The development of Frontex: integration through supranationalism

Yichen Zhong & Helena Carrapico

To cite this article: Yichen Zhong & Helena Carrapico (2023): The development of Frontex: integration through supranationalism, European Politics and Society, DOI: 10.1080/23745118.2023.2244384

To link to this article: https://doi.org/10.1080/23745118.2023.2244384

© 2023 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group

Published online: 16 Aug 2023.

Submit your article to this journal

Article views: 147

View related articles

View Crossmark data
The development of Frontex: integration through supranationalism

Yichen Zhong and Helena Carrapico
Politics and International Relations Department, Northumbria University, Newcastle upon Tyne, UK

ABSTRACT
This article interrogates the development of the European Border and Coast Guard (Frontex) and its implications for the EU’s approach to border control coordination. Through the theoretical lens of the principal-agent model, it investigates information asymmetry and friction between stakeholders in the implementation of Frontex’s increased competence at the borders. The findings of this article show that the development of Frontex has led to growing incentives for the EU’s supranational institutions to steer the agency to pursue their individual objectives, creating new supranational elements in EU border management.

KEYWORDS
Frontex; principal-agent model; accountability; border management

Introduction
As part of the EU’s efforts to address the 2010 Euro Crisis and the 2015 Refugee Crisis, the EU has witnessed an intensified agenciﬁcation reform, in which a wide range of regulatory and executive tasks have been concentrated within a quickly growing number of specialised EU agencies (Chamon, 2016; Levi-Faur, 2011; Léonard & Kaunert, 2022; Pollak & Slo-minski, 2021). While the Euro Crisis has led to the establishment of several new agencies with rule-making and supervisory responsibilities (e.g. the European Banking authority and the European Securities and Markets Authority), the Refugee Crisis encouraged further empowerment of a number of existing agencies that had previously been given a limited mandate to support common policies on asylum, migration and external borders, such as the European Border and Coast Guard (Frontex) and the European Union Agency for Asylum.

Against this background, the present article explores the development of Frontex and interrogates how the empowerment of the agency has aﬀected the EU border management institutional conﬁguration. Frontex constitutes an essential cog in the EU’s border control architecture and is currently experiencing a rapid organisational expansion. Its remit was initially limited to operational support and coordination, given Member States’ reluctance to relinquish their sovereignty in an area that is at the core of national sovereignty (Bertozzi, 2008; Cortinovis, 2015). Thus, a considerable number of academic...
studies has been sceptical of Frontex’s significance for the EU’s border management system, pointing to a strengthening of intergovernmentalist logics (e.g. Carrera & den Hertog, 2016; de Bruycker, 2016; Wolff & Schout, 2013). While neo-functionalist analysts duly show evidence of spill-over dynamics in European cooperation on border guard functions (Niemann and Speyer, 2018; Scipioni, 2018), they are always limited by the sovereignty clauses in Frontex’s legal acts and the lack of full right to intervene. Although it seems to be a valid consensus that Frontex is a product of a political compromise between EU stakeholders, there is a gap in the literature which has allowed for both Frontex’s own autonomy and friction among stakeholders in the implementation of the agency’s legal acts to be underestimated. This article proposes to address this gap by embracing a principal-agent approach, which offers theoretical insights into the consequences of multiple stakeholders delegating powers to an agent.

Bearing in mind the limitations of the principal-agent model in the context of an increasingly complex EU institutional system (Delreux & Adriaensen, 2017), the analysis contributes to its advance by relaxing the model’s restrictive assumption of information asymmetry. Looking at the efforts made by both the EU’s supranational institutions and Frontex to address information asymmetry, this article claims that, despite its limitations, the principal-agent model is capable of providing a good understanding of the consequences of delegation in the EU. The findings of this article shows that the EU’s supranational institutions are increasingly advantaged by the empowerment of Frontex, whereas the enacting coalition of Member States in the initial creation of the agency failed to consider the prospect of subsequent plays of the rule-setting game. These findings challenge the claims by new intergovernmentalism that the proliferation of EU agencies erodes supranational institutions’ authority, and consequently, that the EU witnesses ‘integration without supranationalism’ (see Bickerton et al., 2015). In order to investigate the implications of Frontex’s latest developments for EU border management, the present article relies on the analysis of official European Union documents and on semi-structured interviews with officials working in the European Commission, the European Parliament, and Frontex, which were conducted between 2021 and 2022.

