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The new European border and coast guard agency: pooling sovereignty or giving it up?

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ABSTRACT

In 2016, the European Parliament and the Council adopted a legislative act creating and regulating a new European Border and Coast Guard Agency. Its Article 19 states that – should a Member State's failure to control its own borders jeopardize the collective effort to monitor the external borders of the Schengen Area – the new Agency could take over the management of border control operations in that Member-State. This transfer of power begs a crucial question regarding EU's conflict of sovereignties. First, this article identifies three paradigmatic conceptions of sovereignty (traditional, post-sovereignist, and post-traditional), and, second, it applies them to our case study to assess which conception provides the best explanatory model. We eventually argue that the post-traditional perspective proves the fittest to capture the current integration of the EU's external border management, best described as an institutional bricolage (by contrast with a grand architectonic design).

KEYWORDS

Border controls; Frontex; migration; political theory; refugee crisis; sovereignty

Introduction

In September 2016, not long after a massive inflow of asylum seekers came in the EU through the Balkan route and generated in its wake a political turmoil in virtually all Member States, the European Parliament and the Council adopted the Regulation (EU) 2016/1624 creating and regulating a new European Border and Coast Guard Agency (hereinafter, the Agency) (European Parliament and Council Regulation of the EU 2016). Though it may not be directly obvious from its brand-new name, this piece of legislation does not set up a new Agency from scratch tasked with the integrated management of the external borders of the European Union but arguably 'builds on the current Frontex Regulation, aiming to revamp the Agency into a Frontex+' (Carrera and Den Hertog 2016, 1).

While there is no lack of matters for discussion in the new mandate granted to the Agency (such as its expanded scope, its articulation with human rights concerns [see International Commission of Jurists, ECRE, and Amnesty International 2018] or its relation to asylum policies), one political mechanism stands out and appears bound to raise eyebrows, if not controversies. Article 19.6 states that – should a Member State's failure to control its own borders jeopardize the collective effort to monitor the external borders of

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the Schengen Area – the new Agency could, at the request of the Commission and with the approval of the Council, deploy Border and Coast Guard teams in that Member State to take over the management of border control operations. A factsheet circulated by European Commission (2015) describes this provision – bluntly but accurately – as a 'right to intervene'. This type of transfer of power is unprecedented in the integration process of the EU's external border management. Given the traditionally close association for the state between the autonomous control of its borders and its sovereignty (Torpey 1998; Andreas 2003; Duez 2018), the 'right to intervene' begs some crucial questions regarding the lingering conflicts of sovereignties within the EU's institutional architecture.

The significance of the article 19 should not be overstated. The right to intervene is neither unconditional, nor put entirely out of the Member State's reach. According to article 13 of the Regulation 2016/1624, if a state's mismanagement of its borders put at risk the stability of the whole Schengen Area, the Member State would first be informed by the Agency that it failed its periodic 'Vulnerability Assessment' – meaning that it lacks the 'capacity and readiness [...] to face upcoming challenges [...] at the external borders' (article 13.4) – and subsequently given a series of binding recommendations to implement swiftly. If the Member State does not take the necessary measures to mitigate the risks, the procedure described in the article 19 would then be triggered. But the government of the non-compliant Member State would still get a chance to have a say on the matter, since the Agency's intervention must first be approved by the Council in which the Member State is duly represented (Article 19.1).

Furthermore, if the intervention is approved, the Agency is tasked with drafting an operational plan. The non-compliant Member State has then to approve it (Article 19.5). On paper, this provides the Member State in question with the possibility to challenge or contest the plan. However, no mention is made either of a due process for a Member State to contest the operational plan or of what would happen in such a scenario. What the legislation *does* explicit however, is what would happen if a Member State did *not* comply and cooperate with the Agency within 30 days. The Commission would then trigger a procedure from the Schengen Border Code allowing the neighbouring countries to shut down their borders with the non-compliant Member State (Article 29), effectively insulating it from the rest of the Schengen Area and breaking with Schengen's founding principle of the internal free movement of people. The Member State's margin of manoeuvre is thus narrow, if not hypothetical.

It would however be preposterous to claim to know how those different vertical checks and balances would play out in practice, since the procedure has until now never been resorted to. The unequal distribution of power amongst Member States sometimes lead to political processes and outcomes that differ significantly from what European legal texts dictate. Hence our research questions, building on the theoretical framework sketched in the introduction of this special issue. What does this mandate entail for the lingering conflict of sovereignties in the European Union? Do Member States retain their ultimate authority while delegating some operational competences to a technical agency or did they just transfer inadvertently their sovereignty to a supranational level?

