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The Evolution of Frontex Governance: Shifting from Soft to Hard Law?

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Abstract

This article investigates the evolution of the governance of the Frontex agency by focusing on joint operations, the area of activity that has posed the greatest challenges in finding an appropriate distribution of tasks and responsibilities between the member states and the agency. Adopting insights from rational choice institutionalism, this article argues that successive reforms of the agency have led to the inclusion of hard law elements in an attempt to address the main shortcomings of a governance framework that was initially predominantly based on soft law. However, sovereignty issues and institutional constraints that characterise this area of cooperation have induced member states to retain some of the central features of the previous soft law architecture. As a consequence, the reform process has resulted in the adoption of a 'hybrid' system of governance that mixes hard and soft elements in an attempt to reconcile competing policy priorities.

Keywords

Frontex; border control; EU migration policy; EU governance

Since its creation in 2004, the Frontex agency has navigated the rough waters of EU migration policy, characterised by crisis-driven policy-making, shifting high-level priorities and fluctuating issue salience (Bossong 2007). In a context of strong politicisation, the agency has received repeated pressures to intervene from member states facing migration 'crises' at their borders (Carrera 2007; Nascimbene and Di Pascale 2011; Euractiv 2014). Against this backdrop, EU institutions have carried out a reform process aimed at extending the Frontex operational mandate, by revising the Frontex Regulation in 2007, 2011 and 2014 (Council/Parliament 2007; Council/Parliament 2011; Council/Parliament 2014). This article takes into consideration the main features of the governance framework established for deploying Frontex Joint Operations (JOs)¹ and tries to unveil the reasons that led actors at the EU level to revise that framework in the course of successive legislative amendments.

The governance of Frontex has already been addressed by several academic contributions. Whereas some authors have traced the institutional dynamics that led to the creation of Frontex using a principal-agent model or by combining new institutionalist assumptions (Leonard 2009; Ekelund 2014), other authors have questioned the value added provided by the Frontex 'formula', pointing to the limited results achieved by the agency in several areas of activity due to a lack of autonomy and governance weaknesses (Pollak and Slominski 2009; Wolff and Schout 2013). No in-depth study, however, has been produced to date that focuses on the governance of JOs and that enquires systematically about the evolution of that governance framework. A focus on JOs is justified for several reasons. First, JOs have been at the centre of public opinion and media attention, because

¹ JOs refer to border control activities coordinated by Frontex that take place at the external borders of the member states. JOs are usually hosted by one member state, whereas other member states may participate with equipment or personnel. Other operational activities carried out by the agency, such as joint return operations, are not addressed in this article because they involve modalities of cooperation that cannot be assimilated to those of border operations (for an overview of Frontex activities see the agency's website: <http://frontex.europa.eu/about-frontex/mission-and-tasks/>).

they have been deployed to tackle emergency situations at Europe's migration hotspots, such as in the Mediterranean or on the Greek-Turkish land border. The centrality of JOs in the work of Frontex is also testified to by the fact that this area of activity absorbs by far the largest part of the Frontex budget, approximately 47 per cent of the about 98 million EUR that made up the overall budget of the agency in 2014 (Frontex 2014). Finally, JOs are interesting due to the sovereignty and even constitutional issues that they raise: indeed, JOs require member states to give up part of their previously exclusive control over external borders and to recognise Frontex, and other member states involved in operational activities, as legitimate actors entitled to perform a range of border control tasks in their place. Thus, the JOs' governance impacts on the overall physiognomy of the integrated management system of external borders called for in Article 77(1)(c) of the TFEU (Treaty on the Functioning of the European Union) and fuels the related debate on the establishment of a European System of Border Guards as a possible long term evolution of that system (European Council 2014 and 2009).

The analysis developed in this article takes as a starting point the literature on new modes of governance, which has acquired increasing relevance in the field of EU studies (Héritier and Rhodes 2010). Although new modes of governance are associated with the use of non-binding instruments typical of soft law and in opposition to the classic binding instruments of EU law (regulations and directives), several studies have recognised that the choice between hard and soft law is not a binary one because 'hybrid constellations' have been created in several EU policy areas that include both hard and soft elements within the same policy framework (Trubek, Cottrell & Nance 2006: 67). Therefore, this article tries to understand the reasons for the choice of a specific set of governance instruments in the case of Frontex JOs adopting insights from Rational Choice Institutionalism, 'the most well developed literature on international institutions' (Abbott 2008: 10). More specifically, following arguments developed by Rational Choice Institutional contributions, the governance of JOs is framed in terms of a trade-off faced by EU actors when choosing between hard and soft instruments (Abbott and Snidal 2000).

