FRONTEX: More of the Same?

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ABSTRACT:

Building on the notion of 'agencies' as non-majoritarian instruments to professionalise (or 'depoliticisise') EU policy making, this article examines whether the introduction of Frontex as an agency instrument in 2004 implied a major change in the management of the EU's border control compared to the earlier network. Even though formal evaluations have acknowledged the positive achievements of Frontex, this article questions whether those assessments actually helps us to understand better the added value of Frontex as agency. To do so, the article draws from a legitimacy based model to assess the added-value of the agency. Input and output legitimacy are being assessed through a number of accountability mechanisms. The model is applied to predecessor of Frontex (SCIFA+/PCU) and to Frontex. We conclude that the choice for the agency instrument was not sufficiently argued and that the design of Frontex hardly offers the advantages of the agency structure.

1   Introduction

On what basis do the European decision makers decide on the use of instruments? As reviewed by Kassim and Le Gales (2010), much of the (EU) instrumentation literature assumes rational decision makers whereas in reality the choice of instruments may also be determined by factors such as fashions, misconceptions and bureaucratic politics. The EU's original set of instruments decision makers could choose from was limited. As argued by Majone (1996), European integration was based on regulation. The sensitivities involved in creating a fiscal transfer union limited the EU's toolbox basically to regulation because market regulation spreads costs of over large numbers of consumers and, hence, makes the costs less visible. Additional instruments were added gradually. The diversity in countries due to enlargement and the creeping integration in more intergovernmental policy areas such as economic reform, employment policy and border control demanded cooperative types of 'networked governance' (Schout and Jordan 2010). Moreover, upheavals over among other mad cow disease, dioxin chickens and overregulation resulted in a lack of trust in the quality, transparency and implementation of EU legislation. This legitimacy crisis triggered the debates on the need for EU agencies as independent regulatory authorities. Agencies were assumed to offer greater transparency, expert authority, flexibility, better informed decisions and better implementation (European Commission, 2001). EU agencies have been embraced

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as major non-majoritarian expert-driven (hence depoliticised) tools of governance at arms-length from political decision makers.

As discussed elsewhere, the EU's agencification opens the question as to whether agencies have implied actual changes in the management of EU policies (Schout 2008). EU functionalist theories present agencification as essential for advanced economies that have to regulate complex and dynamic technologies (Majone 1996). However, neo-institutionalists would point to the pressures preventing overhauls due to centripetal forces associated with traditions, values and interests (Moe 1987). Similarly, interests of major actors may prevent changes in the practice despite formal changes in governance (Kelemen and Tarrant 2011). The EU's rule systems, including the Meroni doctrine, block delegation of tasks of the European Commission and also the constraints imposed by the EU's human resource policy prevent real changes (Schout and Pereyra 2011). Hence, Majone's (1996) hope of professionalization through agencies can be confronted to the view that agencies result from interinstitutional compromises in which their independence is diluted.

Although agencies are supposed to different in many ways, little attention has been devoted to the comparison of agencies to other types of policy instruments. Schout (2011, 2012) has started to analyse whether the agency instrument has turned out to be a functional innovation. Using a legitimacy based approached, his study on the EU's aviation safety agency (EASA) shows that the introduction of the agency in 2004 proved to be less of a break with earlier aviation safety instruments as often claimed. Success of the agency was in fact more caused by the growing cooperation in the aviation network which had started in the pre-existing network, than by the introduction of the agency instrument as such. The pre-existing network was in fact overly criticized and written off to soon. This does not mean that EASA is functioning poorly but it does mean that the choice for the *agency instrument* proved to offer little added value. Interestingly, experts and politicians had turned against the earlier network that existed before EASA was created. Without much analysis the network-based approach was replaced by an ill-conceived agency.

Following Yin (2003), replication of this N=1 study is necessary to generalize these findings on the (limited) innovativeness of EU agencies compared to other policy instruments and to test the relevance of the comparative legitimacy-based model. Have shifts towards agencies proved to be an added value elsewhere or is there a general pattern in why EU agencies result in weakened forms? This paper applies the methodology to the case of Frontex (the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union). Frontex is presented as a regulatory agency on the Commission's website and the executive director has the powers to take independent decisions (art. 25 Regulation 2007/2004) that are to be expected in an independent regulatory authority.

The first formal independent evaluation of Frontex was very positive saying that it "has achieved remarkably much in its short existence. It has established itself as the focal point for community discussions on practical border management and it has developed a path that will enhance cooperation and data sharing" (Cowi 2009: 6). But does this prove the added value of Frontex as *agency*? Frontex operates in a very uncertain policy environment and its effectiveness is hampered by many enduring political, legal and operational difficulties (Wolff, 2010). Building on the notion of agencies as non-majoritarian instruments to professionalise (or 'depoliticisise') EU policy making, this article examines whether the introduction of the agency instrument in 2004 implied a major change in management of the

EU's border control. Drawing from Schout's work (2011, 2012), section two introduces the model to study the change in instrument from network to agency from a legitimacy perspective. Section three analyses the intergovernmental network that preceded Frontex (SCIFA+/PCU). The input and output legitimacy components of Frontex are discussed in section four. Section five discusses the conclusions in relation to whether the agency instrument has made management of border control more legitimate compared to the earlier network approach. This study combines earlier work on the added value of EU agencies (Schout 2008, 2011, 2012) and research on Frontex and the EU's border control policies (i.e. Carrera, 2007; Wolff 2008, 2010; Pollak and Slominski 2009, Leonard 2009).

