are more "strategic" in nature[205]. While it is true that the FRO reports immediately to the ED when she requires it, nonetheless the CF reports its recommendations and opinions not only to Frontex steering bodies but also to a wider audience, including Frontex political principals and the public, even if with some limitations and with less promptness. In sum, even though the work

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[203] The FRO also mentioned that the selection of Frontex Joint Operations that she visits depends on incident reports: "I go to the field because I have received three incidents of the same type. Or one. Certain pathologies you understand what they imply". By way of hypothetical example, she referred to "certain pathologies" such as pushbacks.

[204] The CF annual report for 2016 still evidences that the FRO does not have adequate support in terms of staff (Frontex 2017: 19)

[205] During the interview, Inmaculada Arnaez, Frontex FRO, described the difference between hers and the role of the CF within Frontex. She focused in particular on the distinction between the types of recommendations on fundamental rights issued by the two bodies: on the one hand, the FRO revises all Frontex documents and visits numerous Joint Operations (including Return) having full access to all Frontex documents, and she reports on how to mainstream fundamental rights in the day-to-day activities of Frontex; on the other hand, CF's access is more limited due to its role and thus its recommendations are more strategic in nature. In her words: "I am for the day-to-day business and operational matters and this is the difference of my advice. My focus is operational and their focus is strategic."

of the CF cannot be conclusively associated with monitoring, as defined by the OHCHR, it cannot even be assimilated to mere observation, thus placing the forum once again in a privileged position.

6.4. EFFECTIVE SOCIAL ACCOUNTABILITY?

Operative and executive agencies in the EU have been deemed to be lacking accountability in the literature, as discussd in Chapter 2.2. However, the call for accountability of EU agencies has to be balanced by the need of agencies to remain independent. In the case of Frontex, the agency has been deemed to lack accountability on the protection and promotion of fundamental rights. This Chapter focused on the analysis of a specific form of accountability for Frontex which does not hinder the independence of the agency: social accountability. Most private companies have endorsed social accountability, also known as corporate responsibility, which is voluntary and has a positive reputational effect[206]. Operative agencies, which are part of the executive branch of EU governance and base their legitimacy, at least in theory, on their expertise and independence, might profit in terms of reputation from a stronger legitimation, especially when their activities directly affect the rights of individuals, even if individuals are third country nationals. Overall, an effective social accountability relationship could prove beneficial not only for the reputation but also for the democratic legitimacy of the agency.

Effective accountability, according to Busuioc is "not *more* but *better* accountability" (2013: 278, emphasis in the text). Better accountability for EU agencies involves the reduction of problems related to both overload and deficit of accountability, while ensuring that the independence of the agency is respected. When considering Frontex accountability in the field of fundamental rights, an effective social accountability should avoid at once the "too many

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[206] Social accountability for private companies is regulated by SA8000, which is an international standard created by the American body Social Accountability International (SAI). This certification is voluntary and gives to American as well as European companies the opportunity to show to their clients and customers that they respect a certain level of social and ethical standards in their work. The certifying body is not a governmental institution but a multi-stakeholder initiative which grew to become an established business.

eyes" issue or "Multiple Accountabilities Disorder" – i.e., having too many principals holding the agency accountable for different aspects of its activity (e.g., too many accountors for the agency financial accountability) – and the accountability deficit issue. The presence of a limited number of CSOs that work in close cooperation with the agency reduces the risk of having too many social accountability principals, with CF members potentially being the foremost forum for social accountability with regard to fundamental rights issues vis-à-vis CSOs that remain outside of the agency. The accountability deficit on fundamental rights issue is also eased by the presence of the CF, as this body retains independence while becoming *the* expert – together with the FRO – on Frontex fundamental rights problems.

Table 10: Frontex and its Consultative Forum on fundamental rights: an accountability relationship?

	De jure	**De facto**
Information	Yes (effective information)	Yes (with some limitations)
Debate	Yes (multiple fora of exchange and follow up)	Yes (with some limitations?)
Consequences	Yes (informal) No (formal)	Yes (informal) No (formal)

Source: author's own elaboration.

The effectiveness of this accountability relationship is however hindered by a number of potential "diseases", which are not relatable to either overloads or deficits, as Busuioc would put it, but which still hinder the effectiveness of the relationship. Table 10 helps identify these diseases. In particular, there are limitations in the practice of information exchange between Frontex and CSOs, consisting in not frequent but still unjustified delays and omissions from the agency. Moreover, there are limitations concerning the debate phase, as the newest members of the CF (e.g., AIRE Centre) are not much engaged in the direct interaction with Frontex and its officers, meaning that interaction with the agency is manly filtered either by the CF Secretariat or the FRO. The CSOs' representative who can fully exploit his position to have a more direct interaction with the agency is the CF co-chair, who has multiple opportunities to engage directly

with Frontex officers, also at high levels (i.e., Executive Director and MB members). Lastly, concerning formal consequences, CSOs represented in the CF cannot directly trigger sanctions or consequences for Frontex misbehaviour, as their role is limited to strategically advise the agency on how to *prevent* wrongful conduct on the part of the agency.

Finally, there are other issues concerning this particular relationship, which cannot be evidenced based solely on the analysis of Boven's three phases of accountability, but which emerged during interviews with CSO's representatives and CF members in general. These include: the required consensus to pass opinions and recommendations to Frontex; the practical potential for a monitoring function; the absence of clear indicators to establish the impact of CF and CSOs work on Frontex. A detailed description of these issues ensues.

1) The hybrid nature of the CF and the need to reach consensus with a view to make recommendations to Frontex. As an example, here is reported part of the interview with one of the representatives of CSOs working in the CF. In this interview, Interviewee 4 recalls a specific situation in which a CSO monitoring fundamental rights at the EU borders denounced repeated push-backs in Greece, in an area where also Frontex was operating[207](ProAsyl, 2013). On that occasion some CSOs wanted to pass a recommendation to Frontex and here is how it worked out:

> You cannot just say this is a purely Greek thing. And that is something that we tried to develop through this attempt to make this recommendation to Frontex, as a CF. [The recommendation] is to say: 'you have to give a very clear message now to the Greeks saying that, you know, at least you have to investigate this properly. And you have to ensure that Frontex is properly informed about everything that is happening in its operations'. And

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[207] Interviewee 4 described the situation as follows: "For instance, do you remember the whole thing about push-backs at sea… when ProAsyl published the report...The report itself does not accuse Frontex of committing fundamental rights violations but it says [that] this is all happening in an operational area where Frontex is coordinating operations. So, either Frontex does not know anything about this, and then that's problematic because, you know, we are spending a lot of money on an operation and the agency responsible for coordinating that operation does not even know what is happening in there…and on the other hand if they do know, of course then that is really problematic"

because of the whole hybrid institutional set up of the CF this never resulted in anything,

because there was no consensus to make any kind of recommendation. (Interviewee 4)

Also one of Frontex Head of Units interviewed commented on the issue of consensus within the CF by specifying that: "I would expect that members of the CF have their own views. This is not a concern for Frontex, but for the CF chair when they have to reach consensus" (Interviewee B). In the CF working methods, the provision of agreeing by consensus has always been linked with the availability of majority voting in case of persisting dissent on specific issues, coupled with the possibility to record the dissent on the CF minutes. The changes introduced by the 2016 Frontex regulation did not alter significantly this requirement. It must be noted, however, that dissent was never recorded on CF minutes (2012-2016) and that interviewees unanimously declared that they do not remember major disagreements leading to the need to resort to majority voting.

