

FRONTEX – Legitimate Agent for Border Security or Ruthless Deportation Agency?



An Analysis of the Activities of the European Union's Border Agency
with a Special Focus on Legitimacy and Controllability of its Operations

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Abstract

In 2006, the European Commission published a communication calling for the reinforced management of the EU's Southern maritime borders and for strengthening the capacities of the European agency concerned with guarding the EU's external borders: FRONTEX. Today the agency possesses a very wide range of tools to supervise and co-ordinate a common effective approach to protect the EU's external borders. It is the key player of European border management at sea, land and air. Against this, civil society and the media criticize the lack of transparency of FRONTEX' work, claim violations of human rights at European borders, and critique the lack of accountability regarding the European Parliament. Some are as well proposing to cease its activities. With the help of Scharpf's legitimacy theory and his distinction between input- and output legitimacy the objective of this thesis is to discuss if FRONTEX can be considered a legitimate border agency or not. In this regard FRONTEX will be examined in three frames. It's public perception, meaning the media coverage and civil society concerns with regard to its work. FRONTEX 'in action' which will be a closer look at how FRONTEX is working and how it is embedded in European border management and thirdly in a more theoretical discourse the role of the Member States' governments as well as the potential for the European Parliament to strengthen the controllability and accountability of FORNTEX. A final outlook on avenues for more parliamentary control will round of the thesis.

1. Introduction and Outline

“On June 6, it had been six refugees who drowned at the Libyan coast, 27 more barely survived as Sicilian fishers dragged them aboard in the very last minute. The morning after another overcrowded boat left North Africa and capsized only an hour later. Two survivors speak of more than 150 deaths” (Süddeutsche Zeitung, Juni 2008)¹. These are typical news from Europe’s external



borders where every year hundreds of immigrants risk their lives by choosing the long, dangerous and hopeless journey in small boats over the high sea to enter the EU. Countries like Italy, Malta, the Canary Islands and Greece find it hard to cope with the challenge. The European answer was the development of an integrated border management approach to promote solidarity, partnership and shared responsibility between EU Member States. The border agency FRONTEX was created as an institution to foster these aims.

The main task of FRONTEX is to carry out so-called ‘Risk Analyses’, give technical and operational assistance at the external borders as well as to manage joint return operations (FRONTEX, 2006) which are among the mostly criticized of its activities. As operations are still conducted by police and border guard systems of affected Member States, the agency only has a supporting role. However, as this paper will show, numerous programmes and initiatives, with more or less strong Member States’ participation give FRONTEX a very wide range of tools to supervise and co-ordinate a common effective approach to protect the EU’s external borders. In this context, it is often claimed that FRONTEX should also be more accountable to the European Parliament since at present, Strasbourg has only some influence on its overall budget. From an academic viewpoint, FRONTEX controllability and legitimacy is often questioned. In addition statements like: “A murder against Boatpeople” by “a Migrant-hunting EU Agency” in “the war against refugees”² are typical claims expressing the fierce criticisms made by Human Rights organizations about the EU’s border agency. In reports by the European media, FRONTEX is connected with images of small boats packed with refugees and migrants – displaying mere hopelessness, as the one above, these images might be the most graphic example of how acute the migration topic is. But even more as emotions run high, they as well call on scholars to present a nuanced analysis of the role and workings of FRONTEX under these circumstances. Given that the agency became more and more important in the field of European border controlling since its establishment in 2005, the objective of this thesis is to assess the public debate about FRONTEX, contrast it with a detailed insight into its workings and its legal and operational background, and finally to shed some light on whether the organization’s operations can be considered legitimate.

¹ www.sueddeutsche.de/politik/2.220/europa-und-die-migration-di (accessed 15th June 2010), Photo: dpa.

², <http://indymedia.nl/nl/2008/06/52836.shtml> and <http://thevoiceforum.org/node/1562>.

The general research question will therefore be:

– *Is FRONTEX a legitimate agent for border security or not?* –

This will be answered through the following subquestions:

1. What was the purpose to implement FRONTEX?
 2. What is the public coverage of FRONTEX by the media and the civil society?
 3. How does FRONTEX conduct its missions and what are they based on?
 4. In which way is FRONTEX influenced or perhaps dependant on the decisions of certain Member States' Governments?
- Chapter 2 will present Scharpf's theory of input- and output- legitimacy whereby input legitimacy is "government by the people" and output legitimacy "government for the people". It will be the theoretical framework of the thesis.
 - Chapter 3 explains the methodological approach and procedure.
 - Chapter 4 is dedicated to the establishment and management of the agency FRONTEX. After a look at the historical background the structure, budget and instruments will be described in order to gain a basic understanding what FRONTEX is.
 - Chapter 5 deals with the image of FRONTEX in the general public presented but also influenced by media and civil-society organizations. Hereby an exemplary look will be taken at publications by NGOs like *Pro Asyl* or *Evangelischer Entwicklungsdienst*, international human rights organisation like *Amnesty International* and mainstream European media outlets which will present a condensed version of the public criticism.
 - In Chapter 6 an analysis of the agency's actual workings and operations, in other words FRONTEX 'in action' will be conducted. In order to go beyond the public image of the agency and present a thorough review of its operations (land, sea and air), its role as a network for consultation and in cross-national data-gathering and policy-setting.
 - Chapter 7 presents a more theoretic discourse about sources of legitimacy for the previously outlined agency's activities. The main findings of the previous chapter serve to assess the role of Member States and potential for the European Parliament to strengthen controllability and accountability of FRONTEX. A final outlook on avenues for more parliamentary control is presented to round of the paper in light of concerns at the three perspectives, media coverage, functioning and input and output legitimacy.

2. Theoretical framework

In general the aim of creating an agency is connected to the hope that it will be a ‘depoliticized’ body, acting immune against any kind of political pressure – an important asset in order to fulfil long-term policy objectives (Majone, 2006). With regard to FRONTEX Chiti (2009) argues that through a functional perspective, the establishment of the agency served two purposes: Firstly to “institutionalize cooperation and integration among Member States’ administrations and between the latter and the Commission” and, secondly, “to give to a certain number of EU fields a decentralized order”. This delegation of power to a non- elected EU body always leads to the general question of the EU’s alleged democratic deficit and the closely linked issue of public legitimacy. In order to be able to adequately assess the legitimacy and effectiveness of the agency’s workings I chose Fritz Scharpf’s (1999) legitimacy theory as a theoretical framework of the thesis. His recognized approach that legitimacy is a two – dimensional concept which refers both to the input and the output of a political system shall be introduced below:

Scharpf (1999) identifies input-oriented legitimacy as the “government by the people”. Input legitimacy requires procedures or mechanisms to connect political decisions with citizens’ preferences. At the very principal level, input oriented legitimacy is reached by means of voting and elections. In classic democratic polities, legitimacy is mediated by a parliament which is then transmitted to the executive (Griller/ Orator, 2007). Further a collective identity is required since only than a minority can accept the decision of the majority for the purpose of public welfare.

In the European Union polity, this idea of legitimacy has been translated into a twofold concept: Coming from the European Parliament and its elected representatives, and therefore be a direct source of legitimacy, as well as the Council as an indirect source because its members are belonging to the executive of Member States which can be held responsible by their national parliaments, and so ultimately the electorate. At a further level, legitimacy of administration is ensured by several mechanisms. Representative organs, such as the European Commission, have to have personal and substantive modes of legitimacy. With regard to personal legitimacy it is often referred to a ‘chain of legitimacy’ to the office-holder which has to be uninterrupted (Schliesky, 2004). This means that personnel must be originally appointed by the Member State’s government and approved by the European Parliament. Substantive legitimacy is based on legislative directing. All acts of the Commission have to be binding to the will of the Council and the Parliament which contains as well ex-post controls like for example budgetary control (Griller/ Orator, 2007). What however is missing at the European level is a common identity. Scharpf (2004) indicates that citizens still consider themselves first as ‘German’, ‘French’, etc. instead of ‘European’. He explains that this becomes visible when looking at the lack of interest in European elections, lack of common media or a European discourse. Scharpf argues that this lack of collective identity means a severe problem with regard to input- oriented legitimacy since input oriented legitimacy derives from the collective citizens’ preferences which cannot be determined without a collective identity.

On the other hand, democracy would be an ‘empty ritual’ if the democratic procedure was not able to produce effective outcomes (Scharpf 1997, pp. 19). In this regard Scharpf looks at the

output legitimacy and defines it as “governance for the people”. It calls for a more utilitarian approach of effectiveness and efficiency in dealing with political issues. The basic assumption is that the legitimacy of a political system lies in its ability to achieve the citizen’s goals (to serve the people), to solve their problems, that is to fully correspond to the collective preferences of the citizenry (Horeth, 1999). This as well should prevent the abuse of power by the system (Scharpf 2004). Justifying institutional arrangements for collective actions therefore requires the perception of a range of common interest that is stable and broad enough. With regard to the European Union this would be a common interest across the member states and additionally the common understanding that it should be done on a European level. It can be distinguished between objective and subjective components of the outcome which means the extent that policy outcomes succeed in effectively solving the problem and the extent people are actually satisfied with it (Boedeltje, Cornips 2004).

When looking at FRONTEX from an output oriented point of view the agency would be legitimate if there is a common interest across the member states that border security should be managed together and on a European level. Further the agency’s actions must effectively tackle and solve the problems of border management and the people must be satisfied with the content of European policy. However since output legitimacy derives from the effectiveness of the European policy and its decision making process it has only a meaning in relation to the preferences of the European citizens. Therefore input oriented legitimacy has to be considered similarly. There must be hence mechanisms and regulations which track down and include citizens’ preferences into political decision and therefore into FRONTEX’ decision making procedure. As above mentioned though, FRONTEX was established to be a ‘depoliticized’ body in order to be more effective concerning its workings. This could be understood that it is more or less separated from European policy in order to not be influenced by strong political groups or changes in government. This however leads to the question to what extent FRONTEX is “governed by the people” or its representatives? The role of the European Parliament in this regard ought to be limited. Following Scharpf’s theory there must be a clear lack of input legitimacy which would have automatically negative effects on the output side as well. The lack of a European collective identity already pointed out by Scharpf would even add to this assumption.

With Scharpf’s differentiation between input- and output- legitimacy I expect to be able to more precisely assess if FRONTEX has the ability to contribute to an increase in effectiveness with regard to the ‘output’ of European border management and what is determining it. When looking at the ‘input’ of FRONTEX it shall become clear how the agency is embedded in European policy and to whom it is accountable. Depending on the outcome of the assessment it can then be concluded if FRONTEX is a legitimate agent for border security or not

3. Methodology

Methodologically, the thesis is based on a desk study which includes a comprehensive review of scientific research literature, open source materials and media reports, and a thorough analysis of various EU documents on FRONTEX and EU border management. Hereby different policy fields such as, generally, European governance, law and international relations, as well as thematically asylum and migration questions are considered. A qualitative method approach is used which permits to study selected issues, cases or events in depth and detail.

Since FRONTEX is a very young agency, the academic debates about it are still not very extensive. One of my goals is to contribute to these academic debates. This is as well what triggered me to start doing research on FRONTEX. The largely horrifying reports and pictures of refugees who were trying to cross the Mediterranean Sea to reach Europe which are closely linked to the work of FRONTEX as a European agency let me wonder what FRONTEX is exactly doing on the European borders. Also because I had the impression that at a first glance publications about FRONTEX seemed to be rather negative and one sided.