This article is organised as follows: the next section assesses the applicability of the principal-agent model to the increasingly complex context of EU border management system. It identifies the multiple principals of Frontex and analyses its empowerment process through the principal-agent lens. Since the principal-agent problem typically arises where the two parties have asymmetric information, Section Two looks at Frontex’s access to information, which is how the agency collects a wide range of data from stakeholders and creates a picture of the situation at the EU’s external borders. As diverse stakeholders have different and even contradictory policy objectives for the EU’s approach to external borders (Perkowski, 2019), the emergence of Frontex as an information hub and operational actor in EU border management has led to fierce competition between them wishing to hold the agency to account. Section Three thus looks at how the European Commission and the European Parliament advance their individual policy objectives and introduce control mechanisms to get Frontex to pursue their ends. It finds that, both the European Commission and the European Parliament have introduced regulatory elements on top of the original intergovernmental ones to address information asymmetry and non-compliance in policy implementation, enabling integration through supranationalism.
1. A principal-agent perspective on Frontex

Following the effective removal of internal barriers in view of the realisation of the Single Market, the EU intensified agencification reform efforts to overcome the territorial-based implementation of EU policies (Pollak & Slominski, 2021). Despite the different delegation regimes that exist in the EU legal order, power-conferring is at the very heart of the proliferation of EU agencies (Chamon, 2016). It thus come as no surprise that the principal-agent model has become a popular analytical tool to study the design of delegation and control mechanisms (Delreux & Adriaensen, 2017).

The principal-agent model is not a theory in itself but an abstract model that can be tailored to a problem under investigation. The model was initially developed in the early 1970s to conceptualise the micro-level relationship between business managers and capital owners (Jensen & Meckling, 1976; Ross, 1973). In Political Science, the model was first applied to theorise the control by the United States Congress of independent agencies (McCubbins & Schwartz, 1984; Weingast & Moran, 1983). More recently, principal-agent analyses have been carried out in studies of international organisations and EU bodies (Hawkins et al., 2006; Kassim & Menon, 2003; Pollack, 1997).

In European Integration studies, rational-choice institutionalists make the most sophisticated use of the principal-agent model in exploring the conditions under which Member States delegate technocratic or regulatory tasks to supranational bodies that enjoy a certain level of autonomy from and exert influence over Member States (Pollack, 1997). The model generally presupposes that EU Member States have bounded rationality, and delegation occurs if the perceived gains from delegation exceed the costs. Delegation gains can be achieved by reducing political transaction costs, facilitating credible commitment, specialising policy-making, and improving implementation efficiency (Kassim & Menon, 2003; Pollack, 1997; Tallberg, 2002). Delegation costs refer to situations where EU bodies behave in ways different from what was originally intended, or begin to pursue their own preferences rather than the ones of their principals (ibid.). Since the principal-agent model does not privilege the role played by either Member States or EU bodies, it allows us to move beyond the dichotomous debate between neo-functionalism and intergovernmentalism (Delreux & Adriaensen, 2017).

In the case of Frontex, the usage of the traditional principal-agent model in exploring its creation and expansion comes across, however, as less straightforward. In the classic principal-agent model, an actor can be defined as a principal only if it grants and revokes authority to a non-majoritarian agent through delegation (Thatcher & Stone Sweet, 2002, p. 2). This definition turns out to be challenging when applied to the case of Frontex. When it was set up by Council Regulation (EC) 2004/2007, Frontex was merely entrusted with facilitating operational coordination between Member States. As Pollak and Slominski (2009, p. 905) point out, the establishment of Frontex ‘cannot be regarded as a delegation of authority from the Council or the Member States (…), because neither of these potential principals has the power of trans-governmental coordination and assistance in the field of border management (…).’ Therefore, at first sight, the principal-agent model would seem ill-suited for understanding the empowerment and expansion of Frontex.

Nevertheless, bearing in mind that Frontex’s coordinating role was previously performed by national authorities in the framework of the External Border Practitioners Common Unit (PCU), this article considers that the principal-agent model is still applicable,
and that EU Member States can be considered the agency’s direct principals. Not only do Member States play a key role within Frontex’s Management Board, but they also cooperate with Frontex’s Executive Director in drawing up operation plans, and issue instructions to Frontex officers during as host Member States for Joint Operations (JOs). In this light, the tasks performed by Frontex officers in the context of JOs are directly outsourced by the host Member States, which exercise the primary political control over Frontex activities.

Procedurally, Frontex was initially created through the consultation procedure, and was entrusted, following the full Communitarisation of border control policy, with additional tasks through the ordinary legislative procedure. In both procedures, we may identify the Council as a political principal that links Member States and the agency, and the European Parliament as another principal that acts together with the Council as a supranational legislative actor. The European Parliament also exerts indispensable ex-post influence on Frontex’s functioning and implementation through budgetary control and hearings.