2) The ambiguity of the CF in terms of its ability to monitor or observe Frontex operations, and thus the (in)ability of the CF to monitor whether its recommendations are applied in practice on the field. In 2016, Interviewee 4 mentioned the example of the Code of Conduct for Return operations, which was mentioned also by other CSOs' interviewees, as a typical situation in which the ambiguity of the CF, divided between advising and monitoring Frontex, becomes evident:

"We have agreed now on this code of conduct, there are a number of things that have been inserted on the basis of the recommendations of the CF and a number of things have not been accepted, that's natural… any kind of negotiation process will have that. But now it comes down to how can we, as a CF, assess whether it has an impact or not. And that is also linked to the kind of, I would say, ambiguity of the role of the CF as such: is it a monitoring mechanism or is it an advisory body?... And that's the key problem. And that' also why these visits to the Joint Operations are always presented as 'it's not monitoring, it is a way for us to understand better how it works so we can better advise you on how you should ensure fundamental rights compliance'". (Interviewee 4)

This issue cannot be addressed in theory, as the mandate of the CF is clearly limited to advising the agency, not monitoring. However, the question in practice remains, especially now that CF's visits to Joint Operations, including Return, have intensified and there is a clear opportunity for CF members to support the work of the FRO, who has – herself and through the CF – repeatedly evidenced her lack of resources:

> "As repeatedly recommended during the year, urgent recruitment of additional technical staff to support the Fundamental Rights Officer remains key to the Agency's ability to deliver on its fundamental rights obligations, including the rolling out of an individual complaints mechanism as foreseen in the European Border and Coast Guard Regulation."
> (Frontex CF, 2017a: 7).

3) This last point is linked to the mainly CSOs', but also CF's, internal issue of lacking clear indicators and methodology to establish whether their recommendations have an impact on the agency in practice. This is mostly due to the scarcity of resources (i.e., time, staff and money) of CF members and especially CSOs, as previously discussed. According to the majority of CSOs' representatives interviewed, the presence of a clear impact assessment would create a drive to find more time and resources for CSOs to invest in participating actively to the CF. The impact assessment through clear indicators would enable answering to the crucial question for CSOs: is it only a waste of time or is the work within the CF effective? This question has been addressed, in the present study, through the personal understandings of the actors involved in the CF-Frontex relationship. In the words of a Frontex Head of Unit, when asked if CF work had been effective: "if this answers your question: they are not here to look good" (Interviewee B).

Overall, the most direct outcome of this social accountability relationship is, following the work of Zeitlin: learning. When the interaction among the actors that are part of this accountability (or quasi-accountability) relationship is recursive, also the resulting learning is recursive. A recursive learning implies a systematic revision of the actors' understanding of

each other's work and thus searching continuously for more fitting solutions, which is necessary particularly in a fast-changing environment such as border management in the EU. There are multiple examples of this type of recursivity in the relationship between Frontex and the CF, and thus the CSOs sitting within it, including the frequent revision of Frontex Common Core Curriculum (training), or Frontex Fundamental Rights Strategy, but also Frontex Vega Children concept, which have to be continuously adapted to the new conditions at the borders (CF, 2017: 6). The next section provides a detailed discussion on recursive learning.

6.4.1. RECURSIVE LEARNING PROCESS

The establishment of a stable relationship between the CSOs in the CF and Frontex officers was decided in 2011, as described in Chapter 4. The need for the establishment of such an arrangement derives from the perception of a failure of the agency to address the accountability issues concerning the protection and promotion of fundamental rights at the borders of the EU. This reputation failure, thus, opened up opportunities both for CSOs to learn how Frontex works from within and for Frontex to learn how to mainstream fundamental rights in its activities. According to May "failure serves as a trigger for considering policy redesign and as a potential occasion for policy learning" (1992: 341). Indeed, the perceived failure of Frontex to address issues of fundamental rights' nature in its activities has induced the agency to open up to CSOs and other actors of the EU fundamental rights regime[208] to learn how to cope with the fundamental rights challenges ahead.

Frontex is a body prone to learning from difference due to its nature. The agency was born with the role of promoting cooperation and coordinating many different procedures and practices of borders management. Indeed, every member state of the EU which opted for cooperation in this field brought its own background and understanding of border management and it was left for the agency to learn how border and coast guards from every state could work

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[208] For a thorough discussion on the actors of the EU fundamental rights regime see Chapter 4.

jointly. In this sense, Frontex is a place where best practices in border management are exchanged and, thus, it has always been a place where its officers have had to be receptive and learn from one another. This environment might facilitate the proneness of the agency towards working as a crucial node of a network and learn from multiple actors in order to shape its activity and experiment in order to find a fitting approach to different challenges at the member states' borders.

In this scenario, the relationship between the CSOs represented in the CF and Frontex has evolved in one in which the debate phase has a paramount role, which, thus, has induced the creation of a number of strategies for a recurrent interaction and continuous exchange of views on fundamental rights issues among the parties. The ample spectrum of types of interaction between CF members and Frontex is illustrated by the meetings held by the CF, outside of its three mandatory plenary meetings, listed in the CF Fourth Annual Report (2017: 51-53). Even though the main line of communication between CF members and Frontex is through the CF Secretariat, the FRO, and CF Chairs, CSOs that have been members since the inception of the CF have all had multiple opportunities to establish a working relationship with Frontex officers at various levels, thus not only at the highest levels (e.g., Executive Director and his Deputy, Heads of Units) but also on the ground through CF missions to Frontex operations. Furthermore, the interaction is enriched by the attentive research of CSOs and the other members of the CF on specific issues concerning Frontex activities, such as Operations, Accountability, Training, Return, and Risk Analysis.

By observing Frontex work both from inside and outside while interacting with Frontex officers, CSOs sitting in the CF have been learning not only about Frontex itself but also about border management issues and practices. According to Interviewees 4 and 10, in the very first phase CSOs struggled to get to know the agency with its complex procedures and even acronyms and Frontex generally facilitated their learning process. In a second phase, once CSOs became familiar with the agency's work – i.e., since 2014-15 – CSOs have been allowed to

observe directly Frontex activities at the EU borders. Frontex also has been learning from the relationship with the CF and its members, since the very beginning; indeed, Frontex has seen its understanding of fundamental rights significantly shaped by the relationship with CSOs sitting in the CF, as demonstrated in this Chapter. This type of learning process, triggered by the requirement of Frontex Regulations to be advised on all fundamental rights matters by the members of the CF, can be assimilated to what Sabel, in 1993, called "learning by monitoring". Sabel reflected specifically on the market and on its necessity to both learn constantly, in order to adapt to local necessities and changing circumstances, and monitor that gains from that learning process is shared equally among participating firms. The solution, he proposed, is to be found in institutions that combine these two requirements – i.e., learning and monitoring – thus easing the transaction costs of establishing trustful relationship among firms, for example. In the case of EU border management, while Frontex itself reduces the transaction costs of establishing a trustful relationship among border guards of different EU member states by learning from their differences and monitoring (officially since Regulation 2016/1624) their activities at their borders, the CF, as independent body, focuses on the fundamental rights aspects of border management. What CSOs within the CF do is to learn how borders are managed locally through Frontex and their national partners and to monitor both Frontex and member states to improve fundamental rights protection and promotion, by adapting rules and procedures to fast changing and locally different situations, in a trustful environment.

The learning process, in the case of CSOs members of the CF and Frontex, is not only mutual, but also recursive. This frequent and uninterrupted interaction which lasted for 5 years, between Frontex and at least for 7 out of the 9 CSOs represented in the CF, has triggered a loop of recursive and mutual learning. This type of learning process has been introduced by Sabel and Zeitlin (2010) and is one in which provisional arrangements, proposed to address emerging challenges, spur from a continuous process of revision and review, based on the experience of the diverse actors involved, and are not intended to be definitive solutions. Recursivity is

ensured by the modality of interaction between CSOs and Frontex. CSOs learn by monitoring Frontex activities, give recommendations based on their experience and on what they have learned about the agency and, finally, are concerned with the follow up of their recommendations, also through the FRO. If challenges persist, even after CF recommendations are delivered, CSOs and the other members of the CF revise, also with Frontex officers, their strategic recommendations. A clear example of this way of proceeding, which has a recursive nature, is the successful VEGA Children Joint Operations, during which the CF had a substantial role. This Operation was conducted by Frontex first in 2014 and was resumed in 2015, both times involving members of the CF and other CSOs[209]; the continuous interaction and proactive cooperation between Frontex officers, international organisations and CSOs, both in the airports during the operations and at Frontex headquarters produced the VEGA Children Handbook. All interviewees consider this Handbook the biggest success of the cooperation between Frontex and its CF. The VEGA Children concept, according to the CF annual report of 2017, is continuously under revision to ensure the "enhancement of child protection in Frontex activities" (CF, 2017: 6).

