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**Integration by stealth and
core state powers:**

A case study on the
integrational dynamics of
Frontex

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Abstract

Il presente elaborato si prefigge di verificare la validità della teoria proposta da Philipp Genschel e Markus Jachtenfuchs (2016), la quale razionalizza il processo di integrazione europea analizzando le caratteristiche strutturali, politiche ed economiche, in cui esso si svolge. La teoria sostiene, in particolare, che il trasferimento di competenze dagli Stati Membri all'Unione Europea avvenga grazie all'incontro di due macro-fattori, indicati come domanda ed offerta di integrazione. Il primo termine, coerentemente con la matrice neo-funzionalista che caratterizza l'approccio dei due autori, si riferisce all'esistenza di incentivi alla comunitarizzazione, come ad esempio una riduzione dei tempi decisionali in determinati settori, una maggiore credibilità degli impegni assunti dagli Stati Membri, oppure la possibilità di condividere risorse e trarre vantaggio da economie di scala. Di converso, il secondo termine si riferisce alla volontà politica degli attori coinvolti nel processo legislativo europeo di soddisfare tale domanda, dandole luogo attraverso un atto formale delle istituzioni alle quali essi appartengono. Genschel e Jachtenfuchs propongono dunque un modello che individua dei pattern ricorrenti nel processo di integrazione europea, stabilendo delle correlazioni tra di essi e la natura della domanda ed offerta in determinati momenti storici.

Tale teoria risulta particolarmente interessante in quanto inserita all'interno di un dibattito accademico in cui diversi studiosi sostengono che l'Unione eserciti, nella propria prassi, un'influenza maggiore di quanto le competenze ufficialmente assegnatele facciano immaginare (Mérand, 2009; Schimmelfennig, 2018; Egeberg e Trondal, 2011). Essi ritengono dunque che esista una discrepanza tutt'altro che trascurabile tra i poteri che l'Unione dovrebbe esercitare e quelli che essa esercita nel concreto; il che, se verificato, comporterebbe notevoli preoccupazioni in termini di legittimità del sistema politico nel suo complesso. Ancor più rilevantemente, Genschel e Jachtenfuchs (2018) suggeriscono che tale ufficiosa espansione dell'influenza dell'Unione riguardi non soltanto i settori di competenza tradizionalmente comunitaria, ma anche i cosiddetti "poteri cardine dello Stato". Tali poteri, che comprendono l'esercizio della violenza legittima, la pubblica amministrazione e la riscossione di tasse e imposte, sono quelli grazie ai quali lo Stato moderno, concepito come sistema organizzativo della vita politica e sociale, è stato istituito ed ha prevalso su modelli alternativi in Europa a partire dal XVI secolo (Tilly, 1975). Data l'alta pregnanza simbolica che caratterizza questi settori in virtù delle loro radici storiche, dunque, tali competenze sono sempre state mantenute al riparo dalle forze dell'integrazione europea e gelosamente custodite dagli Stati; ed è perciò comprensibile che una loro condivisione in seno all'Unione comporterebbe notevoli ripercussioni tanto sulla pervasività e "statalità" UE stessa, che sul ruolo e sulla natura degli Stati Membri. Occuparsi di tale approccio al processo di comunitarizzazione

permette dunque di discutere non solo quali siano le competenze effettive dell'Unione, ma anche di soppesare le considerazioni teleologiche ad esso sottese.

Ciò che contraddistingue la teoria sviluppata da Genschel e Jachtenfuchs è che essi applicano metodicamente il proprio modello, basato sui concetti di domanda ed offerta, anche a tali competenze cardine, razionalizzando l'integrazione europea in questi settori e sostenendo che l'Unione vi eserciti una notevole influenza. Di converso, ciò che accomuna questi due autori con i numerosi altri che trattano di queste tematiche è che essi si avvicinano allo studio dell'Unione Europea da una prospettiva neo-funzionalista, in cui grande enfasi viene posta sugli effetti di spill-over e sulle altre cause che inducono gli attori facenti parte delle istituzioni, nello specifico della Commissione, Consiglio e Consiglio Europeo, a preferire crescenti livelli di integrazione. Al fine di comprendere al meglio i presupposti che sorreggono queste teorie la prima delle tre parti in cui è suddiviso questo elaborato si cura di presentare le peculiarità del modello neo-funzionalista, assieme agli spunti di riflessione che esso fornisce riguardo allo sviluppo storico dell'Unione. Tale discussione preliminare, che include inoltre una breve trattazione relativa alle modalità con cui essa acquisisce ed esercita le proprie competenze, risulta necessaria al fine di contestualizzare il vero nucleo tematico del primo capitolo: la cosiddetta "integrazione furtiva".

Il termine, dal significato non ancora chiaramente definito, è stato utilizzato con accezioni differenti all'interno della letteratura nella quale esso compare, complicando la valutazione della sua reale portata e della natura dei fenomeni cui si riferisce. Ciò ha dunque richiesto, da parte di chi scrive, un'analisi dei documenti in cui esso trova applicazione al fine di sistematizzarne il significato, il che ha successivamente permesso di interpretare i casi descritti dagli studiosi neo-funzionalisti qui considerati in quanto descrittivi di episodi di integrazione furtiva, anche in assenza dell'esplicito utilizzo del vocabolo. Si è dunque giunti alla conclusione che il termine indichi, globalmente, due differenti dinamiche associate all'integrazione: da un lato si trovano i casi in cui le istituzioni europee hanno adottato degli atti conferenti nuove competenze all'Unione in sostanziale assenza di pubblicità, al fine di evitare le ripercussioni negative dovute all'opposizione delle opinioni pubbliche nazionali (Majone, 2005); dall'altro, si hanno i casi in cui il trasferimento di determinate competenze all'UE ha causato, nel concreto e in maniera non intenzionale, una cessione di potere più ampia di quanto formalmente previsto, espandendo l'influenza decisionale ed esecutiva dell'Unione (Trondal, 2016). Il capitolo si svolge dunque attorno alla trattazione dei fenomeni di integrazione indicati come "furtivi", in particolare secondo la prima delle due accezioni succitate, assieme alla discussione riguardo ciò che essi hanno comportato in termini di estensione delle competenze comunitarie, di efficacia delle politiche adottate e dei dubbi sulla legittimità del sistema politico nel suo complesso.

Tale trattazione ha valore sostanzialmente introduttivo rispetto agli argomenti trattati nel secondo capitolo, i quali mirano a fornire una panoramica di come Genschel e Jachtenfuchs, assieme ai numerosi

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altri autori ad essi collegati, hanno descritto la graduale acquisizione di potere dell'Unione Europea nell'ambito delle competenze cardine dello Stato. In questa seconda parte viene presentata innanzitutto una breve trattazione di questi poteri, di come essi siano stati progressivamente centralizzati e monopolizzati dalle nascenti organizzazioni statali del XVI secolo e dell'importanza fondamentale che essi rivestono nell'amministrazione dello Stato e nella percezione di sovranità dello stesso. Inoltre, verrà qui fatto un breve accenno alle potenziali conseguenze di una loro comunitarizzazione; ed in ottica comparatistica verranno discusse le differenze, in termini di allocazione delle competenze decisionali all'interno dei diversi livelli del sistema di governance, relative ai poteri cardine nei sistemi federali, verso il cui modello alcuni autori sostengono che l'Unione si muoverebbe nel caso di un'integrazione in tali settori (Hallerberg, 2016).

In secondo luogo, verrà discussa la maniera in cui la teoria generale basata su domanda e offerta è stata modificata per adattarsi a queste specifiche aree politiche; ed in particolare saranno presi in considerazione i diversi fattori che giustificano la reticenza degli Stati Membri nel condividere tali competenze: il fattore "politiche alte" e l'importanza della natura dell'attore veicolante la domanda. Questi elementi serviranno ad arricchire la comprensione delle teorie in esame, in quanto verrà presentato il modello secondo il quale i pattern dell'integrazione risultano modificati dalla peculiare natura dei poteri cardine, comportando un vasto ricorso all'utilizzo di deroghe e la prevalenza di forme di regolamentazione rispetto alla creazione di corpi o istituzioni europei deputati alla gestione delle nuove competenze. Inoltre, la trattazione di queste tematiche permetterà di comprendere la spiegazione che Genschel e Jachtenfuchs forniscono della maniera in cui le competenze cardine vengono gestite dall'Unione Europea, attraverso ciò che essi definiscono controllo indiretto. Secondo tale prospettiva, l'Unione non esercita direttamente questi poteri, non avendone esplicitamente competenza in virtù dei limiti previsti dai Trattati, ma esercita piuttosto un'influenza sugli Stati Membri tale da determinare i limiti e le forme del loro esercizio degli stessi. Questo secondo capitolo risulta dunque utile al fine di comprendere, da un lato, la prospettiva neo-funzionalista dei due autori; e dall'altro di metterne in risalto le incongruenze e le potenziali falle.

A tal proposito, numerosi punti risultano incorretti o poco chiari. La teoria, infatti, risulta incapace di prevedere alcuni sviluppi del processo integrativo che sono stati empiricamente osservati, per esempio la rinazionalizzazione di alcuni settori politici come la Politica comune della pesca o la Politica agricola comune; nonché fallisce nel giustificare la creazione della Banca Centrale Europea, che secondo il proprio modello non avrebbe dovuto essere istituita. Inoltre, ben più fondamentale risulta la questione relativa ai concetti stessi di domanda ed offerta, sui quali la teoria si basa, che si dimostrano ad una prima analisi vaghi e potenzialmente inadatti ad essere utilizzati analiticamente per razionalizzare i pattern del processo di comunitarizzazione. Tali incongruenze verranno utilizzate, nel terzo capitolo, per tentare di falsificare

il modello proposto da Genschel e Jachtenfuchs, occupandosi prevalentemente di quest'ultimo aspetto e del tema del controllo indiretto.

La metodologia preposta a tal fine consiste nel selezionare una politica comunitaria per il cui svolgimento sia richiesto l'esercizio di uno dei poteri cardine, così da poter verificare se le ipotesi dei due autori, tanto dal punto di vista delle condizioni strutturali di domanda e offerta che da quello della definizione delle forme e dei limiti in cui gli Stati esercitano tale potere, siano congruenti con le effettive caratteristiche della politica in questione. Si tratta, in sostanza, di un controllo della coerenza interna del modello in esame, nonché della sua capacità di razionalizzare il processo integrativo. Si è dunque selezionato, per questo test, il caso dell'istituzione di Frontex, l'agenzia europea della guardia di frontiera e costiera: sia in quanto fattispecie non ancora analizzata secondo questa prospettiva, sia poiché le funzioni di controllo dei confini terrestri e marittimi dell'Unione necessitano dell'utilizzo della forza al fine di regolamentare i flussi migratori in ingresso nella zona Schengen.

La prima sezione del terzo capitolo si occupa, coerentemente, di appurare l'esistenza di elementi che possano essere identificati come domanda e offerta per la creazione di Frontex. Per far ciò, si è proceduto ad analizzare il contesto in cui la nuova agenzia ha progressivamente preso forma, esaminando i lavori preparatori che hanno preceduto l'adozione del reg.(CE) 2007/2004, istitutivo della stessa. In particolare, essi constano delle interazioni tra le varie istituzioni europee attive a riguardo, dalle comunicazioni e report della Commissione, agli emendamenti e richieste proposti dal Consiglio, alle conclusioni del Consiglio Europeo in materia di controlli delle frontiere esterne. Poiché, tuttavia, non si è stati in grado di identificare chiaramente una domanda ed un'offerta al livello europeo, si è optato, al fine di comprendere le motivazioni che hanno spinto verso la creazione di Frontex, per una ricerca degli stessi fattori a livello nazionale. Si è conseguentemente selezionato un unico paese che per motivazioni legate al suo ruolo nell'istituzione dell'agenzia rappresentava un potenziale candidato ideale, l'Italia; di cui sono stati considerati i documenti parlamentari e governativi, nella forma delle relazioni annuali presentate sia dall'organo esecutivo che legislativo al fine di monitorare ed orientare la condotta di quest'ultimo presso il Consiglio. In tal caso, e contrariamente alle ipotesi di Genschel e Jachtenfuchs, è stato possibile reperire numerosi elementi che evidenziano come la nascita di Frontex sia stata sostanzialmente determinata da un forte interesse italiano in materia, dunque dagli interessi di singoli Stati Membri, piuttosto che da condizioni strutturali in seno all'Unione Europea. Tale conclusione, benché derivante da un'analisi parziale, la quale per essere rappresentativa necessiterebbe la valutazione documenti di tutti gli (allora) quindici membri dell'Unione, evidenzia la debolezza della teoria esaminata, suggerendone la scarsa applicabilità ai fini della razionalizzazione del processo integrativo.

In fine, l'ultima parte di questo elaborato è stata dedicata al tema del controllo indiretto delle competenze cardine. Per verificare la veridicità delle affermazioni dei due autori a riguardo si è proceduto

ad esaminare la documentazione legale che regola il funzionamento dell'agenzia e delle operazioni che essa svolge, in particolar modo il suo regolamento istitutivo ed il codice Schengen. Inoltre, si è tenuto conto della letteratura preesistente in materia di pratiche securitarie e di armonizzazione "soft", dovuta all'influenza esercitata dal concetto di analisi del rischio sviluppato da Frontex. Infatti, è stato sostenuto che i criteri che l'agenzia utilizza al fine di determinare i punti vulnerabili lungo i confini comuni, e che richiedono un intervento degli Stati Membri con potenziale supporto da parte di Frontex, siano stati via via adottati dagli Stati stessi, modificando quelli precedentemente in uso (Léonard, 2010; Horii, 2016). Si è a tal proposito confermato che la competenza relativa all'esecuzione dei poteri cardine rimane saldamente nelle mani degli Stati, come previsto dalla teoria di Genschel e Jachtenfuchs; mentre non è stato possibile reperire sufficienti informazioni riguardo all'effettiva portata della sua autorevolezza per quanto riguarda il concetto di rischio. Infatti, per appurare tali affermazioni sarebbe stato necessario svolgere un'analisi delle prassi effettive degli Stati Europei nell'eseguire i controlli alle frontiere, verificando se esse abbiano o meno subito un'alterazione in seguito all'istituzione dell'agenzia.

Globalmente, i risultati portati dall'indagine presentata nel terzo capitolo suggeriscono che il modello neo-funzionalista sviluppato Genschel e Jachtenfuchs non soddisfi le caratteristiche necessarie per essere considerato valido. Esso si rivela inadatto per via dell'utilizzo di categorie ermeneutiche, quelle di domanda ed offerta, troppo imprecise per poter essere utilizzate analiticamente o per permettere un riscontro empirico della loro esistenza secondo le modalità previste dai due autori; mentre per quanto riguarda la teoria del controllo indiretto si può senz'altro affermare che l'Unione applichi una certa influenza sugli Stati Membri, benché essa non determini unilateralmente il contesto in cui essi esercitano le proprie competenze cardine.

Foreword

The purpose of the present dissertation is that of investigating whether there exists a discrepancy between the competences that are attributed to the European Union and those that it exercises in its praxis. In fact, several theories exist (Genschel and Jachtenfuchs, 2016; Mérand, 2009; Schimmelfennig, 2018) that claim that the EU's influence is extended well beyond the powers formally conferred to it by the Treaties. These theories utilize the concept of integration by stealth to explain how the expansion of the scope of the Union occurs. The term has two separate but interconnected meanings. The first one refers to forms of integration that happen without being publicized, so without raising a public debate. The lack of public opinion's interference, it is claimed, provides policy-makers with more freedom to pursue the policies of their choice (Majone, 2010). The other refers to the unintentional conferral of power to European institutions that follows a given form of integration. This happens when the communitarization of a policy transfers more power than expected to European institutions (Trondal, 2016).

Importantly, it has been suggested that the EU's influence has managed to reach the control of the so-called core state powers (Egeberg, 2016; Menon, 2016; Genschel and Jachtenfuchs 2018). Such powers are those through which the modern State has been built in Europe, and entail the monopoly of violence, the establishment of a public administration and the levy of taxes (Tilly, 1975). Given their historical roots, these powers have traditionally defined the identity and role of States in organizing the lives of individuals and the international community. Hence, they retain a high degree of political salience for State actors, by which they are jealously defended. To verify these claims, this dissertation assesses whether the Union concretely interferes with the exercise of core state powers. Accordingly, the case study presented in the third chapter deals with the European policy on external borders, which requires one of these powers, the use of force. Particularly, we shall discuss the creation of Frontex, the Union's border and coast guard agency, and check whether empirical data are matched by the prediction of the discussed theories. The final goal is that of joining and integrating the debate regarding the influence that the Union applies onto Member States.

To develop our analysis, we will begin by presenting the discussion on the nature of the European integration process. Since most of the theories taken in exam are neo-functionalism in approach, we will briefly present the advantages and disadvantages of such a school of thought. Indeed, neo-functionalism allows to examine the phenomenon of integration by stealth, which is extensively utilized to explain the EU's meddling in core state powers. Likewise, the fact that policies are stealthily adopted raises concerns regarding the legitimacy of the Union itself. Moreover, scholars like Majone (2010) and Moravcsik (2005) highlight the negative consequences of integration by stealth, such as the inefficiency of European

policies and the loss of Member States' power. This first part will reveal fundamental to comprehend the reason why it has been claimed that integration has occurred in core state powers.

Indeed, once the theme of integration by stealth has been presented, we shall proceed by discussing the theories that claim that the EU has gained partial competence in such powers. There, we will discuss the nature of core powers and their political salience, together with the implications that their communitarization entails. In fact, given that the three powers are so important for the State, a loss of their control could hint at the progressive formation of a European Federation. In this regard, we shall present Genschel and Jachtenfuchs' neo-functional theory, which rationalizes the process of integration and provides a framework for comprehending its intimate dynamics. The scheme describes the process as the encounter of two structural factors, a demand and a supply for integration, highlighting what elements are necessary for it to occur. The case study presented in this dissertation attempts to falsify this very theory, to assess whether it can be deemed viable or not. In order to do so, the framework will be discussed in the detail to allow to grasp all those elements that could constitute the point of departure of our analysis.

Finally, the methodology chosen for the third chapter entails the examination of preparatory documents at the European level to verify whether a concrete demand and supply for integration can be found. These two elements, upon which the theory has been built, have not been individuated in the case of the institution of Frontex. Thus, it has been chosen to examine single Member States' documentation, to verify whether these factors could be found at the national level. Given the complications that the study of parliamentary and governmental records entails in linguistic terms, we focused on the Italian case. Eventually, evidence has been found to suggest that the creation of the agency has been the product of the lobbying of single governments within the Council of the European Union. Well aware of the partiality of the analysis hereby developed, we claim that in this case integration has followed a path that could be better described by liberal intergovernmentalism, rather than neo-functionalism.

Chapter 1: Integration by stealth: legitimacy issues and integrational achievements

1.1: Introduction to the first chapter

The aim of this first chapter is that of questioning the nature of what has been called integration by stealth, together with its causes, dynamics and consequences. Several authors belonging to different schools of thought have discussed the issue, however it seems that a shared definition has not been reached yet. Overall, the term seems to refer to two different phenomena. The first one is the transfer of competences to the European Union that happens without publicization, when integration confers new powers to non-majoritarian institutions.¹ These are, namely, the Commission, the European Central Bank and the Court of Justice. Research in this field has taken different directions. Some have focused onto the causes of stealthy integration, proposing theoretical frameworks that try to explain its patterns and developments.² Others have discussed the problems arising from this absence of publicity, mainly in terms of legitimation and public discontent.³ Finally, others have underlined the possibility for communitary institutions to expand their competences during crisis periods in stealthy manners.⁴ On the other hand, the second meaning of the term indicates the extension of the scope of European institutions that happens off the record, without formal shifts of power to the supranational level. Thus, scholars like Trondal, and Egeberg have described the discrepancy that exists between what European acts are formally supposed to produce and they actually produce. For instance, this discrepancy can be due to the informal normative authority of the Commission, whose position is so influential to largely determine the conduct of national agencies.⁵

Both aspects converge into the discussion on the European integration of core state powers, which is the subject of the second chapter and upon which we will try to build our case study. Indeed, it has been claimed by neo-functionalist scholars like Genschel and Jachtenfuchs, that the Union has

¹ See, for instance, Majone, G., *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford: Oxford University Press, 2010), pp. VII-VIII (preface); and Genschel, P. and Jachtenfuchs, M., "Beyond Market Regulation. Analyzing the European Integration of Core State Powers", in Genschel and Jachtenfuchs, *Beyond the Regulatory Polity, The European Integration of Core State Powers* (Oxford: Oxford University Press, 2016), p.10.

² Herschinger, E., Jachtenfuchs, M. and Kraft-Kasack, C., "Scratching the Heart of the Artichoke? How International Institutions and the European Union Constrain the State Monopoly of Force", *European Political Science Review* 3, n. 3 (2011), pp. 445-447; and Genschel and Jachtenfuchs, *Beyond the Regulatory Polity*, pp.12-16.

³ Majone, G., "Europe's Democratic Deficit: The Question of Standards", *European Law Journal* 4, n.1 (1998), pp.6-7.

⁴ Schelkle, W., "Fiscal Integration by Default", in Genschel and Jachtenfuchs, *Beyond the Regulatory Polity*, pp.118-119.

⁵ Egeberg, M. and Trondal, J., "EU-Level Agencies: New Executive Centre Formation or Vehicles for National Control?", *Journal of European Public Policy* 18, no. 6 (2011), p.875.

managed to extend its influence in policy areas that traditionally define the role of the State.⁶ Thus, the present chapter prepares the terrain for the subsequent debate on the control of State-like capacities by the EU. In order to do so, it presents the fundamental theme of integration by stealth, together with its causes and implications.

1.2: The competences of the European Union and the theory of implied powers

In the present section we shall try to understand what the scope of the European Union is, in order to assess whether there exists a difference between its formal competences and its concrete praxis. In order to do so, it can be of primary importance to recall a few concepts regarding the provisions that regulate the attribution of power to the EU. We also present an overview of the ways in which the Union manages, through legal, judicial or procedural means, to expand its influence and go beyond the limits foreseen by the Treaties. Accordingly, we will proceed with the description of the powers that the EU enjoys, together with the analysis of the principles and rules that regulate their exercise.

The attribution of competence to the European Union finds its legal basis in the norms contained within the first sections of the Treaties and, furtherly, within protocol n.2.⁷ The framework for such an attribution is established, in the first place, by the general principles contained in art.5 of the Treaty on the European Union (from now on TEU). According to this article, “under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States [...]”.⁸ Thus, the Union can only exercise those competences that have been formally attributed to it. The same article equally provides two fundamental principles, whose mechanisms are treated in the detail in protocol n.2. These regulate the exercise of conferred competencies: the principle of subsidiarity and the principle of proportionality.⁹ Finally, the different policy sectors in which the EU develops its action are extensively described in art. 3-6 of the Treaty on the Functioning of the European Union (from now on TFUE). Within this, the different categories of European competencies are regrouped in three distinct classes: exclusive, shared and supporting.¹⁰

⁶ Genschel, P. and Jachtenfuchs, M., “From Market Integration to Core State Powers: The Eurozone Crisis, the Refugee Crisis and Integration Theory”, *JCMS: Journal of Common Market Studies* 56, n. 1 (2018), p. 178.

⁷ European Union, *Protocol n.2 on the application of the principles of subsidiarity and proportionality*, attached to the Consolidated version of the Treaty on the Functioning of the European Union (09/05/2008).

⁸ European Union, *Consolidated version of the Treaty on European Union* (13/12/2007), 2008/C 115/01, art. 5.

⁹ European Union, *Protocol n.2*, art.1.

¹⁰ European Union, *Consolidated version of the Treaty on the Functioning of the European Union* (13/12/2007), 2008/C 115/01, respectively arts. 3, 4 and 6.

Notably, the fields enumerated within these categories are explicitly non-exhaustive. However, the respect of the principles of conferral, proportionality and subsidiarity must be always ensured. The check of their respects happens through an *ex-ante* and *ex-post* control in the case of legislative acts; whereas in all the other cases just through the former, on the part of the Commission.¹¹ Following these principles, the EU shall make sure that each of the acts adopted by the legislator reflects the limits of delegation imposed by Member States. Also, the Union's intervention must be better suited to reach the prefixed goals that any equivalent at the national level and the means utilized must not "exceed what is necessary to achieve the objectives of the Treaties".¹² Clearly, more than a specific obligation, these principles represent a form of political control on the behavior of the EU. This implies the possibility for a flexible extension of the range of acts that are theoretically deliverable.¹³

The legal and political literature on the topic reports several cases in which European institutions, usually the Commission and the Court, have been able to force the boundaries foreseen by the Treaties.¹⁴ This fact highlights that the limitation imposed on the EU institutions' conduct is not always as rigid as one would expect. In fact, a consistent jurisprudence by the CJEU has provided the necessary tools for the expansion of the scope of European law, which nowadays exercises a tremendous influence on Member States' legal systems.¹⁵ Indeed, before the entry into force of the Lisbon treaty, there existed no explicit list that identified the competences that the European Unions was supposed to enjoy, thus making an inference of these attributions necessary. Thus, the only criterion upon which such deduction could be made was that of interpreting the norms contained in the Treaties in the light of the objectives of the Union contained in art. 2 of the TEU. However, even this procedure left serious doubts regarding which institution was best suited to handle what specific powers.¹⁶

An explicit enumeration has consequently been introduced by the Lisbon Treaty, but the issue of interpretation still remains. This is because the list has a preeminently symbolic value: some policy sectors are described in the detail and the attribution of competences and procedural rules is written down on paper; while others are described in a more vague and non-exhaustive manner, being primarily determined in function of the objectives to be achieved.¹⁷ Among these "open policy fields" are, for

¹¹ European Union, *Protocol n.2*, arts.6-8.

¹² *Ibid.*

¹³ Adam, R. and Tizzano, A., *Manuale Di Diritto Dell'unione Europea*, 2nd ed. (Torino: G. Giappichelli, 2017), p.431.

¹⁴ See, for instance, *ibid.*, pp.414-415; Majone, *Dilemmas of European Integration*, p.67.

¹⁵ See case CJEU 6/64, *Costa v ENEL*, [July 15th1964], p.594. The Court then affirmed, in a landmark decision, both the principle of supremacy of EU law and its direct effects, stating that "[this provision] would be meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law".

¹⁶ See art.3 of the Treaty Establishing the European Community. In such an article, a simple reference is made to the generic sectors in which the Union's action is developed, without the current distinction among exclusive, shared and supporting competences.

¹⁷ Adam and Tizzano, *Manuale di diritto*, p.413.

example, some specific areas regarding the external action of the Union, such as the Common Foreign and Security Policy.¹⁸ The reason behind this open description of competences lies within the desire of the drafters not to preclude the EU any action that might be deemed necessary in the future. This is especially important in situations in which the Union needs to act outside of previously delegated powers. A relevant margin of discretion is thus left in order to fill in the legal gaps of the contract, allowing for a better flexibility of the overall system.¹⁹ Nevertheless, this very same approach entails several complications and potential risks for Member States: the interpretation of the Treaties can in fact cause a relaxation of the boundaries of the conferral principle.²⁰

The Court itself has implicitly confirmed the validity of the well-known theory of implied powers in affirming that “where an article of the EEC Treaty [...] confers a specific task on the Commission, it must be accepted, if that provision is not to be rendered wholly ineffective, that it confers to the Commission necessarily and *per se* the powers indispensable in order to carry out that task”.²¹ In the same way are interpreted the previously unforeseen power for EU institutions to create new bodies, such as European agencies, and the ability to conclude international agreements with third parties.²² As can be understood, the Court has given ground to a jurisprudence that has expanded the mandate of EU institutions. Thus, EU law now covers a wide range of policies, increasing in particular the role of supranational bodies such as the Commission. In fact, the Court did not just make an occasional usage of such a hermeneutic method. Rather it consistently took advantage of the dynamic interpretation of the Treaties to consolidate the fundamental principles of European law.²³ Accordingly, this *ex-post* judicial support has determined a peculiar position, in the legislative process, for the Commission. Indeed, the institution’s role as a long-time uncontested policy initiator has allowed it to gain competence over most of the areas of community intervention. This is because its position as an initiator made it possible for the Commission to put forward legislative acts in policy sectors that, although not being foreseen within its competencies, were closely connected to the objectives it was charged with.²⁴ Thus, the jurisprudence of the Court confirmed the legitimacy of those acts and expanded the reach of the Commission. This has historically provoked opposing reactions on the side of Member States, that have tried to limit the centralization deriving from the accumulation of power at the supranational level. In fact, this

¹⁸ See art. 23-41 of the TEU. Within such articles the principles to be respected and the objectives to attain relatively to the CFSP find their legal founding.

¹⁹ Adam and Tizzano, *Manuale di diritto*, pp. 416.

²⁰ H ritier, A., “Covert Integration of Core State Powers: Renegotiating Incomplete Contracts”, in Genschel, P. and Jachtenfuchs, M., *Beyond the Regulatory Polity?*, pp. 230-248.

²¹ See the following joined cases CJEU 281, 283, 284, 285 and 287/85, *Federal Republic of Germany and others v Commission of the European Communities* [July 9th,1987], point 28.

²² Adam and Tizzano, *Manuale di diritto*, pp. 414-415.

²³ Carreau, D. and Marrella, F., *Diritto internazionale*, 2nd ed. (Milano: Giuffr , 2018), p. 139.

²⁴ Wallace, H., Wallace, W. and Pollack, M. A., *Policy-making in the European Union*, 5th ed. (New York: Oxford University Press, 2005), p.53.

accumulation has at times been perceived as a self-motivated attempt to increase the Commission's own status and influence.²⁵ Thus, the several rounds of Treaty reform have tried to slowdown the conferral of powers to supranational institutions and limit their margins of discretion. Particularly, the goal was that of lessening their ability to introduce forms of integration perceived as cumbersome, such as in the case of harmonization measures.²⁶

Nevertheless, harmonizations and other kinds of acts aiming at the convergence of national legal systems are nowadays not completely repressed, but rather are more hardly applicable. In fact, through the exploitation of means such as art. 352 of the TFEU (former art. 308 TEC), the Union is capable of overcoming its limitations. This article, containing the so-called flexibility clause, allows to act whenever a certain competence is not specifically foreseen by the Treaties but is necessary to accomplish a community objective. Also, it is used when the attribution of such competences is not specific enough to determine procedural rules. Concretely, art. 352, states that "if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out therein, and the Treaties have not provided the necessary powers, the Council [...] shall adopt the appropriate measures".²⁷ Given the nature of such a provision, art. 352 can be useful in cases in which the relevant powers to act cannot be deduced from an extensive interpretation of the Treaties' content.²⁸

Nevertheless, given the possible abuse of power that the article entails, the norm is subject to severe limitations in terms of both scope of application and procedural rules. Particularly, in order to be invoked, the article requires: the adoption by the Council at unanimity; the approval of the Parliament (that can exert a true veto power); the final control of subsidiarity from national parliaments; the utter respect of institutional equilibrium; the abstention from the modification of the Treaties themselves, and the exclusion from the CFSP sector.²⁹ Finally, the Lisbon treaty has modified the precedent version of the article, making explicit that the norm "shall not entail harmonization of Member States' laws or regulations in cases where the Treaties exclude such harmonization".³⁰ Thus, through this formulation the conferral of new competences to European institutions has been considerably limited. Particularly measures of positive integration have been inhibited.³¹

²⁵ Adam and Tizzano, *Manuale Di Diritto*, p. 94; and Majone, G., "The Common Sense of European Integration", *Journal of European Public Policy* 13, no. 5 (2006).

²⁶ Majone, *Dilemmas of European Integration*, pp. 67-71.

²⁷ Par.1, art. 352 TFEU.

²⁸ Adam and Tizzano, *Manuale Di Diritto*, p.416.

²⁹ In the case of this article, the subsidiarity check shall be applied following the provisions contained within protocol n.2 independently on the nature of the act, being it adopted through a legislative procedure or not. See par. 2, art. 352.

³⁰ *Ibid.*, par.3.

³¹ By positive integration we mean the introduction of new rules to steer Member States' practices; whereas with negative integration, we mean the abolition of existing rules, often referred to discriminatory clauses.

Majone, *Dilemmas of European Integration*, pp. 144-145.

In addition to judiciary means and the flexibility clause just described, European institutions have historically exploited other tools to expand their competences. Here we present three categories of these instruments: the so-called *passerelle* clauses,³² delegation and implementation acts,³³ and acts deriving from the exploitation of procedural rules. Although the in-depth description of the first two would require a dedicated section, which falls outside of the scope of this dissertation, the third element is here treated. In fact, the theme of procedural rules allows to grasp the kind of mechanisms through which the Commission levies onto other institutions to put forward policy proposals capable of favoring its vision. In fact, within the Ordinary Legislative Procedure, whose usage has been remarkably extended thanks to the Lisbon Treaty,³⁴ the Commission enjoys a dominant position because of its agenda setting role.³⁵ According to the procedure, the adoption of an act requires the approval of both the Council and the Parliament, deciding on the basis of a qualified majority procedure. However, in order to amend the norms contained in the proposed act, the Council (for instance) decides at unanimity, respecting the strong emphasis on consensus building within the institution.³⁶ Thus, it would take the institution an homogenous vision, or at least the absence of explicit dissent, in order to be able to modify what the Commission has put forward. Conversely, the latter can convince the Council, through the so-called trialogues or by threatening to withdraw its act at any given moment if the conditions of the adoption proved unsatisfying.³⁷ Furtherly, the Commission always plays a relevant role in the decision-making procedure through the OLP, even when the proposal derives from Member States, the ECB or the Court.³⁸ Therefore, the Commission covers the most preeminent position within the most utilized

³² Ex art. 25, par. 2 of the TFEU, these clauses allow for the modification or integration of the primary law through secondary law acts.

³³ Ex art. 290 and 291 TFEU, the Commission is called to fill in acts adopted by the Council to give them implementation. Particularly, in the case of delegation acts the Commission enjoys a certain degree of discretion, being able to modify “non-essential” parts of the delegative act. For further information, see Adam and Tizzano, *Manuale di diritto*, pp. 207-217.

³⁴ There exists, however, a security clause. The reference goes to the so-called “emergency brake”, contained in art. 48, 82 and 83 of the TFEU, that favored the acceptance of the extension of the OLP by allowing Member States to suspend acts adoption procedures and refer the matter to the European Council in those cases in which a given act would substantially bear consequences of a State’s order, within sectors of particular political sensitivity (social security, judicial cooperation of crime matters etc.).

³⁵ Adam and Tizzano, *Manuale di diritto*, pp. 198-199.

³⁶ Kenealy, D., Peterson, J. and Corbett, R., *The European Union: How Does It Work?*, 5th ed. (Oxford: Oxford University Press, 2018), p.56.

³⁷ Regarding the formal rules that discipline the OLP, see art. 294 of the TFEU. Instead, regarding the practical dynamics of interinstitutional negotiations, see Kenealy *et al.*, *The European Union: How Does It Work?*, pp.128-135. Finally, for a concrete case regarding the exploitation of this prerogatives, see Blauburger, M. and Weiss, M., “‘If You Can’t Beat Me, Join Me!’ How the Commission Pushed and Pulled Member States into Legislating Defense Procurement”, *Journal of European Public Policy* 20, no. 8 (2013), pp. 1124-1125.

³⁸ Adam and Tizzano, *Manuale di diritto*, pp.202-206.

legislative procedure. Accordingly, it is capable of proposing the expansion of its own competencies with a noteworthy influence.³⁹

Overall, this influence by the Union and the Commission is extremely hard to quantify. Its assessment is complicated by the progressive expansion of the scope of European law, which now also encompasses social policies, education and environmental protection.⁴⁰ Also, the evaluation of this impact requires that several factors are kept in consideration: the nature and scope of application of the acts (whether regulations or decisions, wide or narrow), the level of novelty that they bring to the *acquis communautaire*, Member State's discretion in transposing them (in the case of directives) and the possibility of derogations.⁴¹ Therefore, unequivocally individuating the degree of the impact that the Union applies onto Member States represents a complex task to realize. Moreover, this measure changes inevitably from State to State, and this intrinsic complexity reveals why different studies on the topic show radically opposing results. In fact, some of these indicate that the 60% of national legislative output is influenced by the EU, while others indicate just the 15%, depending on the criteria adopted.⁴² Moreover, it ought to be considered that the Union does not steer Member States' behavior merely through legislative acts, but also through its administrative and judicial praxis.⁴³ This observation, though, still leaves the open question of how and how far the Union manages to extend its capabilities. Indeed, several scholars argue not only that formal Treaty limitations have been at times overstepped, but that the Union has reached control over those powers traditionally associated with state-building practices.⁴⁴ These, often referred to as core state powers, reflect the concentration of capabilities through which, historically, the European modern State has been built. Three fundamental competencies are enlisted in this group, namely the monopoly of legitimate violence, economic and monetary capacity and public administration.⁴⁵ The discussion of neo-functional theories provides some interesting insights in this regard. It also allows to debate whether and how far the Union has gained competence within these core powers, through the concept of integration by stealth.

³⁹ Relatively to the Commission's entrepreneurial role in regulating the environmental policy, see Kenealy *et al.*, *The European Union: How Does It Work?*, p.116.

⁴⁰ Indeed, social and environmental policies are enlisted in art. 4 of the TFEU (shared competences); whereas education falls under the scope of art. 6 (supporting competences).

⁴¹ Van Den Brink, T., "The Impact of EU Legislation on National Legal Systems: Towards a New Approach to EU-Member State Relations", *Cambridge Yearbook of European Legal Studies* 19 (2017), pp.211-235.

⁴² *Ibid.*, p.214.

⁴³ We refer, in this case, to administrative decisions (such as the establishment of a common framework for data exchange) and legal judgements. See, respectively, Heidbreder, E. G., "Regulating Capacity Building by Stealth: Pattern and Extent of EU Involvement in Public Administration", *Beyond the Regulatory Polity*, pp.150-151; and Adam and Tizzano, *Manuale di diritto*, pp. 414-415.

⁴⁴ Rittberger, B., Leuffen, D. and Schimmelfennig, F., "Differentiated Integration of Core State Powers", *Beyond the Regulatory Polity*; Mérand, F., *European Defense Policy: Beyond the Nation State* (Oxford: Oxford University Press, 2009) and Genschel and Jachtenfuchs, "From Market Integration to Core State Powers".

⁴⁵ Genschel and Jachtenfuchs, "From Market Integration to Core State Powers", p. 179.

We will now present an overview of these theories, which provides a possible description of integration and particularly of its stealthy forms. Clearly, the neo-functionalist perspective does not represent the only way to explain some aspects of the “coming together of Europe”. However, its peculiarities allow for the appreciation of certain recurrent patterns, which allowed scholars to suggest that the Union influences the exercise of core powers. Thus, in the following sections we shall illustrate the phenomenon of integration by stealth as interpreted through this lens.

1.3: A neo-functionalist approach to European integration

Within the wide academic discussion that attempts to grasp the nature of European integration, several schools of thought proved to be able to partially foresee its future developments. Each is useful for interpreting peculiar aspects of the overall process but presents substantial flaws in others. Therefore, a methodological choice is necessary to understand the mechanisms underpinning a given policy issue. The Lisbon Treaty, refocusing of the decision-making process of the Union around the Council and the European Council,⁴⁶ could favor the adoption of intergovernmental approaches to integration. However, this dissertation chooses to discuss a neo-functionalist approach to try to describe the mechanism of integration of core state powers. The reason why this has been chosen derives from its approach to how shifts of competence occur. In fact, its focus on spillover mechanisms allows to discuss communitarization in terms of “needs” to integrate together with the “wills” to do so. The accent is thus put onto the possibility of the existence of pressures to integrate, caused by a previous transfer of capacity to the European level. Within this context, conceptual schemes have been put forward to suggest that these “structural conditions” lead to different forms of integration, rationalizing the whole process. Thus, neo-functionalism provides an interesting perspective on the communitarization process as a response to these factors, which could potentially lead to politically salient areas, since the mechanism does not respond to strictly rationalist criteria. Accordingly, it is well fit for discussing integration by stealth and core powers. Therefore, the following section presents neo-functionalism and its importance for the theory of Genschel and Jachtenfuchs.