The first part of my thesis is a more descriptive part where the organisational structure of FRONTEX is presented as well as its role in European migration policy. Since FRONTEX' work is frequently discussed in the media and the civil society a review of these debates is crucial to further complete the picture. Concerning the civil society all relevant national and international organisations are considered. With regard to the media coverage I made sure that national and international relevant media as well as left- and right leaning and liberal- and conservative leaning media are covered in order to have a balanced outcome. The outcome serves as a guideline for the assessment of FRONTEX' actions in the second part of the thesis. The operation HERA is used as a case in point since it was the longest operation coordinated by FRONTEX so far, mostly referred to in scholarly debate and therefore most likely to critically assess. These two parts come down two the third part of the thesis where I assess input- and output legitimacy of the agency by using Scharpf's legitimacy theory and come to recommendations.

Concerning the relations between European Institutions, Member States and FRONTEX in the European policy framework, official documents of the European Union published by the Commission or the Parliament are evaluated. In addition, a few Member States like the United Kingdom, Spain or Germany, countries which take mostly part in FRONTEX' operations, published documents about how they see FRONTEX with regard to the role of Member States. At a second look, the webpage of FRONTEX provides for a relatively good outline of the workings and various operations of the agency. FRONTEX annual general reports, a presentation of the structure of the agency with explanation of task and origin and documents concerning the budget as well as the first external evaluation report on the agency were reviewed to add to the picture. What nonetheless are lacking are more detailed information and evaluation of the different operations or agreements of FRONTEX with third parties. The lack of this information will be critically discussed in the course of this paper.

4. The Case for the European Border Agency

The following chapter has two parts. Initially the immigration policy of the European Union shall be presented. Hereby it is necessary to reveal the reasons why FRONTEX was created. The second focus is on the establishment and mandate of the agency.

When asked, which political issue the European Union should focus on, people in Europe see the question of immigration as the largest concern after the economy and unemployment (Eurobarometer 2009). Obviously, migration has become one of the most important and controversial political issues of the early twenty-first century. At no other point in recent history, such a high number of people have been on the move as during the last years (IOM 2010). Similarly high is the number of irregular migration: current estimates show numbers between two, six and eight million people living in Europe illegally (Lavenex, 2009). In 2006 for example, around 22.016 people were reported to have reached Italy by boat, which was even slightly less than the numbers reported for the year 2005. (BBC, July 2007)

Member States of the European Union have made different historical experiences with the questions of migration. According to their geographical position, i.e. whether they are surrounded only by other EU Member States or have either land- or sea-borders with external countries, they have followed different approaches to handle (irregular) migration flows (Ibid.) The Mediterranean zone, consisting of Greece, Italy, Portugal and Spain, has experienced a drastic change, given that member states in this group – once providers of emigrants for what is known as the central zone (Belgium, Denmark, Germany, France, Luxembourg, Holland and Austria) – have now become receivers of immigrants coming largely from North Africa (Godoy, 2002). Every year thousands of men, women and children of all ages are trying to reach Europe from Africa in small fishing boats, canoes or dinghies. They come from West Africa to reach the Spanish Canary Islands, from Libya to reach Malta or the Italian islands of Sicily and Lampedusa, from Morocco to southern Spain or from Turkey to the islands of Greece (UNHCR, 2009)³. To tackle illegal immigration and the closely linked problem of human trafficking has thus become the dominating challenge of managing Europe's borders today, as have concerns like cross-border crime such as smuggling of drugs, weapons and, in a wider sense, even terrorist activity (German Federal Government 2007).

The European Commission and the Member State have been very active in encouraging and formulating an integrated approach to the management of the EU's common territorial borders and the need for a common, global immigration policy with key concepts like partnership, solidarity and shared responsibility (Carrera 2007; MEMO 07- 549).

³ <http://www.unhcr.org/4a1e48f66.html> (accessed 5th May 2010).

4.1. Moving Towards a Common EU Immigration Policy

The initial impulse that set the goal of a common migration policy on Europe's political agenda can be found in the Schengen Agreement signed by five EU countries⁴ in 1985, further developed and implemented as the Schengen *acquis* in 1990. It aimed to abolish border controls between all participating EU countries. This in turn brought new challenges regarding European migration policy. Abolishing inner frontiers made external border management even more important since the crossing of external borders then provided free access to the whole of EU territory (Jorry 2007). External border management and the establishment of a common asylum- and visa policy thus became one of the top aspects in EU policy making.

The establishment of the Single European Act in 1991, providing the right of free movement of persons within the European Union, encouraged the development of closer cooperation between Member States with regard to immigration policy. The objective was clearly to reinforce police and judicial cooperation among the participating states (Summaries of EU legislation, 2007). With the Treaty of the European Union, signed in Maastricht 1992, immigration and asylum policies were included on the agenda of the integration process. The 1997 Treaty of Amsterdam incorporated important parts of the Schengen *acquis* in the mainstream of European Law and thus offered the legal basis for a common migration, asylum and visa policy (Ibid.).

In an October 1999 meeting in Tampere, the European Council agreed that “the separate but closely related issues of asylum and migration call for the development of a common EU policy” (European Parliament 1999) and, further defined important guidelines such as “partnership with countries of origin”, “a Common European Asylum System”, “fair treatment of third country nationals” and “management of migration flows”. Equally important in the context of migration management were the “Tampere Milestones” towards a free area of security and justice (Ibid.).

The subsequent Laeken European Council of December 2001 became a key element in strengthening common border management, whereby the Commission received the mandate “to work out arrangements for cooperation between services responsible for external border control and to examine the conditions in which a mechanism or common services to control external borders could be created” (Laeken EC, 2001).

The approach was confirmed in 2004 with the Hague Programme, again focusing on the objectives for strengthening security, freedom and justice in the EU for the period of 2005- 2010. The main objectives were, firstly, the regulation of migration flows, secondly, the Control of the European external borders, thirdly, the fight against organized cross- border crime and fourthly, the repression against the threat of terrorism (European Council, The Hague Programme, 2004).

Despite the above mentioned declarations of intent and the formulation of common policy challenges, critical political problems still weren't solved after all: The lack of compatibility between the different national guard services in the EU, the lack of financial and technological resources of Member States directly affected by migration flows, the inadequate training of national border guards as well as insufficient communication persisting between the concerned

⁴ Belgium, France, the Netherlands, West- Germany and Luxembourg.

Member States (Jorry, 2007). In view of the issues originating from the reality in the Schengen regime, it was obvious that a common European approach to give more coherencies in a multidimensional system and to provide effective border management was needed, one that could however not just be limited to formulation of policy goals but that needed to provide the institutional, organizational backing to the policy processes as well. Thus an innovative concept known as ‘integrated border management’ emerged in the EU institutional sphere wherein the border Agency FRONTEX was designed to become the key organizational instrument to execute EU policies (Ibid.).

4.2. Establishment and Mandate of FRONTEX

The European Commission can be seen as a key driver in strengthening the way towards an integrated management of external borders (Godoy, 2002). The main components in this regard are the ‘corpus of legislation’, grasping particularly the Schengen Border Code, the ‘Operational Cooperation’ of the Member States and FRONTEX, as well as the ‘Solidarity’ between the Member States and the Community accompanied by the establishment of an External Border Fund (EC 15801/06, Presse 341, 2006). A key element of the new EU strategy to enhance integrated border security became the establishment of FRONTEX: an external organization with the task to harmonize and improve border security by coordinating Member States` actions with regard to Community policy concerning the management of the external borders (FRONTEX 2010)⁵.

Article 62 and Article 66 of the EC Treaty served as the legal basis of FRONTEX` founding Regulation EC 2007/2004. At the same time, they obligate the Member States to establish binding standards and procedures to regulate the crossings of the external borders of the Member States, as well as cooperation between relevant departments of the administration of the Member States.

Specifically, FRONTEX was conceived as a “European agency for the management of operational cooperation at the external borders of the Member States of the European Union” (Council Regulation EC 2007/2004), whereby it should have a coordinating and supporting role to help the Member States by fulfilling the tasks at their national borders (Ibid.). The new agency, based in Warsaw (Poland), became operational on 3 October 2005 (EC 2005/358). The concept and areas of working of FRONTEX, closely linked with the dimensions of the integrated border management concept, can be divided into four tiers:

⁵ http://www.frontex.europa.eu/more_about_frontex/ (accessed 31.May 2010).

Four tiers of EU border security concept	
‘Inside the external borders’	Operational Cooperation among MSs Immigration Control Inter-Agency EU-Cooperation Return Operations
‘At the Border’	Surveillance (green and blue borders ⁶) Border Checks Systematic Risk Analysis Inter-Agency Cooperation
‘Across the Border’	Operational Cooperation between authorities at the Border
‘Beyond the Border’	Visa Practices and consular operation Liaison Officers Cooperation with Carriers
Based on a Presentation of FRONTEX Ex. Director Ilkka Laitinen (2006)	

Whereas the tiers in this model show that the focus of FRONTEX is on a relatively broad control and management of European external frontiers, the dominant area of activity became - partly due to the public presentation and its internal allocation of resources – to offset streams of illegal migration (Marenin 2010). As stated on the homepage of FRONTEX, so-called ‘Risk Analyses’ are at the heart of its works. These analyses intend to detect likely points of illegal migration departure, possible sea as well as land routes in order to allow a balancing and prioritisation to “ensure the right amount of protection for Member States without under-protecting, but also without overprotecting” (FRONTEX 2010)⁷.

Other tasks are given with the “coordination of operational cooperation between the Member States in the field of management of external borders”, technical and operational assistance as well as the “development of research relevant for the control and surveillance of external borders” (FRONTEX 2010)⁸. The agency further organizes common training for Member State border guards and aims to participate in so-called ‘Return Operations’ to the last ‘safe’ transit country or immigrant’s home countries (Ibid.).

In order to promote overall coherency and transparency, FRONTEX wants to work closely together with other Community and EU partners responsible for the external borders, such as Europol, CEPOL, EMSA (Ibid). To provide transparency, the agency seeks to “communicate on its own initiative in the fields within its mission”, to publish a general report and to provide the public with “reliable and easily understandable information with regard to its work” (Art. 28 EC 2007/2004).

In December 2009, the European Council adopted the Stockholm Programme, the follow-up to the Hague Programme which defines guidelines to strengthen the area of freedom, security and justice during the next five years (Council document 17024/09). Immigration is one of the main focuses of the documents calling for a common approach of the Member States to enhance

⁶ Green= Land borders, Blue = Sea borders

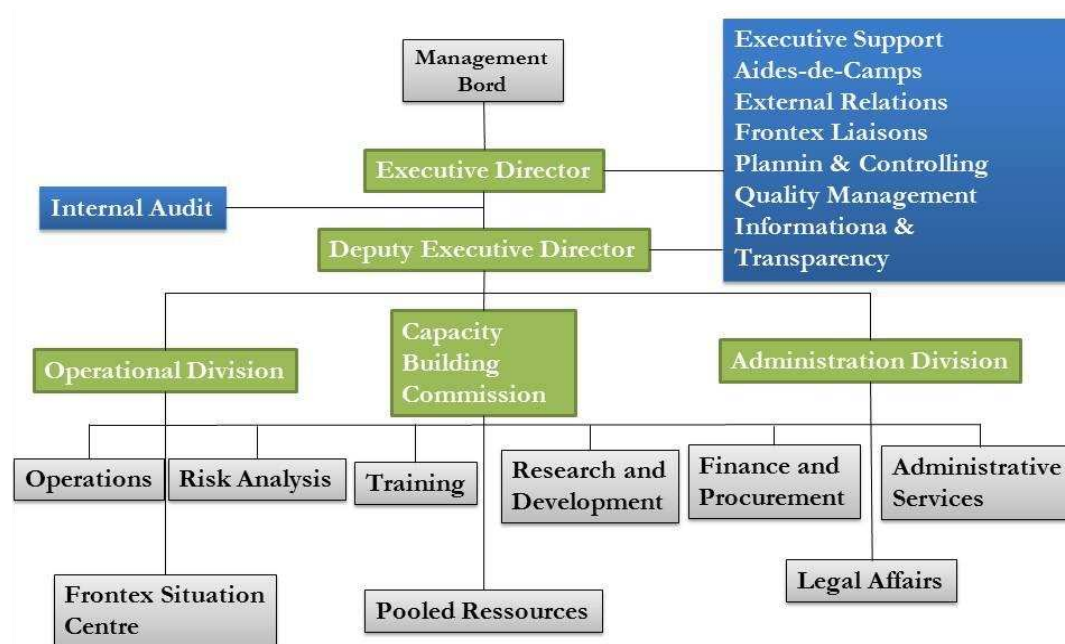
⁷ http://www.frontex.europa.eu/origin_and_tasks/tasks/ (accessed 31 May 2010).