In addition to the co-legislators, the European Commission has explicitly presented itself as the principal that actively anticipates the possibility of delegating a share of its powers to autonomous bodies (Meissner, 2021). The Commission holds quite a schizophrenic position within the EU’s political system. Although, as the executive branch of the EU, the Commission is the agent of the co-legislators, it too plays a significant role in the delegation process, influencing EU agencies’ structure and mandate. The Commission is also an important player given its oversight of Frontex’s day-to-day activities. It is represented in the agency’s Management Board and plays a significant role in the nomination process for the Executive Director of Frontex. As Trauner (2012) notes, identifying the principal should be not only based on its involvement in the legislation of delegation, but also on its actual impact on the functioning and institutional development of the agent. Bearing the level of influence it has on the functioning of Frontex, we consider that the Commission should be understood as a political principal of Frontex, along with the Member States and the co-legislators.

2. Information asymmetry as a variable

Despite the widespread referencing of the principal-agent model in the study of the empowerment of EU agencies, only in rare instances do analysts carefully examine how valid their assumptions are in the context of a specific problem to be studied. Pollak and Slominski (2009) challenge the use of the principal-agent model in terms of the origin of Frontex’s mandate. Delreux and Adriaensen (2017) point out the limitations of the principal-agent model in the context of the increasingly complex EU institutional landscape. Nonetheless, apart from the alleged mismatch between the principal-agent approach’s reductionism and the ever-sophisticated EU institutional network, the principal-agent literature has paid little attention to discussing the validity of the model’s basic assumption: information asymmetry.

Information asymmetry supposes that the agents have better information than their principals, leading to an imbalance of power and moral hazard in transactions (Kassim & Menon, 2003; Pollack, 1997). In the management of the EU’s external borders, however, Member States outsource border-related tasks to Frontex, while also continuing to exercise those tasks themselves in parallel with the agency. Since the national competent authorities continue to entertain relations with EU stakeholders and third parties, there is perhaps no
information asymmetry problem that justifies the use of the model. Instead of deserting the model altogether, this article sees the necessity to relax the assumption of information asymmetry and treat information asymmetry as a variable rather than a constant.

2.1. Information gaps in the early stage

Article 4 of Council Regulation (EC) 2007/2004 entrusted Frontex to develop the Common Integrated Risk Analysis Model (CIRAM) and provide information for appropriate measures to tackle identified threats and risks. The CIRAM was initially employed by the PCU Risk Analysis Centre to collect intelligence, issue periodical risk analyses, and decide on joint operational measures (Council of the European Union, 2003). The Centre collected information by sending out questionnaires to the central points of contact in each Member State. In the questionnaires, national authorities were requested to report, for instance, the push/pull factors contributing to illegal migration into their countries, the main routes and methods used by irregular migrants, and the general situation at international airports/seaports concerning unauthorised entries.

The PCU’s knowledge fully depended on the information provided by the Member States, and there was no corresponding instrument to guarantee data quality. It is also questionable whether the questionnaires collected every six months could provide the PCU with any real-time situational awareness or capacity to respond in the event of an emergency. In 2005, the PCU Risk Analysis Centre moved to Frontex headquarters in Warsaw and was renamed as the Risk Analysis Unit. Instead of improving the information gathering method, however, this move created further information gaps as many national experts left their position in this process. According to Javier Quesada, then Head of the Risk Analysis Unit, the Unit only had seven analysts in 2005 and a limited understanding of what its role should be (Frontex, 2010).

Arguably, although the general task of assessing these risks was laid out in Frontex’s founding regulation, Member States were still inclined to exchange border crossing and migration information through intergovernmental multilateral platforms, such as the Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (CIREFI). During its existence between 1994 and 2010, CIREFI collected monthly statistical data related to border controls, migration and asylum from the national competent authorities of Member States (Council of the European Union, 1994).

The intergovernmental multilateral information sharing method was still prioritised while Frontex was being established. The Council Decision of 16 March 2005, for instance, established a web-based information network Information and Coordination Network (ICONet) for Member States’ migration management services to rapidly share information related to irregular or illegal migratory flows (Council of the European Union, 2005). As part of the legislative proposal establishing Frontex, the Commission called for the agency to access ICONet and other existing instruments, whereas the Council removed the relevant clause in Frontex’s founding regulation. Since some Member States tended to perceive information sharing via the agency as an extra burden rather than a value-added approach, the Frontex of the early days had limited access to the information needed to make a fully informed analysis (Frontex Official C, interview, 15 February 2022), which indicates that the agency had difficulty obtaining asymmetric information in relation to the national competent authorities.
2.2. Building information exchange networks

Once Community competence in the field of border controls was established in 1999, the European Commission repeatedly lamented the ineffectiveness of CIREFI in standardising the rules applicable to information exchange (European Commission, 2000; 2001). The Commission often received data that was out of date or incomplete, leading to considerable difficulty in drawing meaningful comparisons between Member States for the allocation of the European Refugee Fund (ibid.).