Finally, the relationship between CSOs and Frontex has now evolved into a trustful relationship, where both parties value interaction and exchange of views. Even though contacts among single members of the CF and Frontex officers is not frequent and not often informal, trust has grown among the two institutions, also due to the unrelenting work of the FRO and the Consultative Forum Secretariat. This work has not addressed the issue of "capture", mainly because in the literature regulatory agencies – and Frontex is, at least not officially, not one of them – might be captured by business interest groups – and CSOs are nothing of the sort. Nonetheless, the establishment of trust among members of the CF and Frontex might trigger

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[209] A description of Joint Operations Vega Children in 2014 and 2015 is available at: http://frontex.europa.eu/operations/archive-of-operations/QphrlV and http://frontex.europa.eu/operations/archive-of-operations/hWMaeY (accessed 9 August 2017). The VEGA Children handbook is constantly updated by Frontex in close cooperation with the CF and its members.

forms of exploitation of this relationship, such as cooptation. CSOs working within Frontex might change their rhetoric and become less detached from Frontex point of view on border management issues due to socialisation with Frontex officers. Interviewee 4 affirmed:

> I wouldn't say that we felt restricted to say anything about Frontex because we were members of the CF. It makes it more complicated, because the more you understand what the different responsibilities are, it's more complicated to make a specific comment again on the accountability of Frontex or not.

Overall, however, the independence of CSOs from Frontex coupled with the relative insulation of the agency from close socialisation with CSOs seem to ensure that phenomena of capture and cooptation do not occur, at least for the time being[210].

In sum, the learning process of the agency has been evidenced by the evolution of its understanding of fundamental rights, while for CSOs learning has involved observing – if not monitoring – Frontex activity not only from outside, but also from inside. This process reflects what appears to be an increasing trend in the EU governance system; according to Zeitlin, there are:

> "clear signs of a growing focus on joint exploration and recursive learning about how to address common European objectives and challenges in diverse contexts through monitoring, surveillance, and peer review…The intensification of these 'learning by monitoring' activities [has taken place particularly] between 2011 and 2014" (Zeitlin 2016: 1092).

In the context of border management, peer review of fundamental rights is carried out by international organisations, both governmental and non-governmental, which work in a close and mutually fruitful cooperation with the European Border and Coast Guard agency since 2012. The role of CSOs in this cooperation remains crucial as they have the knowledge from the field and the ability to transmit it to Frontex in an institutionalized and recursive way.

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[210] See Chapter 5 for a discussion on CF's independence from Frontex

6.5. CONCLUDING REMARKS

According to Fabrice Leggeri, and Gil Arias-Fernandez before him, Frontex operations are first and foremost border guard operations aimed at securing the borders of the EU and the Schengen area[211]. Clearly, it is not Fabrice Leggeri or Gil Arias-Fernandez (or Ilkka Laitinen, first Frontex Executive Director) who is in charge of steering the political will on how to handle EU borders. Indeed, it is the European Council and Frontex Management Board – which have a very similar composition due to the presence of representatives from every EU member state – that with their overall drive toward administrative efficiency decided to tighten border checks and impede the movement of irregular migrants in response to the so called "refugee crisis". As a consequence, during joint operations and all of Frontex activities securitarian concerns have remained paramount within the agency; this is the reason why activists still claim that the humanitarian discourse, or humanitarianism, is a maquillage operation carried out by EU actors, including Frontex (Pallister-Wilkins, 2015). This means that even though the agency, and the officers who work within it, strongly believe in the need for a full respect of fundamental rights at the borders of the EU, they might be forced to overlook some of these rights for the sake of securitarian policies which are agreed upon elsewhere. As one of Frontex officers declared in

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[211] Fabrice Leggeri, during the launch of the EBCG agency on October 6, 2016 mentions twice fundamental rights in his opening speech, referring to Frontex return operations being carried out in full compliance of fundamental rights and to the complaint mechanism available to migrants, while stressing the renewed agency's focus on securing EU external borders and fighting irregular migration:

> "This is a historic moment and I am very proud to see Frontex become the European Border and Coast Guard Agency. The new Agency is stronger and better equipped to tackle migration and security challenges at Europe's external borders. Its mandate has wider scope and new powers that will allow it to act effectively. The Agency will conduct stress tests at the external borders to identify vulnerabilities before a crisis hits. It will now also be able to offer operational support to neighbouring non-EU countries who ask for assistance at their border and share intelligence on cross-border criminal activities with national authorities and European agencies in support of criminal investigations. It also has a key role at Europe's maritime borders through its new coast guard functions." (available at: http://frontex.europa.eu/news/european-border-and-coast-guard-agency-launches-today-CHIYAp (accessed 30 November 2016); full speech: https://www.youtube.com/watch?v=d1FoXMlO3RU (accessed 6 October 2016)).

Similarly, Gil Arias-Fernandez stressed that Frontex mandate is mainly concerned with securing the EU external border when explaining the scope of the Joint Operation Triton of 2014-2015, which substituted a fully-fledged search and rescue (SAR) operation, i.e., Mare Nostrum. In his words: "Saving lives is always an absolute priority, but the Agency's mandate is to control borders, we do not do search and rescue, even if a border control mission often becomes search and rescue." Available at: http://www.ansa.it/english/news/world/2014/10/16/eu-prepares-to-launch-triton-mission_e50fc314-f373-4446-850b-9d4ee49000fc.html (accessed 16 October 2014).

an interview with Aas and Gundhus (2015: 7-8), talking about the situation of migrants at the Greek border in 2014-2015:

> "it was so bad that my thoughts went to the dark sides of our European history. I began to reflect over – these are very personal thoughts – but I thought about those who were participating under Nazism, who were involved, were they thinking the same as I am now? Did they try to find a way to justify it? Did they understand that what they were doing was wrong? Is it wrong? Should we be involved in this? Should we not be involved? I have a very large apparatus guarding my back, which in a way supports me that this is good, but then you see, at least I see, that nothing happens. What's the point? … Are we contributing to something good or are we just helping Greece to do something wrong? … I hope that my children and grandchildren can look back on what their father and grandfather did as something that was right, that he did something good; that this will not be a shadow in European history that I have contributed to. I really hope so."

Indeed, according to the Schengen Borders Code (2016) "Member States shall provide for training on the rules for border control and on fundamental rights. In that regard, account shall be taken of the common training standards as established and further developed by the Agency." (Art. 17(4)) Moreover, the ultimate responsibility not only for the control of the borders, but also for the respect of the law and thus fundamental rights, remains legally in the hands of the member states where Frontex operations are deployed. In 2015, Frontex even became an advocate for a claim made by all CSOs operating and advocating in the field: to create alternative safe and legal routes to Europe for people seeking asylum[212].

As this Chapter has evidenced, a crucial role in the path of Frontex towards maturity in the field of protection and promotion of fundamental rights has been played by the CF and the CSO's represented in it. As Frontex itself puts it: "[t]he appointment of the Fundamental Rights

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[212] See Amnesty International news of 19 August 2015 "Frontex report underscores urgent need for safe and legal routes". Available at: https://www.amnesty.org/en/press-releases/2015/08/frontex-report-underscores-urgent-need-for-safe-and-legal-routes/ (accessed 19 May 2016).