⁸ http://www.frontex.europa.eu/more_about_frontex/ (accessed 31 May 2010).

border controls. The Stockholm Programme urges Member States to broaden common border and migration surveillance by creating a common data gathering system and by establishing a common procedure for granting the right of asylum. It proposes as well to improve cooperation with relevant Non-Member States in order to better control migration flows. In this context, FRONTEX is again treated as the key player which will be significantly strengthened (Ibid.).

4.2.1. Structure and Management of FRONTEX

The structure of FRONTEX is defined in the Council Regulations EC 2007/2004. It is stipulated here that the agency is a Community body with a legal personality and that it shall be independent regarding technical and operational matters (Ibid.).



Retrieved from <http://www.frontex.europa.eu/structure/>

As this chart shows, FRONTEX has a Management Board composed of two representatives of the EU Commission and one of each Member State. The representatives of the Member States are operational heads of the national services responsible for border guard management. Other countries which are participating in the Schengen *acquis* also have one representative in the Management Board but with limitations during voting procedures. The main tasks of the Management Board are the adoption of annual reports of the agency, working on its Rules of Procedure and adopting its staffing policy. It commissioned an independent external evaluation of the implementation of FRONTEX's founding EU Regulation within three years of its taking up of its responsibilities (2007) and every five years thereafter. The Board is mandated to issue recommendations based on the findings of this evaluations (Art. 33 EC 2007/2004).

The Executive Director, currently Finish Gen. Brig. Ilkka Laitinen, is proposed by the European Commission and appointed by the Management Board (it also has the power to dismiss the Ex. Dir.). The Executive Director is representing the agency, enjoys full

independence in the performance of duties and “shall neither seek nor take instructions from any government or other body” (Art. 25 EC 2007/2004). The Director’s main obligation is to ensure and develop the external relations of FRONTEX which means establishing and maintaining relationships inter alia with competent authorities of the Member States, the European Commission and Council as well as with relevant Non-Member States. The Executive Director is assisted by a Deputy.

At the organizational level, the agency has been structured into three divisions with several sub-departments each: The Operational Division, the Capacity Building Commission and the Administration Division. The structure seeks to offer an integral approach to best observe and to respond to developments in connection with border security.

4.2.2. Budget, Resources and Instruments

Article 29 EC 2007/2004 defines the budget of FRONTEX. The agency is granted an autonomous budget with revenues coming basically from a contribution from the Community and the Member States of the Schengen *aquis*. In its founding year, FRONTEX’ budget was restricted to cover costs for the meetings of the Management Board and staff in general. Budgetary costs were however in need of an approval of the EU Commission. This changed in 2006 when FRONTEX became financially independent (FRONTEX 2005: 4, 2007: 21). The budget increased significantly in the course of recent years – nearly quadrupling from 19 million Euros in 2006 to more than 87 million Euros in 2010. An increase that clearly mirrors the rapid growth of the border agency (Pollack, Slominski, 2009; Official Journal of the EU, 2010).

THE BUDGET OF FRONTEX	
Year	Euro
2005	2.133.000
2006	19.166.300
2007	42.150.300
2008	70.432.000
2009	88.815.071
2010	87.917.000

Retrieved from Pollack/ Slominski (2009), Official Journal of the EU (2010)

In 2006 and 2007, the initial budget guideline was further amended to be able to cover additional operational activities and recruit further staff (Pollack/ Slominski, 2009). The main part of the budget is used for Operational Activities whereby controlling sea borders is the biggest post, followed by training and controlling land borders (FRONTEX 2008). The increases in budget were accompanied by a growth of the staff working for FRONTEX.

	End 2005	End 2006	End 2007	October 2008	End 2008	2009	2010
TOTAL	43	72	131	181	219	254	222

Retrieved from COWI Report (2009), FRONTEX Website (2010), FRONTEX Programme of Work (2009)

According to Article 17 of the EC Regulation 2007/2004, the Staff Regulations for officials of the European Communities apply also to the Agency's staff (COWI Report 2009). FRONTEX does not have officials on permanent contract. The staff is composed of temporary agents, contract agents and seconded national experts (FRONTEX 2010)⁹. Hereby it is important to mention the high number of seconded national experts (SNEs) as part of the composition of FRONTEX' staff. These experts are still employed by their home countries to whose national agencies they are aligned and have shorter terms in office than regular FRONTEX staffers. In 2010, 68 agents are reportedly SNEs which can be considered a relatively high share of overall FRONTEX staff (COWI Report 2009; Pollack, Slominski, 2009). In order to facilitate and strengthen the work of border controlling, FRONTEX has established several instruments, the most important of which will now be described shortly described.

In May 2007, the *European Patrols Network (EPN)* started its work. Following the principle of burden-sharing, it unifies the already existing patrolling activities of the concerned Member States¹⁰ to make the control of the maritime borders more effective and to develop mutual trust by regularly exchanging relevant information (EU Commission Memo/07/203). Two month later, the European Council and the European Parliament put forward a regulation, (EC 863/2007), "establishing a mechanism for the creation of *Rapid Border Intervention Teams* and amending Council Regulation (EC) No 2007/2004". These *Rapid Border Intervention Teams (RABIT)*, currently consisting of a pool of 500 – 600 officials of Member States border guard agencies, should serve Member States in "situation[s] of urgent and exceptional pressure [...]" for example "the arrival at points of the external borders of large numbers of third-country nationals trying to enter the territory of the Member State illegally [...]" (Art. 1 Regulation (EC) No 863/2007). Following Article 7 EC 2007/2004, FRONTEX also established *Centralised Records of Available Technical Equipment (CRATE)* which compiles a list of equipment, such as vessels, aircraft or helicopters belonging to European Member States that can be made available upon a request of another Member State's border guard agency. The technical records of CRATE enhance as well FRONTEX' coordinated joint operations as they can reduce ad hoc requests for technical assets (FRONTEX 2010)¹¹.

When looking at the establishment of FRONTEX through the eyes of Scharpf's theory we are looking at the input side of legitimacy. Delegation of powers to European agencies must follow the modes and standards of democratic legitimacy. In the case of FRONTEX, as such an agency, the composition of the management board and the vote on its director are portrayed as crucial with regard entrusting it with democratic legitimacy. With one representative of each participating Member State and two representatives of the Commission in its management board, controllability over FRONTEX seems, in this context, to be given (Carrera, 2007/Leonard, 2009). Hereby one can positively conclude that as well "the chain of legitimacy" to the office holder with regard to the election of the executive director is not interrupted which is one argument to confirm input legitimacy so far. Procedures, mechanisms and regulations were created in order to answer the call for better border security at best and to integrate the wish of the Member States. However considering Scharpf's defined lack of collective European identity

⁹ http://frontex.europa.eu/job_opportunities/general_information/ (accessed 1 June 2010)

¹⁰ Member States participating in EPN: Portugal, Spain, France, Italy, Slovenia, Malta, Greece and Cyprus.

¹¹ http://www.frontex.europa.eu/newsroom/news_releases/art26.html (accessed 31 May 2010)

one can assume that the interest and involvement of Member States is more driven by a ‘national interest’ than by an ‘European interest’ depending on the fact if a Member State is directly affected by illegal immigration or not. In which way this influences input and output legitimacy shall be a question to be discussed later.

Concluding it can be said that with regard to the changes after the Schengen *acquis* the European Union was in need of a common solution concerning border management. FRONTEX was established and became within a short time a key player in European border security which conveys for example the annual increasing budget and staff members. However the myriad of different actors, programmes and mechanisms that lay the groundwork for FRONTEX’ work let its significance and concrete functioning appear rather opaque and confusing though. Before one further assesses the presented actors and instruments with regard to efficacy, it is therefore worthwhile to briefly contrast the institutional and official emergence of FRONTEX with how the agency is perceived in the media and the civil society. For one, a clear and positive public perception is one of FRONTEX presented goals (as described above), it can moreover give a better understanding how the principles of FRONTEX and its work are taken up and evaluated in the public. In other words, how does the public opinion correspond to FRONTEX official design? The following chapter thus seeks to give a short outlook on the perception of FRONTEX in the media and the civil society.

5. Media coverage and the opposition of civil society

FRONTEX, as a coordinator and supporter of operations at the frontiers of the European Union, has to face the public opinion of a large number of civil society organizations, initiatives and parts of the media which, one is inclined to believe, seem to see the border agency often as a resolute if not immoral institution, responsible for the plight and death of hundreds of people at Europe’s external borders. Yet despite the sturdy opposition of Civil Society Organizations, the European Union continues to strengthen the role of FRONTEX and underlines its vital importance, as do national governments. Most newspaper articles or television reports are meanwhile dominated by disturbing pictures of overcrowded boats with poor, hopeless people trying to make their way to reach Europe. Statistical numbers showing the arrival of migrants every year help to create an image of an ‘invasion of migrants’ to Europe against which, it seems, the European Union aims to fighting against with FRONTEX at the front. Against this background it seems that the public presentation of the agency cannot be left ignored. It is therefore the aim of this brief chapter to present the criticism – voiced by major civil- society advocacy groups and surfacing in mainstream media report – in order to extract the core points for the subsequent discussion.

5.1. FRONTEX and the Verdict of Civil Society Organizations

Since FRONTEX became operational, it is steadily observed by Non-Governmental Human Rights Organizations that are highly critical in their evaluations of its work (Marenin, 2010). Furthermore, several websites and blogs like no-racism.org, noborder.org,

frontexwatch.antira.info or borderline-europe.de have emerged as even stronger critics of FRONTEX.

In the debate, the German *Pro Asyl* is one of the most vocal Human Rights advocacy organizations harshly criticizing FRONTEX. Its core claim: “Stoppt das Sterben” (Stop the Dying) shows unequivocally what they believe FRONTEX must be blamed for. In their opinion, FRONTEX stands for the European Union’s aggressive fight against migrants and refugees. Due to massive controls at the EU borders, they argue, migrants have to take much longer and more dangerous ways to reach Europe whereby they risk their life and often die. In order to hinder migrants to reach European coasts, FRONTEX is patrolling in cooperation with national border guards outside of European borders aiming to push the boats back to where they came from. Through the eyes of *Pro Asyl* such activities are clearly violating human rights and, specifically, the right to seek asylum. They point to the fact that there are no binding guidelines for FRONTEX to follow the European Convention on Human Rights or the Geneva Convention on Refugees. *Pro Asyl* hence demands to give every refugee the right to file an application for asylum, thereby clearly positioning itself politically against the operations conducted by FRONTEX.