Following the establishment of Frontex, the European Commission was committed to maximising the agency’s role in information gathering and sharing. In 2005, the Commission concluded a Memorandum of Understanding with Frontex in order to grant the agency access to the Information and Coordination Network (ICONet). Frontex’s final connection with ICONet in 2007 allowed the agency to set up the Frontex Risk Analysis Network (FRAN), through which Frontex’s Risk Analysis Unit was able to work with ICONet and collect data on a monthly basis from 2008 onwards (Council of the European Union, 2009). The data covers detections of irregular border-crossing, clandestine entries at border-crossing points, suspected facilitators, illegal stays, entry refusals, asylum applications, false documents, issued return decisions and effective returns.

With regards to gathering and disseminating information, there was a clear overlap between the activities covered by the Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (CIREFI), and those of the Frontex Risk Analysis Network (FRAN). Whereas the CIREFI compiled national statistics in a situation report that was accessible to all Member States, the FRAN uploaded detection figures on a monthly basis to country folders on ICONet, which were accessible to all stakeholders. In addition to these statistics, Frontex also included its own quarterly reports, Member States’ bi-monthly reports and ad hoc analytical incident reports into the ICONet database (Council of the European Union, 2010). Given the quality of the data collected by Frontex, the Commission proposed the agency take over the management of CIREFI and ICONet (European Commission, 2008b).

In response to the Commission’s proposal, the Council prepared a questionnaire in order to canvass Member States’ opinions on the current orientation and functioning of CIREFI (Council of the European Union, 2009). In February 2010, it concluded that Frontex is ‘well in a position to provide support and advice on most of the relevant issues’, and it ‘should continue to provide the high-quality strategic, operational and tactical analysis (...) and other related advice to internal and external stakeholders’ (2010, p. 3). Under the leadership of the Belgian Federal Police, a Council working group composed of the representatives of Estonia, Finland, and the United Kingdom also conducted a study to detect gaps in the exchange of relevant information emerging from the presentation of the current situation. The working group found that almost all Member States were able to provide Frontex with the data as requested in the template (Council of the European Union, 2011). Informed by the results of the Council questionnaire and the working group study, the Council decided to abolish CIREFI and transfer all its functions to Frontex in 2012.

Following the phasing-out of CIREFI, EU policy-makers further expanded Frontex’s remit by entrusting it with the management of the European Border Surveillance System (EUROSUR) in 2013. The latter had been proposed a few years earlier by the Commission
out of concern for the large number of authorities with overlapping mandates and remits in the Member States with external borders in the Mediterranean and the Atlantic, as well as the perceived need to connect national surveillance systems (European Commission, 2008a). EUROSUR has been developed as ‘the system of the systems’, facilitating data exchange in real-time between Member States and Frontex, building a common pre-frontier intelligence, and elaborating information logged in different monitoring devices and databases (Bellanova and Duez, 2016; Tazzioli, 2018). Through the FRAN and EUROSUR, Frontex is now able to frame a set of specialised information sharing mechanisms where national intelligence is timely fed to the agency, which allows the agency to close information gaps and monopolise an EU-wide picture of the situation at the external borders.

2.3. Integrating situational awareness into joint operations

Since expanding its JOs at the southern maritime borders in 2007–2008, Frontex has set up a Situation Centre parallel to the Risk Analysis Unit to manage the increasing flow of first-hand real-time information and data. According to Frontex’s handbook to the operational plan (2014), the Situation Centre employs the Frontex One-Stop-Shop system (a web-based information-sharing portal) to collect incoming data from all fields of operations and collate it into daily situational pictures. During Frontex JOs, each participating unit is required to submit daily statistical data in the form of Incident Reports and Daily Incident Reports via an established International Coordination Centre or Local Coordination Centre to Frontex Situation Centre. The situational pictures are then forwarded to the Risk Analysis Unit for the production of weekly analytical assessments, analytical warnings for operations and other intelligence reports during the operational implementation of the JOs.

Given the potential for the same information to be transmitted in different formats via multiple channels of communication, Frontex developed a Joint Operation Reporting Application (JORA) in 2011 with the aim to harmonise and simplify information exchange between national authorities and the Situation Centre. Unlike the decentralised FRAN network that is managed by the Frontex Risk Analysis Unit, JORA is a centralised and hierarchical information system that enables a nearly real-time situational awareness over Frontex’s operational zones, and which includes a three-level operational structure: the Frontex Situation Centre is located at the top, followed by the International Coordination Centres, and the Regional/Local Coordination Centres.