Drawing inspirations from our respective previous researches (Deleixhe 2016, 2018; Duez 2008), we contend that this thought-provoking political puzzle offers a unique entry point into sovereignty conflicts in the European Union for at least two reasons. Firstly, because the European Union is best characterized, in Etienne Balibar's words, neither as a boundless project, nor as territory but as a 'borderland' (Balibar 2009). In other words, Europe is made of several cultural and political overlapping folds. The Euro-Atlantic, Eurasian

and Euro-Mediterranean folds (the list is non-exhaustive) intersect and form together an EU's political space devoid of any fixed centre or well-defined identity (Balibar 2009, 202–203). Because of this overlap, borders no longer demarcate the confines of the political territory – as it was the case in the traditional Nation-State. They now run literally through its geographical space and figuratively through the core of its political project (Balibar 2010). No wonder then that, after having reached the limits of an integration process led by the construction of a continent-wide internal market, the EU pins some of its hopes for further political integration onto the development and implementation of a 'European integrated border management at national and Union level, which is a necessary corollary to the free movement of persons within the Union and is a fundamental component of an area of freedom, security and justice', to quote the ECBG's regulation (Recitals 2; see also Geddes 2008). Secondly, sovereignty conflicts that could arise in the wake of the Agency's creation underline that border management cannot be entirely reduced to a mere policy for managing transnational flows. Border management practices also contribute to construct politically a distinction between 'Them' and 'Us'. It contributes to the process of forging a European we-feeling or, in other word, a political community. In this view the creation of the Agency may be viewed, in the words of Norbert Elias (2012), as part of a broader socio-historical process in which small, independent, and competitive social units were gradually transformed and integrated into larger, more centralized, and powerful social units. The European Border and Coast Guard Agency could then be considered a step in an on-going competition between different political units for the monopolisation of the 'legitimate means of movement' (Torpey 1998).

Bringing together those different insights, we will consider that the far-reaching mandate of the European Border and Coast Guard Agency provides a unique vantage point to scrutinize the conflict of sovereignties between the supranational and national levels of power that result from the European integration, but also between various definitions of sovereignty. Bracke, Coman, and Crespy posit in their introduction to this special issue that a research hypothesis binds together the different contributions: 'sovereignty conflicts have become more complex over time' within the European Union (Bracke, Coman, Crespy 2019, 7). For claims of sovereignty no longer pit the nation-state against a supranational authority on a unidimensional vertical axis. Conflicts of sovereignty are now of a multidimensional nature and involve claims from distinct institutions and actors to be the legitimate representative of either popular or parliamentary sovereignty. Those normative claims add a new layer of complexity to the already byzantine tangle of sovereignties within the EU. This article springs from the hypothesis that conflicts of sovereignty within the European Union have indeed grown increasingly complex and ought now to be regarded and studied as multidimensional but, in order to bring some clarity to this muddled picture, it relies on a slightly distinct conceptual typology, emphasizing the divergent meanings of the concept of sovereignty. Our own argumentative strategy consists, first, in identifying and defining three paradigmatic conceptions of sovereignty (traditional, post-sovereignist, and post-traditional). In a second time (and a subsequent section) we will then apply them in turn to the new mandate of the ECBG Agency, to assess which conception provides the best explanatory model for the emerging integration of border management at the European level. We will then explain why both the traditional and post-sovereignist perspectives are ill-equipped to tackle and explain the peculiarities of this new border regime. We eventually will contend that the post-traditional perspective presents a crucial advantage: it considers sovereignty as an historical concept whose constitutive

elements have been broken down and reconstructed it in innovative ways several times over the course of political modernity. This recognition of the changing nature of sovereignty makes it a convenient lens to investigate an institutional bricolage resulting from an unstable political compromise such as the current EU's external border management.

Three conceptual approaches of sovereignty

Two authoritative scholarly figures on the interaction between sovereignty and European integration – Bellamy (2017) and Avbelj (2014) – concur in drawing a strikingly similar threefold typology of sovereignty in the European context. In a first instance, a sharp contrast is drawn between a traditional understanding of sovereignty and its polar opposite, that is a radical deconstruction of the concept eventually leading to the claim that we now live in a *post*-sovereign world. Making some room for nuances offers a way out of this head-to-head confrontation and invites to consider a post-traditional conception of sovereignty. The latter would not break entirely out of the mould of sovereignty but would nevertheless disaggregate and reassemble innovatively some of its constitutive elements. Let us unpack briefly each of these perspectives on sovereignty.