Amnesty International follows a similar approach. In its journal “With one’s arms folded” (Mit verschränkten Armen ,2009), the human rights organization mourns that the European Union explicitly created an area of freedom, security and rights but only with inner effect. Outwards, it says, the European Union is sealed off. *Amnesty* describes that immigration is seen under the aspect of fighting against clandestine immigration and treated as a threat to security. In this light, FRONTEX merely epitomizes what is deemed a mistaken and dangerous approach. *Amnesty* also criticizes the way FRONTEX and national border guards are aiming to force back migrants out of hand in which there is no possibility to examine if they might be able to legitimately claim refugee status. Together with *the Forum of Human Rights* and *Pro Asyl*, *Amnesty International* commissioned a legal opinion to examine Human Rights requirements and measures of border control at sea (Fischer-Lescano 2007a). The opinion states that the rejection of migrants is illegal insofar as the examinations of the individual right of protection is not completed. *Amnesty* therefore urges FRONTEX and the European Union to establish a binding code of behaviour for border guards, one it claims doesn’t exist (the aspect is further developed below), more parliamentary controllability to accompany operations of FRONTEX and proposes criminal charge if cases of death occur during an operation (Wierse, 2009).

In the same vein, the German *Evangelischer Entwicklungsdienst* (EED), an organization of the protestant church, says it is afraid that Europe will lose its credibility continuing to contravene the Geneva Convention on Refugees by rejecting people on the high sea with the help of FRONTEX (EED 2009).

Another dominated group in the discourse, the *Informationsstelle Militarisierung* published two brochures aiming to present the public what it says is a clarification about the work of FRONTEX. Its main point of criticism is the infringement of asylum and the militarization of the issue. It argues that European migration policy is more and more militarized, using FRONTEX as an arm against migrants. FRONTEX, led by a military commander, is operating without the control of the European Parliament in a ‘legal grey zone’, it warns. After all, it is here

not seen as a new solution to migration issues but rather as a hampering and prolonging of the escape route and thereby plight of refugees and the reaction to with brute military force (Informationsstelle Militarisierung e.V., 2009).

As this outline suggests, through the eyes of Civil Society Organizations, it is difficult to find somewhat positive acclaim of the agency's work. As do the political stakeholders involved, the agency itself strongly rejects the claims. Without judged the claims at this point it should be noted that FRONTEX does cooperate with the Office of the United Nations High Commissioner for Refugees (UNHCR) in order to exchange expertise, experiences and information especially on mixed migratory movements towards the European Member States. The agency also maintains that it is closely working together to prepare "general and specific training materials and tolls on international human rights and refugee law applicable to the context of border management." (FRONTEX News releases, 18.06.2008). A similar cooperation is fostered with the International Migration Organization (IOM). (FRONTEX News releases, 02.12.2008).

5.2. FRONTEX in the Media

Since FRONTEX is closely linked with European integrated border management policies, mainstream new reports about FRONTEX are always connected to issues of migration and European borders while the agency is mostly seen as the "major player" in this context (Spiegel, October 2008). In the initial years after its establishment, one of the main points regarding the work of FRONTEX has been its lack of effectiveness to avert the continuously high number of migrants beginning the risky journey to Europe.¹² In this context, the *BBC* stated that "FRONTEX has limited powers" and hence is not able to fully support the Member States to 'rescue' migrants on high see (BBC, July 2007). This was repeated by the British *Sunday Times* newspaper which featured an interview with a representative of FRONTEX who emphasized that the agency had only a supporting and coordinating role since the responsibility of border control rests with EU Member States (Sunday Times, 2007).¹³

In October 2009, Germany's primary public channel *Das Erste/ ARD* featured a documentary which was highly critical of FRONTEX' work - the title read "Fortress Europe – how the EU keeps refugees at bay by any means possible". Referring as well to the claims of *Pro Asyl* and *Amnesty international*, the report dealt with the destiny of thousands of refugees desperately trying to reach Europe. The European Union, fighting against the arrival of refugees, created its "own organization" to secure its borders explained the moderator. Several interviews with migrants and representatives of the *German Institute for Human Rights* and the above-mentioned *Evangelischer Entwicklungsdienst* underlined the core statement that European national border guards, aided and supported by FRONTEX, are violating human rights.

An "outrageous course of action of European border control", "Wild West on high sea", "not compatible with the Geneva Convention on Human Rights" criticized the left-leaning national newspaper *Frankfurter Rundschau* (Frankfurter Rundschau, October 2009). The liberal *Süddeutsche Zeitung* raising similar points however quoted FRONTEX Director Illka Laitinen who

¹² In Malta alone, 1.780 migrants were identified (BBC, July 2007),

¹³ Similar reported at *Tagesschau* (January, 2007), *Frankfurter Allgemeine* (August 2007)

referred to the agency's cooperation with UNHCR and added that border control as such was not to be meant to be the solution of migration issues (Süddeutsche Zeitung, June 2008).¹⁴ In July 2008, the left-leaning *Tagesspiegel* from Berlin added another point in its article "Refugees: Silent Place Warsaw", namely that many information about how FRONTEX is exactly planning and organizing its operations remains secret to outside monitoring (Tagesspiegel, July, 2008).

Articles in recent time tend to be rather positive though. "FRONTEX is something to the effect of a basis of solidarity", helping Member States to support each other in the field of border control, the *Süddeutsche Zeitung* said in January 2010. It went on to argue that since FRONTEX started its work the border, oversight has ameliorated and the number of migrants aiming to cross the Mediterranean Sea is decreasing (Süddeutsche Zeitung, January 2010). In the light of the establishment of the Lisbon Treaty and the Stockholm agreement, the conservative-leaning *Die Welt* reports about the strengthening role of the European border agency, and planned training for border guards to follow Human Rights (Die Welt, 2010). The center-left French *Le monde* added that FRONTEX should also strengthen the cooperation with countries of origin and transit of migration to ameliorate common border patrols (Le monde, February 2010). In the same context, the centre-right French *Le Figaro* reported that France and Italy are aiming to further strengthening the capacities of FRONTEX (Le Figaro, February 2010)¹⁵.

Deutsche Welle, Germany's international broadcaster, offered another point of critique: Since FRONTEX is dependent on the good will of the Member States, it is still very limited in its decision making procedure, *DW* suggested, referring to the EU commissioner Cecilia Malmström who demands to strengthen FRONTEX' executive power in order to make border control more effective. Moreover, it revealed that a common code of behaviour for border guards concerning deportation is planned to be established. Still, in the eyes of *Deutsche Welle*, strengthening the sphere of influence of FRONTEX is a delicate topic since Member States want to preserve their sovereignty. Hence, the outlet further concluded that it will be very difficult to make asylum and security policy an entirely 'common' project (Deutsche Welle, February 2010).

Linking the civil society discourse and the media debate to Scharpf:

When looking at Scharpf's theory one can say that this debate deals with the outcome legitimacy of the agency. In this regard it can be first asked if there is a common understanding or a common interest concerning border security which would be one of the requirements for output legitimacy (Thomassen, Schmitt 2004). Media and civil society both recognized that migration and illegal migration is a current and important issue which has to be addressed. They as well agree on the fact that it should be tackled on the European level and not individually. It becomes clear though that they are not satisfied with the outcome, the work of the agency so far arguing that the agency is not working effectively and that it violates human rights. The debate however reveals that irrespective of FRONTEC there is a common understanding and a common interest with regard to the importance of border security which generally approve the output legitimacy at least in this point. However it also demonstrated several points which question the operations of FRONTEX to which we will come back in Chapter 6.

¹⁴ In a radio report, the public channel Deutschland Radio argued similarly (January 2009)

¹⁵ Similar at Euronews: "More power to FRONTEX" (February 2010)

Besides it can be pointed out that against Scharpf's opinion that there is until now no collective identity in the European Union and in consequence no European public controversies, the discourse of media and civil society however were on a European level and not only on a national one.

5.3. Relevance of the Public Debate

Reviewing the main points in the debate led by non-governmental actors and the media, it has been said that concerns greatly concentrate on the role of human rights. Across the board, FRONTEX stands accused for violating the European Human Rights Convention and the Geneva Convention on Human Rights. If, and where, the debate is taking place in the media, these claims are mostly echoed. But as the review tried to show as well, beyond the unequivocal claim of human rights violations there are also other, sometimes more subtle critical points about FRONTEX that should be considered and challenged in the subsequent discussion in this paper.

To take one, the ineffectiveness of the agency's work, claimed for instance by articles of the *BBC* and the *Sunday Times*, leads to the question of how and with which effect joint operations take place at the external borders. In this regard, one should also ask to what extent FRONTEX actually provides a network of consultation or 'a base of solidarity' as the German *Süddeutsche Zeitung* puts it?

Emphasizing on the one hand the importance of the relationship of FRONTEX Member States and relevant Non-Member States, on the other hand the agency is judged to be still very dependent on their and limited in its own decision (*Deutsche Welle*). Since Member States decide how much sovereignty they would like to transfer, the analysis should assess how this relationship affects the work of FRONTEX?

And to take a third point, with regard to human rights the question of controllability is highly relevant. Is there indeed no outside oversight, as *Der Tagespiegel* and other suggest? It seems that the discussion can only be drawn to a close by answering what parliamentary controllability there is, from national parliaments and moreover the European Parliament. One can see that despite the overall relatively negative reception of FRONTEX in the public debate, these points of criticism can offer a valuable guideline, and can be translated into legitimate questions, for a nuanced, objective discussion that shall follow in the next chapters.

6. Workings and Operations of FRONTEX

As mentioned in the second chapter, central tasks of FRONTEX are financial, technical and coordinative assistance in operational cooperation between the Member States, return operations assistance to Member States to train national border guards, risk analyses and research development. The previous chapter however opened a range of questions concerning mainly operational activities of FRONTEX. In this regard it is crucial to take a closer look at the workings of FRONTEX in order to be able to correctly integrate the arguments put forward by the public discourse. The aim of the following chapter is thus to take a closer look at the role of FRONTEX ‘in action’. After a presentation of the dimensions of operations cooperation the operation HERA will be analysed as a case in point. The findings of the previous chapter will serve as a main thread in the assessment. A detailed review of its role in multi-national operations cooperation, data-gathering and cross-institutional consultation processes will follow in the second part of the chapter.

6.1. Dimensions of Operations Cooperation

One of FRONTEX’ tasks defined in Article 2 EC Regulation 2007/2004 is to coordinate operational cooperation along the external borders of the European Union. Speaking of operational cooperation one can distinguish different activities. At so-called *Focal Points* i.e border crossings, border guards of one Member State work together with border guards from visiting Member States in order to exchange daily practices and experiences. Then, there are *Pilot projects*, first time joint operations of Member States whereby a successful pilot project can further lead to a more regular joint operation. Finally, *Joint Operations* are activities at sea, air and land borders in which FRONTEX takes on the planning, communication and the cooperation and pools expert border guards from Member States, in order to form the *Joint Support Teams* which can be deployed in focal points, pilot projects and joint operations (COWI Report, 2009¹⁶). The following analysis will focus on joint operations since they are at the heart and mainstay of cross operational cooperation. As already mentioned, three areas of activities can be distinguished:

Land Operations

Land Operations cover European border control at the external land borders. Hereby important is the operational cooperation with the neighbouring Non-EU states beyond the external borders. Joint operations in this field aim at identifying illegal routes into the EU as well as discovering illegal labourer and visa over-stayers¹⁷ (COWI Report, 2009).

Sea Operations

Guided by the principle of mutual solidarity between EU Member States, sea operation’s aim are detecting migrants by sea and stopping traffickers and smugglers. The host nation of an

¹⁶ The COWI Report is the first official external evaluation of FRONTEX conducted by an independent Danish consultancy firm, COWI A/S. The evaluation was originally mandated in Article 33 EC 2007/2004.