The term neo-functionalism refers to both a strategy and a theory. On the one hand, it describes the tactic employed by political actors to tie European countries together and achieve the political end of a European Federation.⁴⁷ On the other, the theory describes the mechanism through which a given degree

⁴⁶ Bickerton, C. J., Hodson, D. and Puetter, U., “The New Intergovernmentalism: European Integration in the Post-Maastricht Era”, *JCMS: Journal of Common Market Studies* 53, no. 4 (2015), p. 704.

⁴⁷ Consider the political thought of one of the “founding fathers” of the EU, Altiero Spinelli. See Spinelli, A., Rossi, E. and Bobbio, N., *Il Manifesto Di Ventotene* (Roma: Senato della Repubblica, 2017), p.55.

of integration creates a pressure to furtherly transfer competencies to the supranational level.⁴⁸ It is, indeed, the theory that attempts to rationalize the political strategy. Thus, neo-functionalism as a theory predicts two different dynamics through which the phenomenon of integration takes place: functional spill-over and political spill-over.⁴⁹ The former happens when the acquisition of competences by the EU supplies strong incentives for integration in other sectors, closely related to the former.⁵⁰ This is well represented, for instance, by the creation of the Area of Freedom, Security and Justice. Indeed, the abolition of internal frontiers due to the Schengen agreement allowed the free circulation of people and services. Besides the positive effects, this also entailed some difficulties for Member States, particularly in the field of judicial prosecution. In fact, the possibility of transnational movements has implied a greater struggle in controlling cross-border criminality, given by the incongruence between national criminal law systems.⁵¹ This, in turn, had triggered a demand for a common legal framework encompassing legislative harmonization, exchange of information among Member States and reciprocal recognition of criminal judgements. Judicial Cooperation in Criminal Matters thus fell under the scope of the third pillar; and has eventually been incorporated in the European *acquis*. Now, it finds its general orientation through arts. 82-86 of the TEU.⁵² In conclusion, neo-functionalism interprets these events through the lens of spillover effects: the initial abolition of frontiers created a pressure to furtherly integrate, which produced even more integration.

On the other hand, political spillover refers to a situation in which the same kind of pressure to integrate is provided by supranational and national agents. In this scenario, the continuous socialization of actors belonging to different levels of the governance system, produces a modification in national representatives' behavior and preferences. Accordingly, their perspectives tend to progressively convergence on policy choices that favor integrational outcomes.⁵³ Thus, neo-functionalism well describes the Community Method, i.e. the decision-making type that shaped the first years of the European Economic Community in sectors such as the Common Agricultural Policy. This method showed a substantial balance of Member States' interests in the Council of Ministers. In fact, the entrepreneurial role played by the Commission was matched by a diffused problem-solving attitude by governments, allowing for a flexible negotiation of the proposed acts. Equally, an unwillingness to make

⁴⁸ Wallace *et al.*, *Policy-making in the EU*, p. 15.

⁴⁹ Majone, *Dilemmas of European Integration*, p. 41.

⁵⁰ Kenealy *et al.*, *The European Union*, p.12.

⁵¹ These inconsistencies are now being tackled by the European norms on transnational crimes, with the consequence of a gradual harmonization of national criminal law systems. See Adam and Tizzano, *Manuale di Diritto*, pp.559-560.

⁵² Rittberger, Leuffen and Schimmelfennig, "Differentiated Integration of Core State Powers", pp. 203-205.

⁵³ This theme is exhaustively discussed in the wide literature on the topic, of which just a brief reference is made here. Regarding political spillover, see Haas, E. B., *The Uniting of Europe* (Stanford: California University Press, 1968).

unacceptable requests and a constant search for unanimity characterized the Council's meetings. Thus, it constituted a sort of "code of conduct" of the EEC.⁵⁴

This mode of decision-making set the template for procedures in the years to come, representing an approach whose closest descendant is the Ordinary Legislative Procedure (OLP), introduced with the Lisbon treaty. Such a method has effectively taken the place of the previous co-decision procedure, both in quantitative and qualitative terms. Quantitatively, because its usage has been extended to more than seventy legal bases applied to most sectors of EU policy-making. Conversely, in qualitative terms because the OLP substantially reproduces the same approach of its ancestor: in fact, through this method the Commission is given the role of preeminent policy initiator.⁵⁵ Its proposals are jointly adopted by the Council and the European Parliament, who have the same power to decide on their amendments, acceptance or refusal.⁵⁶ Thus, the system not only gives the Council and the Parliament the same importance in the legislative process, but also puts the Commission in a privileged position.

The OLP and the Community Method have, since the dawn of the European integration, represented a focal point of attention for political scientists. Particularly, this attracted those interested in understanding the dynamics of the process and the role of supranational institutions.⁵⁷ The phenomenon has been widely investigated by neo-functionalists as well, which developed their own framework for rationalizing the dynamics of communitarization. These scholars introduced the concept of integration by stealth, that attempts to describe the reasons underpinning the continuous expansion of the Union, and particularly that of the Commission. Indeed, stealthy integration explains the augmentation of the Commission's competences through its peculiar position within the legislative process.⁵⁸ It is claimed that the institution utilizes its initiative right to propose acts that tackle collective issues in such a technical way as to avoid publicity. In doing so it takes advantage of a perceived pressure to integrate and puts forward solutions that, requiring a technical approach, will be handled by the institution itself.⁵⁹ Overall, this provokes a transfer of competences to the Commission, while keeping politicization levels low.⁶⁰

The theme of politicization is of a particular importance, given its potential impact on integration and collective decision-making. It has been described by Schmitter as the "process whereby the controversiality of joint decision-making goes up. This, in turn, is likely to lead to a widening of the

⁵⁴ Wallace *et al.*, *Policy-making in the EU*, p. 16.

⁵⁵ Art. 294 TFEU.

⁵⁶ Adam and Tizzano, *Manuale di Diritto*, pp. 202-206.

⁵⁷ Meunier, S., "Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment", *JCMS: Journal of Common Market Studies* 55, no. 3 (2017), p. 597.

⁵⁸ Majone, *Dilemmas of European Integration*, p.39.

⁵⁹ *Ibid.*

⁶⁰ Genschel, P. and Jachtenfuchs, M., "Beyond Market Regulation. Analyzing the European Integration of Core State Powers", in Genschel and Jachtenfuchs, *Beyond the Regulatory Polity*, p.9.

audience or clientele interested and active in integration”.⁶¹ Thus, the term refers to the expansion of the public interested in a given policy, which is capable of raising conflicts among Member States regarding its management. The link between politicization and integration is grounded in the post-functional theory that predicts that national publics averse to integrational outcomes would make Member States less likely to pursue collective decision-making. In fact, when domestic constituencies’ preferences diverge because of politicization, States will have more difficulty in finding an agreement capable of satisfying everyone.⁶² Accordingly, keeping politicization low would allow to tackle a collective issue while potentially avoiding public conflicts. At the same time, though, this often expands the competences of the Commission.

Jachtenfuchs and Genschel deepened this theory to rationalize the concept of the structural factors that lead to integration. A brief explanation is here proposed to highlight how this framework conceives the communitarization process, but it will be analyzed in depth when discussing core state powers. The theory interprets the context in which the phenomenon occurs through the lens of the economic categories of supply and demand: in order for integration to take place, a perceived collective need has to be matched by the action of an institution willing and capable to satisfy it.⁶³ We shall first of all discuss the role of the supply factor, since the theory maintains that the nature of the supplier determines the fact that integration receives publicity or not. In fact, non-majoritarian actors like the Commission or the ECB provide communitarization without publicity, due to their highly technical and bureaucratic functioning. Conversely, majoritarian institutions like the Council or the European Council, explicitly political in nature, determine the publicity of the adopted acts.⁶⁴ The choice between the two modes is then determined by the political sensitivity of the policy in question and by its technicality: non-majoritarian institutions intervene when there is an interest in keeping politicization low, due to averse public opinions. Also, they usually act when matters are highly technical in nature. In fact, institutions like the Commission enjoy a reputation as skill-full bodies, due to their expertise. In this regard, it is claimed that the framing of policy issues on the side of the Commission as largely technical problems has fostered the expansion of its competences. However, when public opinions are in favor of integration, majoritarian institutions will handle the process.⁶⁵ Given the fact that most of the issues dealt with by the Union are tied to the single market, thus scarcely political and technical in nature, they are usually managed by the Commission.⁶⁶ Thus, it is assumed that the institution would be willing and able to

⁶¹ Schmitter, C. P., “Three Neo-Functional Hypotheses about International Integration”, *International Organization* 23, n. 1 (1969), p.166.

⁶² Hooghe, L. and Marks, G., “A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus”, *British Journal of Political Science* 39, no. 1 (2009), pp.10-11.

⁶³ Genschel and Jachtenfuchs, “Beyond Market Regulation”, pp. 11-12.

⁶⁴ *Ibid.*, pp.14-16.

⁶⁵ *Ibid.*, p.15.

⁶⁶ *Ibid.*, pp. 12-16.

provide integrational supply in most of the areas of European intervention. Since this entails a shift of regulatory competences, this contributes to determine an expansion of the Commission's scope.⁶⁷

Clearly, the institution is not the only agent capable of providing support for integration. In fact, depending on the policy in question, both majoritarian and non-majoritarian bodies can act as suppliers.⁶⁸ However, integration by stealth, thus through the latter ones, has historically constituted the largest part of the work developed by the EU.⁶⁹ This has been explained in two different ways. On the one side, non-majoritarian institutions have steadily increased their weight within the European system. This has been caused by the Commission's entrepreneurial role in making proposals in ever broader policy sectors. Equally, this has been accompanied by the juridical praxis of the Court, which provided legitimacy to such expansions.⁷⁰ On the other side, the Commission's capacity to avoid publicity makes it easier for policy-makers to let it regulate common issues. Consequently, integration by stealth has gained a preeminent position in the policy-making of the EU, allowing to avoid the possible discontent deriving from Member States' public opinions prone to opposing communitarization. This is also because a limited amount of publicity and politicization determines a higher flexibility of Member States within the Council.⁷¹ This situation allows for an easier acceptance of the acts proposed by the Commission, limiting the invocation of derogations, and thus the fragmentation of the legal regime of EU law. Thus, the theory holds that integration by stealth is a mechanism that tackles common issues while avoiding overt political decisions. Accordingly, it is widely used because it avoids or delocalizes the blame for the solutions to those problems, even though this determines an expansion of European competences.⁷²

Conversely, the demand for integration reflects the perceived benefit provided to the EU as a whole by the common management of a given policy sector. Neo-functionalists individuate two different types of value-added factors that stimulate national actors to delegate their competences: the existence of positive externalities and economies of scale.⁷³ The former term refers to the elimination of disadvantages deriving from the lack of coordination among Member States; whereas the second indicates the gain deriving from the accumulation and sharing of resources that integration provides. The difference between the two is not, as we shall discuss in the next chapter, clear-cut. However, the two

⁶⁷ Majone, *Dilemmas of European Integration*, p.147.

⁶⁸ In this regard, see section 1.4, example a), on the balancing of interests and powers among the institutions.

⁶⁹ Majone, G., "From Regulatory State to Democratic Default", *JCMS: Journal of Common Market Studies* 52, n.6 (2014), p.1216.

⁷⁰ Majone, *Dilemmas of European Integration*, pp.78-79.

⁷¹ Rittberger *et al.*, "Differentiated Integration of Core State Powers", pp. 194-198.

⁷² *Ibid.*

⁷³ Genschel and Jachtenfuchs, "Beyond Market Regulation", pp.12-13.

kinds highlight the elevated interdependence experienced by European States, as well as the prospect gains deriving from a concerted style of problem-solving.⁷⁴

Overall, this theoretical framework provides interesting insights to understand the dynamics of the European integration process. Particularly, the discussion on the existence of structural factors suggests that exists a “necessity” to integrate, parallel to the “will” to do so, as in intergovernmental accounts. The theory tries to be descriptive, rather than inductive, since it takes a given transfer of competences as a starting point and tries to rationalize how the phenomenon occurred. Nevertheless, it also presents some pitfalls. First of all, as we saw, the term integration by stealth also refers to informal transfer of competences, which happen without being intentionally decided. It is thus unlikely that a theory that describes integration as the matching between structural factors could foresee this kind of developments. Moreover, the theory risks provoking a reification of the actors involved in the integration process. Indeed, European institutions are at times treated as unitary actors, which transmits the feeling that every step in the expansion of EU competencies is part of a wider scheme with strategic implications. Finally, the framework is based upon the use of categories that could be contestable. In fact, demand and supply are hard-to-define concepts, which potentially undermines the value of the whole theory. Particularly regarding the demand factor, as is explicitly admitted, it is complex to exactly distinguish between economies of scale and positive externalities in each case.⁷⁵ This uncertainty potentially represents an obstacle in making previsions on future developments. Indeed, both when describing and making assumptions it is important not to confuse causes and effects, which is what an unclear definition of the theory’s categories would produce. If we keep these considerations in mind while developing our analysis it could be possible to overcome these intrinsic pitfalls and develop a sound reasoning. However, whether the theory will be able to describe new phenomena, is still to be ascertained. In a Popperian sense, then, the theory is valid until it is proven wrong by new evidence, which forces to rethink the logic assumptions upon which it is built.⁷⁶ The case study presented in the third chapter aims precisely at stressing the theory, to assess whether it can still be deemed valid or not.

In the next section we shall present the context in which Genschel and Jachtenfuchs’ framework is collocated, starting with the origins of neo-functionalism. This contextualization will allow to discuss the roots of integration by stealth and the political situation in the aftermath of WWII, focusing on Spinelli and Monnet’s vision for the creation of a European federation. Thus, we will proceed with the

⁷⁴ Please notice that “regulation” refers here to the capacity transfer that happens through legislation. In this case EU institutions experience an expansion of the reach of preexisting policy sectors and Member States will be constrained by the new rules adopted at the community level. On the other hand, “capacity building” indicates the establishment of new institutional bodies that are charged with a given set of functions.

⁷⁵ Genschel, P. and Jachtenfuchs, M., “The European Integration of Core State Powers: Patterns and Causes”, *Beyond the Regulatory Polity*, pp. 258-260.

⁷⁶ Popper, K. R., *The logic of scientific discovery* (Hoboken: Taylor & Francis, 2002), p.18.

consequences that their approach the “uniting of Europe” has caused, particularly in terms of democratic deficit and functioning of the European polity.

1.4: Integration by stealth and legitimacy issues

The pathway of integration by stealth can be traced all the way back to the founding fathers of the European Coal and Steel Community, so at the very beginning of the cooperation among European States. Starting with the Schuman declaration in 1950, the standard was set in terms of the final goal to achieve during the reconstruction period.⁷⁷ Two of the political figures of main importance of the period, Altiero Spinelli and Jean Monnet, had precise projects in mind. Both researched the best suited means to reach a European federation, but their approaches were radically different.⁷⁸ Indeed, in a Europe devastated by World War II, the ideological stances of the two political leaders reflected different answers to the same question: how can a rich and prosperous Europe be built, and war avoided in the future? Both were inclined to believe that a supranational federation could be created, ensuring the stability that the continent desperately needed. However, given the recent past of violence and hatred among the peoples of Europe, the reaction from public opinions could potentially represent an unwinnable challenge.

In Spinelli’s vision, the only possible way to achieve stability was to utilize overt political means, with European leaders committing to cooperate towards a new collective polity. His standard was that of a full-fledged federation based on common objectives and a problem-solving attitude.⁷⁹ On the opposite side, Monnet was well aware that no such political will was present or strong enough to be able to convince western European States to commit so drastically to the project.⁸⁰ Especially after the failure of the European Defense Community Treaty in 1954, laying down the basis for a future European army, he was persuaded that cooperation should follow a completely different path.⁸¹ The same institution of the ECSC was, in Monnet’s vision, largely of symbolic meaning. It was not just a means to pool the control over carbon and steel resources, thus for the balancing of power among States. Rather, it represented a concrete step in the direction of a political cooperation.⁸² Eventually, Spinelli’s approach got dismissed and what came to be known as the “Monnet-method” was adopted. It consisted in promoting an economic integration that would have led to a strong spillover effect capable of creating

⁷⁷ Kenealy et al., *The European Union*, p.28.

⁷⁸ Regarding both author’s political philosophy, reference is here made to their fundamental works. For Spinelli, see Spinelli, A., Rossi, E. and Bobbio, N., *Il Manifesto Di Ventotene*; for Monnet, see Monnet, J., *L’Europe Et L’organisation De La Paix* (Lausanne: Centre de recherches européennes, 1964).

⁷⁹ Spinelli et al., *Il Manifesto di Ventotene*, p.52.

⁸⁰ Majone, *Dilemmas of European Integration*, p.42.

⁸¹ Burgess, M., *Comparative Federalism: Theory and Practice* (London: Routledge, 2006), pp. 230-232.

⁸² *Ibid.*, p.4.

the political will to establish a federation.⁸³ Therefore, the whole project was based on creating an interdependence capable of tying States closer together, steadily increasing the scope and deepness of integration and empowering newly established supranational institutions.

Interestingly, this proposal, fundamentally neoliberal in ideology, had been advocated for by political leaders raised in traditions way closer to the idea of *dirigisme* than to that of deregulation. Especially during the war, national economies were utterly focused on military necessities: the State's role ranged from planning the industrial production to stimulating the aggregate demand for strategic goods.⁸⁴ In order to ensure the success of the common project of integration though, a fundamental disjunction of the economic sector from the political sphere had to be operated. This would have opened new possibilities for a technocratic administration favoring the reproaching of the European Countries. Neo-functionalism promises suggested that, in such a way, the collective awareness of interconnection and mutual dependency would have emerged. Also, it would have been possible to foster collaboration and political cohesion towards common goals, enhancing the chances of political decision-makers to deepen their ties.⁸⁵ These assumptions seem not to have realized yet, but they surely led to a concrete increase of competences at the EU, mainly in the absence of clearly stated political ends. Notably, this stealthy strategy produced several undesired issues we are still dealing with today. Particularly, the confusion between means and ends, in which integration is considered a good in itself instead of a tool for solving problems, has created a lack of trust towards European institutions and policies.⁸⁶ Accordingly, the surge in euro-scepticism, has thus far represented a challenge to the whole process, together with the perception a legitimacy crisis of the EU system of governance.⁸⁷

Thus, political scientists' attention has been devoted to the so-called democratic deficit of the Union, searching for those factors that decrease its legitimacy. Particularly, since the distance between European institutions and citizen is an important factor in this regard,⁸⁸ many studies focused on the requests for a better representation of national interests at the communitarian level. These have shown that political conflicts could arise, for instance, because the Commission's presidency is not an elective

⁸³ Majone, *Dilemmas of European Integration*, p. iiv.

⁸⁴ *Ibid.*, p. 34.

⁸⁵ Majone, "The Common Sense of European Integration", p. 617.

⁸⁶ *Ibid.*, p.612.

⁸⁷ An interesting point of view is represented by what Moravcsik wrote regarding the alleged legitimacy crises of the Union, in particular relatively to the application of the democratic principle, accountability, transparency and popular involvement in the institutions' work. See Moravcsik, A., "In defense of the "democratic deficit": Reassessing legitimacy in the European Union", *JCMS: Journal of Common Market Studies* 40, n.4 (2002), pp-603-624.

⁸⁸ European Parliament, "A pro-European and young electorate with clear expectations. First results of the European Parliament post-electoral survey", *Eurobarometer 91.5* (Sep. 2019), pp.59-68. Despite registering the highest European elections turnout in 20 years, half of the population of the Member States still did not show up to the polls. Within this category, a relevant portion still laments the scarcity of information on the elections, the distance of institutions from the citizens, the lack of interest in European affairs or the opposition to the EU in general.

seat and is perceived as merely technocratic.⁸⁹ Indeed, it is claimed that the President of the institution, often portrayed as the “chief of the EU government”, should be directly elected to give a perception of accountability and improve the legitimacy of the EU. This public debate has not found a solution yet, and it reemerged once again during 2019 European elections. Different proposals were thus put forward by preeminent MEPs, Commission’s officials and national politicians, widely ranging in content. These comprised: the direct election of the Commission president, the creation of transnational political parties and the reform of the *spitzenkandidaten* system.⁹⁰

Another element of concern is represented by the historically low turnout to the elections, that have been declining in participation since the first round of direct vote in 1979’s election. Indeed, European elections are usually perceived as “second order national elections”. Contrary to this trend, the most recent round has experienced the highest turnout of the last twenty years, bringing more than the 50% of the European population to the polls.⁹¹ Nevertheless, the calls for an improved representation at the supranational level still constitutes an open question and a theme of political debate. Such initiatives have not always met the favor of political and legal scholars who maintain that, particularly regarding the election of the Commission president, the decision should firmly rest in the hands of the European Council. In addition, others believe that a so-called category mistake exists.⁹² According to this latter theory, the EU, being something different from a State, doesn’t belong to the same logical category of its members. Thus, it does not need to comply to the same criteria to which States are subject. This implies that the Union doesn’t need to respect the same democratic principles in terms of representation and accountability. Thus, it doesn’t need to have a directly elected leader or involve the population in the way States do.⁹³ The reason upon which this stance is based lies in the fact that the legitimacy of the EU derives from the participation and preeminent role of Governments, which are elected by the European peoples. Also, the Union’s main policy focus doesn’t involve most of the basic sectors whose demands a State satisfies, like social (pensions, subsidies etc.) and redistributive policies. In fact, given the difference in preferences among Member States, these requests are better satisfied at the national level. Thus, the

⁸⁹ Moravcsik, “In defense of the ‘democratic deficit’”, pp. 604-605.

⁹⁰A glimpse of this debate and the proposals that arouse during the last year are here reported by theme. 1) Declarations regarding the direct election of the Commission president: a) Stone, J., “EU should get directly elected president in ‘foreseeable future’, Jean-Claude Juncker says”, *Independent* (14/02/2018), available at: <http://tiny.cc/4ixqdz>; b) Giovinazzo, D., “Europa sociale ed elezione diretta del ‘presidente dell’UE’: il programma del PD per l’Europa”, *EuNews* (02/02/2018), available at: <http://tiny.cc/v65tfz>; c) Debating Europe website, “Should the president of the EU be directly elected?”, interview to the GUE-NGL MEP Zimmer, G., available at: <http://tiny.cc/6xxqdz>. 2) Creation of translational lists: a) Verhofstadt, G., Leinen, J., *et al.*, “Why transnational lists are good for European democracy”, *EU Observer* (05/02/2018), available at: <http://tiny.cc/5yxqdz>. 3) Reform of the Spitzenkandidaten system: a) *Présidence de la Commission Européenne: Emmanuel Macron s’oppose au ‘Spitzenkandidat’* (2019), YouTube video, added by ProductiehuisEU [online], available at: <http://tiny.cc/a2xqdz>, min. 4:46.

⁹¹ European Parliament, “A pro-European and Young Electorate”, p.19.

⁹² Majone, “The Common Sense of European Integration”, pp.618-620.

⁹³ *Ibid.*

policies that satisfy those calls are ensured by national parliaments, who are better fit and competent than the EU within those sectors.⁹⁴

At the same time though, it is possible to argue that some features of the European polity hint at the desire for an improved representation, in line with the objectives of the founding fathers. These, accordingly, possibly contests the conclusions reached by the category mistake theory.⁹⁵ Indeed, the distance between the citizens of the EU and its institutions has extremely narrowed throughout the years. Thus, the Union cannot be simply labelled a “union among States”, as claimed by the supporters of the category mistake. For instance, the abovementioned CJEU rulings on direct effect and supremacy of EU law testify the will and necessity to make common rules prevail over national ones. Also, the presence of a European citizenship suggests that the political aspect of the EU, meant as a common project, must not be overlooked.⁹⁶ Finally, the direct eligibility and steady empowerment of the European Parliament highlights the will on the side of Member States to favor a broader representation of European citizens in community affairs.

Overall, these contrasting elements raise the question over the importance of the lack of a true European *demos*. The concept indicates a deep sense of community among the people of Europe, the feeling of common European identity.⁹⁷ Indeed, this is a highly controversial topic in terms of possible effects on integration patterns and direction towards which the Union is moving. The ongoing discussion regarding the finality of integration often involves this latter point, being fostered by the words of the main historical actors of the European political scene. In fact, politicians had opposing goals in mind for the Union’s future. Some, like Spinelli, claimed the necessity to transform the Union into a full-fledged federation, others like De Gaulle suggested to keep it a tool in the hands of governments, while Churchill mainly considered its utility to tackle the “German situation”. Thus, theories on the importance of a European *demos* vary enormously. On the one pole are those profoundly influenced by intergovernmental theories, while on the other are those federalists or comparative perspectives. The former group maintains that the lack of a common people represents a serious deficiency and constitutes an unwinnable obstacle. In fact, to achieve the collective acceptance of relevant redistributive policies, especially in tax and social fields, a feeling of community would be strictly necessary.⁹⁸ Thus, several serious complications

⁹⁴ Adam and Tizzano, *Manuale di Diritto*, p. 424.

⁹⁵ Majone, *Dilemmas of European Integration*, pp.24-25.

⁹⁶ *Ibid.*, p.380-381. See also par.1, art.20 of the TFEU.

⁹⁷ Clearly, that the latter cannot be considered self-standing, being unable to replace national citizenship, just resting alongside it. The political saliency of a common *demos* finds different considerations and declinations depending on the author. Nevertheless, in federalist accounts there exists a trend in downplaying its importance, preferring instead that of “federal spirit”, defined as a common feeling of solidarity, respect of differences and reciprocal loyalty. The latter is indeed defined as the principal feature of federations, whose existence is capable of keeping the polity together. See Burgess, *Comparative Federalism*, p.113.

⁹⁸ Majone, *Dilemmas of European Integration*, pp. 192-195, 206-209.

must be considered. These span from linguistic difficulties to different foreign policy agendas, or from incongruous constitutional traditions to the divergence of visions on the State's *raison d'être*.⁹⁹ The latter one, particularly, refers to what the national organizations are supposed to achieve as a polity. Given the importance attributed to the *demos*, considerable attention has been devoted to analyzing the chances of reaching such a “we-ness” feeling, that scholars like Moravcsik deem to be unreachable.¹⁰⁰ According to his perspective, the difference among European peoples are impossible to overcome. Also, the scarce involvement of Europeans into common institutions contributes to limit the likeliness of a truly European *demos*. Moravcsik maintains that this latter factor, particularly, is due to the EU's involvement in mainly economic affairs and not in those issues that common people would require a deeper Union to handle. These comprise, particularly, social policies such as income redistribution and welfare measures.¹⁰¹

Parallel to these opinions are those, federalist in nature, that consider the issue in completely different terms. Accordingly, the theme of a common people is considered an idealistic abstraction, a product of the reification of the nation produced by liberal democratic visions. Thus, its conceptualization as a clearly identified object ends up suffocating national minorities' identity. Furthermore, it is claimed that in order to build a cohesive polity, a federal solution could provide the instruments to accommodate the calls for delocalized autonomy and survival of national characteristics.¹⁰² In conclusion, the discussed issues on legitimacy, representativeness and unity are reflected in the contradictions and problems that affect the Union today. This, in turn, complicates the debate about which reforms would be necessary for the future of the EU polity. However, all these elements are useful to understand the implications of our discussion on integration by stealth and core state powers. In fact, the neo-functional perspective suggests that avoiding publicity represents a means to continue integrating while bypassing these far-reaching questions. Stating that politicization and conflict are undesired by policy-makers, it provides an explanation of how integration by stealth has been used to avoid the opposition of Member States' public opinions.¹⁰³

We will now continue to discuss the reasons why integration by stealth occurs, analyzing the conditions that influence European policy-making procedures. Thus, since it is used to avoid politicization, we shall discuss the consequences that stealthy integration bears in terms of efficiency and legitimacy of European policies. We shall begin this section with a discussion regarding, on the one side,

⁹⁹ Ibid.

¹⁰⁰ Moravcsik, “In Defense of the Democratic Deficit”, p.603.

¹⁰¹ Ibid., pp. 615-617

¹⁰² Burgess, *Comparative Federalism*, pp. 111-114.

¹⁰³ This represents, however, the pos-functional theory of constraining dissensus. See Hooghe and Marks, “A Postfunctional Theory of European Integration”, p.5. A notable exception is openly acknowledged by the two scholars and presented in the next chapter, regarding the ECB intervention during the financial crisis.

the desire to improve the Union; and the problems that currently affect it on the other. Our objective is that of highlighting the vicious circle that this form of communitarization produces, which contributes to explain why it is widely observed and why it has attracted criticism. Particularly, we will provide three case studies that constitute the counterbalance to this phenomenon: the necessity to balance institutional prerogatives, the confusion between means and ends of integration, and the expansion of supranational institutions.

1.5: Structural conditions and negative consequences of integration by stealth

Given the issues we have just outlined, the Union has been severely criticized, raising calls for its renewal and for closer ties between citizens and institutions. These have been reflected once again in the last round of elections, with the disrespect of the *spitzenkandidaten* system. Indeed, this highlighted the need to clarify the institutional mechanism according to which the European Council “takes into account the elections to the European Parliament” in indicating its nominee.¹⁰⁴ In line with this debate, but contrary to the fact that in most European countries the chief of government is not actually a directly eligible seat,¹⁰⁵ euro-skeptics have gained popular consent.¹⁰⁶ Leaving aside matters of political rhetoric, a number of reasons support these calls for more autonomy and less interference of the EU into the domestic sphere of Member States. Within these, primary importance is attached to the expansion of the Commission’s competences at the expenses of national actors. Observing the innovations introduced by the rounds of treaty reform, it is possible to appreciate the number of policy fields in which the EU has gradually gained a certain degree of competence: evolving from the strictly economic matters of the first three communities, to englobing the two pillars of Justice and Home Affairs and the Common Foreign and Security Policy with the Maastricht Treaty, to the final consolidation of the Lisbon Treaty. Particularly, the latter involved the extension of the OLP and the spread of the qualified majority voting procedure

¹⁰⁴ See par.7 of art. 17 of the TEU.

¹⁰⁵ Particularly those countries that present a parliamentary form of government, such as the UK, Italy, Germany, Austria, Greece, Croatia, Poland etc.

¹⁰⁶ The data considered in drawing such conclusions has been taken from the European Commission website, “Public Opinion in the European Union”, *Standard Eurobarometer 91* (June 2019), p. 5, 8. Trust in the EU has globally decreased, during the 2007-2019 period, from 57% to 44% (p.5). In the same period of time, the “total positive” image of the Union has lowered from 52% to 45%, whereas “neutral” and “total negative” perceptions have substantially remained stable (p.8). Furthermore, considering the results of the European elections between 2009 and 2019 when the election’s procedural rules’ reform occurred, euro-skeptic parties in the European parliament, i.e. those that openly declare to be so, like the ECR group, or that declare to oppose further integration and are dedicated to reverse it, like the Identity and Democracy group (formerly ENF), have raised respectively from 7,44% to 8,26% and from 4,05% to 9,72%. Data taken from the European Parliament website, *Election results. Outgoing Parliament* (2014), available at: <http://tiny.cc/4fysdz>; European Parliament website, *European Parliament 2019-2024. Constitutive session* (2019), available at: <http://tiny.cc/kjysdz>. Representation within the non-attached group has not been, for practical reason, considered.

within the Council. The largely stealthy integration of all these policies has been the distinguishing factor of the communitarization process, but it sometimes provoked bitter reactions on the side of Member States.¹⁰⁷ Indeed, it has been pointed out that the price to pay for an “ever-closer Union” is that of a methodical mislead that works to the detriment of policy effectiveness: integration is often considered to be an end in itself, not a means for solving collective issues. This often plays against the quality of adopted policies.¹⁰⁸

Thus, different forces are competing to shape the EU. On the one side, there are overt political calls for improving the accountability and representativeness of the Union, fostering its cohesion. On the other, policy-making has traditionally avoided political means, due to the risks associated with politicization. Thus, we shall now provide some examples to show how these forces have played out, and what situation they have provoked. Particularly, we will concentrate on the dynamics of the European policy-making, as determined by the institutional architecture of the Union. Accordingly, three different cases are discussed. The first relates to institutional equilibrium as an intrinsic condition within the communitary order, which shall be respected in order to ensure the legitimate functioning of the EU. This equilibrium, due to the necessity to balance the different kinds of interested at stake in the Union, influences the effectiveness of European policies.¹⁰⁹ This provides the basis for understanding the second and third cases, that are strictly connected to the topic of integration by stealth. Overall, these cases demonstrate how, given the nature of the European polity, integration by stealth continues to be a widespread phenomenon. Also, they show how it contributes to put supranational institution’s legitimacy at stake, laying the foundations for the lack of their legitimacy.

a) *The strive for balance: the case of the Common Foreign and Security Policy*

Regarding the nature of the institutional design of the EU, interesting considerations have been raised by the law scholar Jean-Paul Jacqué. The focus of his analysis, particularly, was on the internal dynamics that regulates the policy-making process and the roles of the institutions. In fact, he highlighted that the EU’s structure bears no connections to the classical theory of separation of powers that usually constitutes the basic principle upon which Member States are built.¹¹⁰ Rather, what better describes the

¹⁰⁷ Majone, *Dilemmas of European Integration*, p.70.

¹⁰⁸ Bickerton *et al.*, “The New Intergovernmentalism”, p. 711; Majone, “The Common Sense of European Integration”, p.612.

¹⁰⁹ Majone, *Dilemmas of European Integration*, p.50.

¹¹⁰ It is worth noting here that this very same theory does not find, in Europe, a universal and homogeneous application. Indeed, compared to the constitutional order in the United States, in many European countries and particularly in those characterized by the parliamentary government form, there exists a close connection between the legislative and executive power. Particularly, this is due to the fact that the latter enjoys the confidence of the former as a preeminent

core principle of the Union is that of interests' representation.¹¹¹ Indeed, in the EU polity there exists no distinct division between the three powers: two members of the fundamental institutional triangle, the Council and the Commission, share both the legislative and the executive function.¹¹² Further, ex art. 105 and 108 of the TFEU, the latter also enjoys the capacity to apply direct sanctions to private and public actors.¹¹³ Given this peculiar configuration, what institutions reflect within the system is not the specific function they are charged with, but rather the kind of interests they represent: the Council embodies the governmental aspect, the Parliament embodies the European people(s) and the Commission acts in the interests of the whole Union. Thus, the polity configuration is determined by the interactions of these bodies, in which each tries to defend its own prerogatives and powers.¹¹⁴

Therefore, to ensure the stability of the system and the allocation of competences, the Treaty drafters have given preeminence to the principles of institutional equilibrium. This, together with the concept of sincere cooperation is enshrined in art. 13 of the TEU, representing a fundamental guarantee to the correct functioning of the Union. These two principles provide that “each institution shall act within the limits of the powers conferred upon it by the Treaties, and in conformity with the procedures, conditions and objectives set out therein”.¹¹⁵ Furthermore, interinstitutional agreements have contributed to regulate the relations between EU bodies. These agreements establish formal rules that provide a deeper level of coordination and safeguards each actor's prerogatives.¹¹⁶

The importance attached to institutional balance by the Treaties is also understandable by looking at the Court's judicial praxis. In fact, the Court's judgements have established that the violation of the abovementioned principles can determine the invalidity of an act of the institutions.¹¹⁷ Overall, this

condition for the exercise of those functions it is entitled of. This, in turn, leads to a political homogenization of the two powers through the parliamentary majority. Accordingly, the executive and legislative functions are not as independent as the theory would claim. Furthermore, the executive power can also adopt acts which are formally executive but substantively legislative in nature, thus general and abstract. Vice-versa, the legislative power can equally adopt substantively executive acts, such as when approving the budget, which provoked a split between the formal and functional aspects of those powers. Overall, the empirical application of the theory of the separation of powers rarely occurs. For further clarifications, see Bin, R. and Pitruzzella, G., *Diritto Costituzionale*, 19th ed. (Torino: G. Giappichelli, 2018), pp.77-80.

¹¹¹ Jacqu , J. P., *Droit Institutionnel De L'Union Europ enne*, 4th ed. (Paris: Dalloz, 2006).

¹¹² Adam and Tizzano, *Manuale di Diritto*, pp. 78, 92-94.

¹¹³ In the case of infringement of competition law's provisions. This power on the side of the Commission is similar to that exercised by the ECB, and is sometimes referred to as an adjudication power, since the institution's decision are characterized by bindingness and finality, without the possibility to appeal. Indeed, this kind of evaluation is subject to criteria that are relevantly different from the judicial ones, in that the criteria taken into consideration involve also technical and political considerations. For further clarifications, see Carreau and Marrella, *Diritto internazionale*, pp.89, 610.

¹¹⁴ Majone, *Dilemmas of European Integration*, p.81.

¹¹⁵ See par.2, art.13 TEU.

¹¹⁶ Adam and Tizzano, *Manuale di Diritto*, pp.185-186.

¹¹⁷ See case CJEU C-25/94, *Commission v Council*, I-1496, [March 19th1996], point 49. The Court then confirmed the invalidity of an act produced in infringement of an interinstitutional agreement, in that such an agreement embodies the principle of sincere cooperation and represents a binding commitment to both parties.

necessity to find an equilibrium determines the legal structure of the Union. In fact, in order to respect each kind of interest, a wide set of rules has been designed, together with specific procedural mechanisms that regulate the decision-making process. Accordingly, each policy sector's decisional procedure reflects the interests that Treaty drafters have deemed to be the most important in a given area. For instance, within the Common Foreign and Security Policy, the interests of Member States are the most relevant. Thus, decisions are adopted only by the Council, excluding the Parliament.¹¹⁸ It is possible to grasp this aspect by looking at the policy in question. After the Lisbon Treaty the Commission has been formally replaced by the High Representative for Foreign Affairs and Security Policy, as a parallel policy-initiator to the Council. Therefore, the Commission is now only charged with the function of approving the HR's proposals.¹¹⁹ This way, the Commission has been substantially sidelined by the Council, although the High Representative's double hatted office still reflects its nature of connector between the two. A slightly more relevant position is assigned to the Parliament, being entitled to express opinions only regarding the HR's proposals on the main aspects of the CFSP.¹²⁰ However, it is formally excluded from any form of participation in all the other decisions taken by the Council or from the European Council, except regarding extraordinary measures.¹²¹ Finally, the Court's role has been equally inhibited: its jurisdiction within this policy sector has been explicitly ruled out.¹²² In fact, it only includes those cases regarding the clause of reciprocal non-interference and the decisions providing for restrictive measures against natural or legal persons.¹²³ Therefore, the CFSP presents a strong intergovernmental nature, in which the Council and the European Council hold the central and most influential positions. This determines the substantial exclusion of the other institutions and reflects the will of the drafters to defend national prerogatives when it comes to foreign policy affairs.

Equally, even in policy sectors that are less politically sensitive than the CFSP, the maintenance of the institutional equilibrium is considered a pivotal principle, which guarantees the legitimacy of EU policies. Thus, any action that donates unforeseen decision-making power to actors other than those *a priori* entitled, constitutes a direct menace to other institutions' authority.¹²⁴ In this perspective can be perceived the Commission's attempt to expand its competences, and the judicial praxis of the Court in conferring new powers to supranational institutions. Clearly, the concentration of power at the supranational level is to a certain degree tolerated, at least until it allows to solve concrete common

¹¹⁸Adam and Tizzano, *Manuale di Diritto*, p.849.

¹¹⁹ *Ibid.*, p. 854.

¹²⁰ See art.36 TEU.

¹²¹ Such as in the case of a community mission's budget.

¹²² See art.24 TEU.

¹²³ See art. 275 TFEU.

