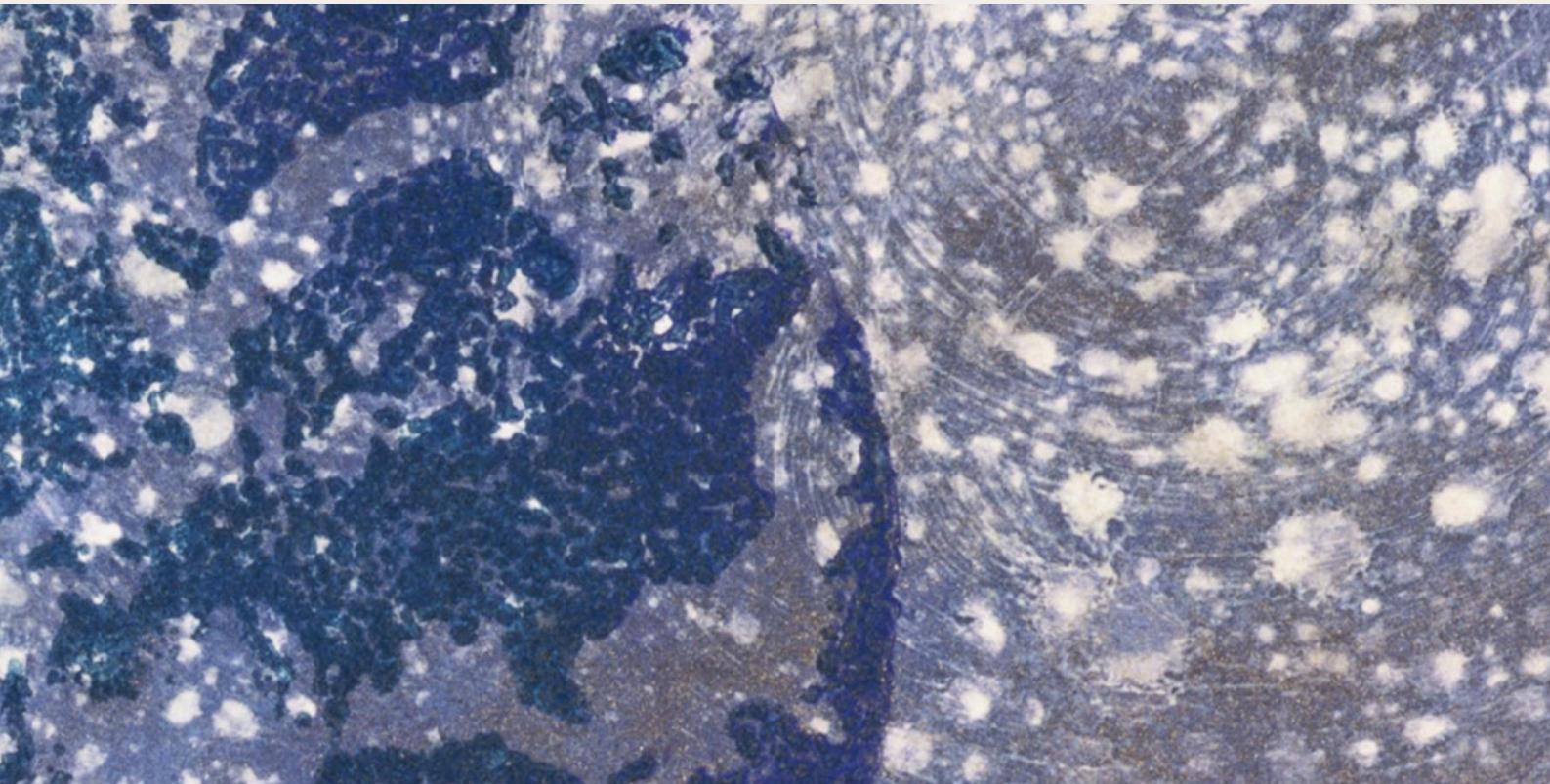


Borders of Technocracy

Expertise, democracy, and the legitimacy of unelected bodies

Trym Nohr Fjørtoft

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Abstract

The delegation of power and tasks to unelected bodies, a pervasive trend in modern democracies, raises a democratic puzzle. These institutions are removed from majoritarian democratic procedures, breaking the “chain of command” from citizens to elected officials and administrations. Still, they make claims to political authority and legitimacy. This dissertation asks: Under which conditions is the delegation of power to unelected expert bodies democratically legitimate?