2   The legitimacy-based model to assess the added value of an EU agency

EU Agencies have been growing in number and size in the EU's administrative set-up. They now host approximately 4.500 employees (European Commission, 2010). The EU agency literature has focussed on issues such as the reasons behind agencies creation, principal-agent problems, conflicts between member states and European Commission, and the design of agencies (Curtin 2005, Leonard 2009, Groenleer et al 2012). Although originally presented as independent regulatory authorities (Majone 1996), it is well established that EU agencies have become more of a compromise instrument as is for example underlined by Trondal (2010: 129-130) who conceptualizes their roles in three categories: EU agencies as autonomous administrative spaces with some independence within EU institutions, as EU-level Community institutions forming part of the official EU institutions, and as multilevel networks bringing together experts from industry, non-governmental organization, etc. Important as this more realistic understanding of EU agencies is, it does not draw conclusions on whether EU agencies are truly something new. Other instruments may combine the similar elements of independence, EU guidance and networks.

This article explores the added-value of agencies as instrument of EU governance. As the sensitivities surrounding EU agencies underlines, the choice of an instrument is not neutral but affects issues such as relative power of EU institutions and member states (Everson et al. 1999, Groenleer 2009), and it may influence the performance of the EU in a specific policy area (Schout 2008). Hence, knowing whether an EU agency is a suitable instrument is important politically and in terms of legitimacy. EU agencies are generally positively evaluated on the basis of their results but not on the basis of their added value *as agencies*. A 'meta-evaluation' of EU agencies typically concluded: "How a policy would work in the absence of an agency is a point which is most often missed. ...The reviewed material does not say much about the reasons why the agency option has been preferred to others, and evaluative information is even more scarce and superficial as regards the continued rationale of the agencies" (Eureval 2008: iv).

While the debate has focused so far on the politics and pressures of agencification, it is time to evaluate the added value of agencies compared to other instruments of EU governance. The model used here follows Schout (2011, 2012) and is based on legitimacy. 'Legitimacy' is a relevant starting point because agencies were one of the responses to the EU's legitimacy crisis in the 1990s. Acknowledging that experience with agencies in OECD countries qualifies their theoretical advantages (Pollitt et al. 2004), the suggestion explored here goes back to one of the basic ideas behind agencies: agencies are an instrument to strengthen the legitimacy of EU policy (Majone 1996).

Following Weber (1968), legitimacy is the trust people and industry have in the actions of government. 'Legitimacy' is a vast subject and has been used differently over time and between authors. Yet, broad consensus has emerged over the composite nature of legitimacy. The current debate concentrates on input, output and throughput legitimacy (Scharpf 1999). Input legitimacy addresses democratic control (government by the people) while output legitimacy concerns government for the people (effectiveness or substantial legitimacy). The legitimacy debate has shifted to throughput legitimacy due to limitations of democratic control over – in particular international – governments. Throughput legitimacy is about how agreements are reached and opens debates about deliberative democracy, transparency and impact assessments (Curtin 2005). However, we follow Bekkers and Edwards (2006: 44) who regard throughput legitimacy as part of input legitimacy because it is linked to questions about who has access to decision-making processes and about the – hierarchical and public – control over the procedures.

The distinction between input and output legitimacy helps to operationalize legitimacy in terms of the underlying accountability mechanisms. Curtin defines accountability as "those arrangements made for securing conformity between the values of a delegating body and those to whom powers are delegated" (2005: 87). Hence, accountability mechanisms are the control instruments that make it possible for, among others, politicians to monitor the organisation (e.g. through work planning and evaluations) and that provide the basis for public trust in the actions of public bodies (e.g. through openness of decision-making). Within the constraints of this study, the discussion on the controls that define the legitimacy of organisations can only remain at an exploratory level.

The mix of accountability mechanisms determines the extent to which an instrument is legitimate. These mechanisms steer the employment of instruments by specifying their objectives, procedures, resources and performance criteria. Instruments structure power relations between government and society by shaping, among others, negotiations, agreements and transparency (Kassim and Le Gales 2010). The design of accountability instruments can be flawed leading to inefficiencies, fake legitimacy or legitimacy problems (Schout and Pereyra 2011). Hence, more accountability does not necessarily equal more legitimacy. Similarly, an instrument can be replaced by another instrument but the basic accountability mechanisms can remain the same – a formal change may not be the same as a de facto change in governance if underlying accountability mechanisms are not sufficiently adapted (Schout 2011).