¹²⁴ For a concrete case of conflict in which institutions' prerogatives are at stake (in this case it is the Council's ECOFIN against the Commission), see Majone, *Dilemmas of European Integration*, p.50.

issues.¹²⁵ Nevertheless, it can provoke severe tensions among Member States and against the Union. As we shall discuss in the next sections, when adopted policies do not reach the expected goals or put institutional equilibrium at stake, they tend to provoke contrasts. These conflicts, often distributive in nature, can threaten the legitimacy of European institutions.

b) Integration as an end in itself: the case of the Common Fishery Policy

The consequences of the continuous effort to keep institutions' powers balanced determines a chronic complexity in introducing wide reforms without modifying the Treaties. Such reforms require, in order to take place, not only a large amount of time but also the agreement of high contracting parties,¹²⁶ thus determining a lack of flexibility of the political system. This stillness suggests that in a polity whose main political struggle is that of preserving institutional prerogatives, adopted policies can often result in sub-optimal outcomes.¹²⁷ Indeed, the interest at stake make so that the principal objective of policy-making bodies is that of maintaining the equilibrium, instead of reaching satisfying and problem-solving agreements.

This very same dynamics can be observed in the case of the Common Fishery Policy, adopted in the absence of publicity. The policy, due to its unsatisfying results, eventually reached a publicized political dimension and provoked dissatisfaction among national publics.¹²⁸ This sector had since the institution of the EC fallen under the scope of the provisions regulating the Common Agricultural Policy, respecting the principles of the common market. A radical change within the political balance of the CFP governance happened in the early 70s, with the accession of the UK, Ireland, Norway and Denmark to the Community. In fact, because of the accession of these countries, the global amount of fish production increased by around 400%. Member States with limited coastal areas tried to take advantage of this by affirming the validity, for the CFP, of the principles of non-discrimination and equal access applied in the Common Agricultural Policy.¹²⁹ Thus, integration in this case was aimed at exploiting other Member States' fishery resources outside of one's territorial waters. In order to do so, the Commission needed to be closely involved in the policy-management process. Also, it needed to be charged with the power to put forward legislative proposals. Nevertheless, monitoring and implementation tasks were not made supranational, but rested within Member States' authority. This was due to States reticence in giving the

¹²⁵ Majone, *Dilemmas of European Integration*, p.79.

¹²⁶ See par.4, art.48 TEU.

¹²⁷ Genschel, P. and Jachtenfuchs, M., "From Market Integration to Core State Powers: The Eurozone Crisis, the Refugee Crisis and Integration Theory", *JCMS: Journal of Common Market Studies* 56, no. 1 (2018), pp. 178–196.

¹²⁸ Majone, *Dilemmas of European Integration*, pp. 111-114.

¹²⁹ European Union, *Treaty Establishing the European Economic Community*, art.38.

Commission such relevant powers. Then, given the possibility of exploitation of the newcomers' fishery resources by the old Members, a harsh debate was sparked regarding the norm of equal access. Eventually, a compromise was found, through the introduction of geographical derogations to the general provision of competition. Special zones of exclusive property were abolished, while a common framework on allowable total catches was introduced.¹³⁰ Overall, the configuration of the sector presented a series of features that, applied together, contradicted the stated objective of the CFP in preserving fishery resources. Indeed, the principle of non-discrimination, combined with the lack of supranational monitoring and the maximum catchable amounts, produced a situation that damaged biological stocks. Indeed, the catches quotas were not respected by old members, and the Commission could not monitor and punish those responsible of the situation. Eventually, this ended up damaging fishery resources, at the detriment of the UK, Ireland and Denmark. Thus, the sacrifice of the Exclusive Economic Zones in the name of the non-discrimination principle played a strong role in favoring a global outcome that proved unsustainable. Also, it fueled outrage and indignation, mainly among British and Irish fishermen.¹³¹

This policy sector represents a situation in which the attempt to balance powers and prerogatives has produced poor and inefficient results.¹³² Indeed, the nature of the policy did not allow to provide relevant powers to the Commission. Thus, the will to integrate without modifying the institutional equilibrium proved unsustainable. Accordingly, stealthy integration represented a viable solution, since it allowed for the communitarization of the policy without politicizing the matter. However, given that both the implementation and the monitoring powers rested with Member State, the resulting situation provoked a rebound effect. In fact, national publics have suffered severe losses and debate was ignited. Also, the Commission's legitimacy got damaged, eventually leading to the criticism that was undesirable since the beginning. Although the Commission had its competences partially expanded, the unwillingness on the side of the Member States to transfer wider powers posed the basis for a future failure. Thus, with the Lisbon treaty and with a subsequent regulation, a strong delocalization (if not a partial renationalization) has been reintroduced. This solution aims at granting the effective preservation of fishery resources, alleviating the discontent produced by the CFP.¹³³

¹³⁰ Council of the European Communities, reg. 170/83 (27/01/1983), art.3.

¹³¹ Majone, *Dilemmas of European Integration*, pp. 111-114.

¹³² To know more regarding the problems of the Common Fishery Policy, see Crean, K. and Symes, D., *Fisheries Management in Crisis* (Oxford: Fishing News Books, 1996).

¹³³ By "re-nationalization" we mean that the competence over a common policy is handed back from European institutions to Member States, thus provoking a phenomenon of "dis-integration". This is precisely what happened in the CFP in relation to the preservation of fishery resources. Indeed, limitations to the principle of non-discrimination have been introduced within 12 nautical miles from Member States' shores, not allowing foreign fishermen within such limits. Equally, a new system of total catchable amounts determined by the Council rather than the Commission has been created; and the monitoring of the policy has remained of domestic competence. See reg. (UE) n. 1380/2013 of

c) Expanding the scope, watering down the content: the case of the Environmental Policy

A second case about the negative effects of integration, strictly correlated to stealthy processes, is that of the Union's environmental policy. In such a policy, the Commission has experienced a continuous expansion of its regulatory competence. Accordingly, the Union finds itself in a situation in which it "bites more than it can chew". The environmental policy is a sector in which community institutions have been remarkably active since the Single European Act, building a wide and complex legislation that could now be defined a "European environmental law".¹³⁴ The TFEU enlists the policy within the category of shared competencies, over which the EU has a competing power with regard to that of Member States. Thus, States only enjoy the power to fill in the gaps left from the Union, without being prejudicial to the application of community law.¹³⁵ The Treaty also states the objectives and the general principles the policy must satisfy and respect, however their general enunciation opens up for the expansion of the Union's scope. Particularly, this bears consequences for the final objectives envisaged by the drafters of the policy. These objectives entail "the preservation, protection and improvement of the quality of the environment; the protection of human health; the prudent and rational utilization of natural resources and the promotion of measures at the international level to deal with regional or global environmental problems, and in particular climate change".¹³⁶ Thus, such ambitious goals are able to expand the potential normative jurisdiction of the European legislator, providing it with a high degree of discretion regarding the acts it can adopt. Consequently, the Union has traditionally carried out a very prolific action in the policy: it aimed at reaching its ambitions of becoming the global leader on environmental matters.¹³⁷ In doing so, it coordinates Member States' conduct mainly through directives and legal harmonizations, however minimal.¹³⁸

In this policy field, the Union's action has been in large part, although not exclusively, carried out by the Commission through the ordinary legislative procedure. This way, the institution expanded its competences sphere by putting forward a large number of acts grounded in the general scope of the policy.¹³⁹ Nevertheless, the actual integration reached through regulative means has obtained a scarce amount of publicity, compared to the huge expectations of becoming a global environmental leader.

the Council and the Parliament, as modified by reg. (UE) n.2015/812 of the same institutions; and Adam and Tizzano, *Manuale di Diritto*, p.476.

¹³⁴ Adam and Tizzano, *Manuale di Diritto*, p.778.

¹³⁵ See art. 4 of the TFEU.

¹³⁶ See art. 191 of the TFEU.

¹³⁷ Majone, *Dilemmas of European Integration*, p.117.

¹³⁸ In order to grasp a glimpse of the Union's high-flying goals and ambitions of becoming the global leader on environmental matters, see European Commission, "Living Well Within the Limits of our Planet", *General Union Environmental Action Programme to 2020* (2014).

¹³⁹ See Adam and Tizzano, *Manuale di Diritto*, pp.778-779.

Eventually, this produced a situation in which the EU has a formal far-reaching mandate but is incapable of handling it efficiently. Indeed, several complications stand between the actual capabilities enjoyed by the Commission and those that would be required to fulfill the Union's promises.¹⁴⁰ Particularly, this is due to two factors, which we present here: formal derogations and heterogeneous application of the *acquis*.

In the first place, the legislation put in place presents formal limitations in terms of uniform application: in fact, different kinds of exceptions are applicable to the provisions regarding environmental matters. For instance, ex art. 191 of the TFEU, derogations can be invoked by Member States to escape those measures that attempt to close the gap between national legislations, therefore constituting a "safeguard clause" against harmonizations.¹⁴¹ Moreover, temporary derogations can be applied, together with the financial support from the Cohesion Fund when States are incapable of implementing the provisions. This happens, for instance, in situations in which the costs associated to the implementation of European acts is deemed unproportionate.¹⁴² In the second place, the implementation of community law, being mainly developed through directives, has given place to a differentiated application of the *acquis* in the policy. This produced a scenario in which not every State reaches the same level of compliance, bringing about a fragmentation of the legal regime and mining the effectiveness of policy measures. These different degrees of application contribute to foster the internal debate between States who are perceived as the net-contributors and those who are accused of free-riding. This fracture often opposes rich countries to poorer ones, despite the introduction of norms that allow for a differentiated application, to promote compliance on each side.¹⁴³

These factors help widening the discrepancy that exists between what the European Union, and particularly the Commission, has taken into its hands and what it is concretely able to deliver. This steady and stealthy integration of regulatory (for the most part) competences has negatively affected its ability to carry out an efficient and coherent environmental action. Also, it has sparked a debate within Member States and attracted blame for its unkept promises.¹⁴⁴ The whole process has also been interpreted as correlated to the prestige and self-aggrandizement ambitions of the Commission.¹⁴⁵ This situation proves to be in contrast with a vision of centralization as the most functional solution to the collective issues

¹⁴⁰ It is also worth noting that the Union's strategic goals are extremely ambitious by definition, thus it is not surprising that their actual achievement presents some complexities. For instance, none of the objectives set for 2010 has been eventually reached.

¹⁴¹ Please note that sub-par. 2 of par. 2 of art.191 formally excludes the possibility of derogating community harmonizations for economic reasons.

¹⁴² Although this does not inhibit the functioning of "the polluter-pays" principle. See art. 192, par.5.

¹⁴³ Majone, *Dilemmas of European Integration*, pp.117-124.

¹⁴⁴ Indeed, a relevant step in capacity building has been the creation of the European Environmental Agency, although it is primarily charged with technical functions like data gathering. See Martens, M., "Voice or Loyalty? The Evolution of the European Environment Agency (EEA)", *JCMS: Journal of Common Market Studies* 48, no. 4 (2010), pp. 890-891.

¹⁴⁵ *Ibid.*

faced by European Member States.¹⁴⁶ However, it is necessary to keep in mind the proportions and complexity of the subject. In fact, it is logical to assume that a supranational intervention would be better suited to handle environmental policies than domestic ones. In this regard, the Union has indeed managed to deliver a number of positive results: not least the steady decrease of industrial emissions into air,¹⁴⁷ or the fall in consumptions of ozone-depleting substances, both happened through regulation.¹⁴⁸ Nevertheless, the continuous expansion of community competencies reflects a contradiction which highlights the reasons for which stealthy integration has been adopted. On the one side, the necessity of cooperation to solve common issues; on the other, the lack of political will to pool the competences that are necessary to do so. Thus, allowing the Commission to act avoids risky oppositions on the side of domestic public opinions, but also presents two risks. On the one side, it portrays the EU as a potential global environmental leader when it is incapable of being one, increasing the chance of future legitimacy issues. On the other, it allows for the expansion of the Commission's scope.

As we have seen through these policy cases, the combination of the structural design of the EU, together with the Commission's proactivity, provoked dissatisfaction towards supranational solutions. As in the case of the CFP, this also triggered the re-centralization of decision-making powers. Indeed, pursuing integration for the sake of integration clashes against the Union's difficulties in steering Member States to respect and implement community provisions.¹⁴⁹ Also, it involves the risk of policy inefficiency. However, this is also due to the substantial limits the Commission is subject to: the insufficient number of employees at its disposal or the dimension of the dedicated budget inhibit the efficiency of its action and lessen the chances of creating a true "European administration".¹⁵⁰ Nevertheless, these circumstances have at times provoked strong reactions and factionalisms among Member States, leading to hostile reactions towards community decisions. These conclusions are corroborated by Member State's conduct in the period following the Maastricht treaty's entry into force. Indeed, it has been observed that whenever delegation of powers to supranational bodies happened, it was mostly directed at newly established institutions, organs or agencies, rather than at the Commission.¹⁵¹ In a neo-functionalist perspective, this defines a situation in which there exist both demand and supply for more integration, but there is equally mistrust towards the Union, and particularly the Commission.

¹⁴⁶ Majone, "The Common Sense of European Integration", p. 621.

¹⁴⁷ See European Environmental Agency website, "Industrial Pollution in Europe", available at: <https://www.eea.europa.eu/data-and-maps/indicators/industrial-pollution-in-europe-3/assessment>.

¹⁴⁸ Ibid., "Production and Consumption of Ozone-Depleting Substances", available at: <https://www.eea.europa.eu/data-and-maps/indicators/production-and-consumption-of-ozone-2/assessment-4>.

¹⁴⁹ Adam and Tizzano, *Manuale di Diritto*, p.801.

¹⁵⁰ Despite the impressive growth in terms of policies dealt with and number of DGs, the Commission's staff does not reach 40.000 people in staff. See Trondal, "The Rise of a European Public Administration", pp.173-176.

¹⁵¹ This phenomenon has gone at the advantage of, particularly, the institution of the ECB and the European External Action Service. See Bickerton *et al.*, "The New Intergovernmentalism", p.705.

Therefore, Member States opted for other solutions, that allow for a tighter control over the exercise of the transferred competences. This way, it is also possible to be safeguarded against potential backlashes of “insubordination” from the agent made object of their delegation.¹⁵² Scholars have, in this regard, discussed about a different theory to explain this new dynamic within the integration process, named neo-intergovernmentalism. In this model, influenced by constructivist theories, national agents’ preferences are determined domestically, but are also influenced by the working environment in which these agents are situated. Eventually, a progressive convergence within Member States’ objectives, procedures and standards is observed. Moreover, according to this same theory, the context of mistrust we have discussed represents the cause for the refocusing of the EU’s decision-making around the Council.¹⁵³

In the next section we shall discuss more in the detail the perceived lack of trust and legitimacy of European institutions, highlighting its connection with structural factors and integration by stealth. However, this time we shall focus on two themes that policy-makers must consider when delegating national competences: accountability and performance assessment. This last step of observations will reveal fundamental to explain why integration has been described by Genschel and Jachtenfuchs as the combination of demand and supply. Also, it will provide the context for the discussion on core state powers.

1.6: Dissatisfaction and calls for improved accountability

Parallel to the expansion of European institutions’ competences through integration by stealth, the preeminently political theme of accountability has raised discussions. Particularly, this regarded the role of non-majoritarian institutions such as the Commission or the ECB. Even though the opposition to supranationalism has been constantly present in the European integration history,¹⁵⁴ in recent years the role played by the latter two institutions has re-sparked the debate. This had relevant consequences in terms of intrusiveness into domestic systems, especially after the entry into force of the post-economic crises measures introduced between 2011 and 2013.¹⁵⁵ Notice that delegation of technical matters to independent and non-elected organs represents the norm in most national systems. These bodies are tolerated because of their results delivery capacity, i.e. the fact of being the best possible choice for

¹⁵² Ibid.

¹⁵³ Ibid., pp.703-722.

¹⁵⁴ Namely, to cite some famous historical examples, the failed ratification of the European Defense Community treaty in 1954, or the so-called “empty chair crises” in 1965.

¹⁵⁵ Serricchio, F., Tsakatika, M, and Quaglia, L., “Euroscpticism and the Global Financial Crisis”, *JCMS: Journal of Common Market Studies* 51, no. 1 (2013), pp. 51–64.

handling given policy issues.¹⁵⁶ This, in turn, provides them with the necessary legitimacy to operate, with variable degrees of independence from political actors and discretion in normative or executive matters of their competence.

The same is not equally valid for their homologues at the European level, that often suffer from a lack of trust from public opinions and decision-makers. This, in turn, leads to requests for a tighter control and possibly a political check of their work. Leaving aside the considerations on the necessity of decisional autonomy for them to be able to operate efficiently, the responsibility towards the electorate holds a high degree of relevance.¹⁵⁷ In fact, this entails the specific discussion of the role and powers these institutions are charged with. The assessment of supranational institutions' accountability proves to be, theoretically, easier for the ECB than for the Commission. This is because the measure of the adherence of the Commission to its mandate is harder than that of the Bank. Indeed, the monetary institution holds a narrower remit, mainly limited to the stabilization of prices.¹⁵⁸ Thus, the empirical evaluation of the Bank's performance is directly assessable through the observation of inflation levels throughout the eurozone. Thus, the assessment is done by comparing the definition of the Monetary Policy and the compliance of the Bank to the it.¹⁵⁹

On the contrary, when it comes to the Commission, it has become increasingly difficult to evaluate the quality of its performance. In the first place, this is due to the complexity of defining exactly what rests inside or outside of its mandate. Moreover, throughout the years and the subsequent rounds of reform, Commission's competences have been expanded. Accordingly, its exact mandate is unclearly demarked, since it is also open to potential enlargements whenever the right occasion is presented. In the second place, it is complicated to confront the mandate of the institution with its concrete accomplishments. For instance, considering the percentage of policy proposals accepted by Member States to grasp whether the Commission tries to satisfy Member States' necessities can be misleading. In fact, as we saw, integration might be pursued for reason different from problem-solving. Lastly, it should be kept in consideration that Member States enjoy a margin of discretion over the way they handle European acts. Indeed, both during the transposition of EU norms into national legislations (in the case of directives) and in the execution of policies, Member States decide how to proceed,¹⁶⁰ according to the

¹⁵⁶ Majone, *Dilemmas of European Integration*, p.83.

¹⁵⁷ Bin and Pitruzzella, *Diritto Costituzionale*, pp.67-69.

¹⁵⁸ See art. 282 of the TFEU.

¹⁵⁹ Indeed, the evaluation of the accountability of the ECB is carried out, in terms of definition and results of the European Monetary Policy, through an annual report presented to the European Council, the Council, the Parliament and the Commission (ex art. 284 TFEU, par.3). Furthermore, the Parliament can hold interrogations of the President of the ECB and of the members to the Executive Board. Finally, the Bank is subject to the judicial control of the Court. For further detail, see Adam and Tizzano, *Manuale di Diritto*, pp.678-679.

¹⁶⁰ Brink, "The Impact of EU Legislation", pp.218-220. At this latter regard of national implementation, it is interesting to notice how regulation through directive acts can contribute to avoid criticism towards the legislator/executor in that it

principle of procedural autonomy.¹⁶¹ Thus, evaluating the impact of Commission's action presents notable difficulties. Equally, determining whether the institution is sticking to its mandate present some serious complications. As a consequence, it is hard to confirm whether the trust accorded to the institution is well placed or not. This fact potentially undermines its legitimacy and makes it difficult to rebut the perception that the institution operates at the detriment of Member States' sovereignty.¹⁶²

1.7: Conclusions

Despite the calls for improved accountability and those invoking a return to greater national autonomy, Monnet's functionalist approach has been able to create a euro-polity with extensive regulatory powers. Indeed, the political system has been able to intrude into most policy sectors managed by Member States. For decades and mainly in economic matters, integration by stealth has achieved important objectives that an overtly political effort could not bring about. It has deepened the degree of interdependence among European States, avoided war, provided economic benefits deriving from the single market and stabilized post-communist Countries. Today's Europe reflects this pattern and proves to be deeply integrated, particularly in the economic field. Here, it enjoys exclusive competences in a wide range of policy sectors, encompassing: customs union, competition law, monetary policy, common commercial policy, common fisheries policy and conclusion of international agreements.¹⁶³ Exploiting the potential gains deriving from improved cooperation, integration by stealth induced Member States to pool their resources and delegate them to the European level. At the same time though, given the technical and bureaucratic way in which common issues have been framed, many areas of policy have remained outside of the scope of the EU. Particularly, this is true for those sectors requiring redistributions and perceived zero-sum games. These policy areas, comprising welfare, social policies, culture, health and occupation, are subject to a high degree of politicization that can hardly escape publicity. Thus, their shift at the European level proves hard to deliver. Nevertheless, despite the

manages to shift the public's attention and potential blame from the regulator (who has proposed a uniform legislation), to the regulated (who is charged with the duty to correctly implement the norms). Thus, the focus will rest with the subject of such regulation, in spite of its content and the likelihood of correctly giving implementation to the acts. See also Genschel, P. and Jachtenfuchs, M., "More Integration, Less Federation: the European Integration of Core State Powers", *Journal of European Public Policy* 23, no. 1 (2016), p.50.

¹⁶¹ Adam and Tizzano, *Manuale di Diritto*, p.801.

¹⁶² Indeed, since the last round of European elections in 2014, the surge of euro-skeptics parties is anything but a localized or contained phenomenon. As can be observed through national elections, these movements lamenting the lack of legitimacy in the interventions of the EU represent a non-negligible force in most of the largest countries: take, for instance, the electoral results of UKIP in the UK, the League in Italy, AfD in Germany, the Rassemblement National in France, Fidesz in Hungary.

¹⁶³ Art.3, TFEU.

complications of publicity-avoiding integration, the Union has eventually gained some degree of power on them, by enlisting them into the supporting competences category.

The considerations hereby made in terms of publicity, politicization and conflict, will be transposed to the discussion of those powers historically tied to State-building practices: public administration, military affairs and fiscal policies.¹⁶⁴ Thus, we will present those theories that claim that the Union has recently managed to gain a partial competence on them. Those theories suggest that, starting around the end of the last century, a series of initiatives has been launched in those sectors, albeit with different results.¹⁶⁵ Also, their partial communitarization has mostly happened in absence of publicity, which will allow us to deepen our analysis of integration by stealth. Clearly, though, the degree of publicity differs from policy to policy. Indeed, the EU involvement in the fiscal and budgetary policies of Member States has attracted a remarkable attention from public opinions, particularly after the introduction of the measures fighting the economic crises.¹⁶⁶ Accordingly, we shall try to understand why some of them are more or less able to attract publicity, and how their integration has been described. In this regard, we will make use of demand and supply for integration to understand what patterns characterize the communitarization of core state powers. Overall, the second chapter allows to explore Genschel and Jachtenfuchs' theory; which will be fundamental to individuate potential weak point to develop the case study of Frontex.

¹⁶⁴ Or, at least, this is the "standard view". See Genschel and Jachtenfuchs, "Beyond Market Regulation", pp.4-8.

¹⁶⁵ Genschel and Jachtenfuchs, "The European Integration of Core State Powers", *Beyond the Regulatory Polity*, pp.252-253.

¹⁶⁶ Hallerberg, M., "Why is there Fiscal Capacity but Little Regulation in the US, but Regulation and Little Fiscal Capacity in Europe? The Global Financial Crisis as a Test Case", *Beyond the Regulatory Polity*, pp.101-102.

Chapter 2: Core state powers' integration: complicacies and implications

2.1: Introduction to the second chapter

The objective of the present chapter is that of presenting the theory, developed by Genschel and Jachtenfuchs in 2016, claiming that the EU has gained competence in core state powers.¹⁶⁷ Also, we shall consider the work of other scholars that used such model as a basis to discuss specific policies tied to the three powers.¹⁶⁸ Before engaging in the discussion on the validity of the theory, though, it is necessary to consider why these powers are so politically relevant. Given their nature and historical roots, their integration would entail far-reaching consequences for the EU. Indeed, the “state-ness” of polities has been traditionally associated with the control over the military, administrative and fiscal powers.¹⁶⁹ Accordingly, integration of these competences could rise concerns about the ends toward which the Union is evolving. Thus, we shall also consider what the communitarization of the three state powers would entail for the EU’s “state-ness”.

After presenting the importance of core powers and the teleological consideration connected to them, we will try to problematize Genschel and Jachtenfuchs’ theory.¹⁷⁰ Our goal is that of grasping what useful insights it provides, as well as its potential flaws. To do so, we shall present the framework in the detail, showing why and how it claims that integration has occurred in core state powers. Notably, the model was integrated by the two authors, to explain the reasons for Member States reticence in sharing them.¹⁷¹ In fact, given the high political and symbolic value of these policy areas,¹⁷² integration has so far proven slower and more complicated than in less sensitive sectors. Accordingly, we shall present those factors that hamper communitarization in this sense, and that derive precisely from the nature of core

¹⁶⁷ Genschel, P. and Jachtenfuchs, M., “Beyond Market Regulation. Analyzing the European Integration of Core State Powers”, *Beyond the Regulatory Polity? The European Integration of Core State Powers* (Oxford: Oxford University Press, 2016), pp. 10-12.

¹⁶⁸ Namely, those of Egeberg (2016), Heidbreder (2015), Mérand (2009), Menon (2016), Schimmelfennig (2018) and Trondal (2016).

¹⁶⁹ Tilly, C., *Formation of National States in Western Europe* (Princeton: Princeton University press, 1975), p. 42.

¹⁷⁰ “Teleological” refers here to the character of those assumptions or speculations that try to predict what the culminating point of the integration process will be. Indeed, some commentators have put forward theories that suggest that the EU will eventually evolve into a federation; whereas other have suggested that Member States will keep being the pivotal actors of the system and will not pool enough resources for a federation to be created. See, for instance, Nicolaidis, K. and Howse, R., *The Federal Vision. Legitimacy and Levels of Governance in the United States and the European Union* (Oxford: Oxford University Press, 2001), p.9; Burgess, *Comparative Federalism*, pp.246-247 and Moravcsik, A., “In defense of the “democratic deficit”: Reassessing legitimacy in the European Union”, *JCMS: Journal of Common Market Studies* 40, n.4 (2002), pp. 606-607.

¹⁷¹ A good example of this is represented by the CSDP, thus from the integration of the use of force. See Mérand, F., *European Defense Policy: Beyond the Nation State* (Oxford: Oxford University Press, 2009), pp. 136-137.

¹⁷² Ménon, A., “Defense Policy and the Logic of ‘High-Politics’”, *Beyond the Regulatory Polity*, p. 76.

powers. Particularly, we consider high-politics and identity concerns, publicity and the importance of the actors vehiculating demand and supply.

Finally, in the last section of this chapter, we shall discuss the two authors' theory of indirect control. The term refers to a form of integration by stealth in core powers, meant as the unforeseen effect that a tighter cooperation among Member States has in expanding the influence of the EU. Indeed, Genschel and Jachtenfuchs acknowledge that the Union does not possess any formal competence to directly exercise these powers, due to the limitations foreseen by the Treaties. However, they claim that the EU applies a sort of indirect control, determining the situations and forms in which Member States are entitled of using their core state powers.¹⁷³ This way, the EU would be able to steer States' practices without exercising core powers itself. This development, it is claimed, derives precisely from the intrinsic difficulties in integrating these policy areas.¹⁷⁴

Overall, the two scholars provide interesting insights on how integration proceeds and on the degree of influence that the Union applies on Member States. However, we suggest that their theory also presents some flaws. For instance, we claim that demand and supply, upon which the framework is built, are too vaguely defined and do not refer to concrete elements.¹⁷⁵ Particularly, the concept of demand is too abstract; and it is difficult to grasp the difference between economies of scale and externalities. Moreover, the theory also fails to predict observed phenomena. Particularly, this is the case of processes of disintegration of communitary policies, in which the competence over previously integrated sectors returns to Member States.¹⁷⁶ Accordingly, in the third chapter we shall try to test the validity of Genschel and Jachtenfuchs' work starting from these very considerations.

2.2: Core state powers: definition and teleological implication

This first section highlights the importance of core state powers, the centralization of which allowed the State, meant as a peculiar form of social organization, to spread and develop. Contrary to competing systems, the State was in fact better equipped to wage and win wars. In the words of Tilly, "war made the state and the state made war".¹⁷⁷ The historical explanation provided here, thus, aims at

¹⁷³ Genschel, P. and Jachtenfuchs, M., "The European Integration of Core State Powers. Patterns and Causes", *Beyond the Regulatory Polity*, pp. 253-254.

¹⁷⁴ *Ibid.*; see also Hallerberg, M., "Why is there Fiscal Capacity but Little Regulation in the US, but Regulation and Little Fiscal Capacity in Europe? The Global Financial Crisis as a Test Case", *Beyond the Regulatory Polity*, pp. 92-95.

¹⁷⁵ Genschel and Jachtenfuchs, "Beyond Market Regulation", pp. 13-15.

¹⁷⁶ The theory, in fact, claims that the inversion of integration has not been experienced yet, although derogations are more frequently invoked. See Rittberger, B., Leuffen, D. and Schimmelfennig, F., "Differentiated Integration of Core State Powers", *Beyond the Regulatory Polity*, pp. 192-194.

¹⁷⁷ Tilly, *The Formation of National States in Western Europe*, p.42.

clarifying the reasons behind States' reluctance in sharing and pooling core powers. It has also been claimed that such a reluctance contributes to explain the dysfunctional institutional architecture of important policy sectors, such as the European Monetary Union¹⁷⁸. Discussing core state powers allows to make a comparison between the EU and those polities, like federations, that have centralized them at a level higher than the national one. Thus, it is possible to understand what teleological implications could derive from their integration. However, some elements suggest that, even in the case of their future communitarization, the Union could not become a full-fledged federation. These are, particularly, the lack of a common *demos*, the possibility to derogate to European acts and the prevalence of regulation over capacity building.¹⁷⁹ Moreover, the development of the EU and its features reflect neither the historical development nor the power distribution in federal polities like the US.¹⁸⁰

The first step in order to understand how and how far the European Union has gained competences in core state powers is that of defining what exactly those sectors are and why they are of a major importance. These powers date back to the sixteenth century and their possession led, in western Europe, to the consolidation of the national-State form over other competing organizational models.¹⁸¹ The centralization and monopolization of core powers has been reached thanks to several fundamental preconditions: a discernible degree of cultural and linguistic homogeneity, the capitalistic organization of the economic structure and the presence of a wide peasantry.¹⁸² The structure that was created proved to be highly organized and fit to wage and win wars.¹⁸³ Particularly, three elements were fundamental in enhancing the efficiency of the system: specialization and labor-division, high amounts of tax revenues and the control over means of coercion. All these elements were obtained through what Tilly named "cycles of extraction and coercion".¹⁸⁴ Those processes established a functional administrative apparatus that allowed to extract larger and larger amounts of taxes from the population. This, in turn, was utilized to create and maintain better performing armies. These cycles not only gave a comparative military advantage over other systems, but also created a virtuous circle that tightened the control over the exercise of legitimate violence. Moreover, a better rationalized and performing army reduced the chance of rebellions and insubordination, thus bringing even more revenues from taxes to sustain the whole apparatus.¹⁸⁵

¹⁷⁸ Genschel, P. and Jachtenfuchs, M., "From Market Integration to Core State Powers: The Eurozone Crisis, the Refugee Crisis and Integration Theory", *JCMS: Journal of Common Market Studies* 56, no. 1 (2018), pp.183-185.

¹⁷⁹ Hallerberg, "Why is there Fiscal Capacity but Little Regulation in the US, pp. 102-103.

¹⁸⁰ Nicolaidis and Howse, *The Federal Vision*, pp.31-32, 483-484.

¹⁸¹ Tilly, *Formation of National States in Western Europe*, p.27.

¹⁸² *Ibid.*, pp.29-42.

¹⁸³ *Ibid.*, p.42.

¹⁸⁴ *Ibid.*, pp.51-65.

¹⁸⁵ *Ibid.*, p.73.

Therefore, it can be understood how the monopoly of these powers came to be identified as the preeminent feature of States' sovereignty.¹⁸⁶ Their role presents such a highly symbolic meaning in defining what a State is and does that those actors incapable of exercising them are not considered State actors or are deemed failed States.¹⁸⁷ This contributes to explain why it is reasonable to suppose that Member States are willing to safeguard their competences in this sense. Nevertheless, European States have, since the first years of their cooperation, shown an interest in pooling core powers.¹⁸⁸ The possibility of integrating them has historically raised concerns among Member States, both for strategic and identity reasons.¹⁸⁹ Moreover, teleological assumptions would suggest that cooperation in core state powers would eventually lead to becoming a full-fledged federation: "in the EU, federalism is often associated with centralization".¹⁹⁰ Surely, competence centralization has represented a fundamental phase in the institution of European national States, but the final goal of State-building was precisely that of forming a unitary actor.¹⁹¹ Even supposing that Europe became the federation Spinelli and Monnet hoped for, it is hardly imaginable that a unitary State could be envisaged in Europe, at least in the short run.¹⁹² However, it can be useful to discuss the possible consequences of the integration of core state powers on the part of the EU, particularly regarding federalism.

First of all, it is important to clarify that federalism does not necessarily entail total centralization of competences.¹⁹³ Even in federal polities the competence over fundamental policy areas is not perfectly centralized but is rather split between the national and federal level.¹⁹⁴ This feature is, clearly, a reflection of the structural necessities of the system and also of the historical path that led to its formation. Relevantly, the European case represents an outstanding exception in terms of development strategy: in most

¹⁸⁶ Particularly, regarding the importance of the administrative apparatus in allowing the gathering of large amounts of data through statistics and consequently carry out census operations to more efficiently tax the population, see Giddens, A., *The Nation-State and Violence* (Cambridge: Polity Press, 1996), pp. 179-180.

¹⁸⁷ Genschel, P. and Jachtenfuchs, M., "More Integration, Less Federation: the European Integration of Core State Powers", *Journal of European Public Policy* 23, no. 1 (2016), p.43.

¹⁸⁸ Think, for instance, to the failed project of the European Defense Community. See Mérand, *European Defense Policy*, p.47.

¹⁸⁹ *Ibid.*, pp.46-47.

¹⁹⁰ Nicolaidis and Howse, *The Federal Vision*, p.156.

¹⁹¹ Excluding federal States like Germany and Switzerland, but also considering other States like Italy or the UK in which power is relevantly delocalized even without formally federal agreements.

¹⁹² Clearly, we are dealing here with speculative assertions, assertions that are, however, based on reasonable assumptions that foresee hard-to-overcome difficulties even in the case of the presence of a political will to create a federal union. Majone, G., *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford: Oxford University Press, 2010), pp. 206-209; and Moravcsik, "In defense of the democratic deficit", pp. 615-617.

¹⁹³ See Burgess, M., *Comparative Federalism: Theory and Practice* (London: Routledge, 2006), p.148.

¹⁹⁴ Given the preeminent influence that *The Federalist* had onto to the theoretical conception of federations, see James Madison's definition of compound republic, in Madison, J., Hamilton, A. and Jay, J., "Paper n. 51", *The Federalist Papers* (Indianapolis: Liberty Fund, 2001), p. 270.

situations, unity has been achieved through war and direct coercion,¹⁹⁵ whereas the Union's primary political goal was precisely that of avoiding war. However, what is interesting is that the exercise of core powers finds different declinations and allocations and is not merely stripped away from Member States. Take, for instance, the monopoly of force in the US. Regarding its external function, i.e. the definition and implementation of a foreign policy strategy, it is completely transferred to the federal level. Nevertheless, national actors may, to a certain extent, maintain foreign policy objectives, although subordinate to the higher ones.¹⁹⁶ On the contrary, in the internal exercise of force, federal States keep a pivotal role in the definition and execution of security policies, whereas federal actors enjoy narrower competences. Delocalization of core powers is thus a normal feature within the US system.¹⁹⁷

Conversely, in the European polity there exists no such degree of centralization, in none of the core state powers. Nevertheless, some recent developments suggest that at least a level of harmonization has been achieved. Take, for instance, the case of administrative cooperation: domestic criminal law systems have reached a situation that resembles that of federal systems like the North American one.¹⁹⁸ Indeed, due to the introduction of the European Arrest Warrant, it can be affirmed that there exists now a "European criminal law" system.¹⁹⁹ The warrant allows for the cooperation on criminal matters and for the mutual recognition and execution of sentences, harmonizing the practices of Member States. Furthermore, other scholars claim that European Countries' behavior are converging in other sectors as well, because of similar initiative.²⁰⁰ Thus, harmonization can be achieved without centralization; and at the same time, perfectly centralized control is not a prerequisite for building a federation. Accordingly, even admitting that more centralization was achieved, the EU wouldn't necessarily become a federation. Furthermore, there exist other features that distinguish the Union from a federal system: first of all, most of the EU's work is carried out through regulation and not through capacity building.²⁰¹ In a federation like the US, the situation is rather the opposite, and federal bodies are charged executive powers.²⁰²

¹⁹⁵ Think, for instance, of the capital importance of the Civil War in the US or the Sonderbund war in Switzerland. See Burgess, *Comparative Federalism*, respectively pp.198-199 and 200-201.

¹⁹⁶ Kelemen, D. R., "Building the new European State? Federalism, Core State Powers and European Integration", *Beyond the Regulatory Polity?*, pp. 215-218.

¹⁹⁷ *Ibid.*, p. 225.

¹⁹⁸ Adam, R. and Tizzano, A., *Manuale Di Diritto Dell'unione Europea* (Torino: G. Giappichelli, 2017), pp. 560-563.

¹⁹⁹ *Ibid.*

²⁰⁰ Such as in arms procurement, a traditional monopoly of Member States. See, respectively, Weiss, M., "Integrating the Acquisition of Leviathan's Swords? The Emerging Regulation of Defense Procurement within the EU", *Beyond the Regulatory Polity*, p.31.

²⁰¹ Please notice that although in both cases the overall toll depends on the margin of discretion enjoyed by the newly constructed legal framework (whether falling under the exclusive, competing or supporting competences category), the two have important theoretical implications that must not be unnoticed: while regulation keeps the EU on a categorically different level from that of Member States, capacity building tends, in directly charging institutions with tasks traditionally exercised by state entities, to push the Union's role closer to that of a State actor. See Genschel and Jachtenfuchs, "Beyond Market Regulation", p. 11.

²⁰² Nicolaidis and Howse, *The Federal Vision*, p.156.

Secondly, integration provokes derogations of the legal regime the closer it gets to politically sensitive area; whereas this does not occur in federations. Thirdly, there exists no European public space for debate and the creation of loyalty to the supranational level, let alone a common *demos*. In this case, the term does not refer to a single ethnic or linguistic group; but rather to the consciousness of belonging to a single community.²⁰³

However, despite not being one, the EU proves to be closer to a federal system than to an intergovernmental organization.²⁰⁴ In the first place that is due to the scope of application of European law, which nowadays regulates or at least intrudes in most of the functions that Member States carry out. Moreover, the Union has proved to be regulated by internal dynamics that are aimed, whether intentionally or not, to the survival of the system itself, sometimes at the detriment of state actors. In this light it is possible to interpret the discussed blurred distinction between means and ends, spillover mechanisms and the observed phenomenon of socialization within European officials.²⁰⁵ Finally, integration has so far been characterized mostly by unidirectionality. So, major re-nationalizations have not taken place so far.²⁰⁶ Indeed, this represents an interesting feature of the European polity, given the fact that in most federal systems the general trend is that of a pendulum movement: an alternation between centralization and de-centralization that makes the system inherently unstable.²⁰⁷

As we have seen, core state powers represent highly symbolic features that European States are reluctant in sharing, for identity and strategic reasons. Although throughout the years the EU has expanded its scope, centralization in such policy areas has not been achieved yet. Moreover, even admitting that centralization was reached, this wouldn't necessarily transform the Union into a federation.