The dissertation focuses on European Union agencies. It has been common to justify the power of EU agencies by appealing to what the dissertation calls *technical legitimacy*. The argument says that political neutrality and technical expertise are independent sources of legitimacy for unelected bodies. Certain institutions are legitimate despite, or even because of, their isolation from majoritarian democratic procedures.

Through an introductory chapter and four articles, this dissertation aims to delineate the boundaries of technical legitimacy. It cautions against too much faith in technical legitimacy, for instance through the widespread claim that agencies’ value-freedom will ensure their legitimacy. But it also disagrees with the position that technical legitimacy is *never* appropriate. The challenge is to figure out when technical legitimacy may be the appropriate standard – and what should come in its place where it is not.

The dissertation combines empirical and normative analysis. A mixed-methods media analysis finds that the legitimation arguments used about agencies in public debate depend on their scientific “hardness” and public salience. A case study of the European Border and Coast Guard Agency, Frontex, uncovers how appeals to technical legitimacy were central when it received a new mandate in 2016. On the normative side, the dissertation argues that agencies face different legitimacy demands depending on their level of epistemic uncertainty and the consequences of potential errors. It also develops a symmetry criterion for legitimacy. The legitimacy of an agency might depend on the level of power delegated to other agencies in a policy area, so that the system as a whole leaves no gaps. Taken together, the dissertation argues against a one-size-fits-all approach to legitimacy: Every institution must not satisfy everything that democracy demands, but the system as a whole must.

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Oslo, May 13, 2022

Trym Nohr Fjørtoft

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Chapter 1

The boundaries of technical legitimacy

Introduction

A pervasive trend in modern democracies is the delegation of power and tasks to unelected bodies. Monetary policy is delegated to independent central banks. Independent regulatory agencies are in charge of food safety, medicines regulation, and a range of other fields. Even core tasks of the sovereign state, like border control, are being delegated to supranational agencies. This development raises a basic democratic puzzle. These institutions are removed from majoritarian democratic politics, breaking the “chain of command” from citizens to elected officials and administrations. Still, they make claims to political authority and legitimacy. But these claims must be grounded in something else than direct answerability to elected officials. This dissertation asks: Under which conditions is the delegation of power to unelected expert bodies democratically legitimate?

Unelected bodies are a feature of both domestic and international politics (*Vibert 2007; Maggetti 2010*). They may be supranational, such as EU bodies or committees of international organizations (*Thatcher and Sweet 2002; Steffek 2021*). They may be domestic, such as national regulators or central banks. They may even be private or semi-private actors (*Cordelli 2020*). This dissertation will focus on a class of unelected bodies that has proliferated rapidly over the past few decades, located at the intersection of the domestic and supranational levels: European Union agencies. These are EU-level institutions with a legal personality, a degree of independence, created by secondary law and staffed by specialists or experts to carry out clearly specified tasks (*Kelemen 2012; Wonka and Rittberger 2010*). There are today close to 40 EU agencies, with a diverse set

of tasks ranging from food safety and fisheries control to gender equality, financial regulation, and border control.

Two parallel trends stand out. Ever more policy areas are delegated to EU agencies. And, through frequent renewals of their mandate, many existing agencies receive increased powers. These twin developments put a strain on the argument that has classically justified such institutions, which I will call the *technical legitimacy* argument. The core of the argument is that political neutrality and technical expertise are sources of legitimacy for unelected bodies. If democracy includes a substantial obligation towards the common good (in the sense of producing results that are in the public interest), certain decisions might legitimately be insulated from majoritarian procedures. As I will return to, variants of this argument are a common thread in many strands of the academic literature on legitimacy. The argument stands in a possible tension with another main demand of democracy, namely that the people, through its elected representatives, is the source of the law (*E. O. Eriksen 2021, 5*).

There is a paradox in the status of technical legitimacy today. A consistent finding in the empirical literature is that the claim to politically neutral expertise and objective knowledge is a powerful legitimizing device. Some claim that political actors strategically disguise their claims in an “objectifying cloak” to obtain legitimacy (*Sinclair 2005*; see also *Paul 2017*; *Boswell 2009*). Others hold that the appeal to technical legitimacy is not necessarily strategic, but that there is a deep-seated cultural reverence for objective knowledge, and especially numerical evidence, in the modern world, including in policy-making (*Porter 1995*; *Fourcade 2009, 84*; *A. Eriksen 2021a*). Technical legitimacy is also a crucial component of the official discourse underpinning EU agencies’ legitimacy. In a 2002 communication, the European Commission wrote: “The main advantage of using the agencies is that their decisions are based on purely technical evaluations of very high quality and are not influenced by political or contingent considerations” (*Commission of the European Communities 2002, 5*). Some academics have argued that for non-majoritarian institutions, technical legitimacy is not only empirically effective; it is in fact the appropriate normative standard. Due to the need for credible commitments or epistemic obligations to ensure the quality of decisions, the argument goes, democratic “input” is not necessary for non-

majoritarian institutions to be legitimate (see *Majone 1996* for the paradigmatic case). Insulation from politics is in this case not only accepted; it is required for these institutions to be legitimate.