Based on Schout (2011, 2012), the comparative framework is summarised in table 1 and builds on the notion that governance involves overlapping accountability mechanisms. This study concentrates, firstly, on *input legitimacy* including hierarchical controls (limited here to political approval of work programmes and budget control) and administrative controls (defined as the rules for decision-making such as work planning, impact assessments, transparency and evaluations). The EU has made great strides in administrative legitimacy. The upswing of better regulation initiatives (European Commission 2009) has changed administrative accountability rather drastically to the extent that certain kinds of depoliticisation have been introduced. Moreover, input legitimacy involves legal oversight (access to justice and appeal mechanisms, Majone 2002) and functional cooperation (mutual learning between experts, Smismans 2004). Expert communities have played a major role in the legitimacy debate as a way to solve shortcomings in democratic legitimacy. Professional values and the resulting peer pressure are particularly important in discussions of agencies as an instrument to depoliticise decisions (Majone 1996).

Output legitimacy relates to effectiveness. Any performance assessment is difficult in view of competing evaluation criteria. Hence, the Commission has had major difficulties in agreeing on a framework to regularly evaluate agencies (European Commission 2008). Following the EU's better regulation agenda (European Commission 2009), we can relate to criteria such as effectiveness (do experts agree on the value of the deliveries?), flexibility (responsiveness to new conditions) and subsidiarity (the EU's ambition to leave responsibilities as much as possible at the national level) as emphasised in. The regular reviews of instruments and interviews – including with actors affected by agencies – can be used to uncover the perceptions of performance. Flexibility is included here because of the complaints on inflexible EU standards and the hope that agencies would be more responsive to changes on the ground (Everson et al. 1999).

Summarising the EU agency debate (Everson et al. 1999; Schout 2012) , an agency would have to be hierarchically controlled by member states and Commission (with an observer role of EP) but preferably only on strategic decisions to ensure sufficient operational leeway for the agency. Administrative control should be well defined and ensure planned operations and transparency of decisions and outputs. Moreover, administrative controls should leave the agency relatively independent to ensure professional management. Legal control is essential to ensure that the agency can operate independently yet under the watchful eye of courts and with controls such as the ombudsman and appeal mechanisms. Finally, the agency should operate effectively (as appearing from evaluations, peer assessments and interviews). With table 1 we have a model to see whether the choice for the agency leads to better defined legitimacy and a structure that is suitable to the independent agency-type instruments. It might well be possible that an agency is created although its controls are designed in such a way that the instrument can hardly be termed 'agency', and might in fact resemble existing instruments of EU governance.

The application of this model to the European aviation safety agency (EASA) revealed that the agency replacing the earlier networked-governance model was not in itself a major innovation (Schout 2011, 2012). In terms of output legitimacy, the earlier network operated quite well and EASA extended rather than replaced its operations. In terms of input control, the pre-existing network was quite well institutionalised in terms of administrative principles and hierarchical control. Although different in several ways, EASA has so far not proved to be much better in terms of output legitimacy either.

The creation of Frontex, its accountability and the legal uncertainties regarding its operations have attracted a lot of attention (Wolff 2008 and 2010; Leonard, 2009; Neal, 2009; Rijpma 2007; Pollak and Slominski, 2009; Carrera 2007 and 2010), this study aims at comparing accountability mechanisms between the earlier structure of SCIFA+/ PCU to Frontex. This study helps to test whether the creation of an agency was a policy innovation and whether it enabled more autonomy and professionalization compared to the previous intergovernmental Council working group.

Table 1 –Framework to assess the legitimacy of EU agencies

Legitimacy	Accountability mechanisms
Input	- Hierarchical control (Can ministers and parliament control strategic decisions?) - Administrative mechanisms (What are the rules for work planning, impact assessments, transparency and evaluations?) - Legal control (How are access to justice and appeal

	mechanisms organized?)
	• Functional cooperation (How is cooperation in peer groups organized?)
Output	• Effectiveness (Do evaluators and peers think that the instrument delivers?)
	• Flexibility (Do evaluators and peers agree that the instrument is responsive to new technologies and emerging issues?)
	• Subsidiarity (Are national experts and bodies involved?)

3   Frontex' pre-history: the SCIFA+/ Practitioner Common Unit

Attention for EU border control increased with the widening and deepening of European integration. The lifting of internal borders following the creation of Schengen (1985) pressed for common solutions to control unwanted immigration and to fight cross-border crime. Compensatory measures were initiated and the EU's Justice and Home Affairs policy was being put in place. A European Community external frontiers convention was proposed in 1991 to shape external borders control. The convention based on a loose intergovernmental agreement with a central role for the General Secretariat of the Council and an intergovernmental committee was never adopted to due to a disagreement between Spain and Britain over Gibraltar (Monar, 2006: 2).