The analysis will focus on a number of sources beyond official legislative documents. In particular, Impact Assessments (IAs) carried out by the Commission in 2008 and 2010 (Commission 2010a; Commission 2008a) are relevant sources due to the role they played in shaping the reform process of the Frontex Regulation. More specifically, the 2008 IA was instrumental in the launch of a broad reflection on the reform of the agency that took place at the EU level (Commission 2008b; Council 2008; European Parliament 2008). Subsequently, the 2010 IA formulated a set of policy options that were later included in the 2010 Commission Proposal in view of the 2011 reform of the agency (Commission 2010b: 3). Finally, semi-structured interviews were carried out with officials from Frontex, the European Commission, the European Parliament and member states' border management authorities (see the list of interviews at the end of the article).

CHOOSING BETWEEN HARD AND SOFT LAW

The emergence of new modes of governance (NMG) at the EU level has been associated with instruments that depart from the traditional Community method of legislating through regulations and directives. The Community method is usually conceived as based on 'hard law': this implies the use of binding instruments, uniform and precise rules, the imposition of sanctions in case of non-compliance and extensive delegation of competences to supranational institutions for the adoption and implementation of those rules. In antithesis to the Community method, NMG are conceived as based on soft law, which means that they are not legally binding, they do not foresee sanctions in case of non-compliance and do not even involve transfer of substantial competences to supranational actors. Accordingly, NMG have usually been associated with the Open Method of Coordination, a non-binding framework of cooperation based on peer review, benchmarking and

evaluation that has been applied extensively in the field of EU social, and healthcare policies (Trubek and Trubek 2005).

The previously described dichotomy between the ‘hardness’ of the Community Method and the ‘softness’ of NMG, however, has been questioned by several contributions, which have pointed to the ‘hybridity’ that characterises several areas of EU governance, where different combinations of hard and soft instruments have been developed to respond to the specific features and requirements of different policy fields (Trubek, Cottrell & Nance 2006). In this regard, the conceptualisation of hard and soft law elaborated by Abbott and Snidal (2000) at the crossroads between International Relations (IR) and International Law is of particular relevance also in the case of the EU. Abbott and Snidal have questioned the standard definition of hard and soft law as based on the distinction between ‘binding versus non-binding’ instruments, which still dominates the largest part of the debate on the issue (Trubek, Cottrell & Nance 2006: 69). In contrast with that narrow definition, the authors define hard law as ‘legally binding obligations that are precise and that delegate authority for interpreting and implementing the law’, whereas soft law begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision and delegation (Abbott and Snidal 2000: 421). The authors add that the proposed categorisation explicitly avoids a binary distinction between hard and soft law, pointing to the continuous gradations of hardness and softness that are experienced in real word instruments (Abbott and Snidal 2000: 424).

Cross-fertilisation with theorisation developed in the IR field is also helpful in understanding the rationale behind the adoption of hard and soft instruments at the EU level. Rational Choice Institutionalism (RCI), in particular, offers one of the most-well developed research agendas to the study of international institutions (Abbott 2008: 10). At its core, RCI assumes that actors (nation states) hold a fixed and consistent set of preferences and behave strategically in order to pursue them. RCI adopts a functionalist logic to the issue of institutional choice, arguing that institutions are designed to deliver rationally anticipated benefits to the actors that create them (Hall and Taylor 1996: 944). RCI accounts have also been applied to the study of the EU institutional framework. In particular, principal-agent models have been used to explain why and under what conditions member states (principals) delegate competences to supranational institutions, such as the European Commission (agents). Besides, the same accounts have also dealt with the post-delegation phase, showing how supranational agents, once granted autonomy and decision-making power, pursue their own policy preferences and contribute to shape subsequent policy outcomes (Pollack 2003: 34).

RCI literature has inquired specifically on the rationale for using hard and soft law instruments, which make it particularly suitable to address the objective of this article (Trubek, Cottrell & Nance 2006: 70-71).² The article by Abbott and Snidal mentioned before (2000) stands out as a ‘classic’ contribution on this topic, due to its attempt to systematise the terms of the trade-off between hard and soft law. Besides, the subsequent attempt by Trubek, Cottrell and Nance (2006) to apply the same conceptual approach to the study of EU policy-making is also relevant for the analysis developed in this article. In particular, the authors argue that the need to find a balance between the advantages of hard and soft law, which are summarised in the following part of this section, is a

² The choice to adopt a RCI account in article does not imply that normative, ideational and social factors such as those stressed by constructivist accounts are not important when explaining the genesis and functioning of governance systems (Abbott and Snidal 2000: 425; Trubek, Cottrell & Nance 2006: 70). However, as recognised by Trubek, Cottrell & Nance (2006: 91), rationalist accounts have been shown to be particularly suited to explain why governance systems are adopted in the first place, which is the primary objective of this article. On the other hand, it should be acknowledged that constructivist accounts have provided important insights to explain how governance mechanisms, especially those based on soft law, work to bring about change once established.