2.3: Adaptation of Genschel and Jachtenfuchs' theory to core state powers

Now that we have seen how core powers are defined and what their importance is, we will proceed to discuss how Genschel and Jachtenfuchs' theory explains their integration. The two authors acknowledge that the "general assumption" holds that the EU does not exercise any control in core powers;²⁰⁸ whereas their framework suggests the contrary. Indeed, it claims that the EU does not directly

²⁰³ This is what is sometimes referred to as the "federal spirit". See Burgess, *Comparative Federalism*, p.113.

²⁰⁴ *Ibid.*, p.239.

²⁰⁵ Wallace, H., Wallace, W. and Pollack, M. A., *Policy-making in the European Union*, 5th ed. (New York: Oxford University Press, 2005), p.25.

²⁰⁶ In this regard, the already mentioned case of the CFP, CAP and Brexit represent interesting exceptions, with relevant consequences that will be dealt with in a later section.

²⁰⁷ Donahue, J. D. and Pollack, M. A., "Centralization and its Discontent: The Rhythms of Federalism in the United States and the European Union", in Nicolaidis and Howse, *The Federal Vision*, pp.116-117.

²⁰⁸ Genschel and Jachtenfuchs, "Beyond Market Regulation", pp.4-8.

control core competencies, but rather it shapes the limits and forms of their exercise on the part of Member States.²⁰⁹ Moreover, integration in these sectors happens in a way that is, similarly to that in non-core policy areas, based upon the encounter of demand and supply. However, given the political saliency of core powers, some obstacles exist that hamper communitarization. In particular, the supply for integration is negatively affected.²¹⁰ Thus, this section presents the factors that characterize the integration of core state powers according to the two authors. We will discuss the importance of high-politics concerns, the relevance of the actor vehiculating demand and supply, blame-shifting dynamics and patterns of fragmentation and disintegration. This section also provides the occasion to present the working of the theory in more depth, showing how it rationalizes integration through four conceptual categories. These elements will provide useful insights in order to discuss the viability of the theory itself, to be later used in the third chapter. The factors that we shall present influence both the supply (high-politics concerns) and the demand (nature and strength of the demand). Together with the political matter of blame-shifting, they constitute the reason for the derogations and fragmentation in the integration of core powers observed by Genschel and Jachtenfuchs.

a) High-politics and publicity

Communitarization in core powers tends to be harder than in other policy areas, due to the so-called logics of high-politics. The term refers to the distinction made between policy areas by virtue of their role within the system, which determines two opposing spheres of power. On the one side are those matters that are perceived as vital for the proper functioning of the State, which belong to “high-politics”. On the other side are those that are considered part of the ordinary administration of the State, constituting “low-politics”.²¹¹ The former group traditionally encompasses functions such as diplomacy, military and monetary policies, i.e. functions that the State carries out in relation to other States. The latter group, conversely, encompasses those powers that constitute the ordinary management of the State: administrative decision, tax levy and so on.²¹² These, often technical and bureaucratic in nature, do not involve concerns of sovereignty, which means that they are not functions that contribute to the identity of the State.²¹³ Clearly, the attribution of one policy to the former or the latter is contingent and changes over time: what was considered high-politics in the past, might not be deemed the same way today.²¹⁴ For

²⁰⁹ Genschel and Jachtenfuchs, “The European Integration of Core State Powers”, pp. 253-254.

²¹⁰ Genschel and Jachtenfuchs, “From Market Integration to Core State Powers”, pp.180-182.

²¹¹ Menon, A., “Defense Policy and the logic of ‘High-politics’”, p. 77.

²¹² Painter, J., Jeffrey, A., Dansero, E., Sommella, R. and Pettenati, G., *Geografia Politica* (Torino: UTET Università, 2011), pp. 35-37.

²¹³ Ibid.

²¹⁴ Menon, A., “Defense Policy and the logic of ‘High-politics’”, p.76.

instance, Mérand discussed this very topic and claimed that the role of the State and its identity have changed from what they were in the '60. In fact, he claims that the monopoly of legitimate violence, due to the role of NATO and the EU, is not perceived as a high-politics power anymore but rather as a service. Consequently, military powers can be traded or produced internally but it is not perceived as a key function of the State anymore.²¹⁵

Due to the perception of some competencies as belonging to high-politics, their communitarization is complicated: it tends to attract publicity and consequently politicization.²¹⁶ The relation between high-politics and publicity, however, is not proportional, and the two concepts must be kept separate. Indeed, not all core powers are equally able to attract publicity, so the conflicts arising from communitarization widely vary in dimensions.²¹⁷ For instance, a high degree of attention is paid to fiscal policies and to all those measures aimed at constraining national budgets or steering tax levies; whereas less interest is devoted to the institution of multinational military battalions. Even less attention is then paid to the progressive convergence of European bureaucracies.²¹⁸ These different perceptions have favored the extension of the EU's scope in certain areas more than in others. As we observed, the Union's competence mainly involves technical policy area related to the single market, thus falling within the sphere of low-politics.

Conversely, given the importance attached to core powers, politicization represents an element of possible disruption to their communitarization.²¹⁹ This, however, does not necessarily imply the absence of demand for integration in these policy areas. Rather, according to Genschel and Jachtenfuchs, politicization hampers the supply factor and makes policy-makers less willing to share their competences: it makes negotiations harder, zero-sum bargains more frequent and poses a protectionist biases based on sovereignty concerns.²²⁰ This is the case, for instance, of the military field: many projects have been launched over time to create a common system of defense, such as the European Defense Initiative, the

²¹⁵ Mérand's conclusions here derive from a reasoning regarding the increasing perception of European States as services providers, due to the massive reorientation of national budgets from military expenditures to social policies following the fall of the Berlin wall. Particularly, he points at the reframing of the functions of the States away from their military roots, favoring ideological representations and attributing preeminence to the usage of symbolic violence (re-education, surveillance and security), rather than to the concrete exercise of the monopoly of force. Furtherly, he hints and the EU's capacity of depoliticization as one of the causes of this process. See Mérand, *European Defense Policy*, pp.151-154.

²¹⁶ Genschel and Jachtenfuchs, "The European Integration of Core State Powers", p.254.

²¹⁷ Ibid.

²¹⁸ The two opposite poles in terms of politicization and debate seem to be represented by, on the one hand, monetary and economic policy, and on the other administrative policies, with the military sector falling in between the two. Regarding the former, see Genschel and Jachtenfuchs, "From Market Integration to Core State Powers, pp.187-188; regarding the latter, see Trondal, J., "The Rise of a European Public Administration: European Capacity Building by Stealth, *Beyond the Regulatory Polity?*, pp. 174-176.

²¹⁹ Menon, "Defense Policy and the Logics of High-Politics", pp. 77-78.

²²⁰ Ibid.

Helsinki Headline Goals or the European Security and Defense Policy itself. Collectively, these express the existence of a demand for integration in military affairs; however, Member States' preferences have so far substantially diverged on how to reach it and toward which goals.²²¹ Thus, the theory we are discussing interprets this difficulty in reaching an agreement as deriving from the sensitive political nature of core powers.

The two scholars claim that the Union manages to intrude even core powers because of its capacity to depoliticize delicate policy areas. In doing so, it transforms contested topics in ordinary ones, through a bureaucratic and technical management.²²² Thus, the degree of conflict is consequently lowered. The theory explains this capacity through the encounter of demand and supply, each subdivided into two factors: on the one side, economies of scale and positive externalities; on the other majoritarian or non-majoritarian. The demand for integration reflects the need to be satisfied and determines how European policy-makers will address the issue: economies of scale lead to integration in capacity-building; whereas positive externalities lead to regulation.²²³ Conversely, the nature of the supplying actor determines the degree of publicity: majoritarian institutions, accountable to their constituency, publicize their achievements; whereas non-majoritarian ones lead to integration by stealth.²²⁴ Accordingly, communitarization would follow four paths deriving from the four elements in which demand and supply are divided: regulation by stealth or by publicity; and capacity-building by stealth or by publicity.²²⁵

It is not clear, however, what the authors exactly mean by demand and supply. Indeed, their definition is too vague to identify some concrete element as belonging to one or the other category. Overall, demand seems to identify a general need or desirability for integration; whereas supply identifies the political will and capacity to satisfy such need. Particularly, the former is the most puzzling element: in fact, it is generically indicated as a “collective problem to be solved”.²²⁶ However, no further indications are adduced to explain who is asking for integration or who gains from it. Conversely, supply seems easier to grasp, in that the support to integration could take the form of a legislative act, whether a decision, regulation or directive. Indeed, such an act gives concreteness to the proposals or preferences of the institutional actors involved in the legislative process. We shall dig deeper into these concepts, and an in-depth discussion of what demand and supply indicate and why they do not constitute analytical categories is presented in the next chapter. However, for now we can utilize those concepts in the abstract fashion

²²¹ Mérand, *European Defense Policy*, p.124.

²²² One peculiar technique, for instance, through which the Union manages to “professionalize” or depoliticize EU politics is that of agency building, that although often flawed with insufficient concrete capacities is formally devoted to efficiency-improvement and problem solving. See Wolff, S., and Schout, A., “Frontex as Agency: More of the Same?”, *Perspectives on European Politics and Society* 14, no. 3 (2013), p. 306.

²²³ Genschel and Jachtenfuchs, “Beyond Market Regulation”, pp.12-13.

²²⁴ *Ibid.*, pp.14-15.

²²⁵ *Ibid.*, pp. 10-11.

²²⁶ Genschel and Jachtenfuchs, “Beyond Market Regulation”, pp.12-13.

utilized by Genschel and Jachtenfuchs, without contesting their viability. Indeed, our goal is that of presenting how the theory describes integration as the product of structural conditions that bring Member States and EU institutions ever closer. Meant this way, demand indicates the prospect aggregate gain deriving from communitarization, i.e. that of the Union as a whole; whereas supply indicates the endorsement given by EU institutions to concretize that gain. Whether something like an aggregate benefit actually exists or is empirically findable, however, will be discussed in the next chapter.

Overall, the theory individuates the factors that determine these patterns by trying to understand their influence on the structural factors of demand and supply. For instance, it is claimed that high-politics concerns lower the chance to find an agreement between EU Member States, since they attribute a great deal of political salience to given policy sectors. Thus, they are understood as an element that affects the supply side of integration. Accordingly, high-politics considerations bear effects similar to those of politicization: both affect the offer for integration and make bargains harder. Indeed, as we saw, politicization primarily affects the supply side, rather than the demand one.²²⁷ Consequently, it is claimed that integration is often driven by non-majoritarian institutions because they satisfy possible demands for communitarization while avoiding publicity and politicization. It has been suggested that these assumptions correspond to empirical observations, as in the case of military cooperation.²²⁸

This statement on the influence of high-politics considerations on policy-makers seems reasonable in that it rationalizes the fears of those actors accountable to a public. At the same time, though, the patterns of integration established by the theory are built upon two structural factors that seem simplistic in their definition. Accordingly, we shall try to determine whether the two concepts can concretely be utilized for interpreting integration. We shall now continue to discuss those factors that influence them, to enrich our understanding of Genschel and Jachtenfuchs' theory.

b) Factors acting on demand: the strength and nature of the demanding actor

The two authors claim that two additional factors bear influence on the demand for integration: the strength and the nature of the actors vehiculating it. The first element corresponds to the opportunity cost of integration, i.e. the relatively higher or lower gain derived from transferring competences to the EU.²²⁹ Such a gain could derive from many different sources: the availability of greater resources due to their pooling from Member States, the reduction of the times associated with policy-making, the greater

Hooghe, L. and Marks, G., "A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus", *British Journal of Political Science* 39, no. 1 (2009), p.14.

²²⁸ See, respectively, Mérand, *European Defense Policy*, p.135;

²²⁹ Genschel and Jachtenfuchs, "The European Integration of Core State Powers", pp. 257-258.

trust in the commitment of other parties and so on.²³⁰ The second one, instead, allows to distinguish between public and private actors.²³¹ In fact, it is claimed that different demanding actors are associated to different “pressures”, i.e. the incentive to provide integration to satisfy the demand. For instance, the main beneficiaries of the elimination of border checks and barriers to trade are private companies and individuals.²³² Given the prospective economic gains deriving from the abolition of custom checks and taxes, European governments perceived an exogenous demand. Conversely, in core state power private parties’ interests are less relevant than public ones, so the demand is endogenous.²³³ Take, for instance, the case of military integration. It is not that private actors, such as military firms, would not have a stake or an interest in the creation of a unified army or in the liberalization of the arms procurement sector.²³⁴ Rather, given the political saliency of this policy, the interests of private parties are considered less important by those institutional actors with the power to decide on the matter. Thus, they will base their choices primarily on considerations tied to the security and identity of their State, thus on public rather than private interests.²³⁵ However, according to the theory, an exogeneous demand is stronger an endogenous one, since those private actors calling for more integration are part of the constituency that legitimates majoritarian institutions.²³⁶ Thus, elected representatives will face incentives to satisfy their demands, particularly when those calls are diffuse in the constituency. Thus, in the case of market related fields in which private interests are wide and diffuse, the stimulus to integrate will be strongly perceived by policy-makers. Conversely, when private interests are small compared to public ones, the demand for integration will be less intense. This, in turn, contributes to explain the higher degree of development of non-core policy sectors compared to core ones.²³⁷

Cases like this, in which both demand and supply are driven by public actors, will reveal crucial for our case study. In fact, we claim that their common origin obstacles the empirical finding of elements that can be identified with one or the other, since in in most scenarios the Commission is both the actor acknowledging the existence of a demand and the one proposing a solution to it. Thus, the two structural factors cannot be neatly separated, or considered objectively. Far from being negligible, this represents an obstacle that is impossible to overcome, when looking for their concrete traces within legislative

²³⁰ Wallace *et al.*, *Policy-making in the EU*, p.33.

²³¹ Genschel and Jachtenfuchs, “The European Integration of Core State Powers”, pp. 257-258.

²³² European Commission’s website, “Quantifying the Economic Effects of the Single Market in a Structural Macromodel”, *European Economy Discussion Paper* 094 (February 2019), pp.12-14.

²³³ Genschel and Jachtenfuchs, “The European Integration of Core State Powers”, pp.256-258. Notice, though, that in some cases private interests are involved as well, as in the case of the progressive disclosure of the European arms procurement market. See Weiss, “Integrating the Acquisition of Leviathan’s Swords?”, pp. 35-36.

²³⁴ *Ibid.*

²³⁵ Mérand, F. and Angers, K., “Military Integration in Europe”, *Beyond the Regulatory Polity*, pp.57-58.

²³⁶ Genschel and Jachtenfuchs, “The European Integration of Core State Powers”, pp. 257-258.

²³⁷ *Ibid.*

preparatory documents. Accordingly, our third chapter revolves around this very topic to dismiss Genschel and Jachtenfuchs' theory.

c) Blame shifting and legitimacy concerns

The topic of blame shifting represents a political theme of major importance, influencing the supply side of integration. In fact, scholars like Schelkle and Schimmelfennig claim that sometimes non-majoritarian institutions are forced to supply integration because majoritarian ones are unwilling to do so.²³⁸ Recall that non-majoritarian institutions like the Commission and the CJEU are sometimes criticized for supporting integration in most cases, often for reasons of self-aggrandizement.²³⁹ Particularly, because of its willingness to provide integration, the Commission has also been labelled an “engine of integration”.²⁴⁰ Interestingly, these authors observed how in peculiar circumstances non-majoritarian bodies have proven reticent to the idea of expanding the scope of their powers. It has been argued that this is due to the attempt of governments within the Council to shift the blame for actions that need to be taken.²⁴¹ Accordingly, this theme constitutes a factor taken in consideration by Genschel and Jachtenfuchs for its influence on the supply factor.

This dynamic can be observed through the case of the European Central Bank's intervention during the economic crises. It has been claimed that the financial architecture of the European Monetary Union (EMU) was unfit to perform an efficient markets' stabilization action during stress periods.²⁴² This feature emerged during the crisis, particularly when the Greek debt needed to be restructured to avoid the contagion to larger economies. Thus, it was necessary that some institutional body acted as a lender of last resort for Greece. The ECB was not the only actor capable of acting in this sense, nevertheless the Council's immobility, due to the potential blame in using public money in this sense, forced it to step up.²⁴³ The Bank, although determined to do “whatever it takes” to bring stability to financial markets,²⁴⁴ showed reluctance in fulfilling that role. First, this is because rescuing Greece would have been a political move; through which the technical legitimacy of the Bank could be undermined.²⁴⁵ Furthermore, the role

²³⁸ Schelkle, W., “Fiscal Integration by Default”, in Genschel and Jachtenfuchs, *Beyond the Regulatory Polity*, pp.118-120; and Schimmelfennig, F., “Liberal Intergovernmentalism and the Euro Area Crisis”, *Journal of European Public Policy* 22, no. 2 (2015), p.189.

²³⁹ Majone, G., “The Common Sense of European Integration”, *Journal of European Public Policy* 13, no. 5 (2006), p.613.

²⁴⁰ Adam and Tizzano, *Manuale Di Diritto*, p. 94.

²⁴¹ Schimmelfennig, “Liberal Intergovernmentalism and the Euro Area Crisis”, p.189.

²⁴² Genschel and Jachtenfuchs, “From Market Integration to Core State Powers”, pp. 183-185.

²⁴³ *Ibid.*, p. 189.

²⁴⁴ We are here referring to the famous words of the ECB's president Mario Draghi at the Global Investment Conference in London in 2012, aimed at bringing stability onto European financial markets, although quantitative easing measures and the purchase of Greek bonds had happened back in 2010.

²⁴⁵ Schelkle, “Fiscal Integration by Default”, pp.119.

of lender of last resort was explicitly prohibited by the Treaties: in fact, bailing-out the Greek government would have meant an infringement of art. 123 and 125 of the TFEU.²⁴⁶

Eventually, against the fights within the Council on how to solve the situation, the Bank overcame its reluctance and bought both private and public Greek bonds.²⁴⁷ Following, it was harshly criticized by the German Bundesbank both regarding quantitative easing measures and the institution of the Long-term Refinancing Operations. Indeed, it was claimed that these measures had given the ECB “quasi-fiscal” powers and were financed by domestic tax-payers.²⁴⁸ These solutions were also considered risky and potentially costly for the Eurozone. In the aftermath of the crisis, several measures were adopted to avoid facing a similar situation again, such as the institution of the European Systemic Risk Board within the ECB. According to Schelkle, these measures created a quasi-fiscal capacity within the institution: in fact, it now possesses a supervisory power that preoccupies Member States.²⁴⁹ In a new crisis situation, States would have to bear the costs of bailouts without being able to decide it themselves.

This example provides an interesting insight for understanding the behavior of non-majoritarian institutions. In this case, the Bank’s intervention was determined by the necessity to act, rather than by its desire for more integration.²⁵⁰ Equally, this suggests that majoritarian institutions can donate more competencies to European bodies due to their reticence to act themselves and take responsibility. In fact, it is claimed that the Council’s EcoFin, under the spotlight given by the gravity of the situation, decided to shift the blame onto the ECB. Thus, it forced it to step up and buy the Greek debt. Accordingly, blame-shifting affects the supply for integration: it inhibits the support coming from majoritarian institution and favors non-majoritarian ones.²⁵¹ The three factors that we have analyzed so far bear consequences for the integration of core state powers. Given their political saliency, these policy areas are influenced by high-politics concerns and can determine blame-shifting actions by majoritarian institutions. Moreover, the demand for their integration is often vehiculated by public actors. Thus, communitarization in this sense presents some differences compared to less sensitive sectors, particularly

²⁴⁶ Indeed, par. 1 of art. 123 TFEU specifically prohibits the purchase, on the side of the ECB and national central banks, of both private and public debt instruments, together with overdraft facilities and other kinds of credit facilities. On the other hand, art. 125 contains the so-called “no-bailout clause”.

²⁴⁷ Schimmelfennig, “Liberal Intergovernmentalism and the Euro Area Crisis”, pp.186-187;

²⁴⁸ Schelkle, “Fiscal Integration by Default”, pp.112-113.

²⁴⁹ Ibid.

²⁵⁰ Particularly, here we are referring to the then ECB president Trichet, who publicly requested the Council to institute a European minister of finance that could legitimately handle such matters of the behalf of the Union. See Elliott, L., “EU should control member states’ budgets, says bank boss”, *The Guardian* (02/06/2011), available at: <http://tiny.cc/agxffz>.

²⁵¹ Genschel and Jachtenfuchs, “The European Integration of Core State Powers”, pp. 261-262. We must recall that these changes in behavior have been linked to public opinion’s consensus or dissensus for integration, meant in the post-functionalist sense of the term. See Hooghe, L. and Marks, G., “A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus”, *British Journal of Political Science* 39, n. 1 (2009), pp. 5-6.

regarding the invocation of derogations. The next two sections, which we shall now present, discuss the idea that these instances contribute to the different degree of integration in core state powers.

d) Patterns of fragmentation

Derogations represent a constant feature in the integration of core state powers, especially when compared to market-related policies.²⁵² In fact, Member States rarely share the same reasons to reach an agreement, particularly in politically sensitive areas.²⁵³ Thus, a possible solution to integrate without imposing measures to States that are unwilling or incapable of bearing them, is the application of derogation. Thus, it is possible to observe derogations being applied to all three core policy sectors. For instance, many European Countries have not yet adopted the euro as their national currency.²⁵⁴ Moreover, in the internal security field within the Space of Freedom, Security and Justice, the UK and Poland are not subject to the Charter of Fundamental Rights. This bears consequences for the application of provisions in civil and criminal administrative cooperation.²⁵⁵ Finally, in the monopoly of coercion, cooperation happens on a voluntary basis, due to a system that has been gradually introduced through forms of political socialization.²⁵⁶ This tendency to derogation has, eventually, given ground to “enhanced cooperation” procedures.²⁵⁷ Accordingly, those States that are capable and willing to pursue tighter forms of collaborations accept to do so and make usage of communitary procedures. Although these forms of self-commitment are not part of the *acquis* universally applied, some of them are particularly important for the EU polity: among these are the single currency itself, the PESCO and the Schengen Agreement.²⁵⁸

²⁵² Rittberger *et al.*, “Differentiated Integration of Core State Powers”, pp. 192-194.

²⁵³ Think, for instance, of the differences in European governments’ preferences during the eurozone crisis. See Schimmelfennig, “Liberal Intergovernmentalism and the Euro Area Crisis”, pp.184-188.

²⁵⁴ It is here worth noting that of the 28 Countries that constitute the European Union, 9 are still utilizing their own currency. Among these, only the UK and Denmark have officially opted-out of the single currency thank to a specific procedure foreseen in protocols n.15 and 16 to the Lisbon Treaty, while the others shall adopt the Euro once their economic parameters will be deemed in line with the established convergence criteria.

²⁵⁵ See protocol n.30 to the Lisbon Treaty, which denies both to the CJEU and to national courts the jurisdiction over those rights arising from the Charter.

²⁵⁶ Mérand, *European Defense Policy*, p. 14.

²⁵⁷ Ex art. 20 TEU. The disposition provides that the procedure can be started by at lead nine Member States and its object shall entail one the EU competences, without prejudice to the exclusive ones. The act enabling the reinforced cooperation shall be adopted by the Council through qualified majority voting, unless the object of the procedure regards the CFSP, in which case unanimity is required.

²⁵⁸ See Adam and Tizzano, *Manuale di Diritto*, pp. 56-57. Please notice that what previously stated regarding the reasons behind derogations to the single currency raises some doubts on the nature of the policy in question as a kind of enhanced cooperation. In fact, the non-application of the provisions is not due to the lack of will to be part of the Eurozone, but rather from the temporary inability to join. Thus, the debate is still ongoing between the classification of the single currency policy as a kind of enhanced cooperation or as a differentiated application policy.

It is interesting to notice that until the Single European Act in 1986, no derogation had been invoked unless of a temporary nature.²⁵⁹ Those derogations were due to incapacity in reaching common standards, not to unwillingness. Clearly, though, until that moment integration revolved around the institution of the common market, staying away from core powers. However, derogations had not been used even in those policy areas characterized by a relevant distributive nature, such as the Common Agricultural Policy and the Cohesion Funds.²⁶⁰ Conversely, legal fragmentation represents nowadays a relevant feature of the integration process.²⁶¹ To understand the reasons for this trend in fragmentation, it has been argued that the structural conditions in which integration occurs have changed. Accordingly, either demand or supply have lowered their intensity. It is reasonable to suppose that this is due to a change in supply conditions, more than in demand ones. In fact, it is unlikely that potential gains deriving from integration have disappeared; rather there is a greater difficulty in reaching agreements. Indeed, core and non-core powers do not substantially differ when it comes to the demand aspect: in both cases, States face prospective economies of scale or externalities and have different integrational preferences. Conversely, the most salient aspect could be that of supply: the Union now deals with more sensitive political areas, which can spark distributive conflicts and makes negotiations harder.²⁶² Thus, these policies are handled intergovernmentally, rather than supranationally.²⁶³ Thus, the more a given issue is politicized, the more the decision-making will be intergovernmental. This bears consequences for the supply side, in that non-majoritarian institutions will be less likely to provide integration.

Overall, politicization proves to be a central factor for core state powers. As we saw in the chapter on integration by stealth, publicity can cause the politicization of a policy issue, from which conflicts and debate can derive. Thus, when there exists a will to integrate on the part of Member States but preferences are different, derogations can constitute a viable tool to reach a compromise.²⁶⁴ Conversely, avoiding publicity can equally constitute a way to avoid politicization. Indeed, it has been claimed that the only core state power whose integration has received wide attention is the monetary one.²⁶⁵ It is not, clearly,

²⁵⁹ Rittberger *et al.*, "Differentiated Integration of Core State Powers", p.193.

²⁶⁰ *Ibid.*

²⁶¹ We shall also acknowledge that, given the expansion in the Union's membership, preferences are physiologically less homogeneous.

²⁶² Rittberger *et al.*, "Differentiated Integration of Core State Powers", p. 196.

²⁶³ *Ibid.*, p.196-197. Recall, for instance, that the CFSP is managed outside of the influence of the Commission. Equally, decisions regarding the Excessive Deficit Procedure are taken by the Council, not by the ECB. See, respectively, arts. 41, par. 3 TEU and art.126, par.6 TFEU.

²⁶⁴ *Ibid.*

²⁶⁵ Consider, for instance, the importance attributed to monetary policies during the crisis. According to the standard Eurobarometer 69 of March 2008, economic considerations were the focus of European citizen's preoccupations, with 37% of the analyzed population indicating "inflation" as their main concern, while the 20% indicated the "economic situation". In a later phase of the crisis, the 45% Europeans described "inflation" as their main concern and the 78% indicated that their view of the economic situation was "very bad", according to Eurobarometer 71 of September 2009. See the European Commission website, "Public Opinion in the European Union", *Standard Eurobarometer 69* (March 2008), p.12; and "Public Opinion in the European Union", *Standard Eurobarometer 71* (September 2009), p.22,33.

that publicity univocally constitutes a threat to integration in these sectors. In fact, publicity can also be a means for building consensus among domestic constituencies, when the public opinion is in favor a given policy's communitarization.²⁶⁶ However, given the political importance attached to core state powers, even a supportive public opinion would not necessarily induce Member States to integrate. This is the case, for instance, of military cooperation in the EU. In fact, a surprising share of European nationals seems to be in favor of the creation of a common army and of CSDP missions abroad.²⁶⁷ Nevertheless, Member States have so far opposed the supranationalization of the military sector, which results scarcely integrated.²⁶⁸

Within the next paragraph, we will discuss another potential way to avoid the application of European norms: the re-nationalization of policies. Particularly, we will deal with the neo-functionalist account of why this form has been seen so rarely in the EU. The explanation hereby presented considers the phenomenon in the light of the lack of efficient supply for disintegration, institutional constraints and self-reinforcing effects of spillover mechanisms.

d) Patterns of disintegration

Derogation is not, theoretically, the only possible form of fragmentation of the European legal regime. Indeed, there also exists the possibility of re-transferring competences that had been communitarized to the national level. Genschel and Jachtenfuchs claimed that this of phenomenon of *dis-integration* has been rarely observed in non-core policy areas; whereas it has never been observed in core powers so far.²⁶⁹ However, this affirmation proves incorrect, since a marked re-nationalization has been experienced in two fundamental sectors of community competence: the Common Fishery Policy and the Common Agricultural Policy.²⁷⁰ Furthermore, the scenario of a possible disintegration has even been explicitly foreseen by the Commission in 2017.²⁷¹ However, we have so far observed a considerable

²⁶⁶ Clearly, other factors like party politics and identity must be taken in account. See Hooghe and Marks, "A Postfunctional Theory of European Integration", pp.17-18.

²⁶⁷ European Commission website, "Designing Europe's future: Security and Defense" *Special Eurobarometer 461* (April 2017), p.4. Accordingly, the 65% of Europeans are in favor of a common foreign policy, 75% of them are in favor of the CSDP and the 55% of them would positively welcome a common army.

²⁶⁸ Mérand, *European Defense Policy*, p.2.

²⁶⁹ Genschel and Jachtenfuchs, "The European Integration of Core State Powers", pp. 264-266.

²⁷⁰ In the case of the CAP, the renationalization process touched upon different aspects of the policy. After the Agenda 2000 programme, national legislators enjoy wider discretion, particularly regarding the system of decoupled income payments; whereas the Commission mostly supervises Member States' legislative output. This transformation also influences the environmental policies related to the regime of payments and the so-called "envelopes" spending on meat and dairy products; bringing the decision-making closer to the national level. See Wallace *et al.*, *Policy-making in the EU*, pp.174-175.

²⁷¹ See the European Commission website, "Reflections and scenarios for the EU 27 by 2025", *White Paper on the Future of Europe* (March 2017), pp. 18, 22. In the final section of the document, five different potential scenarios are

expansion of communitary competences, thus it is legit to wonder what conditions favor integration more than disintegration. Scholars belonging to different schools of thought have thus proposed their explanation for this phenomenon. Overall, different factors must be considered, such as institutional factors and the self-reinforcing effect of spillover mechanisms.²⁷² Here, these elements have been combined with Genschel and Jachtenfuchs' concepts of demand supply, determining two structural factors for disintegration.

Collectively, the proposed explanation comprehends four elements: two acting on the supply for disintegration (S.1, procedural rules that favor the *status quo* and S.2, the lack of disintegrational supply); one on the demand side (D.1, weak request for renationalization); and one on the self-reinforcement of spillover mechanisms (S.O.).

S.1: The first factor, influenced by institutionalist theories, refers to those decisional mechanisms that allow to maintain of the status quo of the reached level of integration. Indeed, in most policy sectors a double majority is necessary within the Council and the Parliament to adopt a regulation or establish a new agency.²⁷³ The necessity of a large homogeneity of preferences is even more marked in core state powers, given their importance.²⁷⁴ Thus, both the adoption and the amendment of communitary acts is subject to the same voting procedures, which makes a complete reversal of the preferences of the Council unlikely.²⁷⁵ Accordingly, once a policy has been communitarized, re-nationalization would prove politically costly, although clearly not impossible. This, in turn, protects the reached level of integration.

S.2: Secondly, considering a neo-functionalist perspective, in the EU there is no homologue institution to the Commission or the Court, willing and possessing the material resources to supply disintegration. This void makes it considerably difficult to find an institutional actor pushing for renationalization.²⁷⁶

D: On the demand side, it is reasonable to suppose that there are social and political groups that are unhappy with the outcomes of integration. These could, in the right circumstances, behave as

envisaged for the direction of the Union. The second and fourth ones specifically discuss the viability of the return to, respectively, nothing more than the single market and the suppression of the European management of those policy areas in which a collective action is perceived as complicated or debate-sparking. Such policy sectors are "regional development, public health, parts of employment and social policy not directly related to the functioning of the single market, State aids, standards for consumer protection, the environment and health and safety at work".

²⁷² Majone, *Dilemmas of European Integration*, p. VII (preface).

²⁷³ Think, for instance, of the OLP, in which ex art.294 TFEU requires the double majorities of the Council and of the Parliament.

²⁷⁴ For instance, within the CFSP decisions are taken by the Council at unanimity, see art. 31 TFEU. This implies that in when integration takes place, as in the case of the institution of the European External Action Service (with reg.EU 2010/427 of 26/07/2010), it is necessary to reach an identity of visions among the Council's Member States.

²⁷⁵ Genschel and Jachtenfuchs, "The European Integration of Core State Powers", pp. 264-266.

²⁷⁶ Genschel and Jachtenfuchs, "Beyond Market Regulation", pp. 18-19.

demanders for disintegration. This is the case, for instance, of the British fishermen that were negatively affected by the Common Fishery Policy. Another example is that of States like Greece and Portugal, who suffered from the measures adopted to alleviate the effects of the Eurozone crisis.²⁷⁷ These “spill-back” effects, i.e. the disincentives for further integration, had been already foreseen back in neo-functionalism accounts in the seventies.²⁷⁸ However, those unhappy with integration prove to belong to social groups that do not share a common ideological ground, being usually part of extreme right or extreme left-wing parties.²⁷⁹ Thus, collaboration to push for disintegration is complicated, and the transmission of the requests proves inefficient.²⁸⁰

S.O.: Finally, the last reason for the lack of disintegration historically analyzed in neo-functionalism accounts is that of the self-reinforcement of spillover effects. Recall what we have said about the necessity to ensure police and judicial cooperation, given the abolition of internal borders through the Schengen agreements. We used that example to show how spillover mechanisms tend to self-reinforce, making some policies necessary once a given degree of integration has been achieved.²⁸¹ Accordingly, it is the demand for integration, rather than disintegration, that is strengthened.

Overall, all of these factors contribute, according to neo-functionalists, to inhibit disintegration and lessening the likelihood of re-nationalization. Thus, it has been claimed that the integration process, particularly in core state powers, will continue its substantially unidirectional path in the following years.²⁸² In conclusion, we have so far considered why core state powers are deemed so important for Member States, and what factors are determined by this importance. Particularly, we have presented the theories that discuss the topics of high-politics concerns, the nature of actor vehiculating the demand and blame-shifting. These terms determine peculiar dynamics for the integration of core state powers, tied to political and identity concerns on the part of Member States, which make it difficult to reach communitarization. Their pooling, it is claimed, is often characterized by the invocation of derogations but also by a noteworthy steadiness. We shall now consider that, if neo-functionalism claims are correct and the EU has concretely gained competences in these policy areas, some teleological concerns arise. In fact, it is legit to wonder what the exercise of core powers would entail for the EU, and what hints does it provide on the culminating point of the integration process. Given that these powers have been fundamental in State-building processes and that they have a highly symbolic meaning, would this mean that the Union itself is becoming “state-like”? Equally, would the State, meant as an organizational system, become

²⁷⁷ Genschel and Jachtenfuchs, “From Market Integration to Core State Powers”, p.187.

²⁷⁸ Schmitter, P. C. “A Revised Theory of Regional Integration”, *International Organization* 24, no. 4 (1970), p. 840.

²⁷⁹ Genschel and Jachtenfuchs, “Beyond Market Regulation”, p.18.

²⁸⁰ *Ibid.*

²⁸¹ Majone, *Dilemmas of European Integration*, pp. 42-44.

²⁸² Genschel and Jachtenfuchs, “The European Integration of Core State Powers”, pp. 250-251.

useless? Does the shared competence of core powers between the national and supranational level strip the former of its “state-ness” quality? Federalist analyses have demonstrated that zero-sum game considerations, i.e. the obsolescence of States due to the pooling of their competences, are substantially misleading.²⁸³ However, the delocalization of vital functions of the State poses some serious questions about what margins of action are left to state actors. Particularly, this entails what the role of States will be in a potentially stronger EU.²⁸⁴

Despite a deeper critique of these implications being way out of the scope of this dissertation, the integration of core State powers clearly raises this kind of concerns. Moreover, this process of decentralization away from the State seems to be in open contrast with the centralization historically entailed in state-building practices. The concept of “governance”,²⁸⁵ utilized as a hermeneutical instrument to comprehend these trends, suggests a fundamental turn: the evolution of the role of national States, of their functions and *raison d'être*.²⁸⁶ It does not hint, though, at the disappearing of the institution itself. These questions remain, however, open.

Now that we have discussed the preconditions for integration in core state powers, we shall turn to discuss what concrete cases of communitarization are observable in these policy areas. The neo-functional framework used so far, in fact, identifies precise cases in this regard, comprising the Monetary Union, administrative cooperation and the liberalization of the arms market. Also, it individuates the patterns formed by integration in these sectors. Some of these have been already discussed, like the tendency to disintegration and the lack of centralization; whereas others entail the predominance of regulation over capacity-building. In fact, it is claimed that there exists a disproportion in the way communitarization occurs, which is due to the difficulty in overcoming identity and high-politics concerns. Moreover, similarly to the cases in the first chapter, this determines policy structures incapable of satisfying the needs they are called to address. We will now evaluate some concrete cases, in order to understand how Genschel and Jachtenfuchs’ framework rationalizes empirical phenomena. This will prove particularly useful, since we shall hereby present the theory of indirect control, which will be tested in our third chapter.

²⁸³ Processes of so-called “rescaling” to the supranational and sub-national level are, in a federal perspective, deemed as national strategies to reincorporate those policy sectors that have slipped through the State’s grasp due to globalization forces. See Keating, M., “Europe as a Multilevel Federation”, *Journal of European Public Policy* 24, no. 4 (2017), p. 616.

²⁸⁴ Burgess, *Comparative Federalism*, pp. 257-263.

²⁸⁵ It is interesting to notice how the concept itself, despite not having a universal definition and being rather an umbrella-term recalling a general “good management” approach, has more to do with the liberalization of global markets and the transposition of rationalistic criteria applicable to company management to the public sphere, than with a political philosophy approach. For a critique of the governance idea, see Deneault, A., *Governance: il Management Totalitario* (Vicenza: Neri Pozza, 2018), pp.4-5.

²⁸⁶ Burgess, *Comparative Federalism*, p. 226.

2.4: The features of core state powers' integration

We will here first of all discuss the case of the European Monetary Union, since it represents by far the most integrated of the three core powers.²⁸⁷ It is an interesting case given its degree of development and the complications that affect it. Indeed, Genschel and Jachtenfuchs claim that the communitarization of monetary powers respected the patterns individuated by their theory in terms of demand and supply.²⁸⁸ On the demand side, the economic interdependency between States and spillover mechanisms are considered as the main factors that stimulated the institutions of a common monetary policy.²⁸⁹ This demand, mainly vehiculated by private actors, aimed at alleviating the negative externalities deriving from the abolition of internal frontiers. In fact, the free movement of goods, services, people and capitals would have had positive repercussions on the EU's economy.²⁹⁰ Accordingly, the EMU's architecture reflects these structural conditions and is mainly organized by regulation.²⁹¹ These provisions aim at monitoring State actors and avoiding excessive deficits, thus preventing the necessity to bail-out Eurozone members.²⁹² Notice, though, that the first step of the EMU was one of capacity building: the institution of the ECB.²⁹³ However, the bank was given a narrow mandate that did not give it substantial competences in the levy of fiscal resources, which would have directly touched upon one of the core powers. Instead, it was only charged with the functions of prices stabilization and definition of the common monetary policy. Also, it was denied the fundamental role of lender last resort, which is usually attributed to central banks.²⁹⁴ Indeed, this competence would have meant supranational control over Member States' fiscal resources. This first assessment seems to confirm the neo-functionalist theory: the stimulus for creating the monetary policy and introducing the single currency largely came from private actors willing to alleviate negative externalities. Accordingly, the EMU has been largely shaped through

²⁸⁷ The EMU is, in fact, the only area where a national competence such as monetary policy has been completely transferred to the supranational level and now falls within the scope of art. 3 TFEU (exclusive competences). See Rittberger *et al.*, "Differentiated Integration of Core State Powers", p. 201.

²⁸⁸ Hallerberg, "Why is there Fiscal Capacity but Little Regulation in the US", pp. 117-119.

²⁸⁹ Interdependency is, according to McNamara, declined in terms of exchange rates fluctuations, which brought negative consequences both for private actors' transactions and daily interactions and for the management of the Common Agricultural Policy. It is to notice, however, that another decisive element in pushing towards a common currency is that of the willingness to reach a political homogeneity in Europe. See Wallace, *Policy-making in the European Union*, p.143.