In the meantime, an intergovernmental group SCIFA (strategic committee on immigration, frontiers and asylum) was created by the Treaty of Amsterdam in 1997. This Council working group composed of senior officials from the member states had to issue strategic guidelines on issues of immigration, frontiers and asylum, thereby providing input for Coreper (Council of the EU, 2010). SCIFA was sub-dived into 'SCIFA +' and included the Council working group plus the heads of each national border guards services (hence: 'SCIFA+') (Neal, 2009: 341). It had the mission of coordinating the ad-hoc centres of border control.[2] SCIFA is the strategic working group (and still exists today) while SCIFA+ had to manage the operational network of national practitioners that would approve and monitor the joint operations and pilot projects.

Enlargement and the arrival of new migration flows on the southern EU borders reactivated the discussion on EU border control in 2002. The Commission drafted a communication examining the possibilities to 'work out arrangements for cooperation between services responsible for external border control' as mandated by the Laeken summit (European Council meeting, 14-15 December 2001). Effective management of EU's external borders was

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[2]   Those centres, located in various member states, were specialised on sea, air and land borders. The centre for land borders located in Kehl, Germany had the objectives to: 'enhance the intensity of border controls and surveillance; to create a more effective, uniform border control standard; to prove the feasibility, effectiveness and added value of multinational teams on the spot; and to work out suggestions for the amendment of existing provisions aiming to reach a higher standard of border control and surveillance' (House of Lords, 2003: 14). In other words it created a decentralised network of border control with specialisations according to the expertise of each member state.

assumed to boost internal security and "the citizen's sense of belonging to a shared area and destiny" (European Commission 2002: 2).

At the same time, the Italian presidency presented a feasibility study (in May 2002) on the development of common EU border guards. The paper was supported by the Benelux, Austria, Germany, Italy and Spain. Special attention was paid to addressing problems on a thematic basis (in particular by type of border) or on a geographical basis'.[3] However, this feasibility study did not clarify which instruments to choose. It did not come out clearly for or against the creation of a (communitary) European Border Guard but advocated more generally for a network of national border guards based on the ad-hoc centres which would act as 'knots' of the network, common units for special tasks, common risk analysis, financing mechanism and a common curriculum (House of Lords, 2003).

SCIFA+ quickly turned out to be ill equipped to deal with the challenges of border management. The work of SCIFA+ presented "serious deficiencies concerning planning, preparation, evaluation, operational coordination, the treatment of difficulties arising during the implementation of projects and the commitment of the participating countries" (Council of the European Union in Leonard, 2009:379). The Commission also argued that the weaknesses of SCIFA+ were 'related to its large membership and wide agenda, but presumably also by a lack of a common approach.' (Rijpma, 2010: 10). Therefore, a Common Unit was created in 2002 under SCIFA giving it an 'operational flavour' (PCU: External Border Practitioners Common Unit). The PCU gathered the heads of border guards and hold separate meetings from SCIFA+, dealing exclusively with operational aspects. SCIFA continued to manage the overall strategy of border management (House of Lords, 2003).

The creation of PCU resulted from the acknowledgement that there was a need for EU external borders to be handled by "a body consisting of those *par excellence* charged with the elaboration of this specific task" (Council of the European Union, 2003). In other words there was a need for professionalization and de-politicization. The task of the PCU was to act as a "'leader' co-ordinating and controlling operational projects" (European Commission, 2003a: 2).

Analysis of the accountability of the Practitioner Common Unit

PCU's *hierarchical control* was defined by its mandate in the Treaty (article 62(2) TEC (first pillar)) and the reference to its "multidisciplinary and horizontal role" in the field of criminal matter (third pillar). Its political guidelines on major strategic decisions and general work planning were defined by the European Council (intergovernmental hierarchical control) and the SCIFA working group gathering national civil servants. As discussed by the House of Lords (2003), the PCU "would be subject to scrutiny by both national parliaments and the European Parliament" but in reality the various operations that took place under the PCU mandate did not adopt any rules that would have regulated the powers and accountability of the members of these teams". As PCU's cooperation is intelligence-led (based on risk analysis and the exchange of information) and adopted no data protection rules its work concerned

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[3]   Art. 9 Joint Action 98/244/JHA of 19 March 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, introducing a programme of training, exchanges and cooperation in the field of asylum, immigration and crossing of external borders (Odysseus programme) - (1998-2002) [Official Journal L 99, 31.03.1998].

mostly operation day-to-day management of border control issues falling under member states. Hence: "the nature, powers and accountability of the current central structures are far from clear, and a number of our witnesses have argued that legality, human rights and accountability issues were not sufficiently dealt with in the Commission and Council proposals" (House of Lords, 2003). If anything, there was much political interference and little operational discretion – something for which an agency could be a useful antidote.