¹⁷ An Over-stayer is a person who “illegally remains in a country after the period of the permitted visit has expired”. (See: <http://www.thefreedictionary.com/overstayer>, accessed 8th June 2010).

operational cooperation is the country of destination of migration. The host nation is carrying out the operation together with FRONTEX, provides the management structures and the main part of the equipment whereby participating countries get as well an “inside into alternative border management methods” (Ibid.).

In recent years, operations became longer in duration and more complex. Sea operations now employ 60% of FRONTEX’ operational budget and counting (Ibid.). They represent an important support for Member States’ national activities. Without a clear borderline and points of control (which can be established at land borders), migration control at sea is much more complicated and cost intensive (Ibid.). Further, operations at sea are subject to a very complex legal framework since every participating Member States implements international conventions differently (Ibid.).

Air Operations

Joint air operations occur at EU airports and specifically aim at “targeting the abuse of visas and documents by third country nationals, detecting illegal immigrants, selecting high risk flights and initiating appropriate pro-active checks, updating the profiles and modus operandi of potential illegal immigrants, collecting, identifying and arresting human smugglers/traffickers.” (Ibid.). It should be noted here that due to the huge number of passengers going through EU airports, FRONTEX’ workings in this area are not wide-scale and its operational influence thus remains limited (Ibid.).

6.2. Implementation of FRONTEX’ Operations

Article 3 EC Regulation 2007/2004 identifies three different kinds of initiatives procedures which can result in a joint operation. One possibility could be that the agency itself, based on its risk analyses, proposes such a joint operation. A second possibility is based on the proposal for an operation done by the Member States whereby FRONTEX would evaluate the proposal before deciding whether or not it will co-finance the operation (Article 3 Section 4 EC Regulation 2007/2004). The third possibility arises when a Member State faces a certain situation wherein it requires assistance. Concerning the two latter impulses, FRONTEX conducts a risk assessment to evaluate the concrete situation whose results would be discussed with the involved Member States afterwards (FRONTEX Webpage)¹⁸. In a further step, a request is send to other Member States in order to ask if they are willing and able to participate and what they could offer regarding staff material. These offers are evaluated against the background of the concretely identified needs, for instance, the needed profile of experts or technical requirements of surveillance equipment. With the input of all participating Member States, the operational plan is then finalized (FRONTEX Webpage)¹⁹. The length of operations can strongly vary. Land operations are often repeated short term operations, for instance “SATURN” in 2009 had 4 operational phases of one month length each (FRONTEX Webpage)²⁰. The majority of air

¹⁸ <http://www.frontex.europa.eu/structure/operations> (accessed 6th June 2010).

¹⁹ <http://www.frontex.europa.eu/structure/operations> (accessed 6th June 2010).

²⁰ http://www.frontex.europa.eu/examples_of_accomplished_operati/art54.html (accessed 15th June 2010).

operations are shorter, mostly one month activities for example “SILENCE²¹” from June to July 2008 and “HUBBLE²²” from June to July 2009. Sea Operations have very different duration ranging from 31 to 365 operational days²³ (FRONTEX General Report, 2008).

As a standard, every joint international operation at sea is coordinated by an International Coordination Centre (ICC). Member of ICC are representatives of each country which offers human or operational support and one representative of FRONTEX (House of Lords, 2008). An equivalent to the ICC is FRONTEX’ Situation Centre (FSC). It is seen as a ‘single point of entry and exit of information’ concerning joint operations whereby the FSC processes and evaluates information before they transmit it. The FSC is consulted for joint operations at land and air (COWI Report, 2009).

After an operation has ended, it will be evaluated by FRONTEX. Meanwhile the operation will be continued by the responsible state, however without the assistance of other states (House of Lords, 2008). So far, FRONTEX has taken forward joint operations at any type of border (156 to day)²⁴. In 2008 and 2009 alone, eleven and thirteen air operation, thirteen and seventeen land operations and nineteen and twenty-two operations at sea border (FRONTEX General Report, 2009). The focus in this thesis will mainly be on operations at sea since they are not only the ones mostly discussed in the public but also receive by far the highest budget²⁵ and major strategic planning resources. On top, the European Council has consistently called for increased border surveillance in the Mediterranean area (European Council 15914/1/05, 2005). Specifically, the joint operation by the name HERA will be analysed in more detail. It is one of the operations most widely referred to in the scholarly debate and has so-far been the longest operation coordinated by FRONTEX.

6.2.1 The HERA Operation as Case in Point

In the beginning of 2006, FRONTEX has concluded in a report how the route from West Africa to the Canary Islands has become one of the important paths of illegal migration. This led to the decision to carry out a series of joint operations in this area (House of Lords, 2008).

In cooperation with Spain, FRONTEX chose a two track approach to tackle the situation. In the first track, called HERA I (July 2006), experts of various sorts²⁶ from different Member States²⁷ were deployed to support Spanish authorities on the Canary Islands in interviews with migrants. The results gave a better inside in the country of origins of the migrants which would facilitate their possible return. Further information on the facilitation of the migration flow led as well to several arrests of facilitators (FRONTEX 2010)²⁸. The second track, HERA II (August

²¹ http://www.frontex.europa.eu/examples_of_accomplished_operati/art42.html (accessed 15th June 2010).

²² http://www.frontex.europa.eu/examples_of_accomplished_operati/art58.html (accessed 15th June 2010).

²³ Operational days: MINERVA 33, NAUTILUS 152, HERA 315 (FRONTEX General Report, 2008).

²⁴ 2006- 2009 altogether 156 operations (FRONTEX General Report, 2009).

²⁵ In 2009 55% of the budget was used only for operations at sea (FRONTEX General Report, 2009).

²⁶ police advisers, trainers and observers, customs and drug enforcement officers, documents experts, delegates to regional and international planning groups and international/regional organisations (p. 33, Marenin, 2010).

²⁷ Participating experts came from France, Germany, Italy, the Netherlands, Norway, Portugal and the United Kingdom.

²⁸ http://www.frontex.europa.eu/examples_of_accomplished_operati/art5.html (accessed 8th June 2010).

2006), consisted of border surveillance operations, especially along the coast of Africa. They brought together technical surveillance equipment like vessels and aircraft from Member States such as Spain, Italy, Portugal and Finland, to enhance the control of the area between West Africa and the Canary Islands. Due to strong bilateral agreements with Mauritania and Senegal, European border surveillance was hereby in fact “externalized” to African territory which enabled EU border guards to stop refugees which were heading to Europe already at African borders (Carrera, 2007).

During HERA II 4953 immigrants were ‘intercepted’ on the African coast and 2507 ‘diverted’ back (European Commission SEC (2008), 150) which, in the interpretation of the organization is a success since they “were stopped from setting off for a dangerous journey that might have cost their lives” (FRONTEX Webpage)²⁹. The total budget for HERA I and II was 3,500,000 Euro (European Commission SEC (2008) 150).

However, since the immigration flow remained high, a third operation, HERA III, was launched in August 2007, following a request from Spain. As for its predecessors, a two track approach was used once again: Staff from Germany, France, Italy, Portugal and Luxembourg were deployed in the Canary Islands to examine the origins of illegal immigrants and measures against facilitation of illegal migration. The second track consisted of aerial and naval coast patrols along the coast of West Africa (FRONTEX Website)³⁰. Here 2,745,315,2020 Euro were spent. During HERA III, 2,020 illegal immigrants were intercepted and 1559 diverted back (European Commission SEC (2008) 150).

6.3 Assessing FRONTEX’ Operations

6.3.1 *Limited Access to Relevant Documents – A Lack of Transparency?*

Publicly available information about FRONTEX’ operations are to be found mainly in the FRONTEX annual reports and its website. However, details concerning the effectiveness of results are difficult to discover as FRONTEX does not mention any information on this in the annual report, meanwhile evolution reports on accomplished operations are not made available to the public (COWI Report, 2009). Agreements between Member States and Non-Member States will neither be published. In the critique of Papastavridis this undermines the legitimacy of operations like HERA and clearly strengthens the argument for more transparency and public accountability to which FRONTEX is required to in Article 28 EC Regulation 2004/2007 (2010).

In a UK House of Lords inquiry, Mr. Faull, the Director- General for Justice, Freedom and Security countered that FRONTEX is often using classified information and data of Member States to develop Risk Analyses which the agency has to treat confidentially in order to be effective (House of Lords, 2008). On the contrary, Jeandesboz (2008a) recommends in an analysis on future development of FRONTEX requested by the European Parliament, that the European Parliament should be able to request Risk Analysis, evaluations on joint operations and

²⁹ <http://www.frontex.europa.eu/gfx/frontex/files/hera-statistics.pdf> (accessed 8th June 2010).

³⁰ http://www.frontex.europa.eu/newsroom/news_releases/art13.html (accessed 8th June 2010).

feasibility studies to be published in order “to enhance the transparency of EU activities in this area for European citizens” and to allow “independent external analyses and evaluations of FRONTEX to be developed”.

6.3.2 Impact of FRONTEX' operations

The *Commission Communication COM (2008) 67 final* considered the work of FRONTEX in view of its short operational time in general as very impressive. Additionally, when one searches for concrete evidence, the House of Lord's report for instance refers to a statement made by Illka Laitinen, explaining that HERA led to the decrease of over 70% of immigration to the Canary Islands which should be seen as a huge success. However, one has to keep in mind that a not so insignificant percentage of people might have just chosen another route to come to Europe (House of Lords, 2008).

With regard to the operational impact, one can conclude that the number of participating Member States increased which hardly would have been the case without the establishment of FRONTEX (COWI Report, 2009). However, in the context of actually controlling migration, the image remains unclear. Joint operations do have an immediate effect at European borders, migrants are apprehended and the pressure on the concerned borders is reduced. Nevertheless, the effect seems to be observed only during the conduction of an operation and soon lessens once the operation is over. The trend to more long-lasting operations is thus considered to enhance effectiveness (Ibid., Pollack/ Slominski, 2009). After all, one has to keep in mind that until now, FRONTEX' legal and practical scope for independent action still remains limited. The agency still has a coordinating role and, in terms of border operations, principally no executive power on its own.

6.3.3. Operational Involvement of Member States

There still exists a strong variation in Member States cooperative involvement. FRONTEX tries to motivate more Member States to take part in joint operations, however these are often the same ‘old friends’, Member States like Italy, Spain, France and Germany, who actually participate contrary to, for example, a country like Greece (Pollack/ Slominski, 2009). It is assumed that the inclination of financially weaker Member States to participate is due mostly to their inability to provide equipment for lengthy operations (COWI Report, 2009). As a case in point, one can look at the first phase of the operation NAUTILUS in 2007. Its stated aim was to observe immigration routes from Libya to Malta and Sicily. The first phase of the operation ended unexpectedly at the beginning of August 2007. Media reports cite financial reasons and insufficient participation of the Member States (c.f. Deutsche Welle, August 2007, Tagesschau June 2007) while no explanation about its ceasing is given by FRONTEX (it makes absolutely no mentioning of the events on either its Website or any published report). Furthermore, Malta recently stated that it will stop hosting FRONTEX missions since it is against the proposed new guidelines: “These guidelines charge countries responsible for the missions with taking in migrants found on the high seas, instead of having them taken to the nearest safe port” (Timesofmalta.com, April 2010).

These experiences show that FRONTEX is very dependent on the willingness of the Member States to actually participate. One should also reiterate that there is no legal obligation for Member States to provide financial and technical support in joint operations launched by FRONTEX (Carrera, 2007). In this context, Pollack and Slominski (2009) explain that Member States follow a ‘pick-and choose approach’ whereby FRONTEX is seen as an instrument to support and finance ad-hoc cross-national border management. Sergio Carrera (2007) contends similarly that European joint operations seem to be very ‘emergency-driven’. He argues that HERA I, II and III were launched as a rapid answer to the pressure of the Spanish Government and the media which publicly “over-dramatized” the overall situation urging the European Union to act against the “invasion of migration”. For the future, it could well be that Member States will prefer to patrol their waters independently even in cooperation with other Member States, but without the contribution of FRONTEX or complementary to the actions of the agency (Rijpma, 2010).