Officer and the establishment of the Consultative Forum have contributed to ensuring and promoting the respect of fundamental rights in the Agency's activities." (Frontex, 2015d: 2) This contribution has taken many forms: the lobbying of Frontex form within by CSOs, the establishment of a still not fully-fledged social accountability relationship between CSOs and Frontex, the recursive learning process among the EU agency and non-governmental organisations.

The CF as a whole and CSOs in particular, indeed, have had an influence on Frontex understanding of fundamental rights. Notwithstanding the theoretical and practical difficulties in measuring influence – as discussed at length in Chapter 2 – there are some clear findings of the tripartite analysis carried out in this Chapter to assess whether and how Frontex' fundamental rights frames changed over time and whether this change can be attributable to the influence exercised by CSOs represented in the CF. While the frame analysis of Frontex official documents confirmed a qualitative change in Frontex way of framing fundamental rights, the self-attributed influence method helped illuminate how and to what extent influence has been exerted so far by CSOs on Frontex. As affirmed by both CSOs and Frontex's representatives interviewed, the influence of the CF on Frontex was clear in two areas: relevance and technicization of fundamental rights in Frontex activities. It remains however difficult to differentiate clearly the influence of the CF as a whole from the influence of the nine CSOs represented in it. The interviews conducted, triangulated with CSOs programmatic goals and CF's minutes, show that CSOs usually speak with one voice within the CF, generally agreeing while in Brussels on a common vision of their work within the CF. However, the absence of definite and measurable goals set by CSOs makes it impossible to clearly establish what has been so far the influence of CSOs on Frontex understanding of fundamental rights. The only available indicator is what CSOs consider to be a success in the interaction with Frontex and all CSOs mentioned without doubts Frontex VEGA children operation and the Codes of Conduct on Joint (Return) Operations.

As for the second part of this Chapter, devoted to exploring the de jure and de facto social accountability relationship between Frontex and the selected CSOs, the analysis shows that there is a (quasi-)accountability relationship both in theory and in practice. This type of accountability, if properly recognised by all actors involved, might have significant consequences for the overall accountability of Frontex on fundamental rights matters, especially because it does not hinder the independence of the agency while creating a virtuous circle of mutual learning. Indeed, the mutual and recursive learning process between CSOs represented in the CF and Frontex is to be considered the strongest outcome of this relationship, a relationship which is based on both influence or accountability. The reason why learning is so relevant lies in the fact that both CSOs and Frontex have shown great willingness to get to know one another and work together, notwithstanding the initial mutual suspicion. As one of the CSOs representatives affirmed:

"A very valuable dimension of this relation is that during meetings there is a wide representation of Frontex staff and depending on the topic they send different people, so it is not one person who is in charge of CF relations which deals or pretends to know all the topics and to listen to all the things we say but rather that there is really an effort to bring to us the people in charge of the different files." (Interviewee 9)

Finally, the trust established among these actors has not only not refrained CSOs from voicing their critiques towards Frontex, but it has also given CSOs a wider and deeper understanding of how border management policies are implemented and a clearer idea of who and how is to lobby to achieve more effective results. This, in turn, creates opportunities to enhance the democratic legitimacy of the EU governance system, based on the effective involvement of CSOs in the highly complex and technical domain of EU operative agencies. The next and final Chapter draws the conclusions on the present research project by evidencing limits and potential for future research, provides some recommendations for Frontex CF's impact assessment, and hints at the discussion on the democratic legitimacy of the EU

governance system which is based on the "expertification" of CSOs and the "agencification" of the EU administrative and regulatory arm (Egeberg and Trondal, 2016; Knodt, Greenwood & Quittkat, 2011; Smismans, 2006).

CHAPTER 7
Conclusion

"we can do little about the reasons which make men and women prefer to leave their country
rather than remain and live in it. It is not in our power to change these facts."
(Foucault, 1981)

7.1 BORDERS SCHIZOPHRENIA: CSOS AND THE GOVERNANCE OF CROSSINGS IN THE EU

The incipit of this thesis focused on three facts: deaths and violations of fundamental rights at the EU borders, securitisation and externalization of immigration policies both at national and EU levels, management of EU borders increasingly devolved to the EBCG agency. Against this background, CSOs have played a significant role by providing services and relief for migrants who have been crossing irregularly – and with great peril – the EU borders, while at the same time advocating for the protection and promotion of fundamental rights at the EU level, and particularly within Frontex. The relationship between Frontex and CSOs has not always been easy and, especially in these controversial times, it is something that needs to be investigated.

2016 has been the year that marked yet another evolution of Frontex[213], which has been replaced by the EBCG agency. On 6 October 2016, the Regulation creating the EBCG agency entered into force. This "new" agency has substantially more competences and can count on a fully-fledged European border and coast guard force. The establishment of the European border guards' agency has revived CSOs' cries against the increase in powers of the agency in the absence of a clear judicial control (Frontexit, 2016). In line with CSOs and scholars who have researched thoroughly Regulation (EU) 2016/1624 (Rijpma, 2016), this study supports the view

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[213] Frontex Regulation has been amended and revised several times since the establishment of the agency and in particular in 2007, 2011, and 2013.

that in a political environment drenched with populist calls for more security and less migrants and refugees' rights, it is important to build a renewed agency that is aware of, and trained in, the protection and promotion of fundamental rights, and which works efficiently against fundamental rights violations at the Schengen and EU borders.

In order to increase the understanding of the dynamics that lie behind such evolution of the EBCG agency and to point out possible future challenges, this study has addressed the question of whether and to what extent CSOs that have a unique opportunity to lobby the agency "from within" – i.e., within Frontex CF – have actually contributed to change Frontex' understanding of fundamental rights. The present research has also explored the possibility of supporting Frontex legitimacy vis-à-vis the general public on fundamental rights matters through social accountability, while underlying the uniqueness of the mode of CSOs' consultation in Frontex CF. Particular attention has been devoted not only to the interaction between the agency and CSOs but also to the motives that drove some CSOs to gain access to Frontex and some CSOs to "go public" to advocate for the protection and promotion of fundamental rights at the EU borders.

The evidence presented in this work has hopefully shown that Frontex' understanding of fundamental rights has indeed evolved since the inception of the agency, also thanks to the work and influence of the CF and the CSOs sitting therein. The evolution has taken place chiefly along two lines: a strong increase in the commitment to the protection and promotion of fundamental rights in all Frontex activities, and an operationalisation of the concept of fundamental rights in the most controversial areas of action of the EU agency (e.g., joint Return Operations). Particularly with regard to the second type of evolution of Frontex understanding of fundamental rights, that is the shaping of fundamental rights tools, the presence of CSOs within Frontex CF has proven essential.

However, even though Frontex understanding and communication[214] has considerably improved on fundamental rights, numerous doubts persist about Frontex management of situations in which fundamental rights of migrants are threatened. By merely carrying out a quantitative analysis on Frontex official documents, searching for the string "fundamental rights", there is no doubt that fundamental rights are now among Frontex strongest concerns. What strikes as controversial is the emptying of the content of these operationalised fundamental rights on the field, which is also the major concern for CSOs, both inside (Interviewee 3) and outside the CF (Frontexit, 2016; Moreno-Lax, 2018). Overall, the use of a humanitarian rhetoric does not prevent Frontex or the seconded national border guards to possibly disregard fundamental rights at the EU borders, especially in the absence of an effective judicial control or a working individual complaint mechanism.

The next section summarises the findings of this research while addressing the theoretical questions raised in Chapter 1. Section 7.3, instead, presents tentative implications for the future of Frontex CF and its impact assessment. Lastly, Section 7.4 concludes by pointing out the main limitations of this research and by suggesting a way forward for the study of CSOs' role in EU agencies' consultative fora.