central element to explain the increasing hybrid character of governance systems at the EU level (Trubek, Cottrell & Nance 2006: 67).³

Starting with hard law, one of its main advantages lies in the possibility of establishing *credible commitments* among the parties, which directly stems from its binding character. This feature is particularly important when the benefits of cooperation are great but actors hold a rational incentive to adopt uncooperative strategies, such as in the case of collective action problems and 'prisoner dilemma' situations (Abbott and Snidal 2000: 426). Another central argument in favour of hard law is the reduction of *transaction costs* associated with policy-making. This type of cost is produced by interactions between actors that are required for the application and further elaboration of agreed rules, including during the implementation process. Accordingly, a law that specifies detailed implementing rules can avoid controversies regarding its application, whereas delegation of competences to supranational agents can improve the effectiveness of the decision-making process by providing policy-relevant expertise not directly available to decision-makers (Abbott and Snidal 2000: 430). Finally, delegation of adjudicative or executive powers to third party institutions is the way most commonly used to avoid problems of *incomplete contracting*. More specifically, those problems stem from the impossibility of laying down contracts that can anticipate all the possible contingencies and related obligations falling to the parties (Abbott and Snidal 2000: 433).

Although hard law permits benefiting from a series of advantages, it also bears costs and limitations that make it unsuitable under particular circumstances. This is the reason why policy-makers may prefer to frame cooperation on the basis of soft law instruments. First of all, soft law permits the reduction of the *negotiating costs* of an agreement, such as time spent in bargaining sessions, as non-binding norms lower the stakes for the parties involved (Abbott and Snidal 2000: 434; Trubek, Cottrell & Nance 2006: 73). Another central issue that can make soft law more suitable has to do with *sovereignty costs*. In those fields closely related to the core of national sovereignty, actors may thus be induced to avoid risks of unwanted sovereignty costs, favouring arrangements that are non-binding or do not delegate extensive powers to third party institutions (Abbott and Snidal 2000: 436; Trubek, Cottrell & Nance 2006: 74). Finally, *flexibility* is also a feature of soft law that is particularly relevant in those policy areas characterised by rapidly evolving conditions and divergent negotiating positions among the contracting parties. More specifically, soft law can accommodate diverse legal and institutional systems without imposing top-down uniform rules and can enable better coping with uncertainty, particularly by reducing the scale of unforeseen future costs associated with entering into an agreement (Abbott and Snidal 2000: 445; Trubek, Cottrell & Nance 2006: 74).

The previous review of arguments specifies the main terms of the trade-off that exists between hard and soft law from a RCI standpoint. In the following section, the trade-off will be adopted to single out the motivations that have determined the choice of the governance mechanisms introduced to regulate Frontex JOs during successive rounds of reform of the Frontex Regulation. In particular, the hybrid character assumed by the Frontex governance system will be explained as a result of the tension that exists between the two poles of the trade-off between hard and soft law and the ensuing attempts by actors to reconcile them. With regard to the latter, and in line with RCI theorisation, a specific focus will be put on the mediating role of the EU institutional framework in shaping relevant outcomes, paying particular attention to the preferences and negotiating positions

³ The review of arguments presented below largely draws on Abbott and Snidal's contribution (2000). It has to be acknowledged, however, that the theorisation of hard and soft law proposed by the authors is rooted in the broader rationalist strand of IR, and that arguments on the rationale for using hard and soft law have been broadly debated in the IR literature (Trubek, Cottrell & Nance 2006: 71-73).

not only of member states' representatives gathered in the Council of Ministers but also of other EU institutions, such as the European Commission and the European Parliament.

THE GOVERNANCE OF FRONTEX JOINT OPERATIONS

The creation of Frontex should be put in the context of the new migration competences granted to the EU by the Treaty of Amsterdam in 1999, which integrated the Schengen acquis into EU law and further extended the scope of measures related to external border controls that could be adopted by the EU (Monar 2004). In its proposal on the establishment of the agency, the Commission expressed the need to overcome the limits of the intergovernmental framework in force at the time, which was organised around the SCIFA+, a special Council formation composed of the members of the SCIFA working group (Strategic Committee on Immigration, Frontiers and Asylum) plus the Heads of member states' border services (Wolff and Schout 2013: 311). The Commission pointed to previous evaluations of the activities implemented in the context of the SCIFA+, which had underlined the lack of suitable planning and preparation, central operational coordination, and an appropriate legal basis for carrying out common operations (Council 2003: 35). In June 2003, the Thessaloniki European Council had also invited the Commission to examine the necessity of creating 'new institutional mechanisms, including the possible creation of a Community operational structure, to enhance operational co-operation for the management of external borders' (European Council 2003: 4).