Though they have little in common, the traditional and post-sovereignist perspectives on sovereignty nevertheless share one premise. They both assume that sovereignty has a fixed meaning, or at least that its understanding is not subject to historical fluctuation (Loughlin 2003). In their views, sovereignty claims decisively (and, at is inception, provocatively) that no higher order underpins the political order (Mairet 1997, 18–20). The concept would therefore mark an irreversible break in history and usher in political modernity. This begs in turn the question of the *ability* to create and maintain this non-derivative political order. At this juncture, traditional and post-sovereignist perspectives part ways.

For the *traditional perspective* on sovereignty, that owes most of its original insights to Thomas Hobbes (1996) and Bodin (1955), political modernity ought to draw our attention to the close association between sovereignty and supreme authority. In the absence of a stabilizing higher law or power, a ruler must be able to have a final word on any contentious matter, to put an end to internal conflicts and preserve the peace of the polity. The concept of supreme authority implies, in turn, that sovereignty be both *single*, for there can be no supreme authority where two rival authorities compete, and *indivisible*, since any dispersal of its exercise may lead to a challenge between various loci of effective power (Prokhovnik 2008, 40–41). Sovereignty thus needs to demarcate the space on which a ruler can claim supreme authority, thereby creating a *territorial polity* in need of an institutional apparatus, i.e. a *state*, to defend its independence externally from other sovereign polities and to fend off internal challenges to its authority. Traditional sovereignty would thus be defined by a structured cluster of political principles forming 'a mutually supporting package' (Bellamy 2017, 4). This package would be so robust and its constitutive elements so intertwined that no historical shock would have been disruptive enough (or no passing of time corrosive enough) to untangle its key tenets. In Avbelj's words (2014, 348): 'sovereignty remains what it has always been: single, absolute, indivisible, territorial and statist'.

The *post-sovereignist critique* of the traditional view of sovereignty springs from an irrefutable empirical observation: we no longer live in the Westphalian world in which the only relevant political units were independent and territorially enclosed Nation-States (and perhaps, we never did[1]). Authors labelled as 'globalists' put forward the by-now familiar

claim that a combination of technological progress, environmental risks, diffusion of liberal norms and new means of communication created a seismic change in the political landscape, compelling us to rethink, amongst other things, the role and place of sovereignty (Sassen 1996; Castells 2010; Beck 2018). With the rise of an international legal regime ensuring the (imperfect) protection of human rights and the proliferation of international organizations, no authority would be left unsupervised and the previous concentration of authority in the hands of a governmental body at the level of the state would appear to be outdated (Pogge 1992, 48–75).

Adopting a more normative stance, post-sovereignist authors suggest that, to restore any form of efficiency in dealing with global issues, we should rather get rid of this political principle. Since the concept of sovereignty is assumed to have a fixed meaning, it cannot be saved from the fatal blow dealt by globalization. Mairet (1997, 13) brings this analysis to its logical conclusion: 'sovereignty has run its course'[2]. The goals previously attached to sovereignty (that is, preserving independence, maintaining internal order and providing the means for polities to face challenges) would be best achieved in our current world by alternative political principles, such as a vertical dispersal of authority between different levels of decision-making (Pogge 1992, 58), a deterritorialized struggle to enforce subjective rights (Colliot-Thélène 2010) or a shift from the centralizing and hierarchical logic of government to the polycentric and fluid framework of governance (Finkelstein 1995, 367–372). To sum up, sovereignty would be at best obsolete, if not a hurdle, and should be replaced by a non-statist, non-territorial, non-authoritative organizing political principle.

What is striking with the post-sovereignist perspective on sovereignty is that it does not so much challenge or redefine the traditional definition of sovereignty as it rejects it. Since post-sovereignists share with the traditionalists the view that the concept of sovereignty is a structured cluster of mutually supporting elements, it takes for granted that it cannot be reformed and should consequently be discarded if it is no longer fit to tackle contemporary political issues. However, post-traditional perspectives on sovereignty make the pragmatical observation that sovereignty is a social concept, whose efficiency depends on the shared beliefs of agents in its value (MacCormick 2007). And, indeed, sovereignty keeps being referred to by most political actors. It appears thus to retain some form of currency, even in a globalized world. Criticizing sovereignty would not amount to beating a dead horse but would offer an opportunity to think through some ways to reform it (Avbelj 2014, 353–354).