²⁹⁰ *Ibid.*, p. 30.

²⁹¹ We are hereby referring to the main tool through which the Union steers Member States' monetary policy: the Stability and Growth Pact. Moreover, even the instruments dedicated to avoiding the deterioration of the crisis were established by regulation, such as those contained within the Six Pack (the European Stability Mechanism, the European Semester, the Annual Growth Survey), those contained in the Two Pack and the Fiscal Compact. See Hallerberg, "Why is there Fiscal Capacity but Little Regulation in the US", p.88.

²⁹² *Ibid.*

²⁹³ See Genschel and Jachtenfuchs, "From Market Integration to Core State Powers", p. 183.

²⁹⁴ The ECB's mandate is disciplined by art. 282 of the TFEU, whereas its restriction to act as a lender of last resort is found in art.123 and 125 of the TFEU. See Adam and Tizzano, *Manuale di Diritto*, pp. 103-106.

regulation rather than capacity building, which confirms the pattern individuated by Genschel and Jachtenfuchs. However, the theory does not take into account the political interest that Member States had in creating the monetary policy, considering only private actors' preferences.

However, regarding the supply side, it would be reasonable to suppose that given the saliency of the policy sector, communitarization would be affected by high-politics logics and politicization. Thus, we would expect integration to happen through the supply of non-majoritarian institutions, lessening the chance of receiving publicity. It is claimed that this is what we can observe in today's EMU structure.²⁹⁵ Overall, positive externalities and politicization provided the conditions for an integration largely based on regulation by stealth.²⁹⁶ The exception is clearly represented by the ECB, which was devised as public capacity building. Notice, though, that sovereignty concerns led Member States to design a policy that partially safeguarded national prerogatives: in fact, given the narrow mandate of the Bank, supranational decisions are inhibited, particularly regarding fiscal resources.²⁹⁷

In conclusion, the EMU's design shows some key features predicted by neo-functionalists, in terms of publicity and form of integration. The theory, however, fails to predict the institution of the ECB, which is a central feature of the policy. This fact must not be underestimated, since it could reveal a notable malfunctioning of the theory. Nevertheless, the other reported elements seem to support the validity of the framework. Moreover, regarding the EMU, it is maintained that the policy represents the most spread pattern of integration in core state powers: that of regulation by stealth.²⁹⁸ This also highlights what is deemed to be a general trend within the integration of core state powers: the predominance of regulation over capacity building. In fact, it is argued that regulation exists precisely to compensate the lack of capacity building, which entails more publicity and clear-cut shifts of competence.²⁹⁹ We will now discuss these themes in the detail, digging deeper into the EMU case. Later, we shall consider how these preconditions often determine inefficient institutional designs.

²⁹⁵ In fact, the acts enlisted in note 61 derive from the wide spectrum of competences enjoyed by the Bank as a regulatory actor, which is capable, in particular, of the adopting of normative acts (art. 132 TFEU) and initiate legislation to be adopted by the Council (art. 129).

²⁹⁶ If we exclude, clearly, the bail-out operation that attracted remarkable public attention due to the funds established to allow for the rescue plan to take place and the conditionality imposed by the Troika to the Greek Government. However, in the aftermath of the crisis neither the Six Pack nor the Two Pack received relevant press coverage. See Hallerberg, "Why is there Fiscal Capacity but Little Regulation in the US", pp.101-102.

²⁹⁷ See Genschel and Jachtenfuchs, "From Market Integration to Core State Powers", pp. 180-183. This situation eventually led the EMU's institutional architecture to be flawed by low-compliance rates, regulatory gaps and insufficient burden sharing measures.

²⁹⁸ Hallerberg, "Why is there Fiscal Capacity but Little Regulation in the US", pp. 102-103.

²⁹⁹ *Ibid.*

a) Regulation vs capacity building

As has been observed by Majone, regulation in the EU represents the most spread tool for policy-makers to achieve decision-making.³⁰⁰ Thus, if it is true that the form of integration depends on the demand, we should observe either positive externalities to overcome economies of scale or that some factor pushes the process in such sense. As has been acknowledged, externalities and economies of scale are functionally similar, thus they are interchangeable, to a certain degree.³⁰¹ Consequently, externalities can be reframed in capacity building terms and vice-versa.³⁰² Moreover, empirically separating the two proves to be highly complicated.³⁰³

Accordingly, it is reasonable to exclude that the demand factor unilaterally determines the instrument of integration. It is then necessary to consider different elements capable of influencing the choice. Thus, it has been suggested that high-politics and identity concern could influence not only the supply side, but also the demand one.³⁰⁴ In fact, regulation is perceived as a softer kind of measure that does not directly attack States' decision-making abilities. It hides the distributive nature of the process by imposing theoretically equal rules on all the actors involved.³⁰⁵ Also, it should be noticed that while regulation provides immediate effects from the moment of the entry into force, capacity building takes a certain amount of time to settle, because of organizational and logistic reasons.³⁰⁶ Thus, it represents a viable instrument for policy-makers, whose accountability makes them usually favor immediate results.³⁰⁷ Overall, regulations allows to reach agreements rapidly, shadowing the distributive nature of integration. Thus, it can compensate the difficulties in reaching an agreement in capacity-building terms, which would entail more overt pooling of decision-making power.³⁰⁸ Accordingly, in the next section we will deal with the claims that this preference for regulations has determined inefficient policy designs. Before moving

³⁰⁰ It is also interesting to notice how regulation, in the technical-bureaucratic and problem-solving fashion exercised by the EU, is actually part of a wider global shift towards agency-driven regulation as opposed to highly politically influenced policy-making before the 70s. See Majone, G., *Regulating Europe* (London: Routledge, 2005), pp. 55-56.

³⁰¹ Genschel and Jachtenfuchs, "The European Integration of Core State Powers", pp. 258-260.

³⁰² Ibid.

³⁰³ Take for instance the gains derived from the creation of the single market. A retrospective analysis shows how the overall economic benefit, reaching an average of 8-9% of EU's GDP, has been the product of both the elimination of internal frontiers and the lowering of prices (i.e. positive externalities), and of the improvement of industrial output, competition and technology standards (i.e. economies of scale). See the European Commission's website, "Quantifying the Economic Effects of the Single Market in a Structural Macromodel", pp. 19-20. Far from being negligible, we maintain that this point represents the weakest part of this theory. In fact, most of the discussions on politicization, publicity etc. depend of a clear-cut separation of structural factors. Thus, if it is not possible to empirically find a distinction between them, this could represent a serious issue for the viability of the framework.

³⁰⁴ Genschel and Jachtenfuchs "More Integration, Less Federation", p. 50

³⁰⁵ Ibid.

³⁰⁶ Genschel and Jachtenfuchs, "The European Integration of Core State Powers", p.262.

³⁰⁷ Wallace, *Policy-making in the European Union*, p.21.

³⁰⁸ See Hallerberg, "Why is there Fiscal Capacity but Little Regulation in the US", p.102-103.

on, though, we should reflect on the usage of high-politics to justify the predominance of regulation over capacity-building. This case, although referred to core state powers, could be indeed transferred to important policy areas not belonging to those powers, but perceived as high-politics. Thus, we would need to readjust the whole explanation of why regulation and capacity-building are observed, which is the center of the framework itself. On the contrary, it is interesting to notice how high-politics has been used as a trump card, providing a simple explanation to for the theory to continue working smoothly.

b) Institutional constraints and inefficiency

Until the integration process involved only market making and correcting measures,³⁰⁹ distributive conflicts were relatively easily to overcome, given the prospective gains and the absence of high-politics concerns. Nevertheless, when integration moved closer to core state powers, negotiations became more characterized by zero-sum considerations, lowering the chance to reach an agreement.³¹⁰ In the case of the EMU, it is claimed that differences in preferences and the lack of flexibility led to the institution of an incoherent system.³¹¹ In fact, zero-sum consideration and distributive conflicts characterized the negotiations of the policy, which produced compromise solutions.³¹² For instance, not every Member desired a supranational monitoring system, laying the basis for a future inefficiency in assuring their compliance.³¹³ Accordingly, a portion of the States did not respect agreements' provisions, which accumulated to those who could not respect them. This last element, together with the mentioned no-bailout clause, produced a dangerous situation when the crisis arrived. In fact, Members caught in a confidence crisis could not implement expansive monetary policies, since that wasn't a national prerogative anymore. This, eventually, would have forced them to raise interest rates and risk default situations.³¹⁴ Thus, the difference in preferences and the lack of flexibility produced a situation that put Member States at risk, as in the case of Greece. Equally, this was reflected in the solutions to tackle the

³⁰⁹ Kenealy, D., Peterson, J. and Corbett, R., *The European Union: How Does It Work?*, 5th ed. (Oxford: Oxford University Press, 2018), pp.108-113.

³¹⁰ In the case of the adoption of the single currency the common vision of the Euro as a political project was menaced by conflicting stances based on the technical details and standards to adopt, that were dealt with through opt-outs from the UK and Denmark as well as through the inobservance of the mandatory criteria for opting in, such as deficit levels and public debt-GDP ratios, particularly those of Belgium and Italy. See Reinert, K. A., *An Introduction to International Economics: New Perspectives on the World Economy* (Cambridge: Cambridge University Press, 2015), pp. 337-338.

³¹¹ Genschel and Jachtenfuchs, "From Market Integration to Core State Powers", pp. 187-188.

³¹² Ibid.

³¹³ Schimmelfennig, "Liberal Intergovernmentalism and the Euro Area Crisis", p.183.

³¹⁴ Ibid., p.190.

crisis: some encouraged the Greek bail-out, others opposed it; some were in favor of a radical reform of the ESM, others were not.³¹⁵

In addition to this unfitness to handle external financial shocks, a deep crack separated “northern” and “southern” States. The former group was more lightly hit by the negative consequences of the crisis and did not want to share the financial burdens of indebted countries. Northern countries focused their critique on the well-known concept of austerity, lamenting the necessity of tighter regulations on domestic budgets, conditionality for further financial aids and supranational monitoring.³¹⁶ Conversely, the latter group was deeply affected by the economic instability brought by the crisis and requested help and solidarity.³¹⁷ Thus, southern countries requested burden-sharing mechanisms, but eventually had to undergo a strict conditionality to be able to receive help, particularly when the Troika got involved.³¹⁸ As a consequence, the whole affair received a high degree of public attention and ended up being strongly politicized in both factions. This led to the rise of right-wing and left-wing populist movements and the subsequent call for a radical reform of existing agreements.³¹⁹

Eventually, the measures adopted to contrast the crises and avoid its repetition were put forward as regulatory acts.³²⁰ They involved a remarkable degree of bindingness, emphasis on supranational monitoring and limitations to national budgets with strong correlations to the deficit-GDP ratio. They also continue to spark debate, since they are often perceived as damaging national sovereignty and imposing hard constraints on the population.³²¹ Overall, these considerations suggest that sovereignty concerns influenced the negotiations for the creation of the EMU. Particularly, they produced a system that did not possess the necessary supranational competences to ensure an efficient monitoring or assistance to Member States in need. The system, largely designed by regulation, eventually pushed the

³¹⁵ These divisions characterized both creditor and debtor states. See Morlino, L. and Sottolotta, C.E., “Southern Europe and the Eurozone Crisis Negotiations: Preference Formation and Contested Issues”, *South European Society and Politics* 24, no. 1 (2019), pp.14,17.

³¹⁶ Schimmelfennig, F., “European Integration (theory) in times of Crisis. A Comparison of the Euro and Schengen Crises”, *Journal of European Public Policy* 25, n. 7 (2018), p. 977.

³¹⁷ *Ibid.*, p. 978.

³¹⁸ Here we refer to Germany, Austria, Finland and the Netherlands as “northern” States, whereas “southern” ones were the so-called P.I.I.G.S (i.e. Portugal, Italy, Ireland, Greece and Spain) plus France. See Schimmelfennig, F., “European Integration (Theory) in Times of Crisis. A Comparison of the Eurozone and Schengen crises”, *Journal of European Public Policy* 25, no.7 (2018), pp. 977-978.

³¹⁹ *Ibid.*, pp. 978-979.

³²⁰ Recall what we have said regarding the adoption of secondary law acts, while regarding conditionality and austerity measure, see Schimmelfennig, “European Integration in the Euro Crisis”, pp.322.

³²¹ Extensive press coverage was dedicated, starting in 2010, to the several social movements that developed as a response to austerity measures and conditionality, particularly in those States most hit by the crisis. See Kitsantonis, N., “Anti-Austerity Protest in Greece Turn Violent”, *New York Times* (15/12/2010), available at: <http://tiny.cc/4galfz>. Curiously enough though, the crisis was strongly correlated to euro-scepticism in relatively few countries, such as Greece, Portugal, the UK and the Czech Republic. See Serricchio, F., Tsakatika, M, and Quaglia, L., “Euro-scepticism and the Global Financial Crisis”, *JCMS: Journal of Common Market Studies* 51, no. 1 (2013), p. 59.

EU to ask for external help to tackle the crisis: external actors had to intervene to bail Greece out, with all the risks associated to this kind of delocalization.³²²

2.5: EU's indirect control of core state powers

So far, we have discussed the claims according to which the integration of core state powers produces poor policy outcomes, due to concerns related to high-politics and identity. In the last part of this chapter, we will proceed to present Genschel and Jachtenfuchs' theory of indirect control. This theory describes some cases of integration by stealth in core powers, meant as the unintended consequences of the improved coordination among Member States that end up providing power to EU institutions in these areas. In fact, it is recognized that the Treaties do not give the Union formal competences to directly exercise military, administrative or fiscal powers. However, it is claimed that the Union defines the situations and forms for their exercise on the part of Member States, influencing their praxis.³²³ Overall, the topic of indirect control provides some interesting insights to evaluate the EU's influence onto European Countries. Accordingly, in the second part of the third chapter we will attempt to verify whether these considerations can be applied to the case of Frontex. To better explain all the aspects of this theory, thus, two case studies are reported. The first is that of the usage of force. Both the EU's meddling in the sector of arms procurement and the gradual convergence of foreign policy practices will be presented. The second case, on the other hand, is that of administrative cooperation. In such a sector, it is claimed, the EU acts as facilitator between national administrations, to better coordinate them and create a functioning apparatus at the European level.³²⁴

The theory of indirect control reveals puzzling to grasp. In fact, it does not suggest a coercive control of Member States' prerogatives, nor does it imply a formal shift of capacity to the European level. Generally, intergovernmental and realist scholars maintain that the Union does not possess any competence at all in these policy areas, since the Treaties do not confer any formal competences to it in this sense.³²⁵ For instance, the Union does not control any European armed force, nor can it levy taxes. On the contrary, Genschel and Jachtenfuchs affirm that the EU's influence is exercised in a subtler

³²² Genschel and Jachtenfuchs, "From Market Integration to Core State Powers", pp.190-191.

³²³ By indirect control we mean, substantially, that competences are not centralized but rather delocalized, that in most cases the EU does not aim at replacing the State but rather tries to foster horizontal cooperation, and that the Union shapes Member States' execution of those powers, rather than exercising them itself. See Genschel and Jachtenfuchs, "More Integration, Less Federation", pp.249-269.

³²⁴ Heidbreder, "Regulating Capacity Building by Stealth", p.155-156.

³²⁵ We are hereby referring mainly to intergovernmental and realist accounts of integration. See, respectively, Nye, J. S., *Is the American Century Over?* (Cambridge: Polity Press, 2015), "Challengers and Relative Decline" chapter, section "Europe"; Moravcsik, A., "The European Constitutional Compromise and the Neofunctionalist Legacy", *Journal of European Public Policy* 12, no. 2 (2005), p. 365.

fashion, and suggest that the Union defines the limits, forms and legitimacy of Member State's exercise of sovereign powers. Starting from this theory, it has been claimed that the degree of centralization has not reached the same development in each sector: for instance, military cooperation is not as advanced as fiscal surveillance.³²⁶ The patterns thus determined have been explained, once again, through structural factors, and particularly through the demand factor.³²⁷ For instance, the lack of a structured framework in the military field is largely due to the role covered by the Transatlantic Alliance: it is claimed that NATO contributes to mitigate the need for a truly integrated European army, deterring Member States from pursuing integration in this sense.³²⁸

Before proceeding to present the two cases, we must also notice that they differ from the EMU policy in a fundamental aspect. Indeed, in the latter it is theoretically easier to distinguish between demand and supply, since the demand is driven by private actors and supply by public ones. Conversely, in the military and administrative sectors, the distinction becomes blurred: both demand and supply are publicly driven.³²⁹ When empirically researching for structural factors, this overlapping reveals an obstacle that is impossible to overcome. Indeed, as we claim in the third chapter, this makes demand and supply not only confused, but inseparable. Accordingly, in the case of Frontex, thus of the internal use of force, we have not been able to identify demand and supply precisely for this reason.

The goal of the two sections that follow is that of presenting the theory of indirect control through concrete cases that can help understanding its content. Particularly, it is claimed that the forms through which the Union can steer Member States' practices are different and depend from the features of the policy in question. For instance, in the field of public administration, coordinating measures have been introduced to favor the exchange of information among national systems. This, in turn, has donated relevant authority to the Commission, whose role as a central administration has increased.³³⁰ Conversely, in the military sector, the steady growth of regulations on defense procurements or cooperation in criminal matters suggest a European role in shaping how force is used.³³¹

³²⁶ In fact, the Union's influence in military cooperation is not comparable to its capacity to monitor Member States' fiscal policies. Indeed, the first happens mostly on a voluntary basis, at least for what concerns foreign operations, whereas budgetary surveillance is mandatory for Member States. See Mérand, *European Defense Policy*, p.14; and Schimmelfennig, "Liberal Intergovernmentalism and the Euro Area Crisis", pp.190-191.

³²⁷ Genschel and Jachtenfuchs, "The Integration of Core State Powers", pp.256-258.

³²⁸ Mérand, *European Defense Policy*, p.45.

³²⁹ Genschel and Jachtenfuchs, "The Integration of Core State Powers", p.258.

³³⁰ Heidbreder, E.G., "Multilevel Policy Enforcement: Innovations in How to Administer Liberalized Global Markets", *Public Administration* 93, no. 4 (2015), pp.944-946; Egeberg, M. and Trondal, J., "EU-Level Agencies: New Executive Centre Formation or Vehicles for National Control?", *Journal of European Public Policy* 18, no. 6 (2011), pp.882.

³³¹ Mérand, *European Defense Policy*, p.35; and Rozée, S., Kaunert, C. and Léonard, S., "Is Europol a Comprehensive Policing Actor?", *Perspectives on European Politics and Society* 14, no. 3 (2013), pp.385-387.

i) Integration in the administrative sector

Domestic administrations cover a fundamental role in the application of both national and European law, and they usually represent a jealously defended portion of States' prerogatives.³³² Thus, given the complications of this field, cooperation between domestic apparatuses is oriented in a functional fashion through the principle of sincere cooperation.³³³ Administrative matter touch upon the most sensitive structural features of Member States and their cooperation is necessary to ensure the respect of community law. In fact, EU law can only be exercised through national administrations, which represent the core of the European polity.³³⁴ To implement such law, States enjoy the freedom to self-organize according to the principle of procedural autonomy. However, homogenization is complicated both by the high degree of complexity of European law and the scarce acquaintance of domestic bureaucracies with it.³³⁵

The European Union's competence in administrative cooperation is disciplined by art. 6 of the TFEU and furtherly by art. 197. According to these, the policy falls within the supporting competences' category and the EU's role is that of helping Member States to improve their administrative capacity in implementing community law.³³⁶ In practice, the EU administrative apparatus presents a basic structure, in which authority is scattered among the European and domestic levels. Here, integration has been mostly carried out by the Commission, although not by means of a strong centralizing action or through harmonization. Rather the Commission tries to establish forms of horizontal coordination, exploiting the administrative structures already in place and favoring their interconnection.³³⁷

Let us now try to make some assumptions regarding what shape integration could have in this case, based on Genschel and Jachtenfuchs' theory. First of all, a dysfunctional administration can cause serious difficulties in the implementation of policies, particularly those in which the EU has exclusive or shared competence.³³⁸ Thus, since most of the Union's areas of activity are related to the single market, we could expect a diffuse interest by Member States in its correct functioning. Accordingly, we would

³³² Adam and Tizzano, *Manuale di Diritto*, pp. 800-801.

³³³ Art. 4, par 3 TEU.

³³⁴ To grasp the importance of administrative apparatuses in the application of community, see case CJEU 103/88, *Fratelli Costanzo*, [June 22nd, 1989], p.1839. The Court, in that cases, affirmed that "administrative authorities, [...] are under the same obligation as a national court to apply the provisions of Article 29(5) [*the European norm, A/D*] of the Directive and to refrain from applying provisions of national law which are inconsistent with them".

³³⁵ Adam and Tizzano, *Manuale di Diritto*, p.802.

³³⁶ Particularly, according to par.1, the implementation of community law norms is a matter of common interest, thus, accordingly, par. 3 foresees that that Union can intervene in order to ameliorate Member States' administrative praxis, favoring the exchange of information and technical education, avoiding, however, harmonization measures (par.2).

³³⁷ Heidbreder, "Multilevel Policy Enforcement", pp.943-944.

³³⁸ Heidbreder, E.G., "Regulating Capacity Building by Stealth: Pattern and Extent of EU involvement in Public Administration", *Beyond the Regulatory Polity*, p.148.

expect demand to be characterized by positive externalities, rather than by economies of scale. Concretely, relatively to administrative practices in fiscal matters, there exist intense pressures for an efficient collaboration aimed at avoiding the loss of tax revenues deriving from the Value Added Tax. Therefore, we would expect integration to happen through regulation, to limit the conflicts between competing tax authorities, which directly affects the EU budget.³³⁹ However, in some cases Member States have proved reticent in complying with administrative cooperation procedures: in fact, measures like the mutual recognition of professional or study qualifications would entail intricate legal issues and potential operative irregularities for them.³⁴⁰

Regarding supply, we could expect that, given that administrations belong to core state powers, any overt transfer of competencies could produce conflict, and thus integration by stealth would be favored. Also, it must be remembered that bureaucratic structures are technical and managerial in nature and are thus fit to be handled by non-majoritarian institution.³⁴¹ In the abovementioned VAT case, for instance, the Commission is entitled of regulating the administrative praxis of its “own resources”. Consequently, it has the legitimate interest in defending such prerogatives and provide the necessary tools to improve the implementation of EU norms.³⁴² As we have seen, the Commission would be both adapt and willing to supply integration. In accordance with these assumptions, it has been claimed that administrative integration has happened mostly through stealthy regulation.³⁴³

The Commission has proved to be more interested in favoring coordination and preserving national autonomy, rather than in becoming the center of the EU administration.³⁴⁴ Accordingly, legislation has been adopted to favor the connection of national structures. These measures encompass the exchange of information, meetings between national officials and the creation of informatic instruments aimed at coordinating domestic administrations. In this regard, of particular interest is the creation of software programs dedicated to national personnel, such as the IMI (Internal Market Information).³⁴⁵ This tool’s function is that of favoring mutual assistance and simplify data-transfer

³³⁹ Ibid., pp 151-152. It is worth remembering that such losses deriving from poor administrative cooperation have relevant consequences for the financial state of the EU, since ex art. 311 the Union’s budget is wholly financed through the so-called “own resources”. Within these, according to 2014/335/EU, Euratom: Council decision of May 26th, 2014, domestic VAT revenues cover about the 12% of the EU’s budget, which implies that losses due to tax evasion and fraud represent a serious threat to communitary institutions. See Adam and Tizzano, *Manuale di Diritto*, p.125.

³⁴⁰ Heidbreder, “Regulating Capacity Building by Stealth”, p.156.

³⁴¹ Ibid.

³⁴² Heidbreder, “Multilevel Policy Enforcement”, pp.944-945.

³⁴³ Particularly, through the establishment of the three principles of mutual recognition, policed national treatment and mutual recognition. Ibid, p.149.

³⁴⁴ It seems also legit to question the Commission’s ability to handle such a huge load of work, given its restricted dimensions in terms of staff, budget and matters covered, notwithstanding Member States’ reluctance in transferring such competences to a new European institution.

³⁴⁵ Adam and Tizzano, *Manuale di Diritto*, p.804.

procedures, overcoming linguistic difficulties and contributing to the circulation of documentation.³⁴⁶ Thus, it is claimed that integration does not happen through a shift of competence from Member States to the Commission. Instead, it happens through the creation of an integrated structure capable of communicating efficiently and exchanging data. In such a system, the Commission acts as a facilitator rather of a manager.³⁴⁷ Thus, harmonization is avoided, leading to horizontal integration rather than the vertical one.³⁴⁸

Nevertheless, it has been claimed vertical coordination is partially provided by the decision-making authority of the Commission. As Trondal highlights, the Directorate Generals that make up the Commission enjoy a high degree of consideration from national and European agencies. This makes so that their stances are often kept as a point of reference by national agencies, providing it with informal hierarchical power.³⁴⁹ Indeed, the so-called “silo thinking”, due to the independence of the DGs from one another, makes so that the Commission’s suggestions are in practice followed by their domestic and European counterparts, creating a *de facto* administrative powers.³⁵⁰ Thus, it does not represent a formal influence; still it expands the reach of the institution beyond its formal boundaries. Accordingly, these phenomena of horizontal integration and vertical coordination have been described as stealthy capacity-building in administrative competences.³⁵¹ However, we must recall that these claims are contestable, since agencies maintain formal autonomy spaces and, particularly domestic ones, have to confront directives coming from national ministries and authorities.

ii) Integration of means of coercion

The Union’s competences regarding the use of coercion can be treated in two ways: one on extroverted violence, thus on military cooperation; the other on introverted violence and the maintaining of internal order. Since the latter will be dealt with in the next chapter, we will now focus on the former aspect. Military cooperation represents a policy sector in which high-politics considerations are particularly strong, due to the deep meaning associated to the control of a permanent army. Thus, in realist accounts, the military sector is a fundamental feature of States’ power.³⁵² It is then expected that

³⁴⁶ Ibid.

³⁴⁷ Heidbreder, “Regulating Capacity Building by Stealth”, p.155-156.

³⁴⁸ Ibid., p.161.

³⁴⁹ Egeberg and Trondal, “EU-Level Agencies”, pp.875-878.

³⁵⁰ Trondal, “The Rise of a European Public Administration”, p.176.

³⁵¹ Ibid., p. 183.

³⁵² Recall Tilly,. Regarding realist accounts of military power, take for instance, Legro, J. and Moravcsik, A., “Is Anybody Still a Realist?”, *International Security* 24, no. 2 (1999), p.21.

integration in this sector will be hampered by identity concerns. Moreover, this sector has been analyzed in the light of demand and supply, to explain why the Union's competence is so severely limited.

The project of building a European military apparatus is anything but recent. Indeed, several proposals aiming to this goal had been put forward in the last sixty years: among these are the European Defense Community, back in 1954, the Western European Union.³⁵³ During this period, different options of political and military cooperation have been tested, without causing radical evolutions to the sector.³⁵⁴ However, more modest results have been achieved following the Petersberg Tasks and the institution of the Common Security and Defense Policy. In fact, following these initiatives, the first European military missions have been launched in 2003, with operation Concordia.³⁵⁵ Nowadays, the legal regime of the CSDP is disciplined by the Treaties, particularly within the title V of the TEU.³⁵⁶ It is curious to notice that the rules of the CFSP and the CSDP are enlisted in the TEU and not in the TFEU, to highlight their intergovernmental nature.³⁵⁷ Overall, cooperation in these sectors does not constitute an integrated military structure, nor a collective defense agreement such as NATO. Rather, it is a means of political integration and promotion of the European arms industry.³⁵⁸ Two cases are hereby considered to present what neo-functionalists would define a limited indirect control of the EU in military affairs: a) European joint operations and b) arms market liberalization.

a) Regarding the former aspect, we must keep in mind that the mechanism for launching CSDP missions is still underdeveloped: operations are not compulsory, rather they happen on a voluntary basis.³⁵⁹ Thus, the concepts of demand and supply have been utilized to understand the reasons for this lack of integration.³⁶⁰ Regarding demand, which is considered the most important factor, both political and economic factors are to be taken into consideration. Particularly, the fall of the USSR has produced a radical reframing in the objectives of European defense policies in the 90s, away from territorial protection policies. In fact, the direct threat represented by Russia constituted a source of legitimization for the high level of public expenses in the military industry and armies' maintenance and formation.³⁶¹

³⁵³ Mérand, *European Defense Policy*, pp.47,145.

³⁵⁴ Wallace, *Policy-making in the European Union*, p.432.

³⁵⁵ Bulut, E., Grevi, G., Helly, D. and Keohane, D., *European Security and Defence Policy: The First Ten Years (1999-2009)* (Paris: Institute for Security Studies, 2009), p.173.

³⁵⁶ CSDP provisions are enshrined in arts. 42-46 of the TEU.

³⁵⁷ Adam and Tizzano, *Manuale di Diritto*, p. 33.

³⁵⁸ Mérand, *European Defense Policy*, pp.2-3.

³⁵⁹ Art.24 TUE.

³⁶⁰ Mérand and Angers, "Military Integration in Europe", pp.58-61.

³⁶¹ Art.3 of the NATO Treaty itself overly provides a stimulus towards maintaining and improving "individual and collective capacity to resist armed attack".

When the economic crisis in those years broke out, such costs became unsustainable without reasonable motivations. Therefore, in 1991, the European military sector experienced a substantial budget cut.³⁶²

Moreover, the presence of NATO drastically reduced the calls for a purely European defense force, since it provided protection and support to Member States' armies.³⁶³ Thus, the North-Atlantic organization is conceivable as an integrational competitor to the EU, representing an advanced form of military cooperation. NATO also induced relevant changes into European military structures, putting the emphasis on smaller battalions capable of more flexibility and interoperability.³⁶⁴ Overall, the fall of the USSR, the presence of NATO and the cuts to military budgets changed the *raison d'être* itself of European military forces. Accordingly, it shifted from territorial defense to the support of foreign policy targets.³⁶⁵ These factors jointly lowered, it is argued, the demand for a deeper integration in military affairs.³⁶⁶ Conversely, the supply side proves harder to decipher than that of demand. In fact, several forms of dialogue in the sector had been proposed throughout the years. Think, for instance, at the Western European Union, the European Political Community and OSCE. These initiatives, together with NATO, gave rise to a partial convergence of political visions on foreign policy objectives and methods, such as the definitions of threat or rules of engagement.³⁶⁷ Yet, they did not manage to overcome sovereignty considerations and translate into concrete supply of integration for genuine European corps. In fact, within the CSDP, several bodies were created, but these do not constitute a proper case of integration, given their decisional and operative autonomy deficiencies.³⁶⁸ Overall, we can conclude that no such a thing as an indirect control is exercised by the Union onto Member States' use of force. Surely, a certain degree of convergence has been achieved, mostly through NATO, but this cannot be considered relevant enough to steer States' practices.

b) On the other hand, relevant changes have happened within a market sector that was traditionally a state monopoly due to its strategic importance: that of arms procurement. Domestic

³⁶² It is interesting to notice that European military expenditures varied, in GDP percentages, between 5% and 7% around 1965, whereas they dropped to 1.4%-2.3% after 2000. Mérand, *European Defense Policy*, pp.94-96.

³⁶³ Menon, "Defense Policy and the Logics of High-Politics", pp.80-81.

³⁶⁴ Mérand, *European Defense Policy*, pp.61-62.

³⁶⁵ *Ibid.*, p.100.

³⁶⁶ Particularly, this weakened demand has not been overcome even during the Balkan and Iraqi wars, in which calls for an improved military capability were put forward. *Ibid.*, pp. 107-109.

³⁶⁷ The so-called "NATO culture" and the "Brusselsization" of European politics. *Ibid.*, pp. 33, 64.

³⁶⁸ We are here referring to those institutions that, mirroring NATO structures, allow for the launching of CSDP operations. See the European External Action Service website, "CSDP structure, instruments and agencies" (08/07/2016), available at: <http://tiny.cc/5p4ofz>. However, as the European Union Institute for Strategic Studies acknowledges, the tools available to community missions are still inadequate to carry out efficient and timely actions in theaters of war. This is due, primarily, to poor political support on the side of EU Member States, which is reflected in and contributes to inhibit the institutional structure of the policy, loosening the tie with the CFSP and not providing strong-enough decisional procedures and relevant resources, in term of both personnel and financing. See Bulut *et al.*, *European Security and Defence Policy*, pp.404-408.

military industries usually constitute a sector protected from liberalization, where States are the main buyers and the financial sponsors of the military firms.³⁶⁹ However, the economic and political context outlined above has deeply modified the market, allowing European institutions to partially liberalize it.³⁷⁰ After the fall of the USSR, European Member States' investments in military firms became unsustainable, particularly given the rising prices of research and development in arms. Parallely, the reduction of military corps' dimensions and the rise of private security agencies created a favorable situation for a community intervention.³⁷¹

Some Member States have traditionally been at odds with the idea of liberalizing the market, partially for security concerns. Another reason, particularly in smaller countries, was that of the lobbying of military industries to their governments against the free market. Indeed, these firms would have suffered from the suppression of State financial aids and the exposure to market forces. Conversely, more competitive enterprises in larger States were in favor of liberalization, given the high potential gains deriving from prices reduction.³⁷² Overall, however, strong incentives existed to pursue integration. This dynamic was thus interpreted in terms of structural factors: the demand caused by unsustainable military costs was eventually met by a large amount of regulation by stealth by the Commission. Also, a new agency was created, albeit with a narrow mandate.³⁷³ The Commission acted by trying to apply the rules of the common market to the military one, contesting the frequent invocation of art. 346 of the TFEU.³⁷⁴ Particularly, the institution modified those provisions that could put Member States' security in danger, such as those on tender rules in the military sector.³⁷⁵ Thus, protecting States' secrets and collaborating with large firms, the Commission proposed joint positions to stimulate the European regulation of the market.³⁷⁶ Also, in 2004 the European Defense Agency was created. The agency, placed under the direct

³⁶⁹ Weiss, M., "Integrating the Acquisition of Leviathan's Swords", pp.27-28.

³⁷⁰ This is the explicit mandate of the European Defense Agency, according to the Council's common action 2004/551/CFSP of July 12th, 2004.

³⁷¹ Weiss, "Integrating the Acquisition of Leviathan's Swords", pp.33-34. It is also worth noticing the increasing importance of private military companies such as Academi (formerly known as Blackwater), whose apparatuses have significantly grown larger, and whose help lets governments outsource military expenses and risks. See Shorrock, T., "Blackwater Shows that Contractors Let the Military Outsource its Responsibility", *The New York Times* (27/10/2014), available at: <http://tiny.cc/og8ofz>.

³⁷² *Ibid.*, pp. 35.

³⁷³ Weiss, "Integrating the Acquisition of Leviathan's Swords", pp. 32-33.

³⁷⁴ The article provides that "any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material". Thus, it functions as a derogation to competition provisions.

³⁷⁵ Weiss, "Integrating the Acquisition of Leviathan's Swords", p.31.

³⁷⁶ We are here referring to the joint statement by the Commission, the Parliament and several large military companies called STAR-21 Report, referring to the aerospace and defense sector, whose proposals were incorporated into 2004's Commission Green Paper on promoting European level collaboration in arms procurements. See, the Eur-Lex website, "A Coherent Framework for Aerospace - A Response to the STAR 21 Report", *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions* (COM/2003/0600 final), available at: <http://tiny.cc/ay2qfz>; and *ibid.*, "Defense procurement", *Green Paper of the European Commission* (COM(2004)608), available at: <http://tiny.cc/ha3qfz>. Particularly, notice point 3.1 of section I

control of the High Representative, was charged with the tasks of favoring the communitarization of the arms market and the development of common standards.³⁷⁷ Furtherly, more supply has been provided by the Court, which contributed to diminishing the invocation of art. 346 through its jurisprudence.³⁷⁸

In this case, the theory of indirect control suggests that through the liberalization of a traditionally protected market, the Union is shaping Member States practices regarding the purchase of technical equipment. The goal is that of improving the preconditions for joint CSDP operations.³⁷⁹ It is not clear, however, how the liberalization of the market would influence Member States' practices, nor are we provided with information regarding the toll that these measures had. Overall, through both the cases of public administration and the military sector, we have presented situations that suggest a European intervention in core State powers, albeit in a marginal fashion. Nevertheless, whether these elements are sufficient to determine an indirect control meant of core state powers, is still to verify. In fact, contributing to define how Member States exercise their sovereign powers is different from determining how this intervention takes place. Accordingly, in our case study we shall try to assess what degree of influence the Union has in the control of external borders, and whether this could be labelled indirect control.

2.6: Conclusions

Throughout this chapter we have presented several cases that allow to analyze those theories suggesting a European involvement in core state powers. In doing so, we have tried to consider the integration process as the encounter of the two structural factors of demands and supply. On the one side, the elements that bear consequences for the communitarization of core powers have been presented: high-politics concerns, the nature of the demander and blame-shifting actions. Accordingly, the consequences of these factors have been discussed, particularly the theme of derogations. On the other, the ways in which it is claimed that the Union exercises its influence have been shown, focusing on the

(Community exemption system) and the second proposal of point 2.1, section II (Greater opening of the markets) of the former document.

³⁷⁷ Decision (CFSP) 2015/1835 (12/10/2015), art. 5, par.3, point "b".

³⁷⁸ See case CJEU C-337/05, *Commission v Italy*, [April 8th, 2008]. The Court, distinguishing between military and civil usage of military equipment (in this case, helicopters), reaffirmed the inhibition of general derogations (ex art. 296 TEC, now art. 346 TFEU) to community law in defense procurement due to public security reasons. Particularly, point 43 states: "le traité prévoit des dérogations applicables en cas de situations susceptibles de mettre en cause la sécurité publique, notamment à ses articles [...] 296 CE [...], qui concernent des hypothèses exceptionnelles bien délimitées. Il ne saurait en être déduit qu'il existerait une réserve générale, inhérente au traité, excluant du champ d'application du droit communautaire toute mesure prise au titre de la sécurité publique. Reconnaître l'existence d'une telle réserve, en dehors des conditions spécifiques des dispositions du traité, risquerait de porter atteinte au caractère contraignant et à l'application uniforme du droit communautaire".

³⁷⁹ Genschel and Jachtenfuchs, "More Integration, Less Federation", p.45.

concept of indirect control. Overall, the theory seems to be able to describe some general mechanisms, particularly regarding the stimuli to integrate when large prospect gains are envisaged. Still, it is left to assess whether these assumptions are correct. Indeed, at times they describe very wide phenomena, and the usage of the categories of demand and supply risks falling into simple common-sense. In fact, stating that integration in the monetary field is due to “a demand from public actors” is both too general and difficult to subvert. Thus, for the framework to work properly, we claim that it is necessary to individuate a precise demand and supply. We shall deal with this task in the third chapter, presenting our research of demand and supply for the creation of Frontex within European preparatory works.

However, Genschel and Jachtenfuchs theory provides some interesting insights on the “State-ness” of the EU. Indeed, gaining control over these powers would complicate the (already intricate) categorization of the Union. Equally, it would pose questions regarding the role and nature of the State itself and its *raison d'être*. For instance, if the Union gained competence in the use of coercion, it would be possible to question Weber’s definition of the State as an entity that successfully claims a “monopoly of the legitimate use of physical force within a given territory”.³⁸⁰ In fact, as Mérand suggests, it might be the nature of the State that has changed into something new. He claims that the focus of what this entity can achieve is no more mainly determined by its material resources but rather by its capacity to propose symbolic resources and collective visions.³⁸¹ The debate is still open and extremely complex to approach.