6.3.4 Legal Ambiguities on the High Sea

The legal analysis cannot be outlined in detail in this paper but some points of the discourse are worthwhile to be considered when assessing the working of the organization. A thorough analysis of the legal framework of FRONTEX by Lescano and Tohidipur (2007) points out that especially during the operations of HERA, practical and judicial problems became visible. The authors demonstrate that the principle of non- refoulement applies also outside the European territorial waters which would mean that the refoulement of migrants during the operation HERA, even in the coastal waters of third States, was against the Geneva Refugee Convention. Klepp (2010) argues similarly, saying that the missions of FRONTEX to prevent boats from landing in EU territory “clashes with the basic cornerstone of European refugee protection”. Papastavridis (2010) further points to the fact that, indeed, operations at sea face an ambiguity of relevant legal and judicial obligations for their actions as joint operations at sea touch not only fundamental rights but also international human rights and refugee law which have to be related with the law of the sea.

6.4 FRONTEX' Role in Data-Gathering and Policy-Setting

FRONTEX operations are intelligence driven and based on threats and risk analyses which are carried out by the Risk Analysis Unit (RAU) (FRONTEX General Report, 2009). With the words of Ilkka Laitien, this is the “inner core of the methodology of Frontex” (House of Lords, 2008). Thus, what role does FRONTEX play in data-gathering and policy-setting?

Risk Analysis describe among other issues the roots of migration, the situation of the countries of transit, patterns of irregular movements as well as statistics of irregular flows and displacements, modus operandi, etc. (Carrera, 2007). In this regard a whole series of phenomena is linked together under the category of threat whereby visibly logic of anticipation and management and not really one of response to these threats is used according to Neil (2009). Due to, as FRONTEX explained it, sensitive data provided by Member States, risk assessments are completely secret and not classified for the public (Ibid). The Risk Analysis Unit produces Annual Risk Assessment (ASA) as well as Semi-Annual Risk Assessment (SARA) which are

delivered on a regular basis to the Commission, but not to the European Parliament, the only directly elected branch of EU governance (House of Lords, 2008). This is a regrettable lack of transparency and is surprising since risk analyses serve as impetus and basis of all operational activity (Carrera, 2007/ Jorry, 2007). The British House of Lords thus recommended changing this situation (House of Lords, 2008). As well, the European Parliament demanded several times to be included in the flow of information (European Parliament, 2008/2157(INI)).

RAU, composed of a mixture of experienced border guard officials and experts with customs background, uses the Common Integrated Risk Analysis Model (CIRAM). CIRAM provides a common risk analysis methodology for Member States and enables the collection, analysis and distribution of border security related information (Carrera, 2007). Hereby FRONTEX connection to ICONet should be mentioned as well. It is a web-based information exchange system which should contribute to all migratory authorities (Pollack/ Slominski, 2009).

Due to its limited mandate, FRONTEX has poor access to criminal and military intelligence delivered by the Member States. Leaving the data-gathering in this case to Europol seems to undermine the range and usefulness of FRONTEX risk analysis (COWI Report, 2009).

With regard to the secrecy of risk analysis one has difficulties to judge on which legitimate basis decisions are made (Marenin, 2010). It is as well against FRONTEX' commitment to transparency and accountability defined in Article 28 of its founding Regulation. In a recent Commission staff working document (SEC (2010) 149, 2010) the weakness of risk analysis concluding the problem of lacking access to relevant data is considered and planned to be changed.

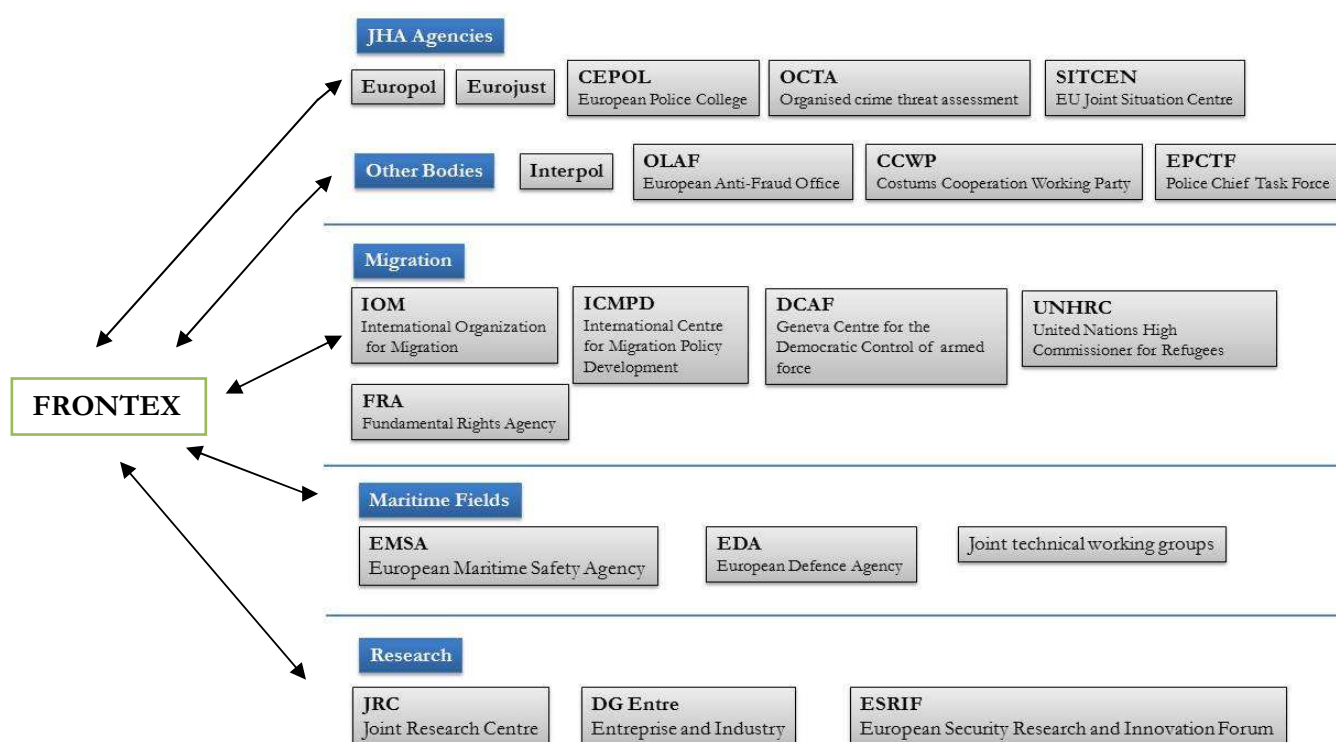
6.5. FRONTEX' Network for Consultation

As formulated in *Article 13 EC Regulation 2007/2004* FRONTEX shall enhance cooperation, not only between Member States, but moreover with other EU agencies and international organizations. In this regard FRONTEX presents in its General Report of 2008 a 'network'-concept, that aims at "looking for strategic partners in various fields affected by border management activities [...] which can contribute to improve integrated border management." Its closest partner in the field of common security and justice is Europol with which it is collaborating since 2006. An official co-partner agreement was established in 2009 (FRONTEX General Report, 2009), whose content is however not publicly available. In the last years, FRONTEX contributed to Europol's "Organised Crime Threat Assessment, ("OCTA") (European Commission COM (2008) 67). Since FRONTEX does not have the means to regularly infer personal data of 'its costumers', its cooperation with Europol and in the same way with Interpol, where it has unlimited access to their data about human trafficking, seems essential for the establishment of its own risk analysis (COWI Report, 2009; Fischer-Lescano/ Tohidipur, 2007). Similar cooperation is fostered with Eurojust, SITCEN, CEPOL, and others (FRONTEX, General Report, 2009).

The cooperation with the United Nations High Commissioner for Refugees, the International Organisation of Migrants, mentioned earlier, and the collaboration with the Fundamental Rights

Agency (FRA) are examples for cooperation agreements in the field concerning migration with the focus on the protection of the people. The focus hereby is on guidance and training in the main principles of international law and refugee protection (FRONTEX, General Report, 2009) as well as exchange of information with regard to asylum practices and human trafficking (FRONTEX Webpage, 2009)³¹.

In the field of maritime surveillance, cooperation are fostered with the European Maritime Safety Agency and the European Defence Agency, in order to exchange information and expertise (FRONTEX Webpage, 2009)³². The Joint Research Centre (JRC) is besides the DG Entre and the European Security Research and Innovation Forum (ESRIF) the most important partner for FRONTEX in the field of Research and Development.



(Overview based on FRONTEX General Report 2009; COWI Report, 2009)

As this figure shows, the plenitude of partnership arrangements and agreements of FRONTEX with other European agencies or international organizations give reasons to infer that FRONTEX seems to be well-embedded in the cross-institutional framework of European security and border policy. The main benefit for the organisation and thus prime reason for cooperation is obviously the exchange of and access to information and expertise. Despite the formal ties outlined above, agreements present often broad stipulations while more concrete information about how cooperation partnerships will manifest themselves in reality and over

³¹ http://www.frontex.europa.eu/newsroom/news_releases/art66.html (accessed 14th June 2010).

³² http://www.frontex.europa.eu/newsroom/news_releases/art74.html (accessed 14th June 2010).

time, remain rather vague. Cooperation in joint operations with inter alia Europol, Interpol or UNHCR are indicated in the General Reports of FRONTEX, yet without the provision of further information (e.g. FRONTEX General Report, 2009). In this regard, the House of Lords (2008b) made “a call for evidence”, demanding to clarify to which extent the Agencies are in need and practise of actually cooperating. To conclude, it can be noticed that until now no structured dialogue with civil society organisations has been pursued, a critical finding if mirrored with the public interest in the workings and lively media debate about FRONTEX (CH 2).

Conclusion

The look at the workings of FRONTEX indeed has shown that the role of the organisation “in action” is very complex and multilayered. Since most documents about concrete results of operations and analyses are only partly publicly available, judgements about the successes of the organisation are limited in the broader scholarly discourse. It can be stated that, without FRONTEX, some of its noted achievements concerning migration control and cooperation, could have unlikely been achieved by Member States alone. Nevertheless, FRONTEX still seems to remain an ‘option’ of cooperation for Member States and not an ‘obligation’ for them to cooperate – from the perspective of the organisation and the reasoning behind its installation an unsatisfying finding. Difficulties during joint operations occurred mainly because of the limited mandate of FRONTEX or because of missing cooperation on the part of the Member States. In this regard, one is prompted to ask which kind of influence Member States have on FRONTEX and how they evaluate, and actually shape its role? As voiced by media and international organizations earlier, another claim clearly resurfaced in this chapter once again: The role of the European Parliament too is limited. Indeed, it can so far not guarantee the transparency of FRONTEX activities. Especially in view of the black spots in the debate about FRONTEX, it seems that the question of parliamentary control ought to be further explored. The remaining part of this thesis shall with the help of Scharpf’s theory tackle these central concerns.