It followed an intergovernmental logic where political approval of PCU work programmes and budgets were concerned. Operations that took place were usually financed by the member states coordinating the operation. The UK as projectleader met most of the costs of the project on sea borders with Turkey (project Deniz), which aimed at detecting illegal migration at sea during the summer 2003. The European Commission was 'approached with a view to seeking financial support from existing budgets to meet the cost of detention and repatriation of those illegal migrants detected during the maritime exercise. As yet there is no firm indication that this approach has been successful' (Council of the EU, 2003e).

As regards *administrative legitimacy* the PCU was developing its own operating procedures as it went along. Ways of working regarding work planning, the use of impact assessments, transparency and evaluations were discussed and defined by the SCIFA+ network. The guidelines for joint operations from July 2002 concluded that all operations would have a lead member state. Member states interested and the Commission would participate in the evaluation visit before the operation. The lead member states would draw up a Project Plan to be endorsed by SCIFA+ and report periodically. Support, training, equipment and any other assistance would have to be provided in line with EU standards and national legislation (Council of the European Union, 2002). Professional management was being put in place.

Evaluation reports produced by lead countries and/or the rotating presidency were part of the administrative accountability mechanisms and several evaluations and the results of SCIFA+/PCU work programmes were published online. A progress report on the overall implementation was produced in 2003 under the Greek Presidency (Council of the EU, 2003g). To this end, the member states had to follow specific guidelines to submit their final reports and had to fill in a detailed questionnaire (Council of the EU, 2003e: 3). As this report shows, part of SCIFA+ operating procedures was to look at alternative instruments and ways to improve cooperation and to ensure effectiveness in view of the huge number of missions and travels involved in SCIFA's "network structure"' (Council of the EU, 2003f: 5). Also the evaluation summary by Europol on the land borders operation is detailed and identifies achievements as well as problems encountered with some commitment issues from some of the member states. Europol also concludes that the weaknesses highlighted by the police agency were presented to SCIFA+ but that "no special attention was paid and no discussion was conducted on the problems raised" (Council of the EU, 2003e: 13). Hence, although the networks were setting up evaluation systems as basis for learning, the evaluations did not lead to lesson drawing.

Legal control proved hard to institutionalize. The PCU being a network coordinating the operations of the border guards, the ultimate responsibility would end up with the member states. However it was not entirely clear what would be the legal responsibility of the different actors in case a migrant intercepted would be returned during an operation, or if an incident would happen during such an operation. Similarly, the legal position of the ad hoc centres involved during the joint operation was not clear. Were they acting on behalf of the member states they were located in or on behalf of a joint operation under the instructions of a group

of the Council? The same situation arouse in case risk analysis centres would perform the profiling of immigrants[4] or who was responsible if a state caused an incident on the territory of another member state (Peers, 2003). Moreover, due to the transition period on JHA (which ended in 2005), the European Court of Justice had no scrutiny on border management. In addition there was no legal basis for the joint operations.

Functional control was the strong asset of the PCU. It was essentially a learning type of network of national experts formulating comprises in peer-groups. Because border guards worked with different methods and in different languages, it was considered essential for the PCU to rely on the network of special national ad-hoc centres (Deloitte, 20009: 8). These centres were supposed to be the interface between national contact points and the PCU. Arrangements regarding the role of the Director of the centres and national participations in the networks were detailed.[5] The networks existed at different levels: experts from border control authorities, directors of the special centres and the network of immigration liaison officer.[6]

Output legitimacy was clearly problematic and related to the intergovernmental working methods, the varying commitment of member states and the many start-up problems. Lack of coordination was a recurring theme in the project evaluations. Some centres were also suffering from a lack of funding such as the Centre in Dover (House of Lords, 2003).

Yet, the network proved to be quite effective in several of its key tasks such as the setting up the essential Common Risk Analysis Model and the formulation of the Common Core Curriculum (Council of the EU, 2003g). For example, under the leadership of Austria and Sweden, eight training fields were identified for the Common Curricula: human resources development, international legislation, national legislation, operational training, criminology, information technology, applied working methods and administration (European Council, 2003d). An implementation report was drafted to evaluate the development of the core curricula. The ambition was to 'gradually reducing quantitative and qualitative disparities that are likely to generate security distortions at the external borders'. Projects introduced included a common syllabus, language training, training on the tasks and legal status of the border guards, and training on the rights of and the protection of asylum seekers (Council of the EU, 2003g: 2). Participating countries agreed to adopt quality assurance measures such a hotline to consult experts, system monitoring, adaptation (possibility to revise or fine-tune the training), and multiplier training as a way to reach uniform training (Council of the EU, 2003g: 6). A structure was put in place composed of a Central European Border Service Academy and a Common Integrated Unit which was supported by national implementation teams. As this shows the network was clearly subsidiarity-based and able to enhance mutual learning.