7.2 THREE THEORETICAL PUZZLES

The present research stemmed from three theoretical questions, presented in Chapter1:

- Is civil society participation in the EU governance system "nothing but consultation"?

- How is it possible to hold effectively accountable EU independent agencies without undermining their independence?

- How can security and human rights concerns be combined when dealing with migration/border management issues?

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[214] Since 2015/2016, Frontex website has had a webpage devoted to answering frequently asked question specifically on the issue of fundamental rights at the EU borders. Available at: http://frontex.europa.eu/pressroom/faq/fundamental-rights/ (accessed 20 November 2017).

The first question relates to the debate on whether CSOs' participation in EU governance can actually increase the input legitimacy of the EU governance itself. The issue of CSOs participation in the EU governance and particularly to the governance of the AFSJ has been addressed theoretically in Section 2.1, and has been empirically tested against the case of CSOs participation in Frontex CF in Chapters 4 and 5.

As per the literature discussed in Chapter 2 (Section 2.1), even though CSOs participation could in theory be highly beneficial for the overall legitimacy of the EU governance system by giving a voice to minorities and thus transmitting minorities' grievances to the policy and decision-makers, empirical studies carried out after the Commission's White Paper on Governance and the entry into force of the Lisbon Treaty do not always share such optimism about the ability of CSOs to fuel input legitimacy. It is worth underlining here that this work has considered the notion of civil society only as organized actors that contribute actively to multilevel governance and thus to potentially increase legitimacy of the EU throughout participation, rather than the locus where a European civil society is formed (Heidbreder, 2012). The absence of a diffused optimism regarding CSOs contribution to EU legitimacy is to be considered in relation to several issues: first of all, CSOs are merely consulted, on ad hoc basis, by EU institutions/bodies/agencies through both formal and informal consultation avenues and modalities; secondly, the CSOs consulted at the EU level claim to be representative of certain minorities but this link with their grassroots and constituency is not always easy; third, CSOs that are highly professionalised might fall prey to their need to survive and thus to be driven by EU funds in their activities, especially in times of shrinking funding (Sanchez Salgado, 2014).

Moreover, still at a theoretical level, while CSOs have gone through a phenomenon of "expertification" and stratification to be able to adapt to and lobby the EU multilevel governance system (as discussed in Chapters 2 and 5), EU governance has become increasingly "agencified". In the AFSJ, this has meant a spillover of new functions to operational and information agencies such as Europol, EASO, FRA, and EBCG agency (Niemann and Speyer

2018). As evidenced in Chapter 2 (Section 2.1), the establishment and - in the case of Frontex - revision of these agencies opened up new opportunities for CSOs to access the governance system by supporting these highly technical agencies thanks to their knowledge and expertise of the field. Chapter 4 has evidenced how Frontex Consultative Forum has proven to be a privileged forum for CSOs direct interaction with the agency in comparison to the consultative fora of other two agencies of the AFSJ. Indeed, compared to the other agencies' fora, Frontex CF has a smaller number of members, meets more frequently, has a more significative interaction with its agency's officers, and it is recognised as a body of the EBCG agency, even though it retains its independence. Moreover, it sets its own agenda, which is then approved by Frontex ED and MB, and has a Chair and Co-chair who are elected for a mandate (i.e., three years and one of the two is a representative of CSOs) and who directly present to the MB and the ED the opinions and recommendations on fundamental rights issues of the CF. Finally, differently from other consultative fora, Frontex CF is required to publish an annual report and its Chair and Co-chair represent the whole CF not only before Frontex officers, but also before the EP and the general public.

The discussion concerning the question "is it nothing but consultation?" has been addressed empirically at different levels in Chapters 5 and 6. The rationale for CSOs choice to gain access to the EBCG agency was explored empirically in Chapter 5 while Chapter 6 has hosted the analysis of the impact of the "lobbying from within" activity of CSOs on Frontex. It must be recalled at this point that the decision to grant access to CSOs was made by the EU institutions through Frontex Regulation 1168/2011 due to legitimacy concerns with regard to the agency. On the same note, Frontex decision to establish a relationship of trust and fruitful cooperation with the CF and its members was triggered both by the logic of exchange – as

theorised by Beyers and Braun (2014)[215] – and by the agency's legitimacy and reputational concerns.

The interviews carried out with CSOs members of Frontex CF highlight a clear willingness of these CSOs to influence Frontex from within (Chapter 5). The remark of Interviewee 7 on the reasons why his organisation decided to become part of Frontex CF – i.e., "It's the lobbyist dream!" – exemplifies this general willingness. Regarding the outcome of this lobbying activity of the CF on Frontex, the frame analysis conducted in Chapter 6 has evidenced that the agency's official documents show an increase in the interest for fundamental rights but also a qualitative change in how fundamental rights are understood (or framed) by the agency itself, mainly in terms of a technical clarification of how fundamental rights should be protected in practice during operations. However, it has been noted that it is nearly impossible to discern clearly the overall impact of the CF from the impact of CSOs members of the CF on Frontex understanding of fundamental rights. However, the (self-)attributed influence method of analysis (see Chapter 3) proved useful to clarify that indeed both CSOs representatives and Frontex officers considered their interaction successful and fruitful in addressing fundamental rights issues. Moreover, CSOs members of the CF agree on having had a positive impact on fundamental rights' operationalisation and mainstreaming within the agency. In sum, the analysis of the lobbying activity of CSOs within Frontex points to the fact that there is some room to affirm that the type of CSOs' consultation tested in Frontex CF is not only innovative, and for the time being unique, but also something more than mere, ad hoc consultation.

The second theoretical question which triggered the present study points to the discussion over EU governance output legitimacy. This issue has been addressed by studying the potential of CSOs to have an impact on EU governance output legitimacy, specifically in the form of Frontex' accountability on fundamental rights issues. Chapter 2 (Section 2.2) addressed the

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[215] See Section 2.1.5.

question of EU agencies' accountability, particularly operative agencies, and described the delicate balance between EU agencies' independence, which is crucial for their efficiency, and the need to hold them accountable for their actions – in this case, on fundamental rights matters. The theoretical solution proposed is a form of accountability, namely social accountability, which is defined as the accountability relationship in which CSOs, or civil society at large, act as the forum that holds accountable bodies/institutions/agencies that are part of the governance system. This solution has been then tested in Chapter 6 through the analysis of the relationship between CSOs that are members of Frontex CF and Frontex itself.

The relationship between Frontex and CSOs that work in close cooperation with the agency is significant to test social accountability mainly because Frontex is still lagging on some fundamental rights issues. The de jure and de facto analysis of the potential accountability relationship between the EBCG agency and CSOs members of the CF, carried out in Chapter 6, has pointed to the possibility of establishing a fully-fledged social accountability relationship between the two parties.

Nonetheless, some limitations remain. In particular, limitations include the not always timely and complete information received from Frontex, even though the 2016 EBCG Regulation clarifies that the agency needs to provide *effective* information on all fundamental rights matters to the CF, and also the impossibility for the CF to formally trigger sanctioning and create consequences in case its recommendations are not followed-up by the agency, even though informal sanctioning can derive from the publicisation of ECBG's lack of implementation of CF recommendations or inputs through the CF annual report or the CF Chair and Co-chair hearings before the EP. In addition, the interviews conducted with CF members evidenced some further problems derived mainly from the hybrid nature of the CF and its legally mandated advisory role. Indeed, the CF gathers organisations with very different interests, backgrounds and resources: CSOs, international (governmental) organisations, and two EU agencies of the AFSJ. In this framework, the requirement of consensus to pass

recommendations to Frontex has led, for example, to watering down some of CSOs' more extreme positions. It must be noted, however, that while recommendations and opinions are not often passed formally, CF members interviewed generally did not recall harsh debates within the CF and dissent has never been recorded on the minutes of the CF meetings analysed (i.e., from 2012 to 2016).