In line with this first insight, post-traditionalists reject the view that sovereignty is a rigidly structured concept and argue that it can evolve (and indeed has evolved) over time to adapt to external circumstances while retaining some of its key tenets (Prokhovnik 2007). A permanent process of conceptual innovation led to the reformulation of some of its key principles while helping sovereignty to remain relevant. By design, this perspective on sovereignty refrains from providing a detailed definition of the concept and rather opts to draw our attention to the decisive conceptual changes sovereignty has gone through over time, be it with the introduction of the revolutionary concept of a *popular* sovereignty by the French Revolution (Rosanvallon 2000), the 'Philadelphian model' of a dispersed sovereignty suggested by the Federalist in the United States (Keohane 2002), or by the relativization of sovereignties through legally enforceable universal norms (Habermas 1996). As it is pointed out in the introduction to this special issue (Brack, Coman, and Crespy 2019), in the European Union, state sovereignties underwent some radical changes and are now 'pooled' (Peterson

1997), 'shared' (Wallace 1999), 'limited' (Keohane 2002), or 'plural' and 'mixed' (Bellamy and Castiglione 1997). This conceptual exuberance is disorienting and the exploration of its nuances and promises is beyond the remit of this article. We would just like to point out a key finding in the post-traditionalist perspective on sovereignty, namely that the concept of sovereignty has been broken down into constitutive parts and reconstructed innovatively several times over the course of its conceptual history. In the process, many of the feature that traditionalists consider to be defining sovereignty have been deeply modified, if not rebutted.

Traditional sovereignty and the new mandate of the agency

If we adopt the traditional view of sovereignty and associate it with a supreme territorial authority, the distribution of sovereignty is turned into an extreme version of a zero-sum game. For, since sovereignty knows no gradation and is assumed to be absolute and indivisible, it cannot logically belong to two actors at once (Walker 2003). Traditional sovereignty is a 'matter of "all or nothing"' (Keohane 2002, 756), or a 'winner takes all' situation. Either the Member States are collectively the sovereign units of the European integration, or the European Union has taken the mantle of the sovereign and should soon reveal to be a supranational State in the making. But there is no third way that escapes this alternative. This sharp distinction is reminiscent of the foundational cleavage in the subfield of European integration studies between intergovernmentalists and neofunctionalists. While the former saw in the European integration a way to rescue the States and argue that European integration never entailed any decisive transfer of power but a mere delegation of competences (Milward 1993), the latter claim that integration is a self-sustaining institutional dynamic whose end goal is the full integration of the subunits into a sovereign supranational polity (Sandholtz and Sweet 1998). Let us now apply the three perspectives on sovereignty to our case study and assess their accuracy.

The technical and supervisory agency and the sovereign member states

The official discourse of the European Union is that the new mandate of the Agency will boost the EU's efficiency without altering its institutional nature. Formerly known as Frontex, the Agency remains a technical actor with limited political responsibilities. This discourse acknowledges that the Agency's new mandate expands dramatically the scope of its activities, but it sees no qualitative change in its governance or in its distribution of responsibilities between principal and agent. The Agency would remain under a firmly intergovernmental governance regime, reflected in the composition of its Management Board, currently made of the heads of each national service of border guards and two vastly outnumbered representatives of the Commission (European Commission 2018). From this institutional perspective, the Member States appear to be in the driving seat of Europe's integrated border management while the Agency is but a technical tool at their disposal. For instance, despite its reinforced mandate, the Agency still has to rely on the good will of Member States when it comes to the deployment of the human and operational resources without which Frontex missions are nothing but empty shells.

But though the Agency's new mandate is, in the words of one of its finest analyst: 'not a revolutionary leap forwards' (Rijpma 2016, 5) it brings enough complex changes to the existing legislation and practices to call for a nuanced analysis. At first glance, it may

even appear that the Agency's new mandate tilts the balance towards a transfer of sovereignty at the supranational level. For, in the words of another analyst, the new mandate is indeed: 'premised on the assumption that beefing up Frontex with more competences would help in adequately responding to the "refugee crisis"' (Carrera and Den Hertog 2016, 5). The Agency is indeed reinforced in the exercise of its previous regulatory and operational functions. With regards to its regulative task, the Agency keeps having most of its own human resources dedicated to data-gathering and risk-analysis (Fabrizi-Racine 2017). As a matter of fact, the further development and widening of Eurosur – an information-exchange framework aiming to improve surveillance and intervention capabilities at the external borders (Bellanova and Duez 2016) – figures prominently in the new mandate as one of the top priorities of the Agency (Council of the EU 2018). The constant monitoring of migration patterns and routes is at the core of its activities and informs the rest of its practices. The Agency is keen to emphasize that it conducts 'intelligence-led policing' (Jeandesboz 2015). But, though the intelligence is centralized and processed by the Agency, it must first be collected and submitted by the Member States, leaving the quantity and quality of the intelligence shared at the discretion of the latter.