Though stressing the advantages that the establishment of an agency would bring about in terms of increased expertise, visibility and operational cooperation, the Commission clarified that, in line with the limited competences introduced by the Treaty of Amsterdam, the agency would simply ensure coordination of member states' actions in the field of border controls and that 'it will not be given any policy-making role' (Commission 2003: 4). In 2009 the Lisbon Treaty, by confirming the 'shared' nature of EU competence in the entire area of Justice and Home Affairs, sanctioned the primacy of member states in the field of border controls and set the legal boundaries within which the agency's mandate would be developed in the following years (Monar 2012: 74).

Although the positive role of Frontex in increasing cooperation on border-related issues was widely recognised, it soon appeared clear that the agency was still too dependent upon the member states for its functioning, particularly regarding the organisation and implementation of operational activities (interviews with COM 1 and MS 1; Council 2008; European Parliament 2008). A first attempt to address the shortcomings experienced by the agency in the field of operational cooperation was made in 2007 when the Frontex Regulation was amended to allow for the deployment of Rapid Border Intervention Teams (RABITs) and to lay down rules concerning tasks and responsibilities of guest officers taking part in JOs (Council/Parliament 2007). Subsequently, a comprehensive reform of the agency was completed in 2011. The 2011 amendments introduced several changes aimed at increasing Frontex operational capabilities and strengthening the monitoring and protection of fundamental rights during its activities (Council/Parliament 2011). Finally, another piece of legislation was adopted in 2014, which dealt with rules to be adopted during Frontex-coordinated sea operations (Council/Parliament 2014).

The following section of this article describes the changes introduced to the governance of JOs by the above-mentioned legislative amendments and points to the reasons for their introduction on the basis of the trade-off between hard and soft law outlined above. The analysis is organised around three aspects of the governance of JOs that have emerged as central in the negotiating process of legislative amendments. Those three aspects are as follows: i) the rules regulating the provision of technical equipment to the agency, ii) the rules regulating the provision of border guards to the

agency, and iii) the rules regarding the respective role and competencies of the agency and of the member states in the organisation and implementation of JOs.

Provision of Technical Equipment

A first point to consider when examining the governance of JOs is the mechanism that regulates provision of technical equipment to the agency. The 2004 Regulation stated in this regard that the agency shall manage a centralised record of technical equipment owned by the member states, 'which they, on a voluntary basis and upon request from another Member State, are willing to put at the disposal of that Member State for a temporary period' (Council 2004: Art. 7). The purported aim of the CRATE (Central Record of Available Technical Equipment) was to implement the principle of 'burden sharing' between member states and to enable Frontex to plan better for operations at external borders (COWI 2009: 53).

Several problems, however, were soon recognised in relation to the non-binding character of CRATE, in particular a lack of willingness on the part of member states effectively to contribute equipment listed in the Record (interviews with COM 1 and FRONTEX 2; European Parliament 2008). The use of technical equipment registered in the CRATE was improved by the signing of Memoranda of Understanding between Frontex and the member states, which specified the conditions for the use of the equipment and its financial implications, including the reimbursement of the costs on the part of the agency (Commission 2008a: 9). Nevertheless, the 2008 IA stressed that the use of such equipment in JOs had occurred only a few times and concluded that 'equipment is a 'missing link' for making semi-permanent operations a reality' (Commission 2008a: 10). This situation was confirmed by the 2010 IA, which pointed to the non-legally binding character of commitments made to CRATE as a major problem: 'While Member States are ready to list a large number of equipment [...] a very small share of that equipment is actually made available [...] In spite of repeated calls by the institutions the contribution of the Member States, based on the current voluntary system have only marginally increased' (Commission 2010a: 12).

The shortcomings associated with the non-binding character of CRATE were addressed in the reform of the agency that led to the 2011 amendment of the Frontex regulation. In particular, the Commission proposal advanced two policy options to improve provision of technical equipment to FRONTEX. The first option was to set up a technical equipment pool based on compulsory contributions from the member states, leaving unspecified, however, the exact functioning of this mechanism. The second option was the introduction of a clearer legal basis for the acquisition or leasing of technical equipment by Frontex, including provisions on the place of registration and use of equipment. This latter option was aimed to ease the acquisition of equipment by the agency, a possibility that, albeit legally feasible under the 2004 Regulation, had never been exploited up to that point (Commission 2010a: 22).