The development of JORA indicates that Frontex has been making progress towards expanding the collection of information on its operations. Another step aimed to improve the agency’s situational awareness lies in the 2015 launch of the Frontex Aerial Surveillance Services (FASS). FASS is a framework contract, under which Frontex leases aeroplanes to conduct Multipurpose Aerial Surveillance (MAS) for a specific timeframe. Since the small rubber boats used for irregular migration across the Mediterranean are usually not detected by coastal radars or regular satellites, manned aircraft and drones are understood by the agency as the most efficient tool to monitor and gather information about migrant boats.

In 2017, Frontex co-led a pilot project in cooperation with the European Maritime Safety Agency and the European Fishery Control Agency in the Central Mediterranean
Sea, which aimed to validate multifunctional flights concepts and enhance cooperation amongst the three EU agencies. The pilot was considered to be a success, and the MAS was introduced as an integrated component of Frontex’s joint sea operations from 2018 onwards. In order to conduct long-endurance MAS, Frontex tested drone use in Greece, Italy and Portugal to monitor the EU’s external borders. For the first trial in 2018, a Heron drone provided by the Israeli Aerospace Industries completed 200 flight-hours of marine patrols and coast guard missions in Crete (IAI, 2018).

At the end of 2019, Frontex formally invited two tenders, valued at €50 million, for aerial maritime surveillance services to be conducted using long-endurance drones. Eventually, one contract was awarded to Airbus and the Israeli Aerospace Industries to provide a Heron drone, and the other was awarded to Elbit Systems to provide a Hermes 900 drone. Compared with the 5–7 hours endurance offered by Frontex’s manned aeroplanes, both drones have an autonomy of up to 30–50 h according to publicly disclosed performance parameters, thus allowing the agency to monitor the seas off the coast of Libya, Tunisia, and Egypt.

Equipped with long-endurance drones, advanced reporting systems and information exchange facilities, Frontex has increased its situational awareness at the EU’s external borders. The agency heavily invested in information infrastructures that gather, distribute, and assess data in order to establish and maintain an EU-wide (pre-)frontier intelligence picture. These efforts provide Frontex with considerable knowledge advantages concerning migration flows and border crossings. However, with the emergence of Frontex as a very authoritative knowledge actor on the European stage, EU stakeholders are asymmetrically informed about Frontex’s activities, resulting in friction between them wishing to hold Frontex accountable and implement their individual policy objectives.

3. Moral hazard and goal conflict: holding whom to account?

Accountability and legitimacy constitute an essential part of a public authority’s added value (Scharpf, 2003). An authority’s legitimacy depends on whether it is trusted by stakeholders in terms of task performance, and the extent to which that performance reflects the preferences of the principals and of the governed. In the case of Frontex, however, as EU stakeholders’ interests frequently diverge, it is unrealistic for the agency to act on behalf of them all. This creates a multiple principal problem that individual stakeholders can steer the agent to pursue their interests in lieu of those of other stakeholders and that the agent can gain greater room for manoeuvre (Moe, 2005). With Frontex effectively closing its information gaps with the national competent authorities, the European Commission and European Parliament are working on a greater oversight of the agency’s activities and a greater access to information. Whereas traditional principal-agent approaches attribute the existence of conflicts in determining goals, as well as moral hazards, to the agent’s side, the final section of this article provides empirical evidence for the presence of competition on the principals’ side.

3.1. European parliament: a disgruntled principal

Whereas Frontex is currently entrusted with monitoring Member States’ capacity to control external borders, its remit does not cover Member States’ fundamental rights’
compliance. However, Frontex’s expanded presence in the field increases the possibility of being directly responsible for fundamental rights violations (Carrera et al., 2018). On 23 October 2020, Bellingcat, Lighthouse Reports, Der Spiegel, ARD and TV Asah published a joint investigation accusing Frontex of being involved in maritime pushbacks to drive away asylum seekers attempting to enter Greek waters (Bellingcat et al., 2020). Soon after, the Border Violence Monitoring Network published a 1,469-page Black Book of Pushbacks, documenting hundreds of pushbacks against asylum seekers, most of which involved Frontex staff (BVMN, 2020).

Following the publication of this document, the European Parliament organised a hearing with Frontex Executive Director Fabrice Leggeri in December 2020, where he denied that the agency was involved in illegal activities (European Parliament, 2020). When asked if Frontex headquarters knew about the pushback activities carried out by the Greek authorities, the Director conceded that he had written letters to them regarding two incidents that had been reported by Frontex staff. Leggeri’s answer, however, failed to convince the European Parliament, which concluded that Frontex headquarters were fully aware of the pushback operations and did not take the necessary steps to stop the pushbacks.