7. Legitimacy, Controllability and Accountability of FRONTEX

By analysing the workings of FRONTEX so far, it became clear that there are considerable factors which prevent it from acting in political immunity (Carrera, 2007). In fact, the involvement of the Member States and their relationship with FRONTEX play a determining role in the organisations workings. At the heart of this debate, the fundamental question still is how FRONTEX' actions as a public agency are to be legitimized? Looking at mediatised concerns about the agency's workings, voiced by non-governmental organizations and journalists (c.f. CH 5), it becomes obvious that the public is concerned with the fact that every year thousands of migrants are seeking refuge status in Europe and asks for the European Union's problem-solving capacities with regard to migration policy. As outlined in an earlier chapter, after very critically discussions about FRONTEX in the beginning, the media now tend to portray the utility of FRONTEX as a coordinator between Member States in European border policy issues more positively. It is still repeatedly criticised though that FRONTEX depends strongly on the goodwill of Member States under which consequently the agency's efficiency is suffering. Further critiques about the violation of Human Rights during FRONTEX' operations point to the secrecy of FRONTEX' operations which suggest that the wider public does not and cannot know what exactly happens when people are detected by FRONTEX on the high sea. The question of the legitimacy of the agency's workings as well as its accountability to the European Parliament appear consistently throughout reports of numerous organizations, some of which are even calling for FRONTEX to cease its activities.

In order to further asses the legitimacy, controllability and accountability of the agency I will again link the existing findings with Scharpf's (1999) theory of input- and output- legitimacy.

Since the European Parliament is the only direct source of democratic legitimacy on the European level, that is to say, the European organ which is publicly accountable, the analysis will end with an outlook on the realm of parliamentary input and control of the European Parliament.

7.1. Output Legitimacy

Keeping in mind that it is still a very young institution, one can first of all say that the agency achieved a first improvement of the involvement of Member States in operation cooperation at the external borders. In this way, it aims at contributing to the 'solidarity' between Member States in this policy arena, a fundamental objective of the European Union and, in Sharpf's theory of legitimacy, an attempt to serve the people through a collective governance approach. Yet, as we saw with the actual implementation of joint operations (c.f. CH6), FRONTEX is very dependent on the willingness of Member States as issues of border control are strongly linked to the question of sovereignty of Member States. This, in turn, results in a dominance of national interests concerning any reform of FRONTEX (Carrera, 2007). It became obvious for instance in 2002 when the proposal to establish a "European Border Police", supported by Germany, Italy and Spain, failed due to the reluctance of other Member States, like the United Kingdom or Scandinavian countries, who preferred a less ambitious approach (Jorry, 2008). Following years of

discussions about the operational cooperation between the agency and the Member States, the EU Commission recently developed new guidelines and amendments of the FRONTEX Regulation EC 2007/2004, (SEK (2010) 150). The discussions and vivid debates in the framework of the European Union with regard to these guidelines offer a case in point of the behaviour and political exertion of influence of Member States when it comes to increasing the agency's effectiveness.

5.1.1 Enhancing FRONTEX' Output-Legitimacy – A Question of Member States' Willingness

An apparent lack of willingness of Member States in the past to provide technical support and staff and to set common standards in this regards, would hamper the flexibility of FRONTEX and make the long-term success of operations impossible, the EU Commission argues, saying that cooperation was so-far still “inefficient” and “inadequate” (ibid.). The central aim of the new guidelines is therefore the reform and strengthening of the mandate of FRONTEX. Here, it is for instance important that Member States which currently contribute technical and personal assistance voluntarily are asked to now provide a minimum contingent regarding staff and technical assistance. The agency would still compensate for costs, such as for borrowed helicopters or border guards. Under the new plans, FRONTEX would have the right to launch its own operations with the access to its own staff and technical stock. This means that it would be provided with a leading role in conducting and coordinating joint operations and return operations. Its mandate would also be strengthened with regard to the ability to foster agreements with non-member countries which are seen as essential for the success of an operation. Finally, the guidelines should ensure that international rules³³ are uniformly applied by all Member States which take part in operational cooperation coordinated by FRONTEX (ibid.).

The European Presidency, currently held by Spain, is in favour of providing FRONTEX with “more resources, clearer rules and specialist officers”. The Spanish Minister of Home Affairs, Pérez Rubalcaba, argues that a more independent agency could work more effectively to secure Europe's External Borders.³⁴ The United Kingdom similarly supports the proposed amendments and welcomes the strengthening of FRONTEX' role (House of Commons, Webpage 2010)³⁵. Already in its ninth edition, a 2008 report on the development of FRONTEX by the UK House of Lords, recommended general guidelines (House of Lords, 2008). However one has to keep in mind that the United Kingdom is, even though contrary to the wish of its government, excluded from full participation of FRONTEX since it is not member of the Schengen acquis and hence not bound by the Regulation. The German Government commented similarly positively on the strengthening of FRONTEX' mandate and approved that it complies with the principles of subsidiarity and proportionality (Deutscher Bundestag, 2009). The changes are also welcomed by Austria (Statement EU-Ausschuss des Bundesrates, 2010), Portugal and Sweden (European Parliament Webpage, 2010)³⁶.

³³ The Convention on the Law of the Sea (UNCLOS), conventions on safety at sea and search and rescue and the international law on refugees and fundamental rights.

³⁴ http://www.eu2010.es/en/documentosynoticias/noticias/feb3_rubalcaba (accessed, 16th June 2010).

³⁵ <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmeuleg> (accessed, 16th June 2010).

³⁶ http://www.ipex.eu/ipex/cms/home/Documents/dossier_COD20100039/lang/en (accessed, 16th June 2010).

On the contrary, the Polish Senate is strictly against new empowering rules for FRONTEX. It argues that “the proposal does not comply with the subsidiarity principle under Article 5 (3) of the Treaty of the European Union”. In its point of view, Member States themselves can control their borders at best. It should therefore be the Member State which is free to decide about the amount of staff and technical assistance to provide and the one to have the final say on matters concerning any operations at their territory (Interinstitutional File: 2010/0039 (COD)). The new guidelines contain as well the aim that recorded refugees should be transported to the country hosting a FRONTEX mission, such as to avoid disputes like the one between Italy and Malta which couldn't agree on which country would have to take the recorded immigrants, in effect letting them be stuck on the high sea (ilmediterraneo.it, 2010)³⁷. Since Malta hosted several operations during the last two years after Italy did, both countries are now strongly objecting the new strategy of disembarkation. They feel that this would put again more weight on their respective country (ibid./timesofmalta.com, 2010)³⁸. Malta, due to its location a strategically important point for FRONTEX operations, even withdrew hosting further FRONTEX mission, stating that it wouldn't profit from the agency's missions anyway. The EU Home Affairs Commissioner, Cecilia Malmström, was quick to respond that with its huge border area, Malta could only gain from the support of FRONTEX. She pointed out that over the last years, Malta has received substantial financial support from the EU for that matter, too. Detailed regulations should further strengthen the solidarity between Member States and hence their contribution to operations that was lacking in the past, the Commissioner argues³⁹. Despite these disagreements the new guidelines were in the end submitted to the European Parliament, after Malta and Italy abstained in a vote in the EU Council (Söderköping Process, 2010)⁴⁰.

7.1.2 The Limited Role of the European Parliament in Determining FRONTEX' Output- Legitimacy

The draft guidelines emerged in form of an implementing measure based on Article 12 (5) of the Schengen Border Code (see Regulation (EC) No 562/2006). Combined with Article 33 of the Border Code, the Commission is authorized to adopt additional measures governing border surveillance in accordance with the comitology decision laid down in Council Decision 1999/468/ EC (Deutscher Bundestag, 17/847, 2010). The European Parliament has in this context only a limited role, that is basically to approve or oppose a draft without having the right of proposing any amendments. In the case of the new FRONTEX guidelines, the European Parliament actually voted against the draft. With 336 votes against, 253 in favour and 30 abstentions, the rejection was after all not strong enough to dismiss the guidelines, since according to the procedure, an absolute majority would have been needed to influence the legislative process (European Union @ United Nations 2010). In the voting, the majority of the Socialist group parliamentarians voted in favour of the guidelines, whereas Christian Democrats and the members of the Liberal party voted against it (timesofmalta.com, 2010)⁴¹. Although the political division behind the vote would suggest otherwise, the rejection seems to have been largely on procedural grounds. The Civil Liberties Committee (LIBE Committee), responsible to prepare the decision of the Parliament, explained more clearly in a Press Release that the

³⁷ http://www.ilmediterraneo.it/index2.php?option=com_content&task=v (accessed, 16th June 2010).

³⁸ <http://www.timesofmalta.com/articles/view/20100405/local/malta-mak> (accessed, 16th June 2010).

³⁹ <http://www.timesofmalta.com/articles/view/20100430/local/so-malta-...1> (accessed, 29th June 2010).

⁴⁰ <http://soderkoping.org.ua/page26766.html> (accessed 15th July 2010).

⁴¹ <http://www.timesofmalta.com/articles/view/20100503/local/meps-mull> (accessed, 3rd July 2010).

'dilemma' of European parliamentarians came from the fact that the guidelines had not been discussed under co-decision procedure. The opinion states that the guidelines as such are considered an important step in the right direction but that they also call for new rules to be enshrined in law in order to have a binding effect (LIBE Press Release, 2010). Since the Commission decided to take its implementing powers granted by the Schengen Border Code (Regulation (EC) No 562/2006), the European Parliament did not have the right to amend the proposal accordingly and therefore a majority of parliamentarians decided to oppose it (LIBE Press Release, 2010). As a consequence, the Committee decided to forward the newly adopted guidelines to the European Court of Justice to judicially challenge their validity on procedural grounds (EPP Group, Press Release, June 2010)⁴². It made the case that it has been wrong to deal with the new guidelines under the comitology and not the ordinary legislative procedure which would have given the Parliament, in that situation as a co-decision-maker, the power to amend rules as it wished to do. Stating that the Commission acted beyond its power, the European Parliament declared the guidelines as invalid (*ibid.*). During the whole process the European Parliament had called for more parliamentary scrutiny over FRONTEX actions at the European external borders, also referring to the criticism of non-governmental organizations (*ibid.*).

We shall turn to the question of greater parliamentary controllability shortly but so far, the case sufficiently illustrates that, with respect to enhancing (the effectiveness of) FRONTEX operations, there is little influence the European Parliament has to offer. With regard to the output-legitimacy – understood by Sharpf as the legitimacy FRONTEX gains through the effectiveness of its workings – it is the dis(unity) of the Member States that determines the degree of success. It can be safely concluded that, in general, the EU and FRONTEX have taken up people concerns regarding migration issues at the external borders. Specifically, risk analyses of the agency attempt to gather insides and knowledge with regard to the different ways of migration. FRONTEX is already well-embedded in the cross-institutional framework of European border and security policy. And, after some years of FRONTEX activities, the number of migrants coming to Europe also decreased significantly. To rule out one obviously intervening variable, the decrease might certainly be a consequence of global economic crises and their effect of employment possibilities in Europe. But as argued earlier, it cannot be denied that it might as well be partly a result of tougher border controls by the community and, specifically its border agency FRONTEX (BBC, June 2010⁴³/ Reuters, 2010⁴⁴). To prove without doubt that FRONTEX indeed brought an increase in effectiveness of EU border management is difficult since access to sensitive data about operations in the area is hard to come by. Predominantly, the contributions to the discussion in the course of adopting FRONTEX's new guidelines suggest that past cooperation on the ground is judged as being less effective than expected. In the same vein, the long-term efficiency of FRONTEX' operations is still unclear and it is repeatedly stated in the academic discourse that FRONTEX' mandate is still not broad enough to work effectively towards leaving the agency with a very own, profound output. Still, in Sharpf's theoretic framework and within the confines of FRONTEX mandate and with regard to the goals set during the establishment of the agency, one can say that it is overall gaining legitimacy by offering the EU public the greater output of effectively carrying out European policy objectives

⁴² <http://www.eppgroup.eu/press/showpr.asp?PRControlDocTypeID=1> (accessed 30th June, 2010).