With regards to its operational functions, the Agency's new mandate aims to respond to what was identified by the Commission as Frontex's main deficiency, that is the lack of contribution (in human resources and equipment) of some Member States to Frontex operations. Plain to see during the 2015 refugee crisis, the unwillingness of Member States to bear their fair share of the costs associated with Frontex operations is a long-standing issue severely undermining the Agency operational capacity (Duez 2014). The new mandate therefore reinforces the coordination role of the Agency and makes the States' obligations more explicit and constraining. For instance, it closes some of the legal loop-holes previously allowing Member States to escape their responsibilities in providing guards and equipment (such as the invocation of a domestic 'emergency situation') (Rijpma 2016, 6), it empowers the 'liaison officer' representing the Agency in Member States hosting a joint operation (Article 12, Regulation (EU) 2016/1624), and finally, it grants the Agency with the aforementioned 'right to intervene'. But, as Carrera and Den Hertog (2016, 1) argue, this model amounts to more of the same and 'stops short of establishing an agency staffed with its own "European border guards" [. . .] thereby reinforcing rather than overturning the logic of Member State border guards seconded for the Agency's work'. In other words, the Agency may have received more competences, the intergovernmental logic of its governance model nonetheless remained untouched to avoid ruffling the feathers of the Member States. It notably avoids the touchy question of designing a robust and binding solidarity mechanism amongst Member States with regards to the implementation of the border controls, left to the states' responsibility (De Bruycker 2016).

The latest reports of the Commission on the operationalisation of the European Border and Coast Guard confirm those predictions. So far, there subsists significant gaps between the planned and the actual provision of human resources and equipment while there is a poor communication of their data by the Member States (European Commission 2017). As recently as May 2018, the European Commission identified 'serious gaps in pledges' made by Member States for operational activities. Despite two consecutive open calls launched by the Agency, the pledges up until the end of April 2018 only cover 49% of the operational needs for experts and 44% of the technical assets for activities at land borders for the period

May–June 2018. For sea border operations, 85% of the experts could be provided but only 51% of the technical assets (European Commission 2018). Despite the Agency's best effort to reinforce its authority, its new mandate would only have confirmed the distribution of responsibilities between the authoritative political actors (i.e. the Member States) and a subordinate technical agency at their disposal.

But this uncompromising assessment of the Agency fails to convince entirely. For, the Agency is granted by the new mandate, on top of its regulative and operational functions, a supervisory role. This is a major innovation. The Agency must now produce a yearly 'Vulnerability Assessment' for each Member State's borders. Those assessments are presented as purely technical, relying exclusively on objective data to identify operational weaknesses, and contrasted with the more politicized pre-existing Schengen Evaluation Mechanism (Rijpma 2016). But this eagerness to distinguish technical from political assessments betrays a deeper truth, namely that the topic of border control has become so politicized that no operational or policy recommendation can ever be a-political and purely technical. In its supervisory task, the Agency is bound to endorse a political role, whether it likes it or not. The provision of right to intervene makes this shift even more palpable. For, any failure to comply with the Agency's recommendation will eventually lead to a European intervention, making those 'Vulnerability Assessments' a very effective tool to monitor states' border practices.

Furthermore, as Ripoll Servent (2018) argues building upon a typology of delegation established by Majone (2001), the Agency should not so much be acting as an *agent* strictly controlled by its *principal* (that is, the Member States) but should ideally be acting as a *trustee* whose aim is to restore the credibility of the integrated border management by preventing cooperation from falling apart. However, since the Agency lacks the required autonomy to enforce properly that coordination, Ripoll Servent presents it an example of a *failed delegation* leading to the establishment of an institutional proxy through which strong Member State can impose their will or even intervene in weaker Member State. Whether one considers it to be either too interventionist or too subordinate to particular interests, the depiction of the Agency as an a-political, neutral and technical agency is in any case severely challenged. And so is the idea that the sovereignty of the Member States is unaffected by the Agency's new mandate.