Lastly, and probably most importantly, the actors themselves should agree to establish an accountability relationship. According to Interviewee b, a non-CSO member of the CF, the CF does not have enough resources available to actually embark in such endeavor – i.e., to hold Frontex accountable with regard to fundamental rights issues, – adding that not even the current fundamental right monitor (the FRO) is able to properly fulfil her monitoring task due to the same problem. One of Frontex Heads of Unit interviewed also affirmed that there was no possibility for the CF to become an accountability forum for the agency (Interviewee B). However, this study has hopefully helped identify some characteristics, which are typical of an accountability relationship and which are already in place, that could indeed support FRO monitoring activity and increase Frontex overall accountability on fundamental rights. These include CSOs ability to "observe" Frontex activity as a member of the CF and to monitor it from outside (see Section 6.3.4), CSOs practical expertise in a variety of issues relating to the protection and promotion of fundamental rights at the EU borders, and, finally, CSOs independence from the agency. Especially with regard to the last characteristic, Frontex FRO cannot be considered as an accountability forum for the agency as she is not fully independent from it: indeed, while she is independent in the performance of her monitoring activity, she remains a Frontex officer.

This is not to say that "more accountability is necessarily better" (Ebrahim, 2005). On the contrary, an accountability overload can be a problem as well as an accountability deficit (Busuioc, 2013). However, in the absence of a strong political and/or legal accountability on fundamental rights issues of the agency, due to the still-not-fully-clear division of competences

and thus responsibilities between the EBCG agency and member states (Rijpma, 2016), it is paramount to ensure that a well-functioning accountability mechanism is in place, which is one of the objectives of the renewed EBCG agency. As Fabrice Leggeri affirmed on the day of the launch of the EBCG at Kapitan Andreevo checkpoint (i.e., Greek-Bulgarian border):

> I would like to assure those who worry about democratic control, that the agency is fully committed to the principle of accountability. First of all, accountability towards the Management Board of the agency, where member states and European Commission are represented. Moreover, the new complaint mechanism is now open to migrants who have reason to claim that their fundamental rights have been affected during the agency joint operations. And because more powers, mora financial and more operational means are granted to the agency, it is normal to feel accountable to political decision makers.

In addition, it is crucial for the nature of the agency itself, that a working accountability relationship on fundamental rights matters does not hinder the independence of the agency itself. The type of accountability proposed here as a potential solution to these problems is a "means to longer-term social change" (Ebrahim, 2005), namely social accountability. In this accountability relationship the forum of accountability is a pool of selected but independent CSOs, with a proven expertise in the field of fundamental rights protection and promotion at the EU borders, which know the details of the work of Frontex, and have established with the agency a relationship based on trust and mutual learning. The present study has tried to shed light on some elements of the relationship between CSOs represented in the CF and Frontex to evidence that there is an already open path that could lead to the establishment of such institutional social accountability relationship, which could be tested within the EBCG agency and could be then potentially applied also to other AFSJ operative agencies. In turn, this could also reopen the debate on the participation of CSOs in the EU governance as "nothing but consultation".

The third and last theoretical question which triggered this study addresses the crucial issue of finding the right balance between security and human rights concerns at the EU borders. To answer such question this study has firstly presented a review of the literature on border control practices in the EU, retracing also the history of EU IBM and Frontex; secondly, it has addressed the role of CSOs in this policy area, describing the strengths and weaknesses of their involvement; finally, this study has analysed CSOs' strategy choices to mainstream fundamental rights in the EU governance of this policy area, and more specifically in the cornerstone of the EU border control system: the EBCG. The extent of the externalisation and securitisation practices at the EU borders has been presented in Chapter 4, together with the academia's focus towards these phenomena and the use of humanitarianism to justify security practices in the same policy field (Pallister-Wilkins, 2015; 2017; Moreno-Lax, 2018). The role of CSOs in the EU fundamental rights regime and particularly in the framework of migration and border control policies has also been addressed in Chapter 4. The divisions deriving from the ideological and resource-wise differences among grass-roots organisations and other CSOs that decided to campaign openly against Frontex versus the CSOs that decided to lobby Frontex from within has been explored instead in Chapter 5.

At the international level the human rights dimension has come to be considered as a field in which government actors, independent national and supranational human rights institutions and civil society organisations are to work side by side to monitor, evaluate and comment on the human rights situation at the national level (Figure 10). This is specifically true for OSCE participating states, whose goal is to "strengthen the effectiveness of the human dimension within the OSCE because lasting security cannot be achieved without respect for human rights and functioning democratic institutions." (Follmar-Otto, 2017: 2)

Figure 10: Actors involved in the national evaluation process
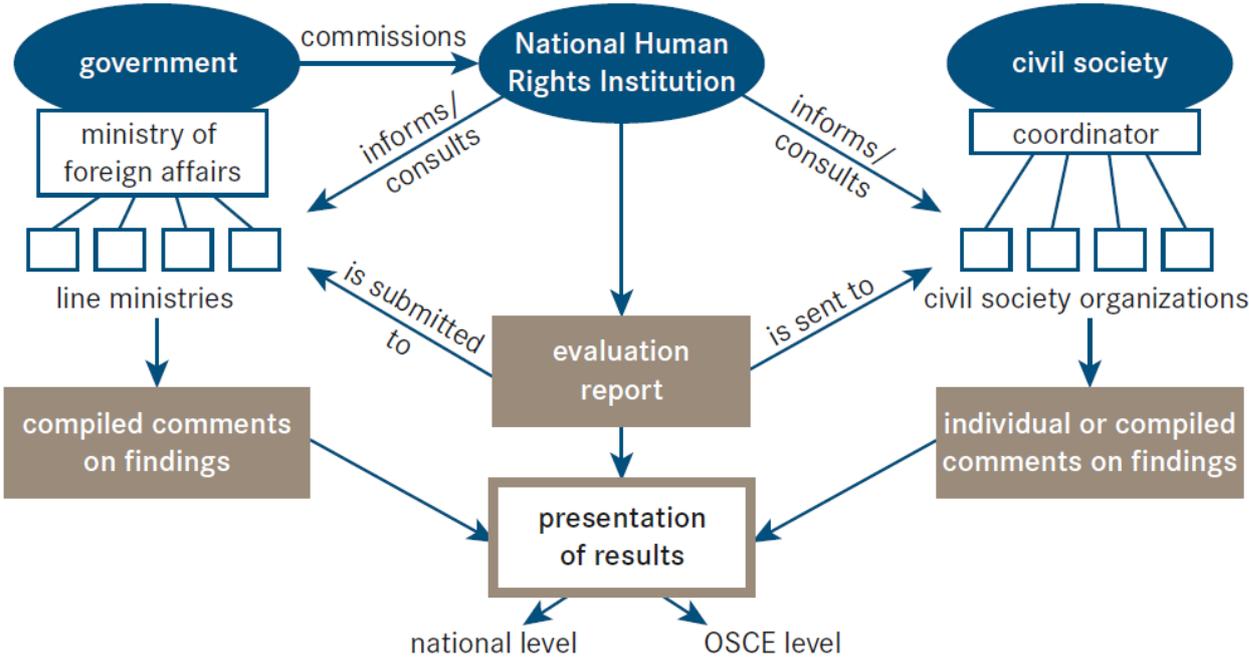
Source: Follmar-Otto, 2017: 2.