The PCU nonetheless suffered from continuing national interferences and was "highly politicized … promoting individual Member States' pet projects" (Neal, 2009: 342). Despite

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[4]   Profiling is defined as ' trying to determine the type of person likely to be an illegal immigrant and the methods used to enter the EU'
[5]   See http://register.consilium.europa.eu/pdf/en/03/st13/st13779-re01.en03.pdf
[6]   ILO are MS immigration officers based abroad in order to establish and maintain contacts with the authorities of the host country with a view to contributing to the prevention and combating of illegal immigration, the return of illegal immigrants and the management of legal migration. See Council Conclusions (2003b).

the progress achieved, the PCU had obviously failed according to Jean Louis de Brouwer, who became deputy director of the DG Justice, Liberty and Security, (European Report, 2003). Typically, an evaluation one (!) year on concluded that SCIFA+/PCU offered too loose a coordination for the different ad-hoc centres. The implementation report of June 2003 stated that 'joint operations faced serious problems' including lack of suitable planning and preparation, lack of central operational coordination, lack of adequate in depth treatment of difficulties which arose during the implementation period, lack of legal basis for carrying out common operations and lack of willingness of the countries to live up to their agreed obligations (Council of the EU, 2003e).

Surprisingly SCIFA+/PCU operated in a hugely difficult and sensitive field and was starting up a host of activities but was written off as 'failed' already within one year. In the meantime, PCU had acted as a "head" to carry out common integrated risk analysis; as "leader" coordinating and controlling operational projects; acted as "manager and strategist" to ensure convergence the field of personnel and equipment, and exercised a form of "power of inspection" (European Commission, 2002: 14). It approved around 17 projects between July 2002 and March 2003 and set up a network of national contact points for the management of external borders (House of Lords, 2002: 13). It should come as no surprise that it became quickly overloaded and would need more time to be efficient.

Acknowledging the critique, our conclusions are less negative. In terms of hierarchical control, it operated mainly under national mandates and national legal control. Administrative controls were clearly being built into the system including regular evaluation of activities. It was also helpful in organising the relevant networks (functional legitimacy). On the output dimension, while the operations revealed a series of grave deficiencies, the progresses made on the common curricula (professionalization of border guards) were quite successful. SCIFA+/PCU had all signs of starting organisation. Even though it existed only one year, it seems it provided a good basis for learning and coordinated actions. Also seeing the experience with Frontex (see below) shows that SCIFA+/PCU was not that bad after all.

4   Frontex

In the light of the structural problems, the Thessaloniki European Council (2003) mandated the Commission to examine alternative institutional mechanisms. The option of an agency for the management of external borders was endorsed six months later (European Council, 2003b). Consensus was reached on Frontex even though the European Commission and the European Parliament preferred a more forceful European Border Guard corps (Jorry, H. 2007: 2). Confronted with unprecedented influxes of migrants Spain, Italy, Malta, Cyprus and Malta played the card of the humanitarian crisis to call for more 'solidarity' and 'burden-sharing' (Wolff, 2008: 259). They demanded common solutions for problems they could not manage financially, materially nor politically (Hernández i Sagrera, 2008). In the meantime different countries were implementing different systems. While Spain set up a radar surveillance system in Gibraltar, Italy and Greece struggled with lengthy maritime boarders on their own. Public pressures were mounting on member states more generally in the face of growing tensions over the EU's migration and asylum policies.

The creation of an agency might have been defendable given the need for technical know-how and operational work involved (Leonard, 2009: 380; European Commission 2003a: 5). Yet, its role as coordinator was underlined from the start and it did not acquire policy making roles. Instead, it 'shall simply assist Member States in implementing Community legislation'

(European Commission, 2003a: 5). The agency can only rely on 'soft law' instruments such as training guidelines (European Commission, 2003a: 5). Germany supported the centralised idea, arguing that 'there should be a body in Brussels above national border authorities with the task of supervising, evaluating and co-ordinating their work' (House of Lords, 2003: para.44) but Denmark and the UK argued instead 'for improving existing mechanisms of information exchange, training and the use of liaison agents' (Monar, 2002:126). Hence, the conceptualisation of the agency instrument was diluted from the start onwards.

The task description shows similarities to SCIFA+/PCU: developing policy expertise, coordinating operational cooperation, assisting the member states on the training of national border guards and carrying out general and tailored risk assessment (a task that was already conducted by the pre-existing ad-hoc centres under PCU), following-up on research related to control and surveillance, and co-ordinating the member states joint return operations. Even though the executive director role was strengthened and a fundamental rights strategy introduced, the 2011 amendments to the Frontex Regulation strengthened mainly the operational planning and not necessarily the design of Frontex as an independent agency.

The added-value of Frontex

Frontex offered a new *hierarchical control* mechanism through the Management Board. Yet, hierarchical control remained to be based on national civil servants accountable to national parliaments. The Commission had proposed a highly centralized solution which the member states watered down to preserve their control over the agency (Wolff, 2008). Essentially, Frontex hardly gained independence from political authorities itself nor shifted control towards EU institutions. Even though the Board "shall consist of member states representatives appointed 'on the basis of their degree of high level relevant experience and expertise in the field of operational cooperation on border management' (ie. Head of border guards services), some members come from national ministries. Hence Board discussions are still tilted towards political issues. National interests have remained key at the cost of the effectiveness of the agency (Cowi, 2009: 65).