According to European Parliament Policy Advisor B (interview, 4 October 2021), Leggeri’s letters to the Greek authorities were largely symbolic, since Frontex staff worked closely with the Greek authorities during joint operations. Although Frontex surveillance aircraft observed the Greek authorities’ practices of border control, the agency failed to take the necessary steps to stop the pushbacks and did not share this information with the European Parliament.

Although Leggeri attempted to claim that Frontex’s operations were geopolitically sensitive, the European Parliament expressed its dissatisfaction with the agency’s culture of secrecy during the hearing. Member of the European Parliament B (interview, 12 November 2021) notes that Frontex should allow the European Parliament to have full access to its operational activities, and ‘even if there were some sensitive issues, Frontex could report to the Parliament selectively, instead of roughly rejecting the demands of the Parliament to access information.’ The European Parliament has also been taken back by the European Commission’s support for Frontex. As European Commission Vice President Margaritis Schinas commented in February 2021, Frontex ‘is a central piece for the success’ of the EU’s new migration and asylum strategy, and the agency ‘has all our institutional support’ (Burchard, 2021). Reacting to this stance, European Parliament Policy Advisor A (interview, 17 September 2021) argued that the Commission has played a role in Frontex’s management, is fully aware of the pushbacks involving Frontex staff, and has failed to join the European Parliament in holding Frontex to account.

The diverging positions of the European Parliament and the European Commission reflect asymmetric information and moral hazard, not only between the principal and the agent, but also between principals themselves. Since EU institutions’ interests diverge and they face incentives to advance their individual interests, asymmetric information between them creates competition in controlling the agent. In an attempt to control the agency, the European Parliament set up a Frontex Scrutiny Working Group in January 2021. The Working Group was tasked with investigating the agency’s possible illegal activities and monitoring its functioning, in particular its compliance with
fundamental rights. Two members of the Working Group, Cornelia Ernst and Sira Rego, have said that ‘the [a]gency is out of control, and that the European Commission and the Member States are allowing such behaviour because it happens far away from the public eye’ (European Parliament, 2021).

From the perspective of the principal-agent model, the European Commission is able to conduct police-patrol controls over the functioning of Frontex, which refers to the use of active and direct oversight to examine the agents’ implementation (da Conceição-Heldt, 2017; Kassim & Menon, 2003). By contrast, the European Parliament mainly employs fire-alarm mechanisms to oversee Frontex’s activities, which refer to measures that rely on interested third parties taking over the costs of monitoring agents’ implementation (ibid.). Although a discussion on which control mechanism can better monitor agents is beyond the remit of this article, the set-up of the Frontex Scrutiny Working Group reveals the Parliament’s willingness to develop more police-patrol controls over and strengthen institutional links with the agency.

3.2 European commission: beyond holding frontex to account

Although the European Parliament has criticised the Commission for its indifference to Frontex’s alleged involvement in pushbacks, the Commission does not view the former as an institutional rival that exerts competing control over Frontex (European Commission Policy Officer C, interview, 15 October 2021). At the European Parliament hearing on 22 February 2021, the Commissioner for Home Affairs commented that Frontex’s alleged involvement in reported pushbacks lies in the reluctance ‘by the Executive Director to comply with the requirements of the regulation’ (Burchard & Baume, 2021). Her statement does not mean that she shares the Parliament’s position. Rather, the Commission is less concerned with whether Frontex staff is involved in pushbacks, and more interested in whether there was any infringement of EU law during Frontex JOs. Since all Frontex employees work under the command of the host Member State, the Commission’s focus is on Member States correctly abiding by EU law and the Frontex Regulation during JOs.

Furthermore, although the Commission implicitly showed that it aims to erode Member States’ exclusive control over Frontex JOs, the Commission itself remains heavily dependent on the willingness of Member States for sustainable policy implementation. It has therefore become further aware of the need to adopt more flexible tactics when competing with Member States for the principal’s control over Frontex (ibid.). In some cases, these flexible tactics have led to a double standard in the Commission’s approaches. In 2019, for example, the Commission asked the Court of Justice in Case C-808/18 to determine whether Hungary had failed to fulfil its obligations under Directive 2013/32/EU and Directive 2013/33/EU on the asylum-seeking procedure. In December 2020, the Court ruled that Hungary had broken EU law by restricting access to the international protection procedure for asylum applicants in transit zones and by unlawfully detaining them. Following the ruling, Frontex decided to suspend all its operational activities (excluding return operations) in Hungary, a decision which was welcomed by the European Commission.