At the same time, many academic commentators, coming from both normative and empirical angles, dismiss the idea of technical legitimacy as naive or unfeasible. The separation of political from technical considerations, while conceptually clean, may prove untenable in practice. If technical decisions are unavoidably intertwined with political values, technical legitimacy has no firm foundation to stand on and would be normatively difficult to defend. What is more, some commentators argue that claims to technical legitimacy are unlikely to be accepted by citizens. According to Martin Shapiro (1997, 287), “information is not technical but political and ... technocracy is, these days, not perceived by the public as legitimate.” The EU, in particular, has been described as moving from an era of quiet, depoliticized integration through technocratic means to a more politicized status quo where contestation has rocketed and where national leaders are hesitant to engage in European integration at all (*Hooghe and Marks 2009; McNamara 2018*). A recent volume claims that the emerging contestation of expertise in the EU means that its policy-making “risks losing a convincing narrative to legitimize policy choices ... which cannot be legitimized through the traditional majoritarian mechanisms on which established nation-states can rely” (*Abazi, Adriaensen, and Christiansen 2021, 11*). Recent claims that we are living in a “post-truth” era, where trust in experts is at an all-time low, suggest that the contestation of expertise may be a problem facing more than just the EU (*McIntyre 2018; Michailidou and Trenz 2021*).

Here is the technical legitimacy paradox: If legitimacy based on claims to neutral expertise and objective facts is both normatively untenable and empirically contested, why is it so frequently invoked—and seemingly effective at generating public trust and authority? This dissertation aims to resolve that paradox. Every modern democracy delegates to experts, most of the time without widespread public contestation. I stipulate that technical legitimacy may be appropriate under certain conditions or modes (see e.g. *Radaelli 1999b*). Not all agencies are created equal—they differ in their expertise type, their scope and power, their political salience, and more. I assume that this variation should matter for their

legitimacy. I will defend an institutional view of legitimacy: There is not one single legitimacy criterion that every agency must meet. Instead, the criteria an agency must meet in order to be legitimate depend on characteristics of the agency and its institutional context. In contrast to some authors, I do not view technical legitimacy as something external to democracy.¹ Democracy contains both epistemic and majoritarian democratic obligations, to which different institutions may legitimately contribute to different degrees.

In making this argument, the dissertation takes both an empirical and a normative approach. It consists of four articles.² In Article 1, I begin by theorizing the *conditions* under which the technical legitimacy argument, and three other legitimacy arguments, are empirically effective and normatively acceptable. I find that terms relating to technical legitimacy is more often invoked in media coverage of EU agencies based on “hard” science. Other legitimation arguments, for instance emphasizing political control, are more prevalent in coverage of agencies based on “soft” science or where public salience is high. In Article 2, I explain how technical legitimacy plays out in an agency that is far removed from the paradigmatic hard-science agencies on which much existing research on EU agencies is based: the European Border and Coast Guard Agency, Frontex. It finds that appeals to technical legitimacy were central in negotiations over a new and more powerful mandate for the agency. The case study is also a starting point for a normative argument, in Article 3, about symmetry in executive powers as a structural requirement for legitimacy. Frontex’s claim to technical legitimacy might have been appropriate in the past, but with the agency’s new powers, it no longer holds. The agency is part of a larger European system of border management which has grown increasingly asymmetrical. The weakness

¹ Jens Steffek (2015), citing Daniel Gaus, writes that it has become normal in IR and European Studies to contrast democracy and output legitimacy, and to stipulate that output (or performance) may be able to compensate for a lack of democratic credentials.