Similarly, although the Executive Director (appointed by the Board on proposal of the European Commission) is formally independent (Art. 25 Regulation 2007/2004), his appointment is strongly influenced by intergovernmental compromises. The current Director and Deputy Director are both former national representatives and likely to go back into their national administrations. There are no hearings of the Executive Director before its nomination in front of the European Parliament. The latter can only ask the Director to come to inform the parliamentarians about his tasks.

The *administrative controls* of Frontex build on the traditions started under SCIFA+/PCU. The strategic decision on work plans and budgets are drafted by the Executive Director and decided on by the Board. The proposals are forward mid-June at the latest to the European Parliament, Council, Commission, EESC and the Court of Auditors. The annual work programme is adopted every September at a three-quarters majority by the Board, after receiving an opinion from the European Commission. It is then forwarded to the Commission, Parliament and Council. With the 2011 amendment, the work plan now also includes a multi-annual plan offering greater stability to operations.

In terms of operational decisions, the agency approves and coordinates joint operations proposals from the member states. The agency can also initiate and carry out joint operations

in agreement with host member states (Art.3). The executive director of the agency draws up the operational plan, and agrees on it with the host member state and the other participating countries. The 2011 amendments details more carefully the tasks and responsibilities of the actors involved in joint operations. Yet, if the host member state or participating member states disagree, operations can be blocked. This is not much different from the way PCU/SCIFA+ was organised.

Joint operations usually follow a standard procedure (2009 Cowi). Risk analysis is conducted by Frontex's risk analysis unit and a project proposal is forwarded to the Executive director. The proposal is approved following an evaluation of the Tasking and Coordination Group. A planning meeting is then organised with the potential supporting countries and the project manager finalizes the operational plan with their input (respecting a predominant role for the host country). Finally, the relevant unit in Frontex (Sea, Land or Air) coordinates planning of the Joint Operation and a period of gathering information follows (Cowi, 2009). The Cowi evaluation underlines that political considerations are taken into account throughout these steps e.g. because it depends upon the willingness of the member states to provide equipment via the Centralised Record of Available Technical Equipment (CRATE). This is very similar to the constraints identified under SCIFA+/PCU.

Ex-post evaluations are obligatory and detailed. They have to include: 'analysis of replies to the analytical questionnaire; number of migrants, including asylum-seekers; routes adopted; in the case of airports, entries refused; migration trends; other irregularities, such as implications for trafficking human beings and drugs; international criminal networks; comparisons with statistics for previous operations; and evaluations by the deployed experts' (House of Lords, 2007: para. 67/68). The annual risk analyses are published on an annual basis. With the 2011 revised mandate the agency has now sixty days to transmit the evaluation of joint operations and pilot projects to the MB. Comparative analysis across the different joint operations shall be conducted in order to improve 'the quality, coherence and efficiency of future operations and projects' (art. 3 para 4). Moreover, for any joint operation, the plan must include 'a reporting and evaluation scheme containing benchmarks'. These reports will not be shared with the European Parliament or national parliaments. This is worrisome since 'refugees and people in need of protection should be subjected to democratic oversight' (House of Lords, 2008: 165).

Transparency is weak compared to its predecessor. It is difficult to access Frontex documents, except for its general annual report and risk analysis report and working arrangements with third countries are not available. Pollak and Slominki (2009) conclude that "Frontex has continued the culture of secrecy". The only transparency mechanisms, again similar to other EU institutions and therefore also the Council, is that Frontex is subject to Regulation No 1049/2001 on access to documents (like the Council) and an individual can lodge a complaint to the Ombudsman or to the Court of Justice in case Frontex would not respect the fifteen days deadline to respond to an information request. This is however no progress compared to its predecessor.

As far as *legal control* is concerned, the creation of an agency has not settled the issue of legal responsibility during the operations of Frontex. Member states are still responsible for what happens at their external border. NGOs have indicated that violations of international law have occurred during joint operations. For example, Human Right Watch recorded that '[in June 2009] 75 boat people intercepted off the Italian island of Lampedusa were handed over to a Libyan naval patrol by Italian coastguards, assisted by a German helicopter operating as

part of Operation Nautilus IV' which is against the principle of *non-refoulement* (Babincka, 2011: 11). Frontex responded by saying that it was impossible to say whether the incident had happened.