The two options proposed by the Commission were transposed in the 2011 Regulation. However, with regard to the first option, the Council amended the Commission proposal to clarify that compulsory provision of equipment would be based on annual bilateral negotiations and agreements between the agency and member states. Under this system, member states are not obliged to provide anything to the agency, but once they have made a pledge, they are obliged to fulfil their commitment, unless in the event of an exceptional situation occurring at their borders (interview with COM 2; Council and Parliament 2011: Art. 7(3)). On the basis of the second option advanced by the Commission, the 2011 Regulation also specified the rules allowing the agency to buy or lease technical equipment, including when an asset is co-owned by the agency and a member state (Art. 7(1)). In spite of this last amendment, it should be recalled that the necessary conditions for allowing Frontex to acquire its own equipment on a regular basis are still far from being

achieved: as noted by a Feasibility Study released in 2014, the current size of the Frontex budget does not permit the purchase of equipment, whereas co-ownership is complicated by issues concerning the place of registration and accountability during the use of the equipment (interview with FRONTEX 2; Unisys 2014: 99).

In terms of governance features, the above-mentioned changes introduced hard law elements in the system while preserving the principle of voluntarism on which the provision of equipment from member states to Frontex is based. Accordingly, the mechanism of 'binding pledges' obliges the member states to honour those commitments they have voluntarily decided to undertake (interview with COM 2). Likewise, the introduction of more detailed and clearer provisions that allow Frontex to acquire its own equipment was singled out as a medium or long term solution to reduce its dependency on member states' pledges (interview with COM 2; Commission 2010a: 23-24). In line with RCI theorisation, those amendments were thus aimed at ensuring that contracting parties abide by their commitments and, with specific regard to ownership rules, avoid transaction costs stemming from the transfer of equipment from member states to the agency. At the same time, the need to preserve member states' autonomy and guarantee the necessary flexibility in the planning of their own border management activities explains why, for example, a fully-fledged binding mechanism based on pre-determined shares of equipment for each member state was not considered as a suitable option.

Provision of Border Guards

The provision of border guards to Frontex was initially regulated by a non-binding system that experienced problems similar to those reported in the case of equipment. Accordingly, the agency had to make ad hoc requests to member states for each individual operation, a situation that created logistical and organisational problems (COWI 2009: 36; Commission 2010a: 13). The 2007 amendments to the Frontex Regulation had indeed provided for a mechanism of compulsory deployment of border guards but restricted it to situations of 'urgent and exceptional migration pressure' in the context of RABIT (Council/Parliament 2007). The RABIT mechanism was described by the Commission in the following way: once a member state declares its willingness to participate in the establishment of the teams, it 'shall make these officers available to the Agency for deployment at short notice to another Member State and for regular training and exercise purposes in accordance with an annual schedule' (Commission 2006: 5). The high threshold set for the deployment of RABITs in terms of what constitutes an emergency, however, meant that such an instrument was employed only once, on the Greek-Turkish border from November 2010 to March 2011, following a formal request issued by the Greek government (Frontex 2010: 24).

In its 2010 Proposal for amending the Frontex Regulation, the Commission suggested extending the same system in place for RABIT to regulate Frontex JOs by constituting a pool of border guards called 'Frontex Joint Support Teams' (FJST) based on a compulsory contribution from the member states. In the course of negotiations, the rationale of the Commission proposal was kept, but, following an amendment presented by the European Parliament (EP), it was decided to merge the Frontex Joint Support Teams and Rapid Intervention Teams in one single formation, called European Border Guard Teams (EBGT), to be deployed in all types of JOs, including pilot projects and rapid interventions. As explained in the EP Report, this proposal was designed to 'streamline the provisions of the regulation, increase transparency, avoid duplication and confusion of roles and most importantly, give a clearer European identity to the Agency's missions' (European Parliament 2011: 38). The same Report also referred to the EBGT as 'an embryonic structure which could, in future, be developed into a fully-fledged EU Border Guard Agency' (European Parliament 2011: 38). This statement is proof of a diffuse positive attitude among EP ranks regarding further EU integration on border management issues (interviews with EP1 and EP 2; Unisys 2014: 100). As in the case of equipment, it

was specified on request by the Council that contributions from member states should be decided on the basis of annual bilateral agreements and that pledges should be binding on them except in cases of exceptional situations at their borders (Council/Parliament 2011: Art. 3b (2)).

The additional option contained in the 2010 Commission proposal was to foresee the gradual creation of a pool of border guards on semi-permanent detachment from member states to Frontex for a maximum of six months in a twelve-month period (Commission 2010b: 22). Although recognising the value added by this option in improving the capacity to plan, initiate and implement operations, the 2010 IA had pointed to the difficulties associated with having completely independent border guards employed as temporary agents, mainly due to sovereignty and legal constraints associated with the delegation of public authority to non-national border guards in the member states (interview with COM 2; Commission 2010a: 27). For this reason, the Commission proposed to make this new typology of personnel subject to the same legal framework as other guest officers (i.e., border guards of member states participating in JOs) were subject to, which had been included in the 2007 amendments. In that circumstance, the Commission moved from the premise that a minimum level of harmonisation regarding the tasks assigned to guest officers was an indispensable condition for assuring the proper implementation of JOs (Commission 2006: 7). Consequently, Art. 6 of the 2007 Regulation provided that guest officers exercising their duty on the territory of a member state should be allowed to perform all tasks for border checks or border surveillance included in the Schengen Border Code except for refusal of entry and only in the presence and under the instructions of border guards of the host member state. Furthermore, the 2007 Regulation introduced provisions on service weapons, use of force, disciplinary measures and the civil and criminal liability frameworks under which guest officers should be placed (Council/Parliament 2007: Art. 6-11).