Finally, we noticed that the theory we have discussed shows difficulties in explaining some phases of the European integration process. Among these are the institution of the ECB and the renationalization of the Common Fishery Policy and Common Agricultural Policy. Indeed, according to the framework, given the nature of core powers and the peculiarities of the EMU, we shouldn’t observe forms of capacity-building. Equally, the stated conditions that hamper disintegration hardly explain why some competences have actually returned to Member States. Moreover, other incongruences have been observed. For instance, we noticed that high-politics considerations are at times utilized in a very flexible way. Theoretically, they should only influence the supply factor, but when needed they have been used to “adjust” the demand factor as well. Equally, it is not clear what difference runs between economies of scale and positive externalities. It has been recognized that this difference is flexible, and their boundaries are blurred, however we claim that confusing these categories risks undermining the theory as a whole. Indeed, how would it be possible to rationalize integration through some interpretative categories, when those categories are unclear and imprecise? In other words, how could it be possible to affirm that integration by regulation is triggered by a demand framed in positive externalities, when “positive

³⁸⁰ Weber, M., *Politik als Beruf* (München: 1921). Translated and edited by Gerth, H.H. and Wright Mills, C., *From Max Weber: Essays in Sociology* (New York: Oxford University Press, 1946), p.80.

³⁸¹ According to this view, the military sector is prominent in highlighting this change away from traditional visions and sources of State legitimization. See Mérand, *European Defense Policy*, pp.150-153.

externalities” is not a precise category, with clear-cut boundaries? This very reasoning is also applicable to the actors vehiculating demand and supply. When, as in the case of Frontex, the two are put forward by the same actor, their content and shape is impossible to separate: the recognition of a need is inextricable from the solution proposed. Then, it would be not possible to distinguish between demand and supply, or between economies of scale and externalities. Let us now turn to the third chapter, where these matters are extensively discussed.

Chapter 3: the integrational dynamics of Frontex

3.1: Introduction to the third chapter

The aim of this third chapter is that of verifying whether Genschel and Jachtenfuchs' theory can be deemed correct in claiming that: a) the Union has gained competence in core state powers; and b) that it did in a way that is describable as the encounter of a demand and a supply for integration. The two authors, in a neo-functionalist perspective, maintain that communitarization occurs when there exist incentives to transfer some competences to the Union; and an institutional actor willing and capable to propose or adopt a legal act in this sense. The theory describes these two factors as the preconditions, or structural context, in which integration takes place. However, it does not specify what is exactly meant by "demand" and "supply", and whom they refer to. Particularly, demand is a complicated concept to grasp: the term seems to indicate the prospective gains (reduction of transaction costs, augmentation of legitimacy, economies of scale etc.) that the Union, overall, experiences in pursuing integration. Thus, this third chapter tries to understand whether these concepts identify some precise objects, and whether the theory can scientifically describe the process whereby the Union expands its competences.

In order to do so, we developed a case study on the European policy regulating the controls at the external borders of the Union. Particularly, we focused on the creation of Frontex, the European border and coast guard agency. The objectives that the policy fulfils are those of regulating migratory fluxes and fighting against transnational crime, smuggling and terrorism; as well as promoting the implementation of the *acquis* on visas and asylum. The reason why we chose this case is that the controls at the borders of the EU necessitate the usage of force to be carried out, i.e. one of the three core power. Indeed, coercion is essential to maintain the order within the Space of Freedom, Security and Justice: through the checks on both land and sea, a discrimination is operated between those migrants who can enter the Space, and those who cannot. It is thus fundamental to clarify whether the use of force has been handed to European institutions or if the EU's intervention is limited to the coordination of Member States. In other words, we shall try to understand whether the creation of Frontex donated more competences to the Union or not. Moreover, the case of Frontex has been chosen because the internal use of force has so far received substantially less attention than that of external force, i.e. the military sector. Particularly, Genschel and Jachtenfuchs' framework has not yet been applied to the controls at the European borders. Accordingly, we attempted to verify whether the process of creation of the borders and coast guard agency could be described through the concepts of demand and supply.

In order to develop this assessment, the case study has been divided into two parts. The first is grounded in the idea that Genschel and Jachtenfuchs' framework cannot be falsified but by tackling the

very fundamentals it is based upon. Since the theory is heavily dependent on structural factors, we chose to focus primarily on the identification of demand and supply: we searched for elements that could be identified as the request or as the support for the creation of Frontex. Moreover, we checked whether the elements we identified matched the predictions of the theory. In fact, being that a new agency had been created and that its establishment did not receive substantial publicity, we searched for proofs of a demand framed in economies of scale and an offer from a non-majoritarian institution. Methodologically, we chose to examine the preparatory works that preceded the adoption of the regulation establishing Frontex. These documents, reporting the stances of each institutional actor involved in the drafting of the legislative act, reflect the context in which such act has been adopted, facilitating its interpretation. At the same time, preparatory works allow to understand each institution's preferences regarding a given topic, providing insights to verify the existence of demand and supply for the creation of Frontex.

Moreover, Genschel and Jachtenfuchs' theory predicts the formation of aggregate structural factors within European institutions, reflecting the preferences of the Union in a collegial fashion. This means that demand and supply refer to the needs and support expressed at the EU level, rather than at the national one. Accordingly, the documents we chose for our analysis constitute the best source of information for our purposes, being issued by communitary bodies. Particularly, most of the records that make up these preparatory works are communications between the Commission and the Council, in which different approaches are discussed to tackle the management of external borders. Also, we considered proposals from the Commission, decisions, opinion and amendments issued by the Council; opinions from the Parliament and the Economic and Social Committee; presidency conclusions from European Council summits; and regulations and programmes that help clarifying the context in which the agency was born.

During this first assessment phase, complications emerged with the identification of structural factors, suggesting that the two concepts cannot be neither clearly identified, nor separated. Indeed, we noticed that both demand and supply came from the Commission, rather than from different actors. Indeed, the institution was the one that recognized a common need and the one that framed it, calling for the creation of a new EU body. Eventually, it also proposed how to tackle the issue and advocated for Frontex to be instituted. Accordingly, the Commission enjoyed relevant discretion, being able to choose whether to propose more regulation or capacity-building. It cannot be maintained, then, that "objective" demand and supply exist at the communitary level that push integration in a given direction. Rather they are the product of institutional actors that pursue the solutions they deem to be the fittest. Consequently, we claim that the two cannot be utilized as analytic tools for rationalizing integration in this field, due to their subjectivity and interconnection.

Conversely, we supposed that the creation of Frontex could be due to the will of specific Member States, rather than to an aggregate pressure to integrate perceived by EU institutions. In order to verify this hypothesis, we analyzed the documentation on the institution of the agency found at the national level, particularly within parliamentary and governmental records. The goal in this case was that of looking for evidence testifying the perceived need, by Member States, of a European agency charged with the controls at the external borders. Clearly, the analysis developed on domestic documentation represents a partial investigation. We are well aware that in order for it to be representative, it would be necessary to examine all (then) 15 Member States' positions. However, a complete analysis would represent a complex and impracticable endeavor to develop in this dissertation, because accessing those documents would require the knowledge of each State's language and a large amount of time. Thus, given the role Italy played in the creation of Frontex and for linguistic reasons, we hereby examined the Italian case.

The methodology we utilized concentrated on analyzing the records issued by the Parliament and the Government to report the latter's activities within the Council. The function of these documents, being that of controlling and directing the Government, testified both institutions' stances regarding the creation of Frontex. Through these records, it was possible to demonstrate that a strong interest existed on the side of Italy, which resulted in an intense lobbying activity for the institution of the agency. The Italian Government also started many initiatives aimed at this very objective. Conversely, some Council documents reveal that other Member States like France and the Netherlands were reluctant to the creation of Frontex and contested fundamental aspects. Particularly, a controvert theme was that of financial and operational burden-sharing. Although further examination would be needed in this case as well, these contrasts suggest that the case of Frontex could be better explained by liberal intergovernmentalism rather than neo-functionalism. Indeed, neo-functionalism predicts that integration proceeds because of spillover mechanisms, creating pressure for further transfers of competence to EU institutions.³⁸² Coherently, Genschel and Jachtenfuchs' theory rationalizes this pressure and identifies it with the concept of demand. Thus, the frameworks points at the existence of structural conditions that push in the direction of a deeper integration. However, this pressure must be clearly identified, in order for the theory to be deemed correct. Throughout the first part, we shall demonstrate that it is not possible to precisely detect a demand factor whose strength was widely recognized.

Conversely, we found evidence that the creation of Frontex was rather due to the will of some Member States, willing and strong enough to impose their preferences to other States in the Council. Such a description of integration, however, is closer to liberal intergovernmental accounts: in fact, liberal intergovernmentalism suggests that integration is the product of Member States' preferences, which are

³⁸² Wallace, H., Wallace, W. and Pollack, M. A., *Policy-making in the European Union*, 5th ed. (New York: Oxford University Press, 2005), pp.15-17.

domestically determined; and that integration represents the solution that States pursue to satisfy their heterogeneous and often conflicting interests.³⁸³ Accordingly, integrational outcomes reflect the configuration of preferences and powers of European Countries. In our concrete case, this is demonstrated by the documents at the Italian level, which testify strong lobbying of the Country for the creation of Frontex. Overall, the evidence we have accumulated suggest that Genschel and Jachtenfuchs' theory should not be considered viable for interpreting this case, due to the vagueness of the concepts of demand and supply. Moreover, the fact that national interests proved so relevant raises questions on whether neo-functionalism can be deemed fit to rationalize integration in such politically sensitive fields.

On the other hand, in the second part of this chapter, a discussion regarding the theory of indirect control is presented. Since the concepts of demand and supply did not prove analytic enough, it was decided not to test the aspects of the theory dealing with politicization, blame-shifting and identity concerns. In fact, these bear influence on structural factors meant as objective elements, which we claim not to be a correct assumption. Thus, it would have been harder to discuss them in our new perspective. Rather, it was decided to structure the second part of the work around the theory of indirect control, being less dependent on demand and supply for integration. This element deals precisely with the concrete degree of European involvement in core powers, describing how they are influenced by the EU. To verify the hypothesis of indirect control we analyzed two kinds of sources. On the one hand, we tried to understand what norms formally regulate the work of the agency. Accordingly, we examined the legal provisions that discipline its structure, operations and relations with other European bodies. On the other hand, since the concept of indirect control constitutes a case of integration by stealth (meant as a power that is exercised off the records), we focused on the agency's concrete praxis. The aim was that of verifying whether Frontex possesses more power than it is formally charged with and whether this bore consequence for the management of core powers.

To address this topic, we focused on political science documentation discussing the agency's role in developing risk analysis.³⁸⁴ Particularly, it has been claimed that Frontex is capable of provoking the harmonization of Member States' concept of risk.³⁸⁵ This task represents a central pillar of the agency's work, through which it establishes which Countries are in need of help at their borders and where communitary funds must be allocated. Accordingly, if Frontex managed to impose its concept of risk onto Member States, its influence would greatly benefit: its decision would be hardly contested; and it

³⁸³ *Ibid.*, pp.17-19.

³⁸⁴ This consists in the evaluation of vulnerable spots at the borders in which it is necessary to operate to tackle illegal crossings; and is an activity developed by both Frontex and Member States. See Frontex website, "Monitoring and Risk Analysis", available at <https://frontex.europa.eu/intelligence/monitoring-risk-analysis/>.

³⁸⁵ Regine, P., "Harmonization by Risk Analysis? Frontex and the Risk-Based Governance of European Border Control", *Journal of European Integration* 39, no. 6 (2017), p. 689.

would be freer to intervene and use communitary money where it deemed necessary. Consequently, this could corroborate the hypothesis of indirect control. However, what resulted from the data we gathered is that Frontex simply contributes to define the situation in which coercion is exercised at the external borders. In fact, considering its legal stance, it cannot be maintained that the agency unilaterally determines the conditions for state actors' use of force. Particularly, Member States' internal legal system are too relevant in determining the situations in which it is necessary to act and during operations at the borders. However, doubts still remain regarding the influence of the agency's risk analysis. In fact, in order to understand how Frontex modified Member States' praxis, it would be necessary to examine each Country's policies in the field of borders checks throughout time. This would provide data on whether the States have changed their approach as a result of the creation of the agency. Nevertheless, given the information we gathered, this dissertation suggests that is not possible to claim that the EU exercises a control on core powers, not even an indirect one. We shall now proceed, first of all, to outline the functions that Frontex is charged with. This first section aims at providing an insight into how the agency is collocated in the EU institutional framework.

3.2: The role of Frontex

Established in 2004 thanks to Council Regulation 2007/2004, Frontex is the European Border and Coast Guard Agency. Its role is that of contributing to the completion of the Space of Freedom, Security and Justice, tackling illegal immigration and transnational crime.³⁸⁶ In order to do so, the Agency supports Member States in carrying out their patrolling operations at the external borders, together with the monitoring of illegal crossings. Thus, Frontex provides additional resources, both in terms of personnel and funds, to help Schengen zone Countries comply with the communitary *acquis*. Accordingly, the agency is charged with a wide set of tasks, which comprise: a) promoting the realization of an integrated border management; b) helping Member States identifying migratory patterns and cross-border criminal activities; c) developing analysis of risk and vulnerability assessments connected to the external frontiers; d) monitoring the situation at the borders and helping Member States' authorities to share their information and cooperate; e) coordinating and organizing Member States' joint operation and deploying personnel and equipment to assist national services.³⁸⁷ It must be noticed, though, that Frontex does not perform those tasks on its own but rather assists Member States within their territory and in high seas.

Now that we have presented an overview of the functioning of the agency, we shall discuss the viability of the concepts of demand and supply for the creation of Frontex. In order to tackle this issue,

³⁸⁶ Frontex website, "Foreword", available at: <https://frontex.europa.eu/about-frontex/foreword/>.

³⁸⁷ Ibid., "Origin & Tasks", available at: <https://frontex.europa.eu/about-frontex/origin-tasks/>.

we present some preliminary considerations suggesting that the two structural factors are hardly considerable as precise interpretative categories. This initial part represents the point of departure of our analysis and will help clarifying the methodological choice made in examining documentation at the EU level. Moreover, through such an examination, we will provide evidence that the two factors are so intertwined as to make it impossible to clearly distinguish between demand and supply. Thus, it is claimed that they cannot be utilized to identify exact patterns of integration.

3.3: Part 1: Analyzing structural factors

a) Preliminary considerations

To verify the viability of Genschel and Jachtenfuchs' theory, it is necessary to start with the discussion of its very roots. Thus, we begin by questioning the nature of demand and supply upon which the framework is built, as well as the possibility of concretely individuating the two. Indeed, throughout the two scholars' work, these concepts are often discussed in an abstract way which does not refer to tangible elements. The first difficulty we encountered was therefore that of understanding what the two terms refer to, given their imprecise definition. We solved this problem by choosing to look for those written statements that testify the need or support, by institutional actors, for the creation of Frontex. Accordingly, we decided to search for them at the European level. Overall, the reason why this approach has been adopted is twofold: findings would need to respect both the internal coherence of the theory and the logics of neo-functionalism. Firstly, it is because for the theory to be correct we should observe that the structural factors coincide with the kind of integration eventually achieved. In this case, this means detecting a demand expressed in economies of scale and a supply coming from a non-majoritarian institution. Clearly, this would only be possible once something identifiable as demand and supply had been found, which we have not been able to do. Secondly, for neo-functionalist premises to be respected, we should observe an aggregate demand and supply for integration, rather than one coming from single Member States. Thus, the best institutional location to look for them was among the documentation issued by the Council, the European Council and the Commission. At the time of the creation of Frontex, the three were the most important actors in the third pillar, of which the SFSJ was part. Thus, only by examining the dialogue they set up when discussing Frontex was it possible to detect aggregate structural factors.³⁸⁸ In order to begin this analysis, we shall now proceed to explicate our reasoning, beginning with what should be considered demand and what supply. The latter is theoretically easier to find, since a

³⁸⁸ Recall that before the entry into force of the Lisbon Treaty the SFSJ belonged to the third pillar, thus the Parliament was only entitled to issue opinions regarding legislative proposals.

concrete evidence of the support for integration could be easily found in EU documents. In fact, a black-on-white supply in this sense could be shaped as a formal act from one of the EU institutions: a proposal from the Commission, a regulation by the Council, the conclusions of a European Council's summit and so on. Consequently, we can suppose that we could find explicit traces of the will to support integration within official records, being precise objects. Thus, we decided to concentrate on demand.

The first complications emerge at this stage, in assessing whether the documents we decided to analyze contain elements that can be identified as a demand for integration. Indeed, as we said, the authors' definition of this factor demonstrates to be too vague. Also, it does not provide precise criteria to distinguish between economies of scale and externalities. In fact, it is limited to the general statement indicating demand as "a collective problem to be solved". On one side, externalities "arise when the domestic exercise of core state powers negatively or positively affects actors in other States". Conversely, economies of scale arise when "the need to meet common challenges [...] creates a demand for the consolidation of capabilities at the EU level".³⁸⁹ Here, a general distinction between the two is traced, however it is not clear what empirical phenomena should be identified as demand. Indeed, its definition entails somewhat of an "objective" need for integration and the prospect gain deriving from it. It is not specified though, what such an advantage refers to, or whom to. For instance, it could refer to preferences (whether expressed or not) of European state actors or institutions, as well as broader gains in term of "what is best" for them. Such an approach would require speculating on what Member States or the Union need, rather than looking for expressed requests for integration.³⁹⁰ Also, the "demand" could be referred to the European Union as a whole, which proves to be equally as puzzling. In fact, this would entail a renounce by States to their own good in favor of the general interest. If liberal intergovernmentalism is at least partially correct, it is reasonable to exclude that such dynamics would play out during negotiations within the Council and the European Council.

However, to test the theory it was necessary to seek out structural factors, in spite of their imprecise definition. Thus, we had to interpret the concept of demand in a narrower sense to be able to precisely refer to objects that could be empirically found. Accordingly, it was decided to exclude abstract prospect gains, whose finding would demonstrate subject to discretion and which would not provide any analytical insights whatsoever. Rather, we chose to search for those documents that could testify a concrete request for integration. In order to do so, it is necessary to assume that "demand" does not represent some kind of gain *lato sensu*, but rather an expressed request. This entails a shift from what

³⁸⁹ Genschel, P. and Jachtenfuchs, M., "Beyond Market Regulation. Analysis of the European Integration of Core State Powers", in Genschel and Jachtenfuchs, *Beyond the Regulatory Polity? The European Integration of Core State Powers* (Oxford: Oxford University Press, 2016), pp.12-13.

³⁹⁰ Not to mention all the relevant consideration in terms of legitimacy of such a view, or the paternalistic approach that is implicitly contained in it.

would ideally benefit an actor (regardless of its preferences) to a direct expression of its will. This interpretation also highlights the subjectivity of the demand factor, rather than its objectivity. Consequently, it proves to be intrinsically tied the actor vehiculating it and bringing it to European negotiation tables.

At the same time, finding evidence becomes a matter of searching for those documents in which Member States or European institution expressed their desire for integration. These acts could take the shape of Commission's proposals, Council's communications and so on. Accordingly, our goal was that of assessing whether such manifestations could be found during the negotiation phases that led to creation of Frontex. We thus examined the *travaux préparatoires* issued by the Council, the Commission and the European Council when discussing the possibility to establish an agency for managing external borders. This methodological choice can be summarized as follows: to validate the theory it is necessary to confirm both its internal coherence and its neo-functionalist premises. In the first case, we need to check whether certain demand and supply conditions lead to the predicted forms of integration. In the second one, we must assume that the two can be found directly at the European level, reflecting collective needs and the solutions designed to tackle them. Since the given definition of demand was too abstract to individuate concrete objects, it was necessary to restrict its interpretation and concentrate on expressed requests for integration. Thus, once evidence had been found in the preparatory works, it would be necessary to distinguish between economies of scale/externalities and majoritarian/non-majoritarian institutions to verify the viability of the patterns individuated by the theory.

Despite these considerations, our assumptions were not confirmed, and the analysis stopped at the first stage. In fact, demand and supply proved impossible to separate, which invalidated the assessment of the internal coherence of the theory. We shall hereby briefly present how the interinstitutional dialogue played out, so as to justify our conclusions.³⁹¹ Firstly, the European Council advocated for a better coordination in the field of external borders management, although in very general terms, not referring to either economies of scale or externalities. Then, the Commission interpreted such a need and framed it in a capacity-building shape, proposing the creation of a new agency. Finally, the Council was persuaded by the Commission's vision, despite the initial absence of interest and its main interest being financial burden-sharing. Thus, the call on the side of the European Council was too general to fall within either the category of economies of scale or positive externalities. Rather, it was the Commission that proposed the creation of a new agency considering the request that was put forward.

³⁹¹ Notice that, given the complexity of the theme, the conclusions of the first part of the chapter are hereby presented to make the following discussion easier to understand. Accordingly, each statement made will be justified in a later moment. Also, recall that in 2004 the JHA pillar was not yet communitarized, so the co-decision procedure was not applicable. Thus, the Parliament could not block or amend legislative proposals; and it was rather the Council that adopted legislation in this field. This explains why parliamentary records are substantially absent from this analysis. See Wallace *et al.*, *Policy-making in the European Union*, p.469.

Our claim is that the institution did not merely transpose the needs of the European Council in the legislative process, but it decided upon a concrete solution to the issue. We could not find evidence of a demand framed in terms of economies of scale coming from the Council or the European Council, but only of proposal of capacity-building coming from the Commission. Thus, it is possible to conclude that in this case the Commission played both the role of supplier and demander, and that demand and supply cannot be neatly distinguished one from another. In fact, the two concepts proved to be highly dependent on the fashion they are framed in and the nature of the actor vehiculating them.

As we said, the possibility of demand and supply to be articulated by the same actors had been explicitly foreseen by Genschel and Jachtenfuchs.³⁹² More than just a theoretical complication, we claim that such overlapping hampers the clear distinction between structural factors to the extent of invalidating the theory itself. The reason is that the way in which a given issue is brought to the table is inextricable from the solution proposed. The institution operating this process is invested with a creative power, and consequently enjoys a degree of discretion in choosing between regulation or capacity-building. Accordingly, it cannot be claimed that the integrational outcome depends on structural factors, but rather on the actions of that institution. Thus, when the Commission recognizes the abstract need for a common management of external borders, it does not merely present an objective issue, but it contributes to framing it. Indeed, it puts forward its vision of how the defense of borders should be carried out and proposes its solution for solving the problem. In this case it is the formal supplier of integration that translates a perceived need into a demand in terms of economies of scale. Clearly, it is not that the Commission creates the need for integration. Rather, given a generic mandate, it gives the demand a certain shape and concreteness. Accordingly, we maintain that a clear-cut distinction between demand and supply is impossible. Thus, the two categories cannot be considered analytical tools for interpreting the patterns of integration indicated by Genschel and Jachtenfuchs' theory. Furthermore, a question that remains open is whether the Commission had any interest in proposing the creation of an agency it partially controlled.³⁹³ Such a topic would deserve more attention and examination; however, it is not unreasonable to suppose that integration took this path partially because it favors the Commission.

We shall now continue presenting the complete analysis and discussion of the European preparatory works. The goal of the following section is that of highlighting the role of each institution and their stance towards the creation of Frontex. We start this discussion by keeping in mind that demand and supply are complex to define, and supposing that the two could be hardly separable, given that the main proponents and beneficiaries are public actors. We will then proceed by demonstrating how a

³⁹² Genschel and Jachtenfuchs, "The Integration of Core State Powers", *Beyond the Regulatory Polity*, p.258.

³⁹³ We shall assess this aspect in the second part of the chapter, the one dealing with the indirect control of the Union of core state powers.

general demand for integration was eventually transformed into a chance for capacity-building. Then, light will be shed onto the discrepancy that exists between the mandate provided by the European Council and the Commission's proposal. Eventually, what is left to assess is why the Council adopted the Commission's vision. In fact, as we shall see, the Council initially proved refractory to the idea of creating a new agency. An alternative explanation was thus researched: we assumed that the need for integration within the two Councils was due to the action of single Member States, who lobbied their interests at the communitary level. In order to correctly address this issue, it would be necessary to examine all European Members' internal documents to check where exactly the process began. Given our limitations in terms of linguistic barriers, this dissertation focuses on the Italian case. Thus, we analyzed the documentation issued by the two chambers of the Italian Parliament regarding the institution of Frontex. Eventually, despite these limitations, it was possible to assess that a strong initiative had been undergone by the Italian Government to establish a common framework on external borders.

b) Documentation at the European level

i) The creative role of the Commission

As outlined above, we begin our analysis by attempting to identify demand and supply within the *travaux préparatoires* that paved the way to the regulation establishing Frontex.³⁹⁴ This dissertation focuses on the records issued between September 11th, 2001 and the end of October 2004, year in which the institution's regulation was adopted by the Council. The reason for this choice lies in the fact that several scholars put a strong emphasis on the fight against terrorism as one of the main causes for the creation of the agency.³⁹⁵ Eventually, it has been observed that the motivations tied to terrorism were actually less relevant (or at least, less mentioned) than other factors. In fact, the most frequently cited reasons were the completion of the Space of Freedom, Security and Justice (SFSJ), irregular migration and fight against criminal organizations. In order to provide a better understanding of the dialogue between European institutions, we chose to proceed in chronological order, presenting the acts according to their publication. The aim was that of extrapolating the elements that, being perceived as issues to be tackled by European institutions and Member States, provided legitimacy for the creation of Frontex. At the same time, this

³⁹⁴ Reg. (EC) 2007/2004.

³⁹⁵ See, for instance, Léonard, S., "EU Border Security and Migration into the European Union: FRONTEX and Securitisation through Practices", *European Security* 19, no. 2 (2010), p. 231; Neal, A. W., "Securitization and Risk at the EU Border: The Origins of FRONTEX", *JCMS: Journal of Common Market Studies* 47, n. 2 (2009), p.334; and Horii, S. "The effect of Frontex's risk analysis on the European border controls", *European Politics and Society* 17, n.2 (2016), p.245.

research highlights how labelling an institution as only demander or supplier is substantially discretionary. In fact, the Commission and the European Council behaved in both ways.

The discussions regarding external border's protection date back to the negotiation of the Schengen Agreement,³⁹⁶ however the idea of the creating a common agency for this purpose was put forward only several years later. While examining the documents, it was discovered that such initiative had been laid down before 2001, particularly during the European Council of Tampere in 1999. The summit's conclusions had a particular importance in providing legitimacy for the birth of Frontex; and they are frequently quoted as a basis in most of them. In fact, among all the documents taken in exam, European Council summits seem to represent highly significative occasions. The reason is that such meetings, indicating the political orientation of the Union, highlight what topics must be addressed by the Council and the Commission. Thus, they provide legitimacy to future proposals and discussion on the objectives thereby indicated. This, in turn, explains why they are often referred to as a basis for collective decisions in the acts we have analyzed. In the case of Tampere, emphasis was put on the shared management of external borders as a step towards the completion of the SFSJ, launched by the Amsterdam Treaty.³⁹⁷ The presidency conclusions remarked the interconnection between aspects that had so far been kept separate and that, in the words of the president, required the definition of a common policy: the management of migrants' fluxes, a shared framework on asylum and partnerships with third Countries to control migration.³⁹⁸ Moreover, the document asked for a closer cooperation, particularly in terms of technical assistance between Member States' services charged with the control of external borders.³⁹⁹ The conclusions also highlighted the importance of a correct and uniform application of the Schengen *acquis*, together with the surveillance of the new frontiers.⁴⁰⁰

As can be understood, this first record can be interpreted as representing both demand and supply. It embodies demand since the European Council is charged with the representation and aggregation of Member States' preferences, thus the perceived demand for integration. Conversely, it also embodies supply, because thanks to its statements it is conferring legitimacy to future policy proposals by the Commission.⁴⁰¹ Nevertheless, what is most important here is that the document does not provide further clarifications on how to reach the stated goals. In fact, it simply recognized the desirability of a common framework on external borders but did not provide further suggestions, data or motivations. Thus,

³⁹⁶ Adam, R. and Tizzano, A., *Manuale Di Diritto Dell'unione Europea*, 2nd ed. (Torino: G. Giappichelli, 2017), p.539

³⁹⁷ *Ibid.*, p.532.

³⁹⁸ European Council of Tampere, *Presidency Conclusions*, pp. 3-4.

³⁹⁹ *Ibid.*, p.5.

⁴⁰⁰ *Ibid.*, p. 5-7.

⁴⁰¹ Indeed, the Commission acted quickly, and already on October 16th, 2001, it proposed the adoption of a common project of administrative cooperation on external borders, the so-called ARGO programme, put forward in COM (2001) 567 final -2001/0230(CNS). Moreover, the institution started discussing the possibility of creating a new agency in the same month. See COM (2001) 628 final, p.8.

nothing hinted at the existence of externalities or economies of scale that could favor more regulation or capacity-building measures.⁴⁰² It was eventually the proposal of the Commission that interpreted such call and provided its supply according to economies of scale. Within the conclusions, it is possible to grasp those elements which constitute Frontex's legitimacy: tackling clandestine migration, fighting against organized transnational crime and preventing traffic in human beings.

The discussion on the control of external borders stationed for the following two years, until the terrorist attacks of September 11th, 2001. These events, due to their challenge to global security, provided a new impulse to the development of cooperation in this policy sector. Indeed, from such a date it is possible to observe the introduction of the theme of terrorism into the European institutional debate. Beginning with the adoption of a framework decision by the Council regarding the fight against terrorism, this theme becomes strictly related to that of the controls at the external borders.⁴⁰³ The new menace offered an incentive for pooling European resources: in Commission's communication on the progress of the SFSJ of October 30th, 2001, the institution claimed the existence of a relationship between security and immigration.⁴⁰⁴ Thus, the communication called for the creation a common body to carry out controls at the external borders and to address the issue of terrorist attacks after 9/11.⁴⁰⁵ Here, the Commission exploited the general phrasing of Tampere's conclusions to propose the institution of a new body, whose features remained unexplained.⁴⁰⁶ Together with this offer, the institution also put forward a number of solutions to tackle related problems, ranging from a harmonized asylum system, to forms of cooperation against drug trafficking.⁴⁰⁷ Overall, the most important aspect of this document is that it demonstrates how a general demand for more cooperation was tackled by a precise offer for capacity-building. In fact, the European Council did not specify what steps it was necessary to implement, nor did it express its request in terms of economies of scale or externalities. Accordingly, it cannot be claimed that there existed objective structural conditions pushing for the creation of an agency, thus for a supply framed as capacity-building. Rather it was the Commission that exploited its margin of discretion as a policy initiator and chose to propose the institution of Frontex. The importance of this dynamic cannot be underestimated, since it is capable of undermining the foundations of Genschel and Jachtenfuchs' framework.

⁴⁰² Although the text mentions "solidary" twice, when referring to the asylum system. See *Presidency Conclusions*, pp.2,4.

⁴⁰³ See the Commission's proposal, COM (2001) 521 final -2001/0217(CNS), p.1.

⁴⁰⁴ See COM (2001) 628 final, p.5. It is worth noticing how the establishment of this connection became the object of a literature on securitization and the exploitation of danger situations to impose extraordinary policy measures. See footnote 397.

⁴⁰⁵ *Ibid.*, p.8.

⁴⁰⁶ Indeed, Tampere's summit simply called for a "closer cooperation and technical assistance between Member States' services in charge of the control on external frontiers". See the *Presidency Conclusions*, p. 5.

⁴⁰⁷ COM (2001) 628 final, pp. 7-8, 10-11.

The Commission had a further chance of strengthening its position on the topic through its communication on the theme of illegal immigration, issued on November 15th, 2001. In the document, the institution calls for a more uniform application of Schengen' acquis,⁴⁰⁸ which is complemented by the call for the creation of common corps for border management. Here, explicit reference is made to the desirability of the institution, in the long run, of a European Border Guard.⁴⁰⁹ It is also worth noticing that in such record the Commission acknowledges the "strong political support" to this proposal.⁴¹⁰ However, it is not clear what this means, nor where this support comes from. Indeed, during this period no working documents or communications were issued from the Council or the European Council. It is reasonable to suppose, however, that informal contacts had taken place between one of the two and the Commission. In any case, it has not been possible to find any official record that reported information in this regard but it is clear that some sort of communication occurred during this period. The only conclusion that can be drawn from this fact is that institutions do communicate among them in many ways, not only through official documentation. This constitutes a serious obstacle to the assessment of demand and supply, since as was stated in the introduction it is necessary to register clear evidence of the two factors to be able to evaluate them.

The two discussed documents prepared the terrain for the European Council in Laeken, which followed closely on December 14th and 15th. Presidency conclusions did not add much to the ongoing discussion, but rather reiterated the general phrasing already utilized in Tampere about the need to establish a "mechanism or common service to control external borders".⁴¹¹ Once again, this "green light" on the side of the European Council constituted the basis for several propositions and communications by the Commission for a new common institution. The most important document that followed after Laeken was issued, this time, by the Council. In fact, adopting the proposition made by the Commission on October 16th, 2001, the Council instituted programme ARGO, finalized at the administrative cooperation on external borders, visas, asylum and immigration.⁴¹² In order to carry out such a task, ARGO established a mechanism for burden-sharing that was framed in what we could define economies of scale. In fact, it aimed at helping Member States that were particularly affected by migratory fluxes due to their geographical position.⁴¹³ The programme, despite not discussing the need of a common agency, highlighted that the main interest of the Council regarded the financial aspects of cooperation.

⁴⁰⁸ See COM (2001) 672 final, p.10-11.

⁴⁰⁹ *Ibid.*, p.18-19.

⁴¹⁰ *Ibid.*, p.19.

⁴¹¹ European Council of Laeken, *Presidency Conclusions*, p.44.

⁴¹² Clearly, ARGO's establishment derived from a Commission's proposal of October 16th, 2001. See COM (2001) 567 final - 2001/0230(CNS).

⁴¹³ See Council decision (CE) 2002/463 (13/06/2002).

Some considerations can be drawn in this regard. On the one side we observe that the European Council's position is imprecise and leaves a large maneuver space to the Commission. This, in turn, is oriented towards a deeper form of integration framed as capacity-building. Conversely, the Council seems more interested in financial aspects than in cooperation mechanisms, as testified by programme ARGO. Each institution had a different stance toward the issue of borders management, and particularly the Council and the Commission seemed to be discussing two different topics: operational cooperation and financial assistance. Considering that the agency has eventually been built, we could individuate a general call for integration coming from the European Council, labelling it "demand". In the same way, the Commission's proposal might be labelled "supply". Also, the fact that Frontex has eventually been created testifies that the Commission and Council's positions were not as distant as these documents could make believe. However, we should keep two considerations in mind. The first is the discussed creative role of the Commission in interpreting the requests of the European Council. The second is that we can only discuss structural factors in a general and non-analytic fashion. In fact, there is no clear request for integration nor there is neat distinction between suppliers and demanders. Thus, we claim that somewhat of a general need for integration does exist; however, since such request does not find a concrete transposition, it does not make sense to use structural factors as tools for describing integration. The only way to do so would be that of emptying the two words of their meaning and just use them to express vague ideas. In practice, demand and supply do not correspond to anything that it was possible to find within official documents.

ii) The response of the Council

At this point, we need more data to corroborate our claim that structural factors do not represent a viable instrument upon which to base a sound theory. Moreover, other questions arise from previous findings. It is not clear, indeed, where the calls for a deeper integration in the field of external borders sprung from. A second hypothesis could be that a strong lobbying on the side of Member States could have pushed for the institution of the agency. In order to tackle this question and support the first supposition, this case study proceeds to analyze the documents that followed, until the adoption of Frontex's regulation. The present section presents the most relevant developments until the issuing of reg. 2007/2004, which comprise both national and European initiatives. Moreover, some elements that suggest the plausibility of our second hypothesis are presented, particularly in relation to the continuous calls for financial solidarity.

The first document that followed ARGO's regulation was a document from the Council's Strategic Committee on Immigration, Frontiers and Asylum of March the 1st, 2002. Here, the institution

recognized the need for a “common network of existing national training facilities” to provide domestic border guard teams with a uniform operational and legal training.⁴¹⁴ The record focused mostly on coordination and cooperation of national bodies, rather than on the institution of a new European agency.⁴¹⁵ Also, the phrasing utilized is opaque and it is hardly understandable what the word “network” precisely refers to. The document, overall, poses more question than gives answers, when discussing the measures to implement regarding borders control.

Following this partial opening on the side of the Council, the Commission published two important papers that aimed at a marked supranationalization. The first, issued on May 7th, constitutes a relevant step towards the institution of Frontex since it introduced the concept of “integrated border management”.⁴¹⁶ Although the term’s meaning was not specified,⁴¹⁷ the document contextualizes the importance of a common handling of external borders in relation to security, terrorism and as a potential political factor.⁴¹⁸ This latter point, particularly, shows the vision of the Commission about this policy sector as an element upon which to build a European identity. The institution also expressed its support for a full integration of the third pillar within the scope of the community, in the “common interest” of all Member States.⁴¹⁹ Moreover, emphasis was put on the financial dimension of the process, to help those Countries that are under stress because of their geolocation.⁴²⁰ On the other hand, the second paper issued on May 30th, discussed the progresses made within the creation of the SFSJ. It is possible to observe how the Commission utilizes these periodical reports to the Council and Parliament to frame common needs according to its views. In fact, the objective of the document was that of highlighting not only the steps undergone until that moment, but also critical issues it was necessary to tackle.⁴²¹ Thus, it provided an occasion for anticipating future proposals to the Council. Through these two documents, the Commission anticipated the decision-making in the Council and took advantage of the conclusions reached in Tampere and Laeken. By bringing the matter to the attention of Member States, it did not merely follow up the European Council’s orientation, but it framed the demand for integration according

⁴¹⁴ Council of the European Union, “Meeting of the Strategic Committee on Immigration, Frontiers and Asylum with the participation of Border-Police Chiefs”, *Note of the Presidency to the Strategic Committee on Immigration, Frontiers and Asylum (Iceland and Norway Mixed Committee)*, doc. n. ST 6760 2002 INIT (01/03/2002), p.2.

⁴¹⁵ *Ibid.*, p.2-3.

⁴¹⁶ See COM (2002) 233 final, p.12.

⁴¹⁷ Mungjanu, R., “Frontex: Towards a Common Policy on External Border Control”, *European Journal of Migration and Law* 15, n. 4 (2013), p.365.

⁴¹⁸ COM (2002) 233 final, pp.4-6. The document identifies the integrated management of borders as a policy capable of delivering reciprocal trust, completing the creation of the SFSJ and demonstrate solidarity, particularly regarding the operational and financial aspects.

⁴¹⁹ *Ibid.*, p.4.

⁴²⁰ *Ibid.*, p. 21.

⁴²¹ COM (2002) 261 final, p.4.

to economies of scale. Indeed, in the end of the document, it referred to the possibility of ongoing initiatives to eventually lead to a full-fledged European Border Guard.⁴²²

After the expression of these positions, the Council adopted two acts that testimony the progressive influence of the Commission's vision onto its own perception of the best way to manage external borders. These documents, issued both on June 14th, are dedicated to the plan for a common management of frontiers and to the global fight on illegal immigration. On the one hand, the first paper deals primarily with the harmonization of provisions on asylum, visas and monitoring at external borders. On the other hand, the second discusses specific aspects of immigration and the relationship with Europol. What is most important is the fact that both records acknowledge the position of the Commission regarding the creation of a new European body, utilizing the same phrasing as in Laeken's presidential conclusions.⁴²³ Moreover, they both recall the importance of three initiatives that proved highly influential for the eventual creation of Frontex.⁴²⁴ These initiatives, systematized in another Council document on October 10th, aimed at examining "the conditions under which a mechanism or common services to control external borders could be created".⁴²⁵ Such projects are: the Commission's Communication on an integrated management of the external borders of the European Union;⁴²⁶ the feasibility study presented by the Italian government on the set up of a European Border Police; and the Workshop on Police and Border Security presented by Austria, Belgium and Finland.⁴²⁷ Overall, the objectives thereby stated defined the Comprehensive Plan for the Management of External Borders. The Plan was welcomed by the Seville European Council and adopted by the Justice and Home Affairs of June 13th, 2002.⁴²⁸

The feasibility study and the workshop, being national initiatives, suggest that a relevant influence could have been exercised by Member States in determining the European agenda. Being this the focus of the next section, we shall now continue to examine how the dialogue played out at the EU level. As we have seen, the Council's position has proven receptive to the Commission's proposals, recognizing the desirability of integration framed in capacity-building terms. In that moment, the process was

⁴²² COM (2002) 233 final, p.22.