Similarly, at the EU level, the involvement of CSOs to mainstream fundamental rights has been gradually increased since the Commission's White Paper on Governance and had a further boost with the entry into force of the Treaty of Lisbon (see Section 2.1.2). Even though participation of CSOs has mainly been on ad hoc basis and has had a prominently consultation nature, EU institution have adopted the view that more involvement of CSOs can enhance both input and output legitimacy of EU governance, while CSOs raise awareness of EU institutions on fundamental rights issues. This is particularly true in the AFSJ, where CSOs advocating for fundamental rights have become part of several consultative fora, as described in Section 4.6.

On their side, CSOs that are active in Europe have different approaches on how to mainstream fundamental rights in the EU: some decide to gain access to institutions/agencies/bodies at the EU, national, and local levels while others decide to remain outside the governance system and "go public". As described theoretically in Chapter 2 (Section 2.1.5), the choice between these two strategies depends on CSOs' resources, that have been catalogued in this study as endogenous and exogenous. In Chapter 5, this strategy choice has

been explored empirically by analysing the resources of CSOs that gained access to Frontex CF. Some notions of the literature on CSOs' lobbying strategy choice have been confirmed, in particular in relation to both CSOs' endogenous resources which are valued by EU institutions (e.g., expertise, knowledge, and high potential for operational support) and CSOs' endogenous resources that are constitutive of CSOs that are supposedly more willing to struggle for and gain access (e.g., sufficient human and financial resources to operate at the EU level, and often a Brussels' office). In relation to the exogenous factors that lead CSOs to gain access, the majority of CSOs represented in Frontex CF have a similar level of embeddedness in the system and a high level of interaction with EU networks, but not all of them; indeed, the member that joined the CF at the beginning of CF's second mandate – i.e., the AIRE Centre – is relatively new to the EU system and was not well-connected with the other CSOs before entering the CF. Nonetheless, AIRE has a high level of expertise in fundamental rights legal matters at the EU level, which formerly only the ICJ had. Nevertheless, it must to be noticed that CSOs that are part of Frontex CF have continued to use "going public" strategies as complementary to gaining access.

The CSOs that decided to advocate for fundamental rights at the EU borders from outside the EU governance system have also been pictured in Chapter 5[216]. Their activity against Frontex has been consistent since the very beginning of agency's operations (see Section 5.5.1) and has been geographically concentrated mostly at the "hottest" borders (i.e., Greek islands and Italian Southern borders), and in two other symbolic cities for Frontex, namely Warsaw and Brussels. The most relevant campaign which has been carried out against Frontex, and which has been mentioned by the CSOs representatives interviewed for this research, is called "Frontexit" and gathers a significant number of small and medium CSOs but also single

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[216] Unfortunately, it was impossible to know which CSOs decided to apply to Frontex CF open calls and thus which CSOs were "left out" by Frontex from the selection. The CF Secretariat, although usually very cooperative, never replied to my requests for information on this issue.

activists and researchers. The role of these networks, campaigning against Frontex, have been fundamental to raise the awareness of the public on the work of the agency, thus creating an environment in which Frontex CF might be able to speak to a wider audience when releasing its annual reports. On the other hand, the agency itself has never devoted particular attention to these demonstrations.

In sum, with regard to finding a balance between fundamental rights and security in the management of migration and external borders in the EU and, thus, to effectively mainstream fundamental rights in border management policies, the present study has evidenced a policy learning potential embedded in the interaction between CSOs and EU agencies (Chapter 6). The learning potential is stronger where interaction is more frequent, focused on specific issues, and not dispersed in the consultation of a multitude of organisations, such as in the Fundamental Rights Platform or in the EASO Consultative Forum. The learning potential is also stronger where there is a chance for CSOs to actively be involved in what Frontex calls "observing" agency operations at the borders.

In conclusion, this study has explored the relationship between CSOs and EU agencies, and more specifically the relationship between CSOs represented in Frontex CF and Frontex itself, by shedding light on some issues that had not been addressed by the literature yet. Firstly, the relationship between this small set of CSOs and the EBCG agency has hopefully proven to be something more than consultation, be it an accountability relationship or an influence relationship; indeed, this relationship has the potential to establish a mutual and recursive learning process, which is the final objective of a well-functioning social accountability relationship. Secondly, this research has proposed a new solution for the independence-accountability nexus for the EU agencies of the AFSJ: the accountability relationship established between Frontex and some CSOs might be a powerful tool to ensure the agency accountability on fundamental rights matters while securing the agency independence, thus potentially providing a model of "accountable independence", using Curtin's words (2017), for

other EU operative agencies to experiment. Third, and last, the delicate balance in border management issues between security, on the one hand, and freedom and justice – i.e., fundamental rights –, on the other, has been addressed in this study by describing what has been the role of CSOs in mainstreaming fundamental rights in EU border management activities to date. In particular, the strategic choice of gaining access to EU actors and/or going public has been analysed, adding a case study to the literature on this issue, and evidencing that the strategy choice for the lobbying activity to be carried out with operational agencies is necessarily different from the lobbying exercised on regulatory bodies and policy-makers. The next Section takes stock from the findings of this research and highlights some possibly useful knowledge for the future work of Frontex CF and for CSOs members of the CF.

7.3. FUTURE IMPLICATIONS FOR CF AND CSOs REPRESENTED IN IT

While conducting this research, some issues regarding CF activity and CSOs' activity within the former were recursively mentioned by interviewees and became more evident from the analysis of CF, Frontex, and CSOs official documents. This Section is therefore devoted to shedding light on these issues, so that they might become useful starting points for the analysis of the work of the CF and of the CSOs represented in it, while possibly proposing some insights for the analysis of the impact of the work of the CF on Frontex, as forseen in Frontex CF Programme of Work for 2018.

For what concerns CSOs represented in the CF, there are two main issues that recurred during interviews and in CSOs documents: the lack of resources, particularly time, and the absence of a clear list of impact or lobbying goals for each single CSO. With regard to the former issue, time is a very scarce resource for CSOs and therefore needs to be managed with the outmost attention. Overall, none of the CSOs interviewed had planned ahead how much time they would have had to devote to the work within the CF, mainly due to the fact that involvement in Frontex CF is never fully predictable and thus time to be allocated to this work

goes in spikes. However, since the CF has now been up and running for more than five years and that only two out of nine CSOs have been replaced in it, the majority of CSOs working in the CF currently have a clearer idea on how to evaluate the time necessary to prepare and complete specific and routinely tasks (e.g., prepare CF plenary meetings and WGs meetings, prepare and participate in mission visits to Frontex operations) and also how to foresee some extra time for Frontex CF work to face unexpected events, in line with the CF Work Plan. This knowledge is essential for planning ahead and make sure that CSOs do not overburden the staff working in the CF, while at the same time keep ensuring a high level of commitment to the CF.

Moreover, interviews with CSOs representatives clearly evidenced that these organisations do not have a set of impact or lobbying goals specific for Frontex. Even though CSOs, together with the other CF members, establish the agenda of CF meetings and CF Work Plan[217], they could benefit from establishing specific goals and benchmarks within the single organisations, so as to both increase transparency towards their constituency on their work within the CF and evaluate their impact to establish whether lobby Frontex from within is actually a good strategy choice for the single organisation.

Finally, some Interviewees mentioned what seemed a useful tool for CSOs' coordination, namely preparatory meetings which used to be held in Brussels among CSOs' representatives before the CF plenary meetings. According to Interviewee 8, similar meetings are useful to support not only coordination among CSOs but also to harmonise the level of preparation and knowledge of all the participants before the CF meetings.

Moving to the recurrent issues of the CF, the latter apparently still struggles to cooperate effectively with the agency on two areas of Frontex activity, namely Risk Analysis, and the working arrangements of the agency with the border and coast guard forces of third countries. Moreover, while the CF has established a focus group on the accountability of the agency on

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[217] The CF Program of Work has to be always presented for approval to the Management Board.

fundamental rights since 2016, substantive results on this issue still seem to be lagging. On the other hand, it is worth mentioning that the CF has planned for 2018 an impact assessment of its work, which could help to work towards a solution of the aforementioned issues.