Hence, legal recourse against member states has remained in the hands of national judges or of the Strasbourg Court. The Lisbon Treaty allows the Court of Justice of the European Union to cover the acts of the agency. There is however no possibility for an individual to claim damages (Babincka, 2011: 23). Whether Frontex will be taken to Courts for its acts during an operation is for the moment very unlikely. Nevertheless, improvements have been made. The Frontex regulation (article 3) now states that: 'The Executive Director of the Agency shall suspend or terminate, in whole or in part, joint operations and pilot projects if it considers that violations concerned are of a serious nature or are likely to persist'. Also a fundamental rights strategy as well as a fundamental rights officer has been created following the 2011 amendments.

Frontex has continued the *functional control* that existed under SCIFA+/PCU. Frontex is the centre of many networks gathering national experts. These include the Frontex Risk Analysis Network, the Network of Training Coordinators, the national training coordinators group, and the Eurosur cooperation network. In addition, it has established contacts with relevant international organisations such as UNHCR which has sent a senior liaison officer to Frontex. Building on the work of SCIFA+/PCU, Frontex has multiplied the networks.

Regarding *output legitimacy*, the agency continues to suffer from the problems encountered by PCU/SCIFA+. Member states still criticize the poor planning capacities and lack of long-term projects. Moreover, joint operations require better planning. The 2009 Cowi evaluation list a range of persistent difficulties: "JO could be improved - in terms of practical planning, uniform modalities for participating officers, slow reimbursement of costs, limited availability of equipment as well as language problems and lack of secure communication lines". Yet, the established common core curriculum and the network of training experts continue to be 'much appreciated by stakeholders who especially value the contacts to colleagues in other Member States and the spirit of common purpose' (Cowi, 2009: 7). Upgrading and adding courses, e.g. on asylum law, the law of the sea and fundamental rights is now in progress (House of Lords, 2008: para.72). Similar to its predecessor, training seems to be one of the main contributions. The common core curriculum helps to socialize and exchange practices of border guards.

Compared to the PCU/SCIFA+, Frontex has still a strong national hierarchical control via the MS. The main novelty is that the budgetary authority is now the European Parliament (but only for part of the 'European' costs of the agency itself). From an administrative control, work planning procedures have improved but operations are still poorly defined. Networks have multiplied under Frontex, but further studies are needed to demonstrate whether this really improved the coordination between the national and agency levels. Legal control has not been clarified as member states are ultimately responsible for what happens at their border. Like a Council working group, Frontex is subject to transparency rules but release of documents on operations has remained problematic. Compared to other policy instruments or its predecessor, not all points of independence, accountability and professionalism have been improved. Frontex seemed to have built on the practices initiated by the pre-existing network rather than result in a new type of instrument.

5 Conclusions

Are EU agencies a new type of EU governance instrument? Earlier work on aviation safety showed that the creation of the agency (EASA) was the result of a feeling that the pre-existing network was not delivering. However, EASA appeared to be in many ways comparable to the previous network and does not fully warrant the classification of 'agency' as independent authority.

Using Frontex to replicate the aviation safety case, we arrive at a number of comparable conclusions. Frontex has offered structures to exchange experience and to build ties between member states. In that it has been successful. Yet, Frontex *as agency* has not been a major addition. Interestingly, as with EASA, the pre-existing network was easily set aside (in the case of SCIFA+/PCU even within one year) whereas it actually provided the basis for the networking that continued under the agency. Decision makers may have suffered from a tunnel vision in both cases assuming that the network approach was incapable of handling the complex environment and that better targeted agencies were needed.

Looking in more details at the design of SCIFA+/PCU and Frontex, we see that both are typically tightly controlled by the national administrations in strategic and in operational decisions. However, both have also suffered from the downside of this hands-on hierarchical control: political interferences. Here the added value of the agency instrument has been particularly limited. In terms of administrative control mechanisms, both have initiated and elaborated planning and evaluation systems needed to organise and stabilise joint activities (i.e. also the network was moving towards professionally organised projects). If anything, administrative controls to guarantee transparency deteriorated under Frontex rather than improved. Legal control has also remained problematic. Again, the intergouvernmental way of cooperating has prevented much progress in terms of legal control. Interestingly, Frontex's predecessor was regarded as a failure whereas we would assume that this qualification is unjustified in view of the progress it initiated and the basis it provided for Frontex. In any case, Frontex is not much better and the progress in cooperation is mainly the result from the building up of experience in working together – it has little to do with Frontex being an agency.

The cases of Frontex and EASA show important parallels. Both agencies have been light-heartedly introduced. Analyses were scant of whether the starting positions (the pre-existing networks) were really so poor or whether upgrading the networks would not be possible. In both cases, the agency formula was opted for without sufficient attention for what an agency actually is (i.e. an independent policy instrument) or how to design the agency in such a way that the strengths of the agency instrument are being brought to bear (e.g. by circumscribing national control in the Management Board and in the day-to-day operations). Contrary to EU literature on EU agencies, this confirms the lack of rationality in the way in which the EU decides on the use of agencies. Political concerns prevent the principals (Commission and especially member states) to lose sight of the original intentions behind their original choice for the agency option.

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