⁴²³ Council of the European Union, "Plan for the management of the external borders of the Member States of the European Union", *Note of the Presidency to the General Affairs Council/European Council*, doc. n. ST 10019 2002 INIT (14/06/2002), p.3; Council of the European Union, "Proposal for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union", *Official Journal of the European Communities* 45, no. C142 (2002), p.25.

⁴²⁴ Council of the EU, "Plan for the management of External Borders", pp.3-4; European Communities, "Proposal for a comprehensive plan", p.35.

⁴²⁵ Council of the European Union, "Status report on the follow-up on the Plan for the management of the external borders of the Member States of the European Union and the Comprehensive plan to combat illegal immigration", *Note of the Presidency to the Council (Justice, Home Affairs and Civil Protection)*, doc. n. ST 12931 2002 INIT (10/10/2002), p.2.

⁴²⁶ The already mentioned COM (2002) 233 final.

⁴²⁷ These two latter documents presented studies aimed at verifying the viability of different models of common management of external borders. Being national initiatives, their in-depth discussion is presented in the next section of the chapter.

⁴²⁸ Council of the EU, "Status report on the follow-up on the Plan", p.3

furtherly stimulated by the Seville European Council held on June 22nd and 23rd. This time the conclusions explicitly recognized the contribution of the three abovementioned initiatives, together with the possibility of creating a European Border Guard.⁴²⁹ Furthermore, the institution asked for the creation of a common body of external frontiers' experts composed of the chiefs of Member States' border guards. Such a body, to be established in the long run, was to be charged with the coordination of the objectives foreseen by the Comprehensive Plan.⁴³⁰

Following, the Council proved malleable to the orientations expressed in Seville, issuing two papers giving implementation to the measures thereby decided. The first one placed emphasis on the operational developments proposed at the summit.⁴³¹ Conversely, the second one encouraged the swift implementation of all the measures agreed upon in the Comprehensive Plan.⁴³² Given the developments that followed these papers, we can conclude that their effect was that of endorsing the Commission's proposal for the creation of a new agency. Indeed, between December 2002 and June 2003, the latter started putting forward concrete solutions to define Frontex's tasks and role. In December 3rd's communication, extensive attention was paid to fiscal matters and burden-sharing solutions. The aim was that of supporting coastal States dealing with intense migratory pressure, transnational crime and asylum procedures.⁴³³ Here, recalling a concept important to the Council, the Commission discussed solidarity principles, particularly on the institution of a common fund for joint operations in the Mediterranean and the purchase of technical equipment.⁴³⁴ Later in June's Communication, the Commission put together all of its proposals to discuss them at the incoming Thessaloniki European Council's summit on June 20th, 2003. The institution's assertiveness was more marked here, having received the support of the Council.⁴³⁵ Moreover, these records constituted the last steps before launching the final proposal to establish Frontex.

We can now make some considerations regarding the burden-sharing measures contained in these last documents. Given that solidarity had been advocated for in multiple occasions, it could be possible to talk about a demand coming from the Council and a supply coming from the Commission. In fact, we can observe the black-on-white request for such measures, their reception at the supranational stage and

⁴²⁹ European Council of Seville, *Presidency Conclusions*, p.9.

⁴³⁰ *Ibid.*, pp.7-8.

⁴³¹ Council of the EU, "Status report on the follow-up on the Plan", pp.2-3.

⁴³² Council of the European Union, "Progress report on the implementation of the Plan for the management of the external borders of the Member States of the European Union and the comprehensive plan to combat illegal immigration", *Note of the Presidency to the Council*, doc. n. ST 14708 2002 INIT (26/11/2002), p.10.

⁴³³ COM (2002) 703 final, pp. 41-43.

⁴³⁴ *Ibid.* p.42.

⁴³⁵ COM (2003) 323 final. This more marked assertiveness can be grasped, for instance, through sentences such as the following: "due to the intensification of illegal immigration by sea, a political consciousness aimed tackling the necessity of an efficient control at external borders has emerged". See p.8.

finally their formalization in a proposal. However, these elements represent marginal aspects in the context of borders management, compared to the organization of joint operations, coordination of national forces and, most of all, development of risk analysis.⁴³⁶ At the same time, these measures entail the spending of relevant amounts of money.⁴³⁷ Thus, it is reasonable to doubt that that Member States that are not exposed to intense immigration pressure would propose redistributive measures on their own initiative.⁴³⁸ Also, as we shall discuss in the next section, it has been observed how financial and operational solidarity had been strongly advocated for by the Italian government. In fact, Italy acted both through EU-unrelated initiatives and during the Italian presidency of the Council.⁴³⁹ Several documents issued by the two branches of the Italian Parliament testify the interest that the Country had in favoring integration in this sector.

Between June 2002, when the JHA Council adopted the Comprehensive plan, and June 2003's Communication, the elements of the interinstitutional dialogue were substantially set.⁴⁴⁰ Indeed, in that span of time the major points were agreed upon and only the details were left to be settled. The path clearly aimed at the establishment of a new European body. Two documents issued between June 2003 and the Commission's Frontex proposal, in November of the same year, reflected this situation.⁴⁴¹ Moreover, the European Council summit held in Thessaloniki enshrined the positions of the Council and the Commission. In the presidency's conclusions, the control of migratory fluxes was placed on top of the agenda, recalling the "common interest of all Member States" in defining a more structured framework.⁴⁴² Also, the conclusions expressed support for the creation of an operational branch of the

⁴³⁶ The importance of risk analysis as a fundamental component of the agency's influence on the use of force will be dealt with in the second part of this chapter. As will be discussed, the identification of "risks" and "vulnerabilities" can extend the scope of Frontex's influence on Member States' conduct.

⁴³⁷ Regine, "Harmonization by Risk Analysis?", p. 698.

⁴³⁸ Majone, G., *Dilemmas of European Integration. The Ambiguities and Pitfall of Integration by Stealth* (Oxford: Oxford University Press, 2010), p.30.

⁴³⁹ Italy held the presidency of the Council during the second semester of 2003, from July the 1st to December the 31st. See Council of the European Union, "Programme of the Italian Presidency in the fields of Immigration, Border Control and Asylum", *Note of the Presidency to the Strategic Committee on Immigration, Frontiers and Asylum*, doc. n. ST 11064 2003 INIT (02/07/2003), p. 1.

⁴⁴⁰ Here, we refer to the content of the documents exchanged between the two main actors, the Council and the Commission.

Particularly, at that point in time the Commission had put forward its vision regarding what tasks a new body would need to deal with (border patrolling, asylum requests, return of illegal migrants) and had incorporated the solidarity principle advocated for by the Council.

⁴⁴¹ Council of the European Union, "Road Map for the follow-up to the conclusions of the European Council in Seville. Combating illegal immigration, integrated management of external borders, integration of immigration policy into the Union's relations with third countries and speeding up of legislative work in framing a common policy on asylum and immigration", *Note of the Presidency to the Permanent Representatives Committee*, doc. n. ST 6023 2003 REV 6 (13/06/2003); Council of the European Union, "Draft Council conclusions on the development of a common policy on illegal immigration, external borders, the return of illegal migrants and cooperation with third countries", *Note of the Presidency to the General Affairs and External Relations Council*, doc. n. ST 10525 2003 INIT (12/06/2003). In fact, the former document simply discusses the drafting of a Road map to test out joint operations, whereas the latter confirms the substantial convergence of the Council and Commission's vision, in formalizing the need for a more "structured cooperation" (p.4).

⁴⁴² European Council of Thessaloniki, *Presidency Conclusions*, p.2.

Strategic Committee on Immigration, Frontiers and Asylum (SCIFA), established on March 17th, 1999.⁴⁴³ This branch was to be eventually incorporated or substituted by Frontex, once it had been established.⁴⁴⁴ Finally, the European Council expressed its concern on the desirability of forms of solidarity, particularly relating to operational activities.⁴⁴⁵

This was the first time that the European Council expressed its political support for integration in capacity-building terms. In doing so, it formally legitimized the position that the Commission had been advocating since November 2001. Moreover, we can observe how solidarity was advocated for many times, by all the three institutions. In fact, the Council's ARGO programme, Commission's communications and this last document from the European Council, all aim at making each Member State aware of the necessity to share financial and operational burdens.⁴⁴⁶ Thus, it is possible that this reiteration was due to some Member State being contrary to the idea of contributing to the control of external borders, given the amount of money and the personnel it was necessary to pool. We shall provide concrete evidence in this regard when examining what reservation had been invoked to the Commission's Frontex proposal, and by which States. Conversely, given that the agency had been eventually created, some Member had probably successfully lobbied their interests to the Council to convince reticent Countries.⁴⁴⁷

Two acts issued in 2003 testify the plausibility of these assumptions: the Greek and Italian Council Presidency programs on Immigration, Asylum and Border Control. In fact, the two considered immigration and controls at the external borders as a top priority, and had relevant interests in common.⁴⁴⁸ The first document focused several times on the topic of burden-sharing measures, in order to develop a just and equitable framework.⁴⁴⁹ More importantly, it expressed the will of the Greek government to expand the functioning of the SCIFA and provide it with an operational arm, potentially through the creation of a new European body.⁴⁵⁰ The presidency also declared its support for several

⁴⁴³ The Committee, entered into force with the Amsterdam Treaty, is composed of Member States' high officials and is charged with the elaboration of the strategy on immigration, frontiers and asylum. The documentation issued by the organ contribute to preparing the meetings of the Council on those matters, contributing to the completion of the SFSJ. See Council of the European Union, "Strategic Committee on Immigration, Frontiers and Asylum", *Note of the Presidency to the Permanent Representatives Committee*, doc. n. ST 7440 2004 INIT (16/03/2004), p.1.

⁴⁴⁴ European Council of Thessaloniki, *Presidency Conclusions*, p.3.

⁴⁴⁵ *Ibid.*, p.4.

⁴⁴⁶ Regarding the Commission's calls for improved solidarity, recall for instance communication COM (2002) 703 final, p.3.

⁴⁴⁷ As stated above, proving this hypothesis right would require relevant time and linguistic resources to analyze each Country's parliamentary and governmental records. The aim of this dissertation is not that of revealing the internal dynamics of the Council, however the more documents at the European level were examined, the more this hypothesis found elements confirming its reasonability.

⁴⁴⁸ Council of the European Union, "Programme of the Greek Presidency in the fields of Immigration, Border Control and Asylum", *Note of the Presidency to the Strategic Committee on Immigration, Frontiers and Asylum*, doc. n. ST 5672 2003 INIT (24/01/2003), p.7; Council of the European Union, "Programme of the Italian Presidency", p. 4.

⁴⁴⁹ Council of the EU, "Programme of the Greek Presidency", p. 10.

⁴⁵⁰ *Ibid.*, p.8.

supranational measures, particularly regarding monitoring and risk analysis.⁴⁵¹ Conversely, the Italian presidency fully endorsed the Greek government's position and provided further support for the introduction of forms of solidarity.⁴⁵² Also, it did not exclude the possibility to introduce a new common body to be charged with the control of external borders.⁴⁵³ As can be seen, the objectives stated in the two declarations reflect two aspects. On the one side, we can observe how the Council's position progressively aligned to that of the Commission. On the other, we registered that the two States had the power to draft the Council's agenda and an interest in pushing for the establishment of a new body.⁴⁵⁴

iii) The Commission's proposal

We shall now present and discuss the Commission's formal proposal for the institution of Frontex, presented to the Council at the end of 2003. Following, we shall also take in consideration the reservations invoked to the text and the amendments that eventually modified its content. This last section aims at highlighting the heterogeneity of interests within the Council, to support the hypothesis of strong national lobbying for the creation of Frontex.

Frontex's regulation was transmitted to the Council on November 11th, 2003 and was eventually adopted by the latter on October 26th, 2004. The proposal, recalling the words of the Thessaloniki summit, claimed that the creation of a new body would "inevitably" produce a gain for all European Member States.⁴⁵⁵ It also evoked what stated by the Greek presidency, who lamented the absence of supranational mechanisms on border controls.⁴⁵⁶ Once again, the Commission reiterated its support for increased solidarity.⁴⁵⁷ However, the discussion phase that took place within the Council after the proposal showed that not every Member State had the same expectations regarding the agency. Particularly, this concerned burden-sharing measures and procedural rules. It is interesting to notice that most of the amendments proposed to the regulation were put forward by France, the Netherlands, Austria or Sweden, who were not subject to intense migratory fluxes. It is reasonable to assume that for these Countries the creation of the agency did not constitute a top priority in the agenda, since they did not need massive community support to control their borders.

⁴⁵¹ *Ibid.*, pp.7-8.

⁴⁵² Council of the EU, "Programme of the Italian Presidency", p.6.

⁴⁵³ *Ibid.*, p.7.

⁴⁵⁴ Kenealy, D., Peterson, J. and Corbett, R., *The European Union: How Does It Work?*, 5th ed. (Oxford: Oxford University Press, 2018), p.58.

⁴⁵⁵ See COM (2003) 687 final -2003/0273 (CNS), p.3.

⁴⁵⁶ *Ibid.*, p.2.

⁴⁵⁷ *Ibid.*, p.6.

Accordingly, although the Council commonly declared to welcome the proposal,⁴⁵⁸ several parliamentary and scrutiny reservations were applied during the discussions on the text. The most general ones regarded the participation of the UK and Ireland to the Management Board: the two Member States, although not being parties to the Schengen Agreement, expressed the will to send their representatives to the board. This, in turn, provoked the reactions of Sweden, Portugal and the Netherlands, who opposed the two States' participation.⁴⁵⁹ More relevantly, France and the Netherlands invoked parliamentary reservation on the whole act, which were kept for several months. This indecision relevantly delayed the adoption of the act; together with Norway and Iceland's scrutiny reservations.⁴⁶⁰ Moreover, Sweden, France, the Netherlands and Austria contested the exchange of sensitive data with Europol and with third countries that had established forms of cooperation with the Union in the fields of border control and return of illegal migrants.⁴⁶¹ Overall, the themes that proved most complicated to solve entailed distributive measures. In fact, on the one hand, Germany, France, Greece, Portugal and the Netherlands contested the usage of common funds to carry out return operations.⁴⁶² Such fund were indeed theoretically dedicated to support joint operations and equipment purchase. On the other hand, France, Sweden and Austria claimed to be free of carrying out operations on their own and with their own standards and procedures, when not acting in coordination with the agency.⁴⁶³ Finally, other reservations were put forwards by Spain, Portugal and France about the decision-making procedures of the agency.⁴⁶⁴

⁴⁵⁸ Council of the European Union, "Draft Council Conclusions on the main elements of the Commission proposal for a Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders", *Note of the Presidency to the Strategic Committee on Immigration, Frontiers and Asylum*, doc. n. ST 15051 2003 INIT (19/11/2003), p.2.

⁴⁵⁹ Council of the European Union, "Draft Council Conclusions on the main elements of the Commission proposal for a Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union", *Note of the Presidency to the Mixed Committee at Senior Officials level, Mixed Committee at Ministerial level and Council*, doc. n. ST 15174 2003 INIT (24/11/2003), p.5.

⁴⁶⁰ Council of the European Union, "Proposal for a Council Regulation Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union", *Outcome of Proceedings of the Working Party on Frontiers and Mixed Committee*, doc. n. ST 6226 2004 INIT (12/02/2004), p. 2. Here, it is also worth remembering how Norway and Iceland were not part of the European Union but were parties to the Schengen zone. Consequently, their status and the degree of their participation to Frontex's decision-making and operations had to be expressly clarified.

⁴⁶¹ *Ibid.*, p.3.

⁴⁶² Council of the EU, "Proposals for a Council Regulation", p. 14.

⁴⁶³ Council of the European Union, "Draft Council Conclusions on the main elements of the Commission proposal for a Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union", *Note of the Presidency to the Mixed Committee at Senior Officials level*, doc. n. ST 7428 2004 INIT (16/03/2004), p.4. It shall be noticed that Member States are fully entitled to adopt all the necessary measure in order to ensure internal security, as provided for by art. 72 TFEU. However, given the shared competence of the EU in the field of cooperation on external borders, Member States are only allowed to develop their action when the in the legal vacuums left by the Union, and anyway in accordance to the general dispositions of European law.

⁴⁶⁴ Council of the European Union, "Draft Council Conclusions on the main elements of the Commission proposal for a Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union", *Note of the Presidency to the Mixed Committee at Ministerial Level*, doc. n. ST 7596 2004 INIT (23/03/2004), p.16. Particularly, these countries voted against the usage of the unanimity rule when request by a Member State. Normally, however, decisions are taken by an absolute majority of the participants.

What do all these reservations reveal about the will of Member States within the Council? To begin with, the discussion of the legislative text lasted for less than a year, overall. Such a time span is not long, on average, for the adoption of an act; particularly when it involves the establishment of a new European body. It shall be considered, though, that in 2004 the EU was still composed of only 15 Member States, since the eastern enlargement hadn't taken place yet. Also, given the belonging of the cooperation on external frontiers to the third pillar, the Parliament was merely involved in providing opinions on adopted legislation. Thus, its opposition would not have delayed the adoption of the regulation.⁴⁶⁵ However, despite a more restricted and homogeneous composition of the Council,⁴⁶⁶ some relevant reservations were invoked, particularly by France and the Netherlands. Their presence suggests that despite the formal support to integration by the Council, some Countries were still reluctant to give their green light to the creation of Frontex. Particularly, as we saw, the most relevant objections entailed measures of burden-sharing, both financial and operational. Thus, the need for integration was not uniformly perceived, let alone expressed. This confirms the suppositions we made above regarding the absence of an objective aggregate "demand" coming from the Council. In fact, on the one side it was observed how the Commission framed both the problem and its solution; while on the other side we detected a heterogeneous response by the Council,⁴⁶⁷ mainly interested in discussing financial assistance. This discrepancy within the institution led us to examine the specific documentation of the Italian Parliament, which is the object of the next section.

Finally, it shall be noticed that after the discussion of the Commission's proposal, no other relevant documents were issued. Indeed, after November 2003 the Council produced only two other papers on the topic. The first one expressed its desire for Frontex's decisional structure to be as intergovernmental as possible,⁴⁶⁸ whereas the second one discussed a proposal of reform of programme

⁴⁶⁵ Please notice that the Parliament did, together with the European Economic and Social Committee, express its opinion regarding the institution of Frontex. Particularly the Parliament criticized the fragmentation observed within the Council at this regard, as well as lamenting the lack of supranational decision-making of the agency, which instead presented strong intergovernmental features. See European Parliament, "Resolution on the progress made in 2003 in creating an area of freedom, security and justice (AFSJ) (Articles 2 and 39 of the EU Treaty)", *Official Journal of the European Union* 47, no. CE 102 (2004), pp. 820-821. Thus, the Parliament confirmed its political support for the establishment of Frontex, which was confirmed also by the EESC. See European Economic and Social Committee, "Opinion of the European Economic and Social Committee on the 'Proposal for a Council decision amending Decision No 2002/463/EC adopting an action programme for administrative cooperation in the fields of external borders, visas, asylum and immigration (ARGO programme)", *Official Journal of the European Union* 48, no. C 120 (2005), pp. 76-77.

⁴⁶⁶ Although, even after the eastern enlargement, conditions within the Council seem to be similar to the period before 2005, in terms legislative output. See Kenealy *et.al.*, *The European Union. How does it work?*, p. 94.

⁴⁶⁷ Which is, clearly, a physiologic feature of the functioning of the Council.

⁴⁶⁸ Justice and Home Affairs Council, *2548th Council Meeting of 27th and 28th November 2003*, doc. no 14995/03 (Presse 334), pp.9-11.

ARGO. This reform aimed at a better allocation of fiscal resources in the field of administrative cooperation on external borders.⁴⁶⁹

iv) Conclusions of the section on EU documents

Before engaging in the examination of the national documentation, it can be useful to draw some conclusions regarding this first part. As we saw, taking advantage of the legitimation provided by the European Council, the Commission has been able to propose the institution of a new agency. It framed the mandate, calling for improved cooperation, as a demand in terms of economies of scale and a supply in terms of capacity-building. The institution did so by emphasizing the situation of those Member States that were more exposed to migratory fluxes, which required financial and operational solidarity to safeguard the whole Schengen area. Accordingly, the Commission did not behave in a receptive way, simply translating the will of the European Council into a policy proposal, rather it acted in a creative way. This dynamic collides with Genschel and Jachtenfuchs' understanding of the role of institutions: in fact, it is not possible to precisely individuate demanders and suppliers. On the one side, the European Council cannot be considered the demander: it did not formally request the institution of an agency, nor did it present its needs in a precise enough fashion for us to label them "economies of scale". Equally, neither the Council could be considered this way: it proved mostly interested in marginal elements of borders management (namely financial and operational solidarity); and its preferences were not homogeneous, as the numerous amendments and reservations invoked on the draft regulation demonstrate. On the other hand, the Commission could be considered both demander and supplier. However, as we observed, the only way to analytically identify one element as belonging to one or the other category, is that of finding concrete evidence of requests and supplies for integration. This proved complicated from the beginning, given the imprecise way in which the two are defined. Particularly, the demand seems to refer to a general idea of "what would be best for the EU", rather than to a concrete request for integration. Anyway, in order to be valid and be utilized to describe the patterns of integration, the two should be separable, i.e. come from different institutions. The fact that demand and supply have not been empirically found as separate entities, suggests that the two categories do not represent but abstractions. Thus, we claim that they should not be utilized as instruments to rationalize the process of European integration.

⁴⁶⁹ Council of the European Union, "Decision amending Decision 2002/463/EC adopting an action programme for administrative cooperation in the fields of external borders, visas, asylum and immigration (ARGO programme)", *Legislative act*, doc. n. ST 15166 2004 INIT (06/12/2004), pp.2-3.

We must acknowledge that this complication could be due to the fact that, in the case of Frontex, the main gainers and proposers of integration are public actors. In fact, it is plausible that in different policy sectors private interests would be represented directly within European institutions. Thus, we could find evidence of private actors lobbying the EU, together with their requests.⁴⁷⁰ Accordingly, we could distinguish between a demand coming from private actors and a supply coming from public ones. Also, it would be possible to verify whether the patterns established by the theory are respected or not. Thus, the issue of the separation of structural factors would be less relevant. In the case of Frontex, however, private actors did not have a role in lobbying for or against the common management of external borders. Consequently, the demand for integration could only come from public actors, whether the Council, the Commission or the European Council. Thus, the chance of observing the overlapping of demand and supply was higher than in other policy areas in which private interests are represented.

However, given what we observed, we claim that structural factors are intrinsically inseparable: in fact, the supplying actor enjoys some degree of discretion when proposing its solution. This subjective element makes it impossible to identify objective structural conditions that push integration towards regulation or capacity-building, overtness or stealthiness. This, in turn, undermines the validity of the four patterns that rationalize integration. Consequently, we maintain that the framework cannot be utilized as a descriptive tool to analyze integration, but rather as an inductive one: it individuates certain structural factors given an observed form of integration.

Now that the most important acts at the European level have been examined, we shall turn our attention to the files produced by the two branches of the Italian Parliament. As we highlighted in this first part, several elements exist that suggest that the creation of Frontex could be the product of lobbying on the side of Member States. Among these, are the heterogeneity of preferences within the Council and the initiatives launched by single Countries to verify the viability of a common agency. The goal of the following part is thus that of detecting whether there existed, at the national level, a strong interest in proceeding with integration in this policy field. Consequently, if evidence of domestic interest was found, it could be a positive signal that the agency has been created to tackle the needs of single Member States, rather than for the whole EU. However, if that was the case, this study would contribute to corroborate liberal intergovernmental theories, rather than neo-functional ones.

⁴⁷⁰ Indeed, a public register has been created for European companies, trade unions, consultancy firms and NGOs to enroll on a voluntary basis, in order to provide more transparency to the EU lobbying landscape. See the European Parliament website, "Transparency register: who is lobbying the EU? (infographic)", available at: <https://www.europarl.europa.eu/news/en/headlines/eu-affairs/20180108STO91215/transparency-register-who-is-lobbying-the-eu-infographic>.

c) Documentation at the Italian level

In order to assess whether national interests have influenced the decision-making at the EU level, we would need to examine the documents produced by single Member States' Parliaments and Governments. Since we had relevant limitations of time and since these records would require the knowledge of the language they are written in, we focused only on one case. Particularly, Italy represented a valuable candidate for our purposes. In fact, the Country is mentioned several times in the EU documentation as a vehement proponent of the creation of Frontex, particularly because of the feasibility study it developed. Also, it held the presidency of the Council in the second semester of 2003, thus it could partially shape the institution's agenda to focus on the themes it preferred. Furthermore, as we shall demonstrate, Italy's geographical position made immigration a top priority for the Country. Thus, we supposed that, whether domestic interests were lobbied to the EU in order to create a new agency, Italy was the fittest candidate for seeking evidence. Even with the limitations we had in terms of samples analyzed, it has been possible to demonstrate that domestic interests have played a relevant role in the creation of Frontex. In the Italian case, it was possible to find concrete evidence of the Parliament's need to institute a new agency, of the Government's lobbying of such interests, and of their reception by the Council and Commission. Contrary to what emerged from EU documents thus, it was possible to identify a precise request, distinguished from the supply provided by the Commission.

Methodologically, we chose to analyze those documents that could provide information on the preferences of the Country regarding how external borders needed to be managed. Given that the interests at stake were mostly public ones, it was decided to focus our attention on the institution charged with the gathering and representation of those interests, i.e. the Parliament. At the same time, though, we needed to assess whether the preferences discussed by the Parliament had been transmitted to EU institutions to receive implementation. Thus, we also needed to consider the documentation issued by the organ tasked with this function, that of the Government. Accordingly, we have mainly examined those records that allowed to connect the will of the Parliament to the activities of the Government. Particularly, we considered those on the participation of Italy to the European Union.

Some of these records, such as the surveys on European policies and the reports on the EU affairs, are issued by special commissions of the Senate and the Chamber of Deputies.⁴⁷¹ They are prepared once a year to inform the two presidents of the Parliament on the activities of the Government in the field of European affairs. Conversely, most of the documents we examined are issued directly by the Government to be successively transmitted to the Parliament. These inform the assembly on the

⁴⁷¹ As regulated by, respectively, by art. 50 of the Rules of Procedure of the Senate; and by art. 144 of the Rules of Procedures of the Chamber of Deputies.

activities of the Council of the EU, on the Union's foreign relations, on the legislative process and on the positions taken by the Government regarding each policy area.⁴⁷² As explicitly stated by one of these papers, "the annual report [...] represents the instrument through which the Parliament, presenting the activities dealt with at the European level and the positions of the Government, exercises its power of orientation and control, and contributes to the definition of the Italian stance at the community level".⁴⁷³ However, since Government's annual reports are published in January of the year following that whose activities are described, these are "more of an exercise on the past, than an occasion for intervention on policies that are currently being defined".⁴⁷⁴ Nevertheless, this kind of documents can be appropriate for the analysis hereby presented. In fact, they allow to grasp a panoramic view of the Parliament's position on external borders management, as well as the stance assumed by the Government to represent those interests.

Together with these annual records, other sources have been taken in exam, namely: reports on the activities and priorities of armed forces, suggestions of the Parliament to the Government before European Council summits, resolutions on the state of European affairs and surveys on the completion of the SFSJ. Overall these documents, complemented by the presentation of the feasibility study on the set up of a European Border Police provide evidence of a strong domestic request for more integration. Indeed, as we shall see, the Italian stance on external borders was well defined and favored the creation of Frontex. This is clearly reflected within the records we have examined, of both the Senate and the Chamber of Deputies. A document issued in 2005 even stated that the creation of the agency is due to and has been supported by Italy.⁴⁷⁵ In conclusion, we observed a strong lobbying on the side of the Italian Government. Thus, considering that Frontex has eventually been created and that the Italian contribution has been explicitly recognized by the Council, we can conclude that our assumption on the role of domestic interests in shaping that policy was correct.

We shall now turn to the exposition of the documents that have been analyzed, in order to provide the evidence that support our claims. Once again, we focused on the records issued between September 2001 and October 2004. Clearly, since EU documents have proven that terrorism constituted but a

⁴⁷² Art. 7, legge La Pergola, L. 9 marzo 1989, n. 86.

⁴⁷³ Camera dei Deputati, "Relazione sulla partecipazione dell'Italia all'Unione Europea (anno 2001)", *Relazione della XIV Commissione (Politiche dell'Unione Europea)*, doc. LXXXVII, n.2-a (14/10/2002), p.3. Given that these documents' original language is Italian, each quotation has been translated by the author of this dissertation.

⁴⁷⁴ Ibid.

⁴⁷⁵ Camera dei Deputati, Senato della Repubblica, "Documento Approvato dal Comitato Parlamentare di Controllo sull'Attuazione dell'Accordo di Schengen di Vigilanza sull'Attività di Europol, di Controllo e Vigilanza in Materia di Immigrazione a Conclusione dell'Indagine Conoscitiva sulla Gestione Comune delle Frontiere e Contrasto all'Immigrazione Clandestina in Europa", *Disegni di Legge e Relazioni- Documenti*, doc. XVII-bis, n.6 (26/01/2005), p. 46. It could be, perhaps, an exaggeration. In fact, the document's intent is that of reporting the Government's activity, however it is not unlikely that one of the paper's goals is also a cosmetic one. Nevertheless, being approved in all of its parts, the documents reflects the perception of the Parliament and the urgency and need for the issue of border control to be brought before the Council.

marginal aspect of the creation of Frontex, this time span has been kept because it allows to draw a comparison between the themes and issues discussed at the two levels in the same period. Indeed, terrorism represented only one among many reasons for the institution of the agency. Conversely, the need to complete the SFSJ and receive support against clandestine immigration, seem to represent the top reasons for pursuing integration. Overall, these records provide a clear picture of the top priorities of both the Government and the Parliament, highlighting the Italian position on external borders and how such a stance was represented at the EU level.

i) Preliminary documents and feasibility study

The first document we shall consider is that of November 26th, 2001, issued by the parliamentary Commission on Foreign Affairs and Emigration and of the Council on European Community Affairs.⁴⁷⁶ It focuses on the Government's position in preparation to the Laeken summit, which was to be held three weeks later. The record did not mention the theme of external borders explicitly; however, it presented the Senate's position on what institutional reforms should have been proposed at the summit. Particularly, it encouraged the Government to propose the full communitarization of the third pillar and to bring the themes of security and terrorism to the table.⁴⁷⁷ This document reflected the general propension of both Italy and Greece, who were to be assigned the Council's presidency in 2002, in proposing a higher level of integration in the field of JHA. Indeed, as observed in the declarations of both Countries' presidential plans, this matter represented a top priority item to them. Particularly, both Countries stressed their interest about establishing common controls on external borders.⁴⁷⁸ Thus, even before the discussion on the creation of Frontex, an interest was manifested by Italy in pushing for more collaboration in this policy field.

Indeed, this very interest emerged within our second record, transmitted by the President of the Council of Ministers to the President of the Chamber of Deputies. This paper, issued on January 31st, 2002, contains the report on the activities of the Government at the European level in the year 2001. It recalls that the Laeken summit encouraged the Commission and the Council to "define those mechanisms of cooperation between services charged with the controls on external borders and to evaluate the conditions for the creation of a common mechanism or service" in this regard.⁴⁷⁹ Also, the

⁴⁷⁶ Senato della Repubblica, "Il Dibattito sul Futuro dell'Unione Europea in Vista del Consiglio Europeo di Laeken", *Relazione della 3^a Commissione (Affari Esteri, Immigrazione) e della Giunta per gli Affari delle Comunità Europee*, doc. XVI n.2 (26/11/2001).

⁴⁷⁷ *Ibid.*, pp.7-8, 14.

⁴⁷⁸ Council of the EU, "Programme of the Italian Presidency", p.6.

⁴⁷⁹ Camera dei Deputati, "Relazione sulla Partecipazione dell'Italia all'Unione Europea (anno 2001)", *Relazione della XIV Commissione (Politiche dell'Unione Europea)*, doc. LXXXVII, n.2 (31/01/2002), p.112.

document states that “without utilizing the expression ‘European Border Police’, hardly acceptable for those States that present frontier services autonomous from police forces, the concept expressed [by the European Council] is similar [to our project] and fulfills the goals we have for longtime pursued”.⁴⁸⁰ Finally, the record affirms the importance of the then ongoing feasibility study for the creation of a European Border Police, established by the Minister of Home Affairs and financed at 80% by communitary funds.⁴⁸¹ It is thus possible to grasp that the institution of an agency or a mechanism of coordination of police forces was a long time priority of the Italian Government and Parliament. Also, the feasibility study highlights the Italian entrepreneurship in this sense.⁴⁸² Moreover, it demonstrates the will to prove to other Member States the necessity and advantages of a common body, particularly within the context of an integrated third pillar.⁴⁸³

We shall now discuss feasibility study in the detail, given its importance in the creation of Frontex and the continuous references made to it throughout both European and Italian documents. The project, presented in Rome on May 30th, 2002, had been developed by Germany, Belgium, France, Spain and Italy on the initiative of the latter; and had received the financing of programme Odysseus.⁴⁸⁴ Taking the Tampere summit’s conclusions as a point of reference, it had received a strong political support by Member States.⁴⁸⁵ Its objective was that of formulating an “hypothesis for a control of the external borders that could be more effective, optimizing the collaboration through the use of common resources, the identification of common procedures, the realization of joint services, and, last but not least, a body of European Border Police”.⁴⁸⁶ However, the study also mentioned a more symbolic value, that of challenging the idea that European peoples have of borders.⁴⁸⁷ Particularly, this was an overt political motive requiring the mobilization of Member States and European institutions’ resources and attention. Overall, the document is substantially composed of technical evaluations on the feasibility of different models for coordinating Member States’ common operations at the borders. These range in nature from interception operations to the return of illegal migrants to their home countries. Thus, a more pragmatic objective emerges from the pages of the document, of which no explicit reference is made in the introduction: that of burden-sharing.⁴⁸⁸ In fact, the principle of solidarity was here aimed at providing

⁴⁸⁰ Ibid, p. 113.

⁴⁸¹ Ibid, p. 114.

⁴⁸² Please notice that the study in question started on October 23rd, 2001. See Police Department of the Italian Ministry of Interior Affairs, *Feasibility Study for the Setting up of a ‘European Border Police’ final report* (Rome, 30/05/2002), p.5.

⁴⁸³ Ibid., p.74.

⁴⁸⁴ Ibid., p.4. Programme Odysseus was a programme of financing aimed as supporting projects of training, exchanges and cooperation in the fields of asylum, immigration and crossings at the external borders. It was set up by the Commission in 1998 and was directed as Member States as well as to NGOs and academia. See European Commission website, “Odysseus Programme”, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_98_1105.

⁴⁸⁵ Police Department of the Italian Ministry of Interior Affairs, *Feasibility Study*, p.15.

⁴⁸⁶ Ibid., p.8.

⁴⁸⁷ Ibid., p.5.

⁴⁸⁸ Ibid., p.69.

operational support to national border services in need of help. Such a support was to be provided by common corps to be established specifically for this function, and made up of seconded agents from Member States' staff.⁴⁸⁹ Moreover, financial solidarity was considered as well, representing the second core element of the study and finding extensive treatment in a dedicated section.⁴⁹⁰ In conclusion, the record clarified not only that some Member States had a clear interest in the theme of borders surveillance, but also that they were willing to bring the issue to the European level. Thus, integration in this field was considered a potential solution to tackle the issue of borders crossing, through funds and personnel lent to the Countries closest to the frontiers. As we saw, the study and its results proved highly influential in shaping the proposal of the Commission. The institution utilized such material as a reference point, presenting it as a technical analysis to promote the communitarization of the border control policy. Accordingly, we can conclude that the preferences of Member States like Italy were represented at the European level and contributed to deepen integration in the field of borders management.

ii) After the feasibility study

Since the publication of the feasibility study, most of the documents issued by the Parliament acknowledged its importance as a contribution of the Country to the European Union.⁴⁹¹ In fact, the institution of Frontex was perceived with particular intensity since the launch of the Convention on the future of Europe. In the following 2002's Report on the Participation of Italy to the European Union, the Senate encouraged the Berlusconi Government to stress the nature of borders control as a primarily European policy.⁴⁹² It also suggested a communitary dialogue with countries on the other side of the Mediterranean, being the department point of many migrants reaching Italian coasts.⁴⁹³ Thus, the importance of communitarizing this policy sectors was once again reaffirmed. Also, the Report explicitly recognized a connection between the feasibility study and a landmark communication of the Commission, named "Towards an integrated management of external border". There, the Government affirmed that the communication had been largely based on the Italian feasibility study.⁴⁹⁴ The validity of this claim should be verified through an analysis of the provision contained in the two documents; however it

⁴⁸⁹ Ibid. These teams would act in a variety of scenarios, comprising Rapid Border Operations, which aimed at providing immediate responses to imminent and critical situation, such as during the arrival of unforeseen and substantive fluxes of migrants.

⁴⁹⁰ Ibid., p.37.

⁴⁹¹ See, for instance, Senato della Repubblica "Relazione sulla Partecipazione dell'Italia all'Unione Europea (anno 2001)", *Relazione della Giunta per gli Affari delle Comunità Europee*, doc. LXXXVII, n. 2-a (15/07/2002), p. 14; and Senato della Repubblica, "Relazione sulla Partecipazione dell'Italia all'Unione Europea (anno 2002)", *Relazione della Giunta per gli Affari delle Comunità Europee*, doc. LXXXVII, n. 3-a (26/06/2003), p. 12.

⁴⁹² Senato della Repubblica, "Il Dibattito sul Futuro dell'Unione Europea", pp.14-15.

⁴⁹³ Ibid.

⁴⁹⁴ Camera dei Deputati, "Relazione sulla Partecipazione dell'Italia all'Unione Europea", p.184.

reveals the importance attached to the study and the attention devoted to the matter. It is also stated that the General Affairs Council, which evaluated the feasibility study, had favorably adopted the proposals thereby written. As a consequence of this endorsement, pilot projects were launched; and the Commission issued a communication encouraging the creation of communitary funds for such operations.⁴⁹⁵

As we have seen, the Italian interests touched upon multiple aspects related to the need to control migratory fluxes. Consequently, several initiatives were undergone, and pressure was applied onto the Council to receive the broadest possible support. Among these initiatives lies another project proposed by the Italian Government and adopted in 2002, regarding the integrated dialogue with third countries.⁴⁹⁶ Its objective was that of including clauses for the return of illegal migrants within the agreements established with such countries, especially those in Mediterranean Africa. The document reporting these data also recalls that Italy had put pressure on the Council to include Turkey and Libya in the list of States with which to establish such connections.⁴⁹⁷ Moreover, it claimed that the Italian Government put emphasis, within the Council, on the fight against terrorism. In fact, terrorism was described as closely related to the control of external borders. This very connection was affirmed once again in 2004's Senate Report. The documents, indeed, stated that a deeper integration in the field of external frontiers had been advocated for by Italy within the Council in order to tackle the issue of potential terrorists incoming by sea. There, the Government recalled how the Greek and Italian presidency has been influential in bringing the theme to the attention of the Council.⁴⁹⁸ In fact, the document expressed its judgement on terrorism and organized crime, considered the "top priorities" for Italy.⁴⁹⁹ In conclusion, the Report also stated that "to reach our goals it is necessary to implement the abovementioned proposals in the short run and reaffirm the priority of security matters for our Country".⁵⁰⁰

Many other documents testify the Italian entrepreneurship in promoting a common framework on external frontiers, which reflect the strong interest perceived by public authorities in this sense. Most of these simply repeat what we have just presented and do not add much to our discussion. However, some provide new useful information. For instance, a 2004's document on internal security issued by the Ministry of Interior Affairs underlines the role Italy played in promoting operational cooperation.⁵⁰¹ The

⁴⁹⁵ Ibid., p.185.