The authoritative agency and the sovereign European Union

When journalists first heard about the European Border and Coast Guard Agency, few of them resisted the temptation to run sensationalist headlines arguing that this marked a dramatic shift of sovereignty from the national to the supranational level[3]. Some seasoned analysts of the Agency concurred. Steve Peers, for instance, claimed that the new mandate: 'in effect, promotes Frontex from the job of tea lady to the role of chief executive officer' (Peers 2015). This is best illustrated by the worry, expressed by some legal scholars, that the 'right to intervene' granted to the Agency would infringe upon the Article 72 of the Treaty on the Functioning of the European Union, stating that Member States are ultimately responsible for their internal security (Rijpma 2016, 6). From a traditional perspective on sovereignty, this makes sense. If Member States are no longer sovereign, it indicates that its indivisible and supreme authority must have been transferred elsewhere (Mungianu 2013). Two very distinct strands of literature suggest that there was indeed an upward transfer of sovereignty toward a supranational level. According to this view, the European Union would

look ever more like a state-in-the-making and the integration of its border management would play an important part in this process. We can find echo of this claim either in the neofunctionalist perspective or in the critical security studies.

Niemann and Speyer attempted in a recent article to overturn the conventional wisdom according to which neofunctionalism would be conceptually ill-suited to address issues of high politics, usually regarded as the reserved domain of sovereign Member States (Niemann and Speyer 2018). Considering that the refugee crisis of 2015 acted as a catalyst to reveal the dysfunctionalities of the previous Frontex governance, their analysis of the Agency's new model builds upon two theses. First, the economic and symbolic costs associated with a disintegration of the Schengen area were so high that both the national and supranational actors involved were keen to avoid any spillback (Niemann and Speyer 2018, 30). Second, incremental changes towards further integration was achieved through a combined pressure from supranational institutions and socialized transnational elites, such as European public servants, human right groups and business associations (Niemann and Speyer 2018, 32–38). In the face of daunting challenges, and since there was no possible way back to national solutions, European transnational elites would have been left with no other choice but to stack all of their political entrepreneurship behind a collective solution, leading to an Europeanization of border controls. This optimistic analysis of the political outcomes of the 2015 refugee crisis may however be overlooking a tad too quickly that some national actors, such as the xenophobic and nationalist parties now present in virtually each Member State, do not regard the disintegration of Schengen as a symbolic cost and are more than willing to overlook its economic cost. Furthermore, the neofunctionalist assumption that European integration is gifted with a self-sustaining dynamic is not corroborated by all the aspects of the Agency's new mandate. As we tried to show above, though they had to make some concessions, Member States resisted bitterly the promotion of the Agency to the status of a supranational authority and ensured that it would remain under a mostly intergovernmental governance. One could also point out that, despite repeated and sustained efforts from a coalition of transnational political entrepreneurs, the European governance of asylum so far failed to integrate any further.

From a very different starting point, critical security studies have argued for some time now that the European Union had resorted to the trick of 'securitizing' migration to foster the integration of its distinct Member States into a unified polity (Huysmans 2000). Through the recurrent association of migrants with a destabilizing effect on the welfare state, public order or the national identity, the European Union has constructed socially and politically the migrant as an existential threat, putting its survival into jeopardy and thereby calling for a sovereign decision to restore order (Huysmans 2006). This in turn would have called for the integration of increasingly more restrictive border controls at the European level, effectively amounting to a transfer of sovereignty from the national to the supranational level. Some time ago, Andrew Neal (2009) had already contested this argument with regard to the original creation of Frontex and we contend that this holds equally true for its new mandate. Neal convincingly shows that, though the concept of a European agency tasked with the control of borders was introduced in the immediate post 9–11 context and was an obvious attempt at securitizing migration, the bureaucratic logic quintessential to the European Union prevented the emergence of anything like a decisionist sovereign, affirming its authority through the regulation of the exception. Negotiated at length between a wide spectrum of actors with conflicting interests: '[the Agency's] logic is not one of response but

rather of anticipation and management.' (Neal 2009, 349) Its regulatory and supervisory functions, based on risk-analysis and surveillance, are much more important to the institution than its operational function. If anything, the Agency's new mandate reinforces this emphasis, further undermining the popular fear that the Agency could be spearheading a supranational revolution meant to turn the European Union into a fully sovereign state.

A post-sovereign agency in a post-Westphalian world?