The creation of a pool of border guards on semi-permanent detachment was included in the 2011 Regulation. In line with the Commission's proposal, Seconded Guest Officers, as they are called, should be detached to the agency for a maximum of six months in a twelve-month period and contributed through the same mechanism of annual bilateral negotiations as for other border guards (Council/Parliament 2011: Art. 3b(3)). As emerged during interviews, this instrument has been welcomed favourably by the member states' authorities primarily due to the flexibility it guarantees and also because it allows the exchange of best practice and the harmonisation of border control procedures without imposing binding commitments and additional costs on their budgets (interviews with COM 2, FRONTEX 2, MS 2).

As stated at the beginning of this section, the non-binding character of commitments made by member states for the provision of border guards and the fact that the agency had to make ad hoc requests for each JO implied a process characterised by uncertainty and high transaction costs. Those weaknesses were addressed through the adoption of a quasi-binding mechanism for the provision of border guards, first in the context of the RABIT and then also for standard JOs, and through the establishment of a pool of Seconded Guest Officers detached on a semi-permanent basis to the agency. The features of these two mechanisms reflect the terms of the trade-off between hard and soft law instruments underlined by RCI: although those mechanisms introduced a 'harder' framework of cooperation, thus addressing some of the main shortcomings of the previous phase, they preserved the voluntary character of member states' contributions to the agency.

The Organisation and Implementation of Joint Operations

A last aspect of the reform process of Frontex to be considered regards the role of Frontex in the organisation and implementation of JOs. The 2004 Regulation remained silent on this point as well as on the obligation to issue an operational plan (OP) detailing the objectives and organisational

structure of JOs. Such a lack of clarity was recognised as an aspect preventing cooperation in the 2010 IA, which pointed to the fact that '[t]he Agency takes on a different role during different operations, depending on *ad hoc* arrangements. While the Agency does draw up an operational plan for each operation such a plan is not foreseen in the legal basis' (Commission 2010a: 13). The same point was stressed in the Management Board Recommendations addressed to the Commission on July 2009 (Frontex Management Board 2009: recommendation number 7), whereas the external evaluation of the agency completed the same year referred to the lack of coordination between member states participating in JOs as a major issue, pointing to delays, uncoordinated responses and different internal procedures as the main problems to be addressed (COWI 2009: 40-41).

In the 2010 IA, the Commission evaluated two options to streamline the organisation and implementation of JOs. The first option proposed to award the agency the sole right of initiative for the launch of JOs and the sole lead in the establishment of the OP and in the implementation of JOs. The second option, broadly in line with the *modus operandi* already established by member states and the agency through practical cooperation, suggested granting Frontex a co-leading role with the host member state in the organisation of the operation: specifically, the responsibility to draw up the OP subject to the final agreement of the host member state, and a shared right of initiative for launching operations (Commission 2010a: 28). The Commission specified that both the options would enable the introduction of a legal basis for the establishment of the OP, but the impacts of the two options were recognised to be different. Regarding the first option, the Commission recognised its main strength in the possibility of organising JOs based exclusively on needs identified at the EU level with a predicted positive spill over in terms of harmonisation and efficiency. Nevertheless, the Commission also recognised important drawbacks associated with that option, namely a lack of flexibility in adapting to local conditions, the impossibility of the agency replacing the combined expertise of national border guards' authorities, and the likely resistance of member states on sovereignty grounds (Commission 2010a: 30). This last point was confirmed by interviews and empirical research, from which it clearly emerged that several member states oppose substantial delegation of border control competences to the agency in order to preserve the primacy of their national systems (interviews with FRONTEX 1, MS 1 and MS 2; Unisys 2014: 90). The second option was thus preferred by the Commission as a suitable compromise between the competing objectives of streamlining the implementation of JOs and the need to preserve member states' prerogatives (interview with COM 1; Commission 2010b: 4).