⁴⁹⁶ Senato della Repubblica "Relazione sulla Partecipazione dell'Italia all'Unione Europea (anno 2002)", *Relazione della Giunta per gli Affari delle Comunità Europee*, doc. LXXXVII, n. 3-a (26/06/2003), p.13.

⁴⁹⁷ Ibid., p.14.

⁴⁹⁸ Senato della Repubblica, "Relazione sulla Partecipazione dell'Italia all'Unione Europea (anno 2003)", *Relazione della 14° Commissione Permanente (Politiche dell'Unione Europea)*, doc. LXXXVII, n.4-a (29/04/2004), p.15.

⁴⁹⁹ Ibid., p.18.

⁵⁰⁰ Ibid., p.17.

⁵⁰¹ Senato della Repubblica, "Relazione sull'Attività delle Forze di Polizia, sullo Stato dell'Ordine e della Sicurezza Pubblica e sulla Criminalità Organizzata (anno 2004)", *Disegni di Legge e Relazioni-Documenti*, doc. CCXII, n.2 (01/12/2005).

record affirms that a landmark joint mission, Operation Neptune,⁵⁰² had been launched following an Italian initiative, after being approved by the SCIFA group and being financed by the ARGO programme.⁵⁰³ Moreover, another 2004's document maintains that "Italy will furtherly intensify its action on the European stage in order for the euro-Mediterranean situation to be considered among the top priorities, particularly regarding fight on terrorism and clandestine immigration".⁵⁰⁴ The Government thus aimed at convincing the Council that "immigration is a complex theme that requires an integrated approach".⁵⁰⁵ Particularly, relevant attention was devoted to highlight how this issue required the equal sharing of burdens.⁵⁰⁶

Overall, the most important elements of the Italian contribution to the creation of Frontex belong to the period comprised between 2001 and the end of 2003. These findings seem coherent with the timing of the Commission's proposal on the institution of the agency, issued in November 2003. From that moment, the records we analyzed simply report that the Italian Government continuously lobbied the Council to promote the adoption of the Commission's proposal.⁵⁰⁷ These data reveal, once again, the will to receive European support on the part of Italy, as well as the political support from the Council and other Member States, particularly Greece.

3.4: Conclusions of the first part

It is now possible to draw several conclusions regarding what the documentation at the Italian level reveals about the creation of Frontex. Firstly, we verified the hypothesis put forward in the section on EU records regarding the Italian will to deepen integration in the field of external borders management. In fact, we found evidence that demonstrate that the Government and the Parliament had a wide and organic interest in regulating migratory fluxes and preventing transnational crimes. To reach this objective, the Government lobbied European institutions for those interests to be represented at the EU level. Also, we observed that independent initiatives had been launched to prove the viability and gains deriving from

⁵⁰² Operation Neptune is a joint operation that took place off the Sicilian coasts in 2004. It was aimed at monitoring the situation at the southern borders of the EU and intercepting the vessels attempting to illegally cross them. See Camera dei Deputati, Senato della Repubblica, "Documento Approvato dal Comitato Parlamentare", pp. 18-20.

⁵⁰³ Senato della Repubblica, "Relazione sull'Attività delle Forze di Polizia", p.61.

⁵⁰⁴ Camera dei Deputati, "Relazione sulla Partecipazione dell'Italia all'Unione Europea (anno 2004)", *Relazione della XIV Commissione (Politiche dell'Unione Europea)*, doc. LXXXVII, n.5 (31/01/2005), p.33.

⁵⁰⁵ *Ibid.*, p.344.

⁵⁰⁶ *Ibid.*, p. 345.

⁵⁰⁷ See, for instance, Camera dei Deputati, "Relazione sulla Partecipazione dell'Italia all'Unione Europea (anno 2003)", *Relazione della XIV Commissione (Politiche dell'Unione Europea)*, doc. LXXXVII, n.4 (30/01/2004), p. 226. Here, the development of an integrated border management strategy is strongly hoped for by the Parliament, as it is expressly stated that it is "anxiously waiting for the institution of the agency". Moreover, the record utilizes a terminology that highlights the advantages of integration in this sector (such as "fruitful" or "equilibrated", p.227); and recalls the contribution of the Country to its development (p. 231).

an integrated framework on external frontiers. Thus, it is possible to maintain that although an aggregated demand has not been observed at the European level, the opposite is true at the national one. Consequently, we can conclude that the interests of a single Country have relevantly contributed to frame the perception of the Council and pushed for the acceptance of the Commission's proposal.

Although it would be necessary to consider each Member State's position about Frontex, the provisions eventually accepted suggest that the Italian requests have been satisfied. This is evident when considering the inclusion of solidarity clauses, which provide support to those Member States patrolling maritime and land borders for the whole Schengen area.⁵⁰⁸ As we already mentioned, the absence of a European demand and the presence of a strong Italian one, suggest that in this case integration could be better described by liberal intergovernmentalism, rather than neo-functionalism. Clearly, these findings alone cannot completely demonstrate that Italy and Greece alone have induced the institution of the agency. For that to be proven, we would need to analyze much more material. Nevertheless, they pose serious doubts regarding the validity of Genschel and Jachtenfuchs' theory.

Finally, we must acknowledge that other questions remain unsolved. Indeed, it is not clear why the Commission, following the request of the European Council for more cooperation, decide to propose the creation of an agency rather than putting forward a regulatory solution. Since we have dismissed the idea of objective structural conditions underpinning integration, it would be necessary to identify what reasons pushed the Commission to propose a capacity-building act. Clearly, this could be due to the specific features of the policy on borders. In fact, it is hard to imagine how regulation alone could tackle the problem of borders crossing, or efficiently deal with the tasks Frontex is charged with. Conversely, it is also plausible that the Commission was interested in proposing the creation of an agency because, as we shall see, Frontex is partially under its control.⁵⁰⁹

Moreover, it is legit to wonder whether demand and supply cannot be clearly distinguished only in this case or whether the situation is different in other policy areas. Indeed, the assessment of structural factors was here complicated because "suppliers" and "demanders" were both public actors, and thus overlapped. Finally, it would be interesting to verify why the Council eventually accepted the Commission's proposal, and what theory better describes the formation of preferences in that case. Despite these open questions to be explored, it has been possible to reach some solid conclusion. Indeed, we have the proofs that the Italian interests have been reported to the European level, that they have received political endorsement and that they have been influential in determining the creation of Frontex.

⁵⁰⁸ Please recall that before the eastern enlargement Italy was the only country in the EU to experience migratory fluxes both by sea and land, though the Mediterranean Sea and the frontier with Slovenia.

⁵⁰⁹ In fact, the Commission sends two representatives to the Management Board of Frontex, which have the same voting rights of those sent by Member States. See art. 63 of reg. (EU)2007/2004 establishing the agency.

3.5: Part 2: Indirect control of means of coercion by Frontex

Throughout the first part of this dissertation we have provided evidence that the concepts of demand and supply, upon which Genschel and Jachtenfuchs built their theory, present notable flaws. Particularly, their definition is not precise enough, thus they cannot individuate any concrete elements that can be identified as the structural factors that determine the patterns of European integration. Also, we contested that objective conditions could be deduced from documentation at the EU level, given the discretion the Commission demonstrated in transforming the request of the European Council into its proposal. Accordingly, we claim that demand and supply do not constitute analytic concepts capable of describing the processes of communitarization. In our opinion the theory risks being used to *induce*, rather than *deduce*, structural conditions from observed forms of integration. Specifically, an inductive reasoning would be that of identifying preconditions framed in, for instance, economies of scale simply because we observed the institution of a new European body. Needless to say, this is the opposite of what a viable theory should be able to achieve.

Most of Genschel and Jachtenfuchs' considerations derive from this very reasoning, as well as from the possibility to precisely identify structural factors. Particularly, this is the case of publicity and politicization, identity concerns, blame shifting and legitimization.⁵¹⁰ All of these, however stimulating, are strictly correlated to the use of demand and supply factors meant as objective categories. Thus, we decided not to discuss their viability as instruments to dissect the process of communitarization: doing so would mean ignoring the conclusions reached so far. Instead, this second part discusses the theory on the topic of the indirect control of core state powers. Recall that Genschel and Jachtenfuchs (and the numerous associated scholars) claimed that the European Union concretely steers Member States' practices in this regard. Thus, since this theory skips the analysis of how integration is achieved and focuses on its practical effects, it has been decided to verify its correctness. In order to do so, we analyzed the legal framework of Frontex, together with the unforeseen consequences that its creation bore on the usage of means of coercion.

Eventually, the validity of the theory of indirect control, meant as the definition of the scenarios and forms in which core powers are exercised by Member States, has been dismissed. Particularly, we considered what powers Frontex holds when launching its operations, how it utilizes the forces at its disposal and what informal influence it has in defining threats and risks. After the analysis, we concluded that although the agency exercises a relevant influence onto Member States' conduct, it cannot be stated

⁵¹⁰ All of these themes would require further analysis and provide interesting insight upon which to reflect, particularly that of publicity. In this particular case, in fact, it seems complicated to evaluate how the degree of publicity can be assessed, and according to which methodology.

that Frontex alone indirectly controls the use of force. In fact, the agency does determine some aspects of the cooperation at borders and contributes to the harmonization of practices and standards. However, many elements are still controlled by Member States, such as the launch of operational activities and the request of the agency's support. Moreover, during operations, the domestic law of the Country hosting Frontex's activities remains the legal point of reference. European provisions and rules established by the agency receive application as well, but they do not unilaterally determine a comprehensive framework for operating. Thus, it cannot be maintained that the Union exercises an indirect control of the core state power hereby considered.

a) The legal basis of Frontex

Within this first section we shall examine the current working mechanism of the agency, as it is in 2019 after several reforms that have been carried out since its establishment. Such modifications have expanded the power to coordinate Member States' forces, however the basic rules that discipline the use of force have remained untouched since 2004.⁵¹¹ The aim of this first section is that of demonstrating that, throughout all the activities carried out by Frontex, the exercise of coercion legally rests within the hand of Member States. Such a feature is in fact recognized by Genschel and Jachtenfuchs. However, the notion of indirect control suggests that the agency alone determines the situations in which coercion is used and the limits of its usage. To verify these assumptions, it is first of all necessary to examine what task are carried out by Frontex. Among these, we shall focus on those concerning the exercise of force. To introduce the provisions regulating the use of force by Frontex's staff members, we shall first of all present the legal base of the agency.

As we have seen, the document establishing Frontex is Council regulation 2007/2004 of October 26th, 2004, issued upon Commission's proposal. This regulation is one of the executive components of the Space of Freedom, Security and Justice. The Union's competence in this field is determined by art.4 of the TFEU, which enlists the SFSJ among shared competences.⁵¹² Particularly, in the case of the policy on external borders, the Union's scope is determined by the provisions found in articles 72, 73, 74 and 77.⁵¹³ Of these, the most relevant is represented by art.77, since it defines the objectives that the policy must achieve: it establishes that "the Union shall develop a policy with a view to: [...] a) carrying out checks on persons and efficient monitoring of the crossing on external borders; b) the gradual

⁵¹¹ Indeed, what was expanded regarding the use of force was the possibility of members of European teams to carry out all the necessary tasks for border checks and surveillance, in parallel to the host State's service forces. See Cortinovis, R., "The Evolution of Frontex Governance: Shifting from Soft to Hard Law?", *Journal of Contemporary European Research* 11, n. 3 (2015), p.260.

⁵¹² Reg. (EU) 2016/1624, art. 4, par. "j".

⁵¹³ Mungianu, R., *Frontex and Non-Refoulement: The International Responsibility of the EU* (Ebook, 2016), p.23, 27-28.

introduction of an integrated management system for external borders”.⁵¹⁴ Also, art.74 represents an important provision for our analysis. In fact, it regulates the Union’s capacity to develop practices of administrative cooperation, both among Member States and between these and the Commission.⁵¹⁵ This article reveals fundamental to ensure the application of common rules, standards and provisions when carrying out controls on external borders.⁵¹⁶

Conversely, since the SFSJ is enlisted among shared competences, relevant limitations are imposed to the EU’s action in this field: art. 72 and 73 defend Member States’ prerogatives and avoid a complete community exercise of its coordination powers. On the one hand, art.72 establishes that the existence of a common policy does not affect Member States’ responsibilities “with regard to the maintenance of law and order and the safeguarding of internal security”.⁵¹⁷ On the other hand, art.73 provides that the existence of a community policy does not preclude the autonomous organization and coordination of Member States among themselves. These can cooperate in the forms they deem appropriate for safeguarding national security.⁵¹⁸ These two preconditions are, as a matter of fact, a strong limitation to the EU’s ability to legislate, as they reaffirm the State’s responsibility in maintaining internal order. Accordingly, Member States are entitled of pursuing the actions they prefer regarding the use of force. Thus, all the forms of operational and administrative cooperation that the EU establishes shall not preclude Member States’ capacity to self-organize. At the same time, state actors’ actions shall not be in contrast with the content of the Union’s policy.⁵¹⁹

b) The role of Frontex: operations and decision-making

In order to understand whether the Union has gained competence in the exercise of force, several factors must be analyzed. The first one is that of verifying what tasks are assigned to the agency, then what decision-making procedures are like, and finally verifying what happens in reality. Regarding the first point, recall that the introduction to the chapter described the tasks Frontex carries out in its daily work. Those that are relevant for our analysis are those entailing the coordination of Member States’ border guard services. Frontex enhances cooperation in order to carry out several kinds of procedures, like joint operations, patrolling duties, return operations, search and rescue actions and rapid border

⁵¹⁴ Art.77 TFEU.

⁵¹⁵ Art. 74 TFEU.

⁵¹⁶ Mungianu, “Frontex: Towards a Common Policy on External Border Control”, p.367.

⁵¹⁷ Art. 72 TFEU.

⁵¹⁸ Art. 73 TFEU.

⁵¹⁹ In that, being a shared competence of the EU, Member States shall not act in disruption of the Union’s action. Adam and Tizzano, *Manuale di Diritto*, p.422.

interventions.⁵²⁰ Thus, given the legislative constraints contained in arts. 72 and 73 of the TFEU, what the agency is supposed to develop is not the direct execution of these tasks. Rather, it acts as a facilitator, favoring the exchange of information among Member States, the harmonization of practices and the coordination of operations.⁵²¹ Indeed, Frontex does not possess executive corps of its own, but relies on Member States for the concrete implementation of the operations it supervises.⁵²² Accordingly, the agency requires State actors to make a portion of their national border guards' personnel available to be utilized when needed. Thus, these officials are those charged with the practical execution of Frontex's operations. This first assessment results in accordance with Genschel and Jachtenfuchs' theory, since the exercise of force is charged on national representatives.

We will now discuss how Frontex is internally organized, to understand how it takes decisions and what degree of autonomy it retains from Member States and the Commission. This assessment aims at evaluating whether the agency can impose exogenous choices on Schengen Countries, thus exercising a great influence on their practices. Frontex's structure is substantially the product of the compromise between two opposing approaches: supranational and intergovernmental.⁵²³ On the one side, stands the Executive Director, which is the legal representative of Frontex and is charged with the preparation and implementation of the strategic decisions adopted by the Management Board.⁵²⁴ His/her role consists in proposing the programs to develop, drafting operational plans with Member States hosting joint operations, and evaluating Member States' requests of aid at the borders. Also, he/she can revoke the financing and can suspend ongoing activities when violations of fundamental rights emerge.⁵²⁵ The Executive Director is responsible for all the actions carried out by the agency and is formally independent in the exercise of its functions.⁵²⁶ Thus, he/she represents the supranational component of Frontex.

On the other hand, stands the Management Board, which is entitled with the adoption of the strategic decisions of the agency. These acts comprise the definition of integrated border management, the targets of risk analysis and the criteria for evaluating vulnerabilities and weak spots at the external frontiers.⁵²⁷ The Board is composed of a representative from each Member State party to the Schengen agreement, thus the organ represents the intergovernmental component of the agency.⁵²⁸ However, the

⁵²⁰ Art.8 reg. (EU) 2016/1624.

⁵²¹ Regine, "Harmonization by Risk Analysis?", p.693.

⁵²² Mungjanu, "Frontex: Towards a Common Policy on External Border Control", p.381.

⁵²³ Wolff, S. and Schout, A., "Frontex as Agency: More of the Same?", *Perspectives on European Politics and Society* 14, no. 3 (2013), p.316.

⁵²⁴ Art. 56 and art. 68, reg. (EU) 2016/1624.

⁵²⁵ Zorzi Giustiniani, F., "Da Frontex alla Guardia di frontiera e costiera europea: novità in tema di gestione delle frontiere esterne", *Diritto pubblico comparato ed europeo, Rivista trimestrale*, n.2 (2017), p.537.

⁵²⁶ Art.68 reg. (EU) 2016/1624.

⁵²⁷ Art.62 reg. (EU) 2016/1624.

⁵²⁸ Art.63 reg. (EU) 2016/1624.

Commission holds two seats of its own within the Board, each having the same voting power of national delegates.⁵²⁹ Accordingly, Frontex is formally autonomous regarding the decisions it adopts, but at the same time Member States determine the content of those decisions.⁵³⁰ Thus, it cannot be claimed that the agency is completely independent in its action, coherently with the character of shared competence of the SFSJ. Despite being a partially intergovernmental body, though, Frontex relevantly shapes Member States' practices at the EU borders, exercising a role that goes beyond the simple coordination stated on paper.⁵³¹

A concrete example of how joint operations are developed is hereby presented, in order to evaluate the role that the agency plays in situations that require the use of force. These scenarios are highly complex and require an extensive discussion to analyze all the elements of which they are composed. Joint operations are missions in which Frontex provides support to a Member State that is experiencing difficulties in carrying out the controls at its frontiers.⁵³² The reasons for this difficulty can vary in nature but are mostly related to the intensification of migratory pressure, due to the augmentation of the number of people trying to cross the border. To tackle the situation, the agency can deploy two kinds of personnel: members of European Border and Coastal Guard (EBCG) teams and seconded experts.⁵³³ The former group is the most relevant for our analysis, since its functions are executive in nature. Indeed, these teams are composed of members of national border guard services that are made available for being deployed in joint operations. The number of persons borrowed is established every year through bilateral negotiations between Frontex and Member States.⁵³⁴ Importantly, Schengen Countries' participation to the EBCG teams does not happen on a voluntary basis. On the contrary, Member States are obliged to lend a portion of their staff, in quantity and quality suggested by the agency itself.⁵³⁵ However, it is essential to underline that these teams do not constitute a truly European force. Rather, during operations they continue being members of national border guards, and legally act on their behalf.⁵³⁶

EBCG teams are deployed by Frontex when a Member State requires support to handle a crisis at its borders, due to migratory pressures or transnational threats.⁵³⁷ Clearly, the personnel composing

⁵²⁹ Ibid, par. 1.

⁵³⁰ Léonard, "EU Border Security and Migration into the European Union", p.247.

⁵³¹ Mungianu, "Frontex: Towards a Common Policy on External Border Control", p.373.

⁵³² Frontex website, "Operations", available at: <https://frontex.europa.eu/faq/frontex-operations/>.

⁵³³ Art. 14 reg. (EU) 2016/1624.

⁵³⁴ Art. 20, par 3 reg. (EU) 2016/1624.

⁵³⁵ Ibid., par 5. Please notice that the ideal composition of teams and thus personnel to borrow is established by Frontex, however the actual number and quality of national guards lent is decided through those annual negotiations with the agency. Moreover, Member States can refuse to provide the necessary staff when in emergency situations.

⁵³⁶ Mungianu, "Frontex: Towards a Common Policy on External Border Control", p.381-382.

⁵³⁷ Art.15 reg. (EU) 2016/1624.

the teams must fit the request made by the agency to Member States, unless in emergency cases in which the State is exonerated from providing its staff.⁵³⁸ Nevertheless, the initiative for launching joint operations or rapid border interventions lies within State actors' hands.⁵³⁹ When a request for support is put forward, the Executive Director evaluates the request in the light of the risk analysis conducted by the agency.⁵⁴⁰ If the Director approves the motion, he/she drafts an operational plan together with the demander, who becomes the host State. This operational plan sets out the major operational points and after approval by the Management Board it becomes binding for all the parties involved.⁵⁴¹ The operational plan, whose content remains confidential,⁵⁴² is revealed by the host Country's service to both domestic and European teams. To ensure the coherence between the operation and the plan, the agency checks whether the orders transmitted by the host Country to operational units respect the agreed upon standards.⁵⁴³

A most important issue to understand whether the Union defines how Member States use force, is that of assessing what norms EBCG teams are subject to when operating. Operations are characterized by a complex set of rules, given by the overlapping of different legal regimes. Indeed, European teams shall respect the host country's legislation, the Schengen Borders Code,⁵⁴⁴ the provisions of the Charter of Fundamental Rights and the rules of the operational plan.⁵⁴⁵ Moreover, they shall be subject to their home State's disciplinary measures.⁵⁴⁶ What is fundamental is that in no occasion members of the European teams act on the behalf of the Union. In fact, even though they are charged with all the functions necessary to attain the objectives of the plan,⁵⁴⁷ they are and remain organs of their home State.⁵⁴⁸ When using force, they can only act under the surveillance of host country's services and according to the national legislation of the State they are in, even in the case of self-defense.⁵⁴⁹

To understand what degree of control the agency exercises on these teams, an interesting contribution is provided by the legal literature on the topic. Indeed, it is still uncertain whether Frontex

⁵³⁸ Art.17 reg. (EU) 2016/1624.

⁵³⁹ Mungianu, *Frontex and Non-Refoulement*, p.18.

⁵⁴⁰ *Ibid.*, p.38.

⁵⁴¹ Please notice that the decisional power regarding the operational plan lies with the Director and the host country. In fact, the Board's opinion is not binding. See Art.16 reg. (EU) 2016/1624.

⁵⁴² Vara, J. and Sánchez-Tabernerero, S. R., "In Deep Water: Towards a Greater Commitment for Human Rights in Sea Operations Coordinated by Frontex?", *European Journal of Migration and Law* 18, n.1 (2016), p.82.

⁵⁴³ Art.21 reg. (EU) 2016/1624. It is noteworthy that if a discrepancy is observed by Frontex officials during this phase, the Executive Director will be entitled to end the operation, ex art. 25 of the same regulation.

⁵⁴⁴ The regulation containing the Schengen agreement's provisions regarding the crossing of both internal and external frontiers. See reg. (EU) 2016/399.

⁵⁴⁵ See Zorzi Giustiniani, "Da Frontex alla Guardia di frontiera", p. 532, and art. 40, par. 2 reg. (EU) 2016/1624.

⁵⁴⁶ Art. 21 reg. (EU) 2016/1624.

⁵⁴⁷ Art. 40, par 1 reg. (EU) 2016/1624.

⁵⁴⁸ Thus, for instance, they are still subject to their home State's disciplinary provisions. See Mungianu, *Frontex and Non-Refoulement*, pp. 61-62.

⁵⁴⁹ Art. 40 reg. (EU) 2016/1624.

could be deemed internationally responsible for the violations of fundamental rights and international law provisions during operations. Particularly, Roberta Mungianu claims that the agency shall not be considered so, since it does not hold effective control of operational forces.⁵⁵⁰ In fact, although the agency is responsible for the general framework within which national border guards act, the orders are eventually issued by the host or home State's personnel.⁵⁵¹ Thus, responsibility rests within the hands of State actors, and the principle enshrined in art. 72 TFEU is respected. Consequently, the provisions regulating the use of coercion do not give ground to hypothesis of direct use of violence on the part the European Union.

Summarizing, Frontex contributes to define numerous aspects of the use of force at the external borders. Indeed, it obliges Member States to share a portion of their personnel to be utilized in common operations, it drafts the operational plan together with the host State and verifies its correct implementation. However, Frontex does not unilaterally define the rules for its activities. In fact, members of the EBCG teams are still considered national officials, acting within the limits foreseen by the host State's provisions. Also, Member States are the only actors that can request the launch of operations, determining the situations in which the agency operates. These conditions seem confirm that the Union does not have a power of indirect control over the use of force, since it is not capable of unilaterally defining the conditions for its interventions. Nevertheless, other elements suggest that Genschel and Jachtenfuchs' claim could be closer to reality than what formal rules suggest. In this regard, the next section presents an evaluation of the risk analysis developed by Frontex. The aim of this discussion is that of highlighting what informal influence the agency exercises in identifying the situations in which Member States shall operate.

b) Risk analysis and the expansion of the scope of the agency

The analysis of risk developed by Frontex represents more than just an objective assessment of the degree of security at the borders European Union. From the documentation hereby examined, relevant elements emerge that suggest that this activity expands the decision-making power of the agency regarding when and where it is necessary to intervene. Thus, the assumption considered here is that risk analysis widens Frontex's influence on Member States beyond that officially recognized in the agency's regulation. Accordingly, this expansion of power could represent a case of integration by stealth, meant as the unforeseen consequence of the communitarization of borders control activities.

⁵⁵⁰ Mungianu, *Frontex and Non-Refoulement*, p.69.

⁵⁵¹ *Ibid.*

Risk analysis is one of the core functions that Frontex carries out, in the words of many officials working for the agency.⁵⁵² In fact, the evaluation of potential danger factors is what underpins each of Frontex' operations, determining whether it is viable or not. Moreover, it also establishes which resources (both monetary and operational) shall be dedicated to it.⁵⁵³ The assessment is developed by a dedicated office of the agency, which acts independently utilizing the criteria approved by the Management Board.⁵⁵⁴ A wide array of information, upon which such evaluations are made, comes from domestic border guard services. Indeed, thanks to the innovation introduced by reg. 2007/2004, Member States are obliged to provide the agency with all the necessary information in a timely and accurate fashion.⁵⁵⁵ Consequently, Frontex possesses a wide range of data it can utilize for producing an integrated risk analysis. The goal is that of monitoring migratory fluxes and individuating potential threats and challenges at the external frontiers.⁵⁵⁶ Importantly, the outcome of risk analysis can entail relevant consequences for Member States: in fact, these must keep the results in considerations when planning their strategy at the external borders.⁵⁵⁷ Also, when vulnerable spots are identified, the Director can issue a recommendation to the Member State responsible for that area. This recommendation, drafted together with the State in question, establishes the necessary measures to tackle the issue, as well as the deadline for their implementation. Whether the recommendation did not receive the appropriate follow-up, the Director is entitled to inform the Commission, and a binding decision is issued by the Management Board to bring the State into compliance.⁵⁵⁸

These measures represent a relevant interference into Member States' management of external borders, thus regarding the use of force. In fact, these provisions force to be compliant to standards that are produced outside of domestic decision-making processes. Also, further measures are foreseen for actors who do not adopt the Board's decision or that do not request the appropriate support from Frontex when under threat. In fact, Member States' in-compliance and will to face disproportionate challenges alone, are considered a threat to the whole Schengen zone. Accordingly, the Council can adopt a decision to tackle the identified sources of risk, forcing the Member State in question to cooperate with the agency.⁵⁵⁹ This can also determine the organization and coordination of rapid interventions by the EBCG teams.⁵⁶⁰ At that point, the un-compliant State is forced to follow the Council's decision. Therefore,

⁵⁵² Regine, "Harmonization by Risk Analysis?", p.697-699.

⁵⁵³ *Ibid.*, p. 695. See also Horii, "The effect of Frontex's risk analysis on the European border controls", pp. 251-253.

⁵⁵⁴ Léonard, "EU Border Security and Migration into the European Union", p. 242.

⁵⁵⁵ Art. 10 reg. (EU) 2016/1624.

⁵⁵⁶ Art. 11 reg. (EU) 2016/1624.

⁵⁵⁷ Horii, "The effects of Frontex's risk analysis", p. 254.

⁵⁵⁸ Art.13 reg. (EU) 2016/1624.

⁵⁵⁹ Art. 19 reg. (EU) 2016/1624. Furthermore, notice that according to the same article, it is the Commission that after consulting the Executive Director issues a proposal for the Council to adopt.

⁵⁶⁰ *Ibid.*

the agency can impose the measures it deems necessary to safeguard the security of the Schengen area. In doing so, it can steer Member States' conduct towards the respect of the criteria adopted by the Management Board. Moreover, in the exceptional circumstance in which the SFSJ results in serious danger, controls at the internal borders can be reintroduced.⁵⁶¹

This feature represents a relevant coercive power that Frontex enjoys vis-à-vis Member States in the management of external frontiers. However, assessing the actual influence of these provisions reveals complicated. In fact, it is difficult to verify the reasons for compliance: Member States could respect the outcome of the analysis of risk both because they agree with its criteria and because of the negative consequences deriving from incompliance. Furthermore, the reputation of Frontex as a highly technical agency, discussed in the next section, contributes to foster its legitimacy and enhance the adoption of its opinions.⁵⁶² Also, it shall be noticed that the provisions to bring Member States into compliance with Frontex's standards seem to constitute an emergency clause for exceptional situations. To be activated, a decision of the Board is necessary, so uncompliant States have a voice in deciding upon their implementation. Thus, we claim that these articles do not represent a form of indirect control over Member States' exercise of core powers, given their exceptionality and subjection to a Council's decisions.

c) Soft harmonization

Within this last section, we shall discuss those elements that make risk analysis widely accepted by Member States, expanding effective impact of the agency. Particularly, we will focus on its authoritativeness, which makes so that its decisions influence both the identification of "weak" spots at the borders and determine the allocation of common resources. In fact, it is necessary to question where the legitimacy for the intrusive measure just outlined stems from. The answer to that question lies within the definition of risk analysis itself: the activity is presented as the product of data gathering and assessment of criticalities, aimed at ensuring the efficient allocation of the available resources.⁵⁶³ Frontex's legitimacy is accordingly built upon its perception as a technical and efficiency-oriented body, who is capable of delivering "objective" assessments.⁵⁶⁴ These, in turn, help Member States improving their management of external borders. Nevertheless, the analysis of data and the identification of "threats" is an intrinsically political decision.⁵⁶⁵ For instance, during the examination of the preparatory documents, we have observed that considerable attention was devoted to preventing illegal immigration, given its

⁵⁶¹ Regine, "Harmonization by Risk Analysis?", pp.700-701. See also art.80 reg. (EU) 2016/1624.

⁵⁶² Neal, "Securitization and Risk at the EU Border", p.337.

⁵⁶³ Frontex website, "Monitoring and Risk Analysis", available at: <https://frontex.europa.eu/intelligence/monitoring-risk-analysis/>.

⁵⁶⁴ Ekelund, H., "The Establishment of Frontex: A New Institutional Approach", *Journal of European Integration* 36, n. 2 (2014), p. 103.

⁵⁶⁵ Regine, "Harmonization by Risk Analysis?", pp.691-692.

potential connection to terrorism. However, different studies demonstrate that immigration must not be univocally judged as a negative element for a country but can also entail some positive aspects for it.⁵⁶⁶ Also, as most of the terrorist attacks occurred in Europe after 9/11 demonstrate, immigration does not always constitute the principal factor in such attacks. For instance, of the seven completed terrorist attacks in 2018, less than half were perpetrated by newly immigrated persons.⁵⁶⁷

Accordingly, the debate is still open regarding what elements bear importance for identifying security threats related to terrorism. Thus, it is possible to conclude that in the field of security, “threats” are the product of a political view: a choice made in considering certain objects as potentially detrimental for the system.⁵⁶⁸ On the contrary, what Frontex does is proposing a view of immigration as intrinsically tied to security, presenting what is the product of discretion as an objective element.⁵⁶⁹ Accordingly, Frontex is perceived as an efficiency-enhancing, transparent and rational body. This, in turn, transforms the management of external borders into a technocratic process, favoring the depoliticization of the policy and promoting the legitimacy of the agency.⁵⁷⁰ This observation contributes to explain why, although asking for the help of Frontex is not mandatory, most Member States stick with the suggestions it makes and follow its guidelines. It is also reasonable to suppose that Countries like Italy, who have demonstrated an interest in limiting immigration, would favor an approach that considers immigration a security threat.⁵⁷¹

The legitimacy of the agency is an important requisite to make sure that risk analysis is collectively accepted, particularly since its outcome determines the allocation of communitary resources. In fact, dedicated funds have been established to harmonize Member States’ practices at the external borders, particularly through the Internal Security Fund.⁵⁷² The instrument is available for Member States’ who proactively adopt policies aimed at “the reinforcement of external border checks”. It aims at ensuring “the efficient and uniform application of the Union’s *acquis* on borders and visas, including the effective functioning of the Schengen evaluation and monitoring mechanism”.⁵⁷³ Thus, the fund stimulates Member States’ compliance with European provisions (particularly the Schengen Borders Code), promoting the harmonization of their practices. However, in order to select which Member States are

⁵⁶⁶ Reinert, K. A., *An Introduction to International Economics: New Perspectives on the World Economy* (Cambridge: Cambridge University Press, 2015), pp. 194-195.

⁵⁶⁷ Europol, *Terrorism situation and trend report 2019*, available at <https://www.europol.europa.eu/activities-services/main-reports/terrorism-situation-and-trendreport-2019-te-sat> (as of 03/01/2020), pp.31-32.

⁵⁶⁸ Horii, “The effect of Frontex’s risk analysis”, pp. 246-247.

⁵⁶⁹ Léonard, “EU Border Security and Migration into the European Union”, p. 243.

⁵⁷⁰ Regine, “Harmonization by Risk Analysis?”, p.696.

⁵⁷¹ Indeed, data can be found regarding the role of Italy in claiming that immigration represents a security threat. See Europol, *Terrorism situation and trend report 2019*, p.48.

⁵⁷² See reg. (EU) n.515/2014, establishing the Instrument for Financial support for the management of external borders and the common visa policy as part of the Internal Security Fund.

⁵⁷³ *Ibid.*, art.3 point “F”.

eligible to receive the money, the Commission decides upon the data provided by Frontex's risk analysis.⁵⁷⁴ In fact, resources are allocated to those Countries whose regions experience the highest migratory pressure and activities of criminal groups. Overall, Member States are selected depending on the risk they are subject to and their proactivity in adopting policies in line with the agency's suggestions.⁵⁷⁵ Thus, we can conclude that risk analysis exercises a relevant influence onto Member States' policies on external borders: it provides incentives for compliance and for the adoption of common standards. Moreover, these political choices find surprisingly little contestation among European countries.⁵⁷⁶

In conclusion, the creation of Frontex provided the EU with a useful tool to standardize the use of coercion at the external frontiers. Indeed, the emphasis on the harmonization of Member States practices is reflected in many of Frontex's activities and aims at improving the efficiency of the agency. For instance, national border guard teams need to cooperate with foreign services to carry out joint operations. Accordingly, they must develop a knowledge of what norms regulate the common operations they will take part in. Thus, Frontex established common standards in terms of training procedures, operational practices and equipment purchase.⁵⁷⁷ Particularly, the agency cooperates with national authorities and the Union's agency for Fundamental Rights to develop common training programmes for European teams' members.⁵⁷⁸ These, utterly financed by the agency, inform national agents on the relevant European and international norms in matters of their interest, comprising refugee and maritime law.⁵⁷⁹ Importantly, the participation to these training courses determines the possibility of national staff to participate in joint operations, since only those who received it shall take part in them.⁵⁸⁰

Likewise, Frontex provides equalization in the field of technical equipment, establishing a common pool of vehicles and weaponry. The agency utilizes this pool, acquired with its own resources, to carry out the activities in which EBCG team are involved.⁵⁸¹ In conclusion, we can understand why Frontex's influence has been labelled "soft harmonization" of Member States' policies in the field.⁵⁸² Overall, the agency defines many aspects of European interventions at the frontiers: it identifies threats and vulnerabilities, it issues suggestions that have a strong influence on States, it defines common rules

⁵⁷⁴ *Ibid.*, art.6, point "c".

⁵⁷⁵ Horii, "The effect of Frontex's risk analysis", p.251.

⁵⁷⁶ *Ibid.*

⁵⁷⁷ These same objectives had been laid down within 2002's Commission Communication to the Council, see COM (2002) 233 final, p.6.

⁵⁷⁸ Art. 36, par. 1 reg. (EU) 2016/1624.

⁵⁷⁹ *Ibid.*, par 3.

⁵⁸⁰ *Ibid.*, par 4.

⁵⁸¹ Art. 28 and 39 reg. (EU) 2016/1624.

⁵⁸² Regine, "Harmonization by Risk Analysis?", p. 702. In such a case, harmonization is defied in opposition to the "hard" practice of imposing norms and interpretative categories. On the contrary, it is claimed, Frontex manages to convince Member States to change their criteria precisely thanks to its respectfulness as an efficiency-oriented and technocratic agency.

through the SBC, the Frontex regulation and operational plans, it establishes training programmes for border guards and a common pool of resources for them to use. Thus, the agency concretely contributes to the development of an integrated border management.

3.6: Conclusions of the second part

Now that we have gathered information on the legal basis of Frontex, its decision-making procedures and the influence it exercises in its praxis, we can draw some conclusions on the indirect control of the use of force. As we said, the theory claims that the Union substantially defines the context in which Member States exercise their core state powers, without exercising them itself. Accordingly, State are left with small margins of autonomy and must comply with EU

provisions. On the one hand, we ascertained that, as Genschel and Jachtenfuchs acknowledged, Member States retain the monopoly of coercion, since Frontex does not possess operational staff of its own. On the other, we verified that the agency contributes to define the situations and forms in which coercion is used. However, the precise degree of influence of the agency in shaping the context of Member States' interventions at the borders is still uncertain. In fact, although the agency establishes some binding rules, States still enjoy relevant margins of discretion. The mandatory elements entail: the formation of European teams, the pooling of information, training programmes and equipment purchase and usage. Whereas, those that lie in the hands of States comprise: the launching of operations, the implementation of operational plans and the use of weaponry. Also, the domestic law of the host State defines salient operational aspects during common operation, such as asylum requests procedures.⁵⁸³ Conversely, the European legal framework establishes uniform rules on the return of illegal migrants and the surveillance at the external frontiers;⁵⁸⁴ however it is ultimately the State who implements such measures.

Additionally, Frontex only intervenes when a State expressly requires its support. Consequently, the range of situations in which it can operate is limited to those in which it is called to do so. Surely, the procedures based on art. 13 and 19 aimed at protecting the frontiers, represent an interference into the definition of domestic policies. As we saw, these measures entail the issuing of a Council act to force Member States into compliance with the agency's suggestions. However, the effect of the two articles, together with that of art. 80 on the reintroduction of internal frontiers, must not be overlooked. In fact, their implementation consists of several steps requiring an intergovernmental negotiation. Accordingly,

⁵⁸³ Art.40, par 6-7, art. 47 par 2b, reg. (EU) 2016/1624.

⁵⁸⁴ Directive 2008/115/CE and reg. (EU) 1052/2013.

Member States have a chance of bargaining over the legitimacy of the procedures. This aspect, which would surely require a more in-depth scrutiny, suggests that Frontex's coerciveness is weaker than it would look on paper.

Still, what we said on the role of risk analysis complicates the assessment of the agency's influence. The progressive convergence of the concepts of "threat" and "vulnerability" represents an element capable of harmonizing Member States' practices at the borders. In order to verify the scope of risk analysis though, it would be necessary to examine the practice of the States party to the Schengen agreement over time. Particularly, we would need to analyze both the evolution of such concepts throughout time and how they have been concretely implemented in carrying out the checks at the borders. Only in that way it could be possible to assess whether Genschel and Jachtenfuchs' claims are correct on the matter of indirect control. Consequently, the harmonizing capacity of risk analysis is an element whose contribution is unclear. Rather, what we can positively confirm is that the agency contributes to defining the legal regime in which Member States exercise coercion: it does not do so unilaterally, but together with all the State actors involved in its activities.

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