Following Frontex’s departure from Hungary, Members of the European Parliament and human rights organisations called for a similar suspension of Frontex’s activities in
Greece (European Parliament Policy Advisor B, interview 04 October 2021). The prospect of leaving Greece, however, appears unlikely since both the Commission and Frontex need to strike a fine balance between risking a falling-out with Member States and continuously encouraging the latter to accept the EU’s border control coordination (European Commission Policy Officer B, interview, 11 October 2021). As there has been no obligation to host Frontex JOs, both the Commission and Frontex have to avoid Member States’ cut-back commitment. If the Commission assertively obliges Greece to conduct more search and rescue operations as part of Frontex JOs, it may run the risk of being opposed by other Member States hosting similar operations, such as Italy and Spain. The Commission wants to ensure that the Frontex JO approach is, on the one hand, an attractive solution for Member States to handle the key executive challenges they face in day-to-day work and, on the other hand, a robust tool for the Commission to ensure EU laws are applied correctly. A strict and unequivocal position against pushbacks in the Aegean Sea will not allow the Commission to achieve two aims at once (European Commission Policy Officer A, interview, 27 October 2021).

As for the Commission’s strict measures against Hungary, the authors interpret them in the context of the wider political dispute between the EU and the Orbán Government since 2016. Considering the series of disputes ranging from the rule of law to asylum relocation, it comes as no surprise that the Commission’s legal action against Hungary, as well as Frontex’s suspension of operations, did not give rise to contestation from other stakeholders. Thus, the issue with Hungary has created a policy window for the Commission to declare that those national authorities which do not comply with EU law will not receive support from Frontex. The Commission has eroded the role of the host national authorities as the main body overseeing Frontex JOs at minimal political cost and aligned the agency’s implementation with its own views. Given the limited mandate entrusted to it initially, Frontex can exploit conflict and competition between the principals to obtain preferential treatment for itself. Connections with the Commission and even the criticism of the European Parliament have actually improved the agency’s room for manoeuvre, reinforcing its monitoring role and justifying its non-compliance with Member States’ pushback instructions during JOs (Frontex Official A, interview, 30 September 2021).

3.3. Empowering the fundamental rights office: the way forward

Although the European Parliament and the European Commission do not see eye to eye on whether and how Frontex can be controlled, both parties share the view that the agency should be entrusted with more power to monitor its own fundamental rights compliance and, if possible, that of the host Member States (European Commission Policy Officer C, interview, 15 October 2021; Member of the European Parliament A, Interview, 27 October 2021). Such a shared position was reflected in Regulation (EU) 2019/1896 of Frontex, which foresees the establishment of the Fundamental Rights Office in its organisational structure. The Fundamental Rights Office is headed by the Fundamental Rights Officer (FRO), who is assisted by at least 40 Fundamental Rights Monitors.

The post of FRO was initially introduced by Article 26 of Regulation 1168/2011, which provided that the FRO shall be designated by the Management Board and be independent in the performance of their duties. Article 48 of Regulation (EU) 2016/1624 further specified that the Fundamental Rights Office shall be provided with adequate resources.
and staff corresponding to its mandate and size. Nonetheless, as the FRO was not entrusted with investigating individual complaints, the post has had little impact on Frontex’s decision-making and task performance (Karamanidou & Kasparek, 2020, p. 31). In 2016, for instance, the then FRO, Inmaculada Arnáez, filed an internal memo about Hungary’s pushbacks and suggested the agency should revise its support to the country (Frontex, 2016).

In February 2017, Frontex Director Leggeri informed the Frontex Consultative Forum — an internal unit bringing together key civil society organisations to advise the agency in fundamental rights matters — that he had decided to keep Frontex’s presence in Hungary for the rest of the year, since the investigation by the Hungarian authorities was closed upon the conclusion that there were no signs of an offense against the law (Frontex, 2017). His response was considered appropriate at that time given that host Member States exert the primary control over Frontex JOs, and the agency had no power to investigate potential cases of non-compliance. Within Frontex’s organisational framework, the Executive Director was entirely responsible for the implementation of the operational activities of the agency, and the FRO was in a very weak position.

Since then, however, this arrangement has been challenged by Regulation (EU) 2019/1896 of Frontex. Article 109 and 110 of the Regulation that the FRO shall be able to monitor the agency’s compliance with fundamental rights, conduct investigations into any of its activities, and provide opinions on the operational plans drawn up for the operational activities of the agency and on working arrangements concluded with third countries. To effectively monitor the agency’s compliance with fundamental rights, Regulation (EU) 2019/1896 equipped the FRO with a set of fundamental rights monitoring instruments. Article 38 of Regulation (EU) 2019/1896 obliges every participant in Frontex operational activities to immediately report any situation of potential violations of the EU Acquis and Frontex’s Code of Conduct in the form of a Serious Incident Report that is assigned to the FRO for handling.