⁴³ <http://news.bbc.co.uk/2/hi/world/europe/10339356.stm> (accessed 3rd July 2010).

⁴⁴ <http://uk.reuters.com/assets/print?aid=UKTRE65F2CD20100616> (accessed 3rd July 2010).

concerning integrated border management. Again, what this ‘output’ looks like, is predominantly determined by the willingness of Member States to shape it. To what extent the workings of the agency are actually justified, influenced or controlled by the European demos, is the second question to which we need to turn now.

7.2. Input Legitimacy

Apart from the output- dimension of legitimacy it is also crucial to look at FRONTEX with regard to the participation quality of the decision-making process that leads to the rules and laws mandating its work (Risse, 2006). In Scharpf’s (1999) theory, this classical idea is defined as Input-oriented legitimacy which will be assessed below.

7.2.2 Sources of FRONTEX Input- Legitimacy

FRONTEX was established under the consultation procedure, adopted by the Council alone. The European Parliament, at that time only a consulting organ, was not really integrated in the decision procedure and one could say that therefore important issues like accountability and transparency have been left ignored (Leonard, 2009). Meanwhile issues with regard to the control and surveillance of the EU’s external borders are adopted under the co-decision procedure (see amendment regulation 863/2007/EC, OJ 2007 L 199/30). As pointed out above, the adoption of new guidelines has not, however. According to Monar (2005), the lack of effective parliamentary controllability is “clearly most undesirable in an area of law enforcement where the rights of individuals can be particularly vulnerable”. The ‘network force’ FRONTEX which would have “significant impact on control and law enforcement practices and operations at external borders [...] requi[re] effective parliamentary control”, he argues (Monar 2005). This is even more important, as national parliaments have no direct influence on or control over decision-making. Furthermore, the European Parliament does not even receive several of the agency’s ‘output’ products, such as FRONTEX’ risk analysis or documents on operational operations. Since the Community budgetary procedure applies as well for FRONTEX it does however have some budgetary influence (House of Lords, 2008). In 2007, the European Parliament in fact decided to freeze 30% of the administrative budget until the agency would have improved its effectiveness and accountability mechanisms (ibid.). Yet, whether the budgetary restriction option can truly be legitimizing as an instrument of oversight and control is questionable. More so, since one has to ask how well the European Parliament can decide about the budget of FRONTEX while being excluded of the preparatory analyses behind the operations that it is asked to finance (ibid.).

7.2.2 Enhancing FRONTEX’ Input -Legitimacy – Avenues for the European Parliament

Replying to a question of a representative of the German liberal party concerning the controllability of FRONTEX, the German government replied that it is well established in the European community law whereby the European Parliament is integrated in the decision-making procedure, can read the agency’s annual reports, receives consulting status, as well the right to call on the agency to report about its actions. Further, the German government’s response expands the idea of legitimacy to the judicial level, arguing that the main emphasis of control is not just on

the European Parliament but on the European Court of Justice (Deutscher Bundestag Drucksache 16/13117, 2009). Still, in order to overcome the lack of transparency and therefore enhance the input legitimacy behind FRONTEX operations, the European Parliament certainly remains the most important actor. It is after all the only institution directly accountable to the European citizenship which has mandated it to make EU policy structures more visible and understandable. And, in light of the criticisms of FRONTEX, it has gained trust as an institution that worked hard to enhance the respect of human rights (European Parliament, 2009)⁴⁵. In the academic literature thus prevails a consensus that in order to resolve the democratic deficit and the lack of transparency of FRONTEX, the better involvement of the European Parliament is essential (Pollack/Slominski, 2009; Jorry, 2008, Carrea 2007, Puntcher Riekmann, 2008).

Since the mission of FRONTEX is closely linked to the exercise of public authority and the curtailment of fundamental freedoms, enhanced democratic and appropriate control is of great importance (Jorry, 2008). The European Parliament as the source of legitimacy should hence to insist to have greater access to documents relevant to the concrete workings of the agency. It should further be informed by FRONTEX about critical negotiations which conclude agreements with non-member states and tactical assessments that focus on particular border regions (European Parliament, 2008/2157(INI)). Evaluation reports on joint operations and other coordinated activities as well as feasibility studies, statistics on migration trends and risk analysis could be published by the FRONTEX' management board to parliamentarians or, at least, LIBE committee members, even if maybe leaving out very confidential data whose (limited) disclosure may negatively affect ongoing operations. This could improve the transparency of EU activities in this area for European citizens to whom EU parliamentarians could be much more effectively communicate the goals and achievements of the agency. It could therefore help to calm the fiercest critics and provide the greater possibility, as well as challenge, to factually conduct external evaluations and analysis of the agency (Jeandesboz, 2008.). However, should evaluations by FRONTEX be found lacking respect for community laws, the European Parliament would be called upon to commission its own assessment (ibid.). In these reformative steps, the LIBE Committee could play a guiding role.

To go a step further, the European Parliament could demand that a unit focusing on legal assistance to persons seeking international protection is established within the FRONTEX agency. Representatives of this unit could be present in FRONTEX' operations at the external borders and inform asylum-seekers and refugees about the legal and the resulting practical issues pertaining to their situation. In this regard, the cooperation with the UNHCR could be strengthened for example by giving the UNHCR an observatory status in the management board of FRONTEX as well as by fostering its participation during joint operations (ibid.). If parliamentary control were to be enhanced in the suggested ways, the Input- legitimacy behind FRONTEX – understood by Scharpf as the power of the people's (delegated) participation, could be significantly enhanced.

⁴⁵ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEX> (accessed, 16th June 2010).

8. Conclusion and Outlook

The aim of this paper was to critically and substantially sharpen the picture of FRONTEX, the European border agency that for some is a ruthless force for the deportation of migrants while hailed by others as an indispensable manager of security at the community's external borders. The analysis began by illustrating the emergence of and need for a community agency dealing with the management of the EU's borders. It is argued that since the establishment of the Schengen acquis and the abolishment of internal border controls, tackling illegal immigration from the 'external' has become one of the dominating challenges of EU border management. Against the difficulties such as the lack of compatibility between different national border guard services, the lack of financial and technological resources of some Member States, inadequate training and poor inter-state communication, the call for an institution that guarantees more coherence and efficiency in communications and operations seemed well-placed.

Established as a legal personality, independent with regard to technical and operational matters, the agency FRONTEX rapidly gained importance. The annual rise of budget and staff give testimony to the significance the European Union sees in its work. With the establishment of the European Patrol Network, the CRATE pool and the Rapid Border Intervention teams, instruments to facilitate the management of community borders were created. The thorough review of scientific literature, official European sources as well as the COWI Report suggest that FRONTEX finds itself well entrenched in an 'information- and 'expertise- exchange' network of relevant border policy institutions, and in view of the relatively short time it operates, contributes significantly to the harmonization of EU border management.

Yet, right from the day of its inception, the agency is faced with strong criticism in the public debate. Closely monitoring its work, several non-governmental organizations fiercely oppose its work. They conclude that its operations are inhumane and not in line with the human rights conventions the Union has ascribed to. Parts of the media tend to echo these judgments whereas overall, journalists today paint a less critical picture. In the media, FRONTEX is today portrayed as a major force against illegal migration, which is very dependent though on the goodwill of certain Member States. This public European discourse of media and civil society on the one hand shows the common interest in border management which is positive with regard to output legitimacy it however disproves, at least in part, with Scharpf's opinion that there is no common European identity and hence no European controversies.

Against the background of the media coverage and the opposition of civil society groups regarding the agency, the paper went on to analyze the actual workings and operations of the agency. It becomes clear that there is in fact not just FRONTEX as single agency at work at the EU's external borders but a myriad of different actors, programmes and mechanisms that, in combination, characterize what FRONTEX actually does and, at the same time what challenges it faces. As a case study, the fourth Chapter explored the joint operations at sea HERA (I,II,III) in more detail. It shows that even if one can paint a fairly accurate picture of FRONTEX' activities by evaluating the agency's general reports, there is a serious limitation in access to relevant operational information, post-operational evaluations or specific risk analysis. These data is all confidential which creates an unpleasant secrecy around the work of FRONTEX. This lack of

transparency undoubtedly contributes to the depth and severity of criticism against it. This paper cannot deny that it remains very much unclear how exactly the border guards under FRONTEX coordination truly show respect for human rights in their operation on the high sea. One must add that the ambiguity of relevant legal and judicial obligations is confusing law enforcement agencies and refugees alike. Admittedly, much of the situation cannot be blamed on the workings of FRONTEX. But it is against this background that we should try to ask to what extent FRONTEX activities can be considered legitimate and controlled. To avoid a politicization of the answer, this paper chose to rely on Scharpf's theory of legitimacy that is well-suited to incorporate both realms of the argument: The effectiveness of its work *for* the European people and the people's possibilities to influence its work – both of which are understood as a source of legitimacy.

The evaluation explicated that, first of all, the media claim of Member States influence is indeed correct: The efficiency of FRONTEX' missions is strongly dependent on the support of the Member States which hence negatively influences the outcome legitimacy. It is clear that FRONTEX is still a tool of the Member States. Having no legal obligations to participate, Member States motivation for and support of the agency can be very positively yet also negatively influencing the joint operation's success. The debate about strengthening the agency's mandate offers a case in point for the dominant interplay of political interest of Member States and the Commission as well as the limited avenues for the European Parliament to influence FRONTEX actual workings. It as well shows how input and output legitimacy are extremely interrelated and that it is therefore crucial to look at both sides of legitimacy. After all, one must conclude that stricter controls at the European borders lead to an increase of illegal immigrants coming to Europe which is a positive outcome. Certainly the sustainability of this operational outcome needs to be attended to by future studies when the agency has been operational for a bit longer. Nonetheless, it also becomes evident that an effective outcome cannot serve as the sole source for justifying the agencies existence and work. To a great deal excluded from information about analysis, preparatory work and evaluations of operational work, the European Parliament has until now only very limited controls when it comes to holding FRONTEX accountable. Accountability rest with EU Member States whose reluctance to publish what they deem are sensible information leads to the vacuum in which the criticism of civil society organization expectedly thrives and which as well shows a lack of input legitimacy negatively affecting the output legitimacy.

By suggesting some avenues for greater parliamentary involvement, the analysis in this paper leads to conclude that there must not always be a trade-off between an effective output of FRONTEX activities and the call for more accountability and transparency. It cannot be the interest of supporters of FRONTEX either to imply that the strength behind its operations lies in disrespect for international obligations regarding the treatment of refugees. Its opponents must on the end concede that also with parliamentary insight in its workings, FRONTEX is designed to be an agency to control the influx of refugees at Europe's borders. The agency might to many appear ruthless in view of the tragic destiny of hundreds of desperate people on their journey to Europe whose hopes for a better existence are likely be shattered by the effectiveness of FRONTEX to fulfil its mission. Yet, in all fairness, FRONTEX cannot be blamed for policies that have been designed by Member States and that are backed by parliamentary and public majorities in the European Union. So apart from the scholarly consensus that the European

Parliament deserves a greater say and influence in its operations, FRONTEX opponents will have to take note of the fact that also the EP overwhelmingly supports the essence of its mandate. FRONTEX has become an important mean to harmonize and coordinate European border control. The question if FRONTEX is a legitimate agency can however not be answered better than with yes and no at the moment. If the increase in its executive powers is balanced with parliamentary control mechanisms, the fact that the agency is expected to execute the migration policy of the European Union will remain. This policy will surely continue to be as debatable as the causes and reasons that year by year send thousands of people on a disastrous journey towards the shores of Europe.

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