The 2011 Regulation kept the main points of the Commission proposal, in particular the obligation to draft an OP for each operation and a co-leading role between Frontex and the host member state in the organisation of JOs (Art. 3a). Specifically, the Regulation provided that the OP includes the objectives, duration, geographical area of interest, instructions to be given to guest officers, provisions on reporting and evaluation and specific rules for sea operations (Council/Parliament, 2011: Art. 3a(1)). A provision was also included upon request of the EP according to which the Executive Director of the agency shall suspend or terminate JOs when fundamental rights or international protection obligations have been violated (Art. 3(1a)). This amendment should be read in conjunction with other instruments introduced by the EP to reinforce the framework for the protection of fundamental rights during JOs, such as the establishment of a Consultative Forum and the appointment of a Fundamental Rights Officer (Art. 26a). The introduction of those provisions testifies to the relevance of fundamental rights issues on the agenda of the MEPs and also of the mounting concerns raised by NGOs, media and civil society on alleged misconduct of Frontex in the context of sea operations implemented in the Mediterranean (Slominski 2013; interviews with EP 1 and EP 2).

The rules and procedures to be followed in the course of JOs at sea had already been addressed through Decision 2010/252/EU, which also included non-binding guidelines for search and rescue (SAR) situations and disembarkation of rescued migrants (Commission 2013: 1). As explained by the

Commission, the central aim of the Decision was to overcome the situation of legal uncertainty determined by different rules and interpretations of International Maritime Law, which had hindered the effectiveness of sea operations and undermined efforts of EU solidarity (Commission 2013: 1). This is the case of SAR activities, which are conducted on the basis of rules and procedures set by international law, such as those included in the 1979 International Convention on Maritime Search and Rescue (SAR Convention). Nevertheless, several divergences have emerged among member states regarding their respective obligations, which is a circumstance that has often prevented the cooperation and coordination between SAR services of neighbouring countries (Trevisanut 2010).⁴

The Decision on sea operations, however, was annulled two years later on procedural grounds, following an action brought by the EP before the Court of Justice of the European Union (CJEU). In line with the substance of the EP complaint, the CJEU considered that provisions on interception, rescue and disembarkation are 'essential elements' of the Schengen Border Code and thus could not be adopted through the comitology procedure, as had been the case of the Decision.⁵

Following the verdict issued by the CJEU, in April 2013, the Commission reframed the rules on Frontex sea operations in the form of a Regulation (Commission 2013). In line with the CJEU judgement, the Commission specified that the new act was to be binding in entirety, including provisions on SAR and disembarkation. The proposed Regulation also strengthened the protection of fundamental rights and the respect of the principle of *non-refoulement*, taking into consideration concerns raised by the European Court of Human Rights in the 2012 ruling *Hirsi Jamaa and Others v. Italy* (Commission 2013: 5; Council/Parliament 2014: Art. 4). During negotiations, six member states (Cyprus, France, Greece, Italy, Malta and Spain) strongly opposed the introduction of rules on SAR and disembarkation into the Regulation; in particular, the five member states criticised those rules as an encroachment on their national sovereignty and added that rules included in the proposed act would have left participating states without the necessary flexibility to accommodate the specific nature and circumstances of each operation (Council 2013: 4). Finally, however, the urgency to finalise negotiations in the aftermath of the Lampedusa tragedy of 3 October 2013 and the pressures raised by the EP to keep the original extension of the Proposal forced the recalcitrant Member states to step back from their initial position, so that the articles on SAR and disembarkation were kept in the final text of the Regulation (interview with MS 2; Peers 2014).⁶

The arguments advanced by RCI provide a useful tool to account for the evolution of JOs governance in this last case. As described above, the 2011 reform introduced the obligation to issue an OP detailing the main organisational aspects of each operation, whereas the 2014 reform provided for a set of binding rules to be followed during Frontex-coordinated sea operations. A central rationale for

⁴ For example, Trevisanut (2010) refers to the frequent disputes that occurred between Italy and Malta as resulting from the refusal of the latter to accept responsibility for persons rescued within its SAR zone. Although Italy backed its argument on relevant rules included in the SAR Convention, Malta advanced an alternative interpretation of the concept of 'place of safety' therein included, stating that 'rescued persons should be disembarked in the nearest port to the place of rescue, regardless of whose [SAR] zone they are found in' (Trevisanut 2010: 532).

⁵ The Commission had chosen to adopt the rules on Frontex sea operations through the comitology procedure considering them as additional measures in the field of border surveillance and thus falling within the scope of Art. 12(5) of the Schengen Border Code (see Commission 2013: 1).