Post-sovereignists argue that the exponential increase in transnational flows radically transformed the structuring of world politics and relegated Nation-States from the status of sovereign (and thereby prominent) actors on the international scene to the rank of one actor amongst many equally important others, such as multinational corporations, global NGOs and transnational networks (Risse-Kappen 1995; Ohmae 1991). Accordingly, sovereignty tumbled off its pedestal. Unable to achieve its main goal, that is to enforce single-handedly a sustainable public order over a territory, sovereignty has been said to have run its course and invited to make way for a new organizing political principle. This post-sovereignist perspective usually goes hand in hand with the thesis of an epochal shift from *government* to *governance* (or *governmentality* in Foucaldian terms) (Rosenau 1992; Foucault 2008). The new exercise of power would no longer be law-centric, centralized, and top-down but would lodge itself into a diffuse network of power apparatus operating in a more bottom-up fashion. For, according to Foucault, governmentality is fundamentally concerned with the art of conducting the individual conducts (in contrast with the repressive approach to individual behaviour adopted by governments) and acutely aware that 'one always governs too much' (Foucault 2008, 319). Hence the turn from hard to soft law or the shift to a decentralized and horizontal governance. In terms of border controls, this would also call for a change of perspective. Borders would no longer be territorial lines demarcating the confines of a sovereign power but would now operate as deterritorialized instruments of social controls, selectively sorting out wanted and unwanted transnational flows in an interconnected world (Walters 2006; Razac 2003; Mezzadra and Neilson 2013).

And to a certain extent, it is true that Member States had a vested interested in the delegation of their competences in border controls to a largely unaccountable supranational agency forming part of a Europe-wide governance of migrations. Since politicians are squeezed between a demand emanating from substantial parts of their domestic electorate for watertight border controls, on one hand, and legal constraints on migration policies that spring mostly from national basic laws enforced by national constitutional courts, on the other hand, they engaged in some forms of venue shopping and moved the decision-making process to a political level that offers more opportunities to escape judicial oversight (Guiraudon and Lahav 2000). It is also a way for politicians to delegate a very sensitive and complex responsibility to relatively unknown and opaque actor, allowing them to claim credits for any of its successes and to lay the blame at its feet in case of failures (Rijpma 2010).

Though a useful lens to scrutinize critically some empirical developments in the field of European border controls such as the Schengen visa policies or the networking of national polices (Bigo 1996; Bigo and Guild 2003), the post-sovereignist perspective does not appear to be particularly fitting for our case study: the Agency's new mandate. In fact, the Agency appears to be swimming against the current of governmentality. Firstly, because it resorts increasingly to binding legal instruments to compel Member States to adopt the required

behaviour with regards to border controls (Cortinovis 2015). The right to intervene is an excellent illustration of this trend. Secondly, because the Agency's exercise of power is far from being devoid of any recourse to violence or coercion, casting some serious doubts on the thesis according to which power would now be geared towards a soft orientation of the individual conducts through suggestions, nudges, and discrete incentives. The Agency's new mandate enhances its role, for instance, in the organisation of migrant forced returns (possibly one of the most coercive act perpetrated by public authorities during peace time) and grants it the right to launch joint return operations at its own initiative (Recitals 32, Regulation (EU) 2016/1624).

This recurrent recourse to an institutionalized form of violence is indeed what some campaigners condemn, depicting Frontex variously as the 'watchdog' (Intrand 2015) of Fortress Europe, or the 'armed wing' (Migreurop 2014) of its migration policies. The 'Frontexit' campaign, for instance, puts forward the military means at the disposal of the Agency and the rising death toll in the Mediterranean Sea as evidence that the Agency turns the external borders of the European Union into frontlines of a needless war waged against an imaginary enemy (Frontexit 2017; Blanchard and Wender 2007). One does not need to agree fully with the campaign's argument to acknowledge that, at the very least, Frontex was instrumental in standardizing repressive practices of border controls throughout Europe. Despite the thrust towards a decentralized European governance of migration (of which the Agency is a central element), the Agency's recurrent recourse to institutionalized forms of coercion is at odds with the thesis of a post-sovereign world in which governmentality would replace government.

The agency at the crossroad of mixed sovereignties. A plea for complexity

Taking stock of the refutations of both the traditional and post-sovereignist perspectives on sovereignty as explanatory models, we suggest (unsurprisingly perhaps given the structure of the article) that the post-traditional perspective is the most consistent with the actual state of power redistribution in European. It better accounts for complex and changing relationships and balance of power between Member States and the European Union. In Bellamy and Castiglione's words, the European integration led to an 'amalgam that may be more bricolage than grand architectonic design, and none the worse for that.' (Bellamy and Castiglione 1997, 423). This description matches closely Frontex's latest developments. The organisation of joint operations offers an excellent example of the convoluted results of this constant negotiation process between partially sovereign actors, leading to a situation in which sovereignties are mixed. The Agency's new mandate had, in the Commission's initial proposal, a clear supranational inclination – granting the Agency with a direct authority over national border guards during joint operations. The Member States, through the Council, then amended the proposal to curb this transfer of power, leading to the current solution. Under the new mandate, while the Agency is tasked with designing operational plans for joint operations and coordinating the different national polices on the ground, the Member State in which the operation takes place is legally in charge of the operation and will be held accountable, should anything go awry. Member states also provide nearly all the human and technical operational means for the operation.