In addition to the legal changes brought about by Regulation (EU) 2019/1896, the Commission also implicitly enhanced its controls over Frontex through the Management Board. Once Regulation (EU) 2019/1896 came into force, Frontex Director Leggeri issued a vacancy notice for the FRO post, and dismissed Inmaculada Arnáez without receiving the Management Board’s prior approval (European Commission, 2020). As a response, the Commission immediately intervened to request the removal of the vacancy notice. The Frontex Management Board eventually adopted a decision on middle management staff in November 2020 and voted to pass the vacancy notice for the FRO. Although the new vacancy notice does not differ from the previous ones, the Commission successfully managed for the FRO to be neither subordinate to the Executive Director, nor be answerable to the latter (European Commission Policy Officer B, interview, 11 October 2021).

Jonas Grimheden was appointed by the Management Board as the new FRO in June 2021, and has, since then, been able to decide in his own right which bodies to submit formal notes to, including the Management Board, the Consultative Forum, and the European Parliament (Frontex Official B, interview, 30 September 2021). In most cases, however, the FRO is expected to report back to the European Commission’s representatives of the Management Board as the Commission is, in fact, the only body that can provide an immediate response to specific serious incidents and organise on-site visits.
in the framework of the Schengen Evaluation and Monitoring Mechanism (ibid.). Similar to the European Parliament’s endeavour to set up the Frontex Scrutiny Working Group, empowering the FRO has allowed the Commission to strengthen its police-patrol control over the agency, to reduce the possibility of moral hazard, and to balance the power of the Executive Director.

Notably, empowering the FRO has equally strengthened Frontex’s capacity to monitor participants in Frontex JOs, including staff from national authorities. Frontex Official B (interview, 30 September 2021) confirms that the presence of the Fundamental Rights Officer and Standing Corps officers can effectively influence Member States border guard officers to comply with EU laws, even if the agency is legally not in a position to monitor the fundamental rights compliance of Member States. While the Fundamental Rights Office is still a new body within Frontex’s organisational structure, it allows the Commission to reduce Member States’ moral hazard and enables the emergence of a regulatory agency in EU border management. In this regard, these authors argue that the rapid development of Frontex has created new opportunities for supranational institutions to influence policy-making and implementation, which is not intended by the enacting coalition of EU Member States initially.

Conclusion

This article has investigated how Frontex has been able to obtain better information and how its development brought institutional significance beyond what is suggested in its legal mandate. The authors suggest that although the principal-agent model is still highly insightful for our understanding of the proliferation of EU agencies, we should be aware of this approach’s limitations. In this light, this article has varied the core assumptions of the principal-agent model and shed light on the endogenous dynamics that underlie the empowerment of Frontex.

As regards the specific case of Frontex, this article finds that the initial institutional setting prevented this agency from obtaining asymmetric information. Nonetheless, Member States’ reluctance to create a strong EU border agency did not prevent Frontex from achieving a self-reinforcing ‘information expansion’. With the Commission’s support and the agency’s own endeavours, information resources have gradually flowed to Frontex-centred information exchange networks, and the established intergovernmental information-sharing networks have been gradually phased out.

With Frontex establishing itself as the EU border information hub and continually enhancing its engagement on the ground, the EU’s supranational institutions have been increasingly eager to get a stronger grip on the agency. Traditional principal-agent analyses emphasise more formal institutional arrangements, through which policy-makers realise joint preferences by delegating authority to the agents. In the case of Frontex, however, this emphasis on formal arrangements has been constantly challenged by unilateral actions taken by one principal. In addition to pursuing their interests by bargaining over the delegation contract, principals competed with their institutional rivals and attempted to exert their influence on the agency. In this regard, both the European Commission and the European Parliament sought to erode the host Member States’ control over Frontex’s operational activities and empower the agency to monitor Member States’ policy implementation.
This article challenges the scholarly view that labels Frontex an intergovernmental instrument and argues that the result of the endogenous dynamics is more supranational elements in the EU’s approach to border control coordination. Decisions within Frontex JOs used to be taken by stealth and with limited EU input, whereas the new scrutiny is now putting pressure on Member States to deliver on their commitments and to ensure more accountability for their actions. Frontex, which was initially created to protect Member States from the risk of moral hazard and hidden information, has turned into an EU instrument that reduces Member States’ possibility of non-compliance.

Disclosure statement
No potential conflict of interest was reported by the authors.

References


Frontex. (2017). To Frontex consultative forum on fundamental rights, Ms Chairperson. Subject: Recommendation on Frontex activities at the Hungarian-Serbian border, 1 February.