Risk Analysis is still an issue area where cooperation between the CF and Frontex on fundamental rights is not as developed as other Frontex areas of competence. This is a particularly critical issue, especially since the entry into force of Frontex Regulation 1624/2016, which has empowered Frontex both to give recommendations to member states on how to manage their borders (based precisely on its Risk Analysis), and to monitor the adoption and implementations of such recommendations by the MSs themselves. Moreover, Risk Analysis is not mere data collection and analysis, but also involves the definition of critical terms such as, for example, "irregular entries", which in turn affects the whole policy-making system of both EU and member states border management (Horii, 2016). This brings about broader consequences on the issue of legitimacy of EU agencies, which, by shaping the terms of the debate in the name of expertise and specialisation, end up *de facto* altering and manoeuvring the policy debate.

Another one of the most prominent fields of Frontex activity which has not been fully discussed with the CF thus far is the agency's working arrangements with third countries. Since the beginning of the present research (2013), and even before that, the main concern of CSOs and researchers alike was to better understand how these agreements work[218], and, after the entry into force of Frontex 2011 Regulation, how fundamental rights are mainstreamed into them (Jones, 2017). In 2016, this was still a major concern also for MEPs[219], which could not access the text of the majority of these working agreements concluded with third countries, such

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[218] In 2011, I interviewed one of the researchers of Statewatch who was collecting data on Frontex from both CSOs and academia. Indeed, the interviewee pointed out that the most controversial issue at the time was the absence of transparency of Frontex on the police cooperation arrangements between Frontex and third countries – i.e., county of transit and origin.

[219] It must be noted that, after the entry into force of the EBCG Regulation, the EP has to be informed on Frontex ongoing discussion with non-EU countries even before the conclusion of an official agreement (art. 54.2 of EBCG Regulation).

as Turkey[220]. This last issue, nevertheless, appears to be solved, since all the agreements are currently publicly available on line. Another issue, however, persists in relation with other countries, such as Niger, Libya, Morocco, Senegal, Mauritania, Egypt, Brazil and Tunisia, with which Frontex has been engaging informally in the past years.

These two areas of Frontex activity, together with Frontex Joint Operations (including Return) at the EU borders, have significant implications for the agency accountability with regard to fundamental rights. The lack of direct ongoing control of the "principal-agent" kind (Busuioc, 2009) on fundamental rights matters, deriving from the agency's own nature, still remains a strong concern. Indeed, despite the positive results of the present research, which has helped to clarify that the agency's understanding of fundamental rights has indeed evolved in terms of interest and operationalisation of fundamental rights during the agency operations, the work of the CF on Frontex accountability on fundamental rights issues remains crucial.

Finally, the external evaluation of CF work is a crucial endeavour in view of improving CF efficiency and its influence on Frontex' conduct in fundamental rights matter. As per CF Programme of Work 2018, CF Chairs will be responsible for the external evaluation. This will further increase both the transparency of the CF vis-à-vis EU institutions and the understanding of the strengths and weaknesses of the cooperation among CF's members and their interaction with Frontex officers.

7.4 LIMITATIONS OF THIS STUDY AND POTENTIAL AVENUES FOR FUTURE RESEARCH

The present research has hopefully fuelled interest in the study of the relationship between CSOs and EU agencies and the impact of CSOs' consultation on EU agencies, in particular operative agencies of the AFSJ. Future research should focus on deepening the understanding

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[220] Minutes of LIBE meetings are available on EP's website and videos can be accessed on request. Here is an extract of Christine Revault d'Allonnes-Bonnefoy (MEP) question to Fabrice Leggeri after the entry into force of EBCG Regulation: https://www.youtube.com/watch?v=i6cLrsfGqe0 (accessed: 25 November 2017).

of these relationships between CSOs and EU agencies', and compare the outcomes of CSOs' consultations. These studies could open up new avenues to discuss the role of CSOs not only as transmission belts for civil society's claims, thus as actors that fuel input legitimacy, but also as accountability fora, thus supporting the output legitimacy of the agencified EU governance system.

This dissertation did not address the issue of whether the evolution of Frontex understanding of fundamental rights has had an impact also in the protection of fundamental rights during EBCG operations at the borders. The main reason for this research choice was the lack of time and resources to carry out data collection on such a heated topic. Nonetheless, studies conducted directly at the borders of the EU are necessary in order to establish whether an evolution in fundamental rights' understanding at the EU levels actually gets transmitted to the field (Marin, 2014; Pallister-Wilkins, 2015; 2017). The goal of this dissertation has been to provide insights for the analysis of Frontex CF work, and will hopefully become the basis for future research on AFSJ consultative fora.

Annex 1
List of Interviewees

Interviewee1 – member of the CF, representative of a CSO

Interviewee 2 – member of the CF, representative of a CSO

Interviewee 3 – member of the CF, representative of a CSO

Interviewee 4 – member of the CF, representative of a CSO

Interviewee 5 – member of the CF, representative of a CSO

Interviewee 6 – member of the CF, representative of a CSO

Interviewee 7 – member of the CF, representative of a CSO

Interviewee 8 – member of the CF, representative of a CSO

Interviewee 9 – member of the CF, representative of a CSO

Interviewee 10 – member of the CF, representative of a CSO

Interviewee a – member of the CF, representative of a EU agency

Interviewee b – member of the CF, representative of an international organisation

Interviewee A – Frontex officer

Interviewee B – Frontex officer

Interviewee C – Frontex officer

Interviewee D – Frontex officer

Interviewee x – Policy Officer, DG HOME, European Commission

Annex 2
List of Abbreviations and Acronyms

AFSJ   Area of Freedom, Security and Justice

AI   Amnesty International

AIEUO   Amnesty International European Institutions Office/European Associations

CCME   Churches' Commission for Migrants in Europe

CEAS   Common European Asylum System

CF   Consultative Forum on fundamental rights – Frontex

COSI   Council standing committee on internal security

CSO(s)   Civil society organisation(s)

DG   Directorate General of the European Commission

EASO CF   EASO Consultative Forum

EASO   European Asylum Support Office

EC   European Commission

ECHR   Convention for the Protection of Human Rights and Fundamental Freedoms

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

ECtHR	European Court of Human Rights
EEAS	European External Action Service
EESC	European Economic and Social Committee
EMN	European Migration Network
EP	European Parliament
Europol	European police office
FRA	European Union Agency for Fundamental Rights
FRAN	Frontex Risk Analysis Network
FRO	Fundamental Rights Officer – Frontex
Frontex/EBCG	(previously) European Agency for the Management of Operational Cooperation at the External Borders of the European Union/(now) European Border and Coast Guard
FRP	Fundamental Rights Platform
GAMM	Global Approach to Migration and Mobility
HR	Human Rights
IBM	Integrated Border Management
ICJ	International Commission of Jurists
ICMC	International Catholic Migration Commission
IFRC	International Federation of Red Cross and Red Crescent Societies
IOM	International Organisation for Migration

JHA	Justice and Home Affairs
JO	Joint Operations
JRS(-E)	Jesuit Refugee Service - Europe
LIBE	Civil Liberties, Justice and Home Affairs Committee – EP Committee
MEP(s)	Member(s) of the European Parliament
MS(s)	Member State(s)
NGO(s)	Non-Governmental Organisation(s)
OHCHR	United Nations Office of the High Commissioner for Human Rights
OMC	Open Method of Coordination
OSCE	Organization for Security and Co-operation in Europe
PICUM	Platform for International Cooperation on Undocumented Migrants
SBC	Schengen Borders Code
TEC	Treaty establishing the European Community (renamed TFEU after the Lisbon Reform Treaty)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNHCR	United Nations High Commissioner for Refugees
WG	Working Groups – Frontex Consultative Forum on fundamental rights

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