This outcome is the result of an unstable compromise reached ultimately in the Council. During its decision-making process, the Council found itself between a rock and a hard place. National public opinions called stringently for more efficient border controls, but Member States staunchly refused to delegate any substantial authority on an issue so close to the core of their sovereign prerogatives (Gatto, D'Alfonso, Dobreva for the European Parliamentary Research Service 2016). Which is why they eventually opted for a policy whose practical details were so vague that only time, and their effective implementation, will tell how the power relations between the different actors will play out and whose authority will prevail. In other words, it is *because* and not *in spite of* the mandate's indeterminacy that it could prevent incurring the wrath of the parties sitting at the negotiating table and be agreed upon. It comes as no surprise to those who follow European and international negotiations closely. Looking into a different European conflict of sovereignties that bears some similarities with our case – the EU's conventional arms export control regime, Hansen (2016) pointed out that ambiguity, vagueness, legal indeterminacy, and interpretive leeway are often used in tough negotiation as strategies aiming to prompt convergence among actors.

In spite of this, one conclusion regarding EU's conflict of sovereignties may still be drawn. Though the Agency's new mandate is not a revolutionary leap forward in terms of political integration (Guiraudon 2018) and falls short of transferring the locus of sovereignty from the Member States to a supranational institution, it does not leave the national sovereignties unaffected (Jabko and Luhman 2019). For, the Member States consented (unwittingly perhaps) to one decisive shift in the distribution of their sovereignties, notably through the Article 19: *they made themselves co-responsible of their respective borders*. Drawing on a distinction highlighted by Van Middelaar (2013, 18–25), we might say that, though Member States remain the key loci of sovereign border controls (and resisted any substantial transfer of power to supranational offices such as the Commission), they no longer exert this prerogative *individually*. It is now the Member States considered *collectively*, as a club of associated States, that act decisively on those matters (Van Middelaar, 46–55). The difference with the pre-existing situation may be subtle but it is nevertheless a clear departure from the doctrine of a unique and supreme authority concentrating all power over border controls. The exercise of sovereignty is turned partially (that is, on a specific policy issue and during emergency situations only) into a collective endeavour shared among different members of a select club. But far from being a deliberate decision taken in full awareness by the Member States, it rather appears as an unintended by-product of a policy chosen as the lowest common denominator of the preferences expressed by the negotiating parties.

Conclusion

Having described the power redistribution in Europe as a sort of amalgam or '*bricolage*', one last question arises, on which we would like to conclude: may such a *bricolage* be resilient, meaning able to withstand or recover quickly from difficult conditions? In plain language, the concept of *bricolage* referred to the process of making or creating something new from a diverse range of things already available. The term, derived from the French verb 'bricoler' (meaning 'to tinker' or 'to putter around'), suggests a great deal of improvisation and creativity. But it also suggests fragility and provisionality. Just like a rubber patch would seal a leaking pipe as long as the leak does not get worse, this *bricolage* of sovereignties would last up until a new crisis occurs and changes the power relations between Member

States and the European institutions. In more academic terms, the question of the stability of the contemporary distribution of power in the field of European border management could be reformulated through the traditionalist/realist lens, begging the question of an eventual 'test of sovereignty' (see for instance Morgenthau 1972, 322–323). One might think that such a reformulation compels us to fall back on the traditional perspective according to which sovereignty is necessarily single and indivisible. For it implies that this political compromise is fragile *because* it allows sovereignty to be exercised jointly. Our article, however, does not make such a claim. It rather states that the design of the European management of borders does not match a single political actor's preference and is rather a second-best solution born out of a contentious deliberation. What our article *does* say however is that, since this compromise is seen as piecemeal and unsatisfactory by most of the negotiating parties, it will be of little use to silence future sovereignty claims. The distribution of power has voluntarily not been clarified during the negotiation of the regulation in order to reach a political consensus. This situation foreshadows future struggles between Member States and the Agency about who is entitled to act, how and with what responsibilities in the management of the next crisis at the European external borders. Knowing that migration and asylum issues are not likely to disappear and will probably amplify, we will not have to wait long before seeing which side of the 'flipping coin of sovereignty' will show.

Notes

1. As a matter of fact, this Westphalian order may very well have never existed as such and amount to a powerful political myth. Krasner, S., *Sovereignty. Organized Hypocrisy*, Princeton, Princeton University Press, 1999.
2. Our translation.
3. 'The biggest transfer of sovereignty since the creation of the single currency' according to the *Financial Times*, 15 December 2016.

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