⁶ It has to be recalled here that, *strictu sensu*, SAR remains a competence of the member states and that the Regulation on sea operations only covers those SAR activities that are performed in the context of border surveillance operations coordinated by the agency. However, as testified by the practice of sea operations deployed in the Mediterranean in the last two years, such as the Italian *Mare Nostrum* operation and the Frontex-coordinated operation Triton, a clear cut distinction between the two activities is often difficult to hold in practice, because in the majority of cases the detection of a boat carrying migrants ends with a SAR operation (Carrera 2015; The Guardian 2015).

introducing those hard law elements in the framework of JOs was to clarify the rules of engagement and the *modus operandi* to be followed by the parties involved, thus reducing transaction costs stemming from member states' uncoordinated responses. Substantial delegation of power to Frontex, however, such as granting it the sole right of initiative for the launch of JOs and the sole responsibility for issuing the OP was discarded, as this option would have introduced an overly rigid framework of cooperation and was considered as incompatible with the preservation of national border control systems.

CONCLUSION

The starting point of this article was to recognise that hybridity is emerging as a central feature of the EU system of governance in an increasing number of domains, which are characterised by the simultaneous presence of 'hard' and 'soft' instruments. According to RCI theorisation, the choice of a particular governance framework should be considered in light of the trade-off faced by policy-makers between the advantages of hard and soft law. Although 'harder' solutions reduce the costs of operating within an institutional framework by assuring respect of commitments and reducing transaction costs, soft instruments are easier to reach, allow the parties to preserve their national prerogatives and can be flexibly adapted to different circumstances.

Frontex JOs present an interesting case for testing the explanatory power of the previously mentioned trade-off due to the complex inter-relationship between the agency and member states' prerogatives involved in that area of cooperation. First, it was shown that the Frontex founding Regulation set in place a system that was largely based on soft-law regarding all the three governance aspects considered in this article. Non-binding mechanisms were established to regulate provision of equipment and personnel to Frontex, whereas the precise role of the agency during JOs was left unspecified. The recognition of major shortcomings associated with that same framework, however, led to the adoption of legislative amendments in 2007, 2011 and 2014. As a result of those reforms, hard elements were included in the governance of JOs that increased the level of hybridity of the system.

Two major aspects addressed during the reform of Frontex were the mechanisms for the provision of equipment and border guards to the agency. Regarding equipment, a mechanism of 'binding pledges' was established to commit member states to provide equipment on a regular basis, whereas more detailed rules were introduced in order to facilitate the acquisition of equipment by the agency itself. A similar system of 'binding pledges' was also introduced to reinforce provision of border guards to the agency. For the same reason, a pool of border guards detached to the Frontex on a semi-permanent basis was also introduced. Another major issue that was subject to reform was the organisation and implementation of JOs. Here, the need to clarify and streamline procedures led legislators to introduce the obligation to draft an Operational Plan for each operation detailing organisational and procedural aspects to be followed by the officers taking part in the operations. Major issues raised by sea operations, including SAR and disembarkation, were also addressed by means of a specific set of binding rules. In line with the arguments advanced by RCI, the analysis developed in this article showed how the introduction of those mechanisms was motivated primarily by the need to assure mutual respect of commitments on the part of member states and to reduce transaction costs involved in the different phases of the organisation and implementation process. The analysis also pointed to the role that EU supranational institutions played in pushing forward solutions aimed at achieving those objectives, sometimes also in contrast with more conservative positions taken by the Council. Accordingly, the Commission was instrumental in highlighting the deficiencies of the previous phase of cooperation and in devising the governance mechanisms that were later on translated in the text of the Regulation. The EP also managed to take advantage of its role as a co-legislator to introduce amendments aimed at strengthening the effectiveness and

coherence of several procedural aspects, as well as to set in place a framework for guaranteeing respect of fundamental rights and asylum law during Frontex operations.

Although arguments for making the governance of JOs ‘harder’ played an important role in the legislative amendments taken into consideration, we should not underestimate the importance of the other side of the trade-off, which points to the advantages of soft law in shaping the reform process. In particular, the analysis demonstrated how sovereignty and institutional constraints have constantly made policy-making actors aware that reform in this field of border controls should necessarily be gradual and follow a step-by-step approach (Unisys 2014). Consequently, the system of ‘binding pledges’ described above was placed within a framework that remains based on voluntarism, which allows member states to retain a large degree of discretion when contributing both technical and human resources to the agency. In addition, from the beginning, substantial delegation of competences to Frontex for the organisation of JOs was written off from the reform project because it was considered too inflexible and incompatible with the preservation of member states’ national prerogatives.

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Table 1: List of Interviews

Interviewee	Interview Date	Interview code
Commission official (DG Home Affairs)	November 2013	COM 1
Commission official (DG Home Affairs)	May 2014	COM 2
Member of the European Parliament	November 2013	EP 1
Assistant to a Member of the European Parliament	November 2013	EP 2
Frontex official	July 2013	FRONTEX 1
Frontex official	January 2014	FRONTEX 2
Member state official (border control authority)	July 2013	MS 1
Member state official (border control authority)	October 2014	MS 2

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