² Two articles in this dissertation are co-authored. Article 1 is written with Asimina Michailidou and Article 3 is written with Hallvard Sandven. For simplicity, I will use the first person (“I”) in this introductory chapter, even when referring to work that is done in collaboration with Michailidou or Sandven.

of the EU's asylum policy renders the EU incapable of discharging the moral responsibilities that arise from having a strong Frontex, raising a novel legitimacy challenge. Finally, the dissertation's Article 4 offers a normative underpinning of the variation uncovered so far. It introduces an argument from philosophy of science – the argument from inductive risk – to debates over the legitimacy of non-majoritarian institutions. The argument says that the value-free ideal in science is problematic because researchers, when making decisions under uncertainty, are forced to consider the consequences of being wrong. These considerations are informed by values. I suggest that the amount of value inputs required for a non-majoritarian institution to be legitimate likewise depends on the institution's degree of inductive risk.

The dissertation contributes to normative debates over the legitimacy of delegation to non-majoritarian institutions, EU agencies, and the European border regime. It also contributes to debates over the *empirical* legitimation of EU agencies, and to substantive debates in European studies on the status of the European border regime.

This introductory chapter proceeds as follows. In Section 2, I delineate major debates on legitimacy in the EU and of non-majoritarian institutions, and zoom in on the notion of technical legitimacy. The concept is found, in different guises, in many strands of the academic literature. In this section, I also spell out my theoretical approach. Section 3 outlines my methodological framework. This dissertation is located at the intersection of normative and empirical analysis, and I explain my view on how the two should be combined. I also present my approach to empirical inference and research ethics. Section 4 summarizes the four articles included in the dissertation. Section 5 summarizes the dissertation's main contributions and implications.

Theoretical framework

Conceptualizing legitimacy

Legitimacy is the concept at the core of this dissertation. It is commonly understood as both a normative and an empirical concept. Max Weber famously defined legitimacy as a purely descriptive phenomenon. In its

empirical sense, legitimacy may be defined as “the generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate” within a social system (Suchman, cited in *Foreman, Whetten, and Mackey 2012, 184*; see also *Deephouse and Carter 2005, 331*). In other words, it tracks the extent to which subjects of a political order believe they have substantive normative reasons to abide by that order’s directives (*Weber 1994, 311–13*). Empirical or sociological legitimacy is often understood a resource that institutions can draw upon and which they must work to cultivate (see e.g. *Tallberg and Zürn 2019*).

In its normative sense, as I understand it, legitimacy tracks whether citizens are right or wrong in their beliefs about these moral reasons to comply (*Buchanan 2018*). An institution is normatively legitimate wherever acceptance of its directives would be expected from a rational person or from a rational process of deliberation (*E. O. Eriksen 2009, 27*). According to an influential view, normative legitimacy should be understood as *justified coercion*, assuming that the state is the appropriate candidate for legitimacy and that its power is mainly coercive (dating back at least to Locke; see also *Rawls 1993*). This is, however, a needlessly narrow conception of legitimacy for our purposes. The EU and its agencies do not primarily hold coercive power, but they nonetheless claim authority, expect compliance, and citizens have beliefs and voice concerns about these institutions’ legitimacy. Instead, we can understand legitimacy as *justified authority* (*Buchanan 2018; Sandven and Scherz 2022*). Under this conception, an institution is legitimate when it provides content-independent reasons for compliance with its directives. By content-independent, I mean that subjects have sufficient reason to comply with an institution’s directives because they come from that institution, even when directives are in conflict with their preferences or interests (see *Sangiovanni 2019; Buchanan 2018; Scherz 2021*).

This view of legitimacy also makes clear the tight link between empirical (or sociological, descriptive) and normative legitimacy. Empirical legitimacy may be a fruitful starting point for examining normative legitimacy. An institution would not be normatively legitimate if no one thought it so (*Langvatn and Squatrito 2017, 44*). As Buchanan puts it, “the legitimacy-making features of an institution are not, as it were, out there to be discovered by normative analysis that pays no attention to the

requirements of achieving sociological legitimacy” (Buchanan 2018, 76). Normative theory should therefore take an interest in – and build on – the normative ideas and moral principles people appeal to when forming beliefs about an institution’s legitimacy, as well as the arguments they use when discussing an institution’s legitimacy in the public sphere.

On the other hand, people’s beliefs need not be taken at face value. It is permitted to evaluate them at a theoretical or principled level. An institution is normatively legitimate only if it *is* worthy of our moral reason-based support (Buchanan 2018, 58). Empirical legitimacy should not be taken to mean any type of popular support. It is different from support based on fear or self-interest. In this sense, normative legitimacy might be causally related to empirical legitimacy. If people are more likely to support a normatively legitimate institution, there is in democratic states a “presumed link between the normative validity of a political order and the social acceptance of this order” (E. O. Eriksen 2009, 24; see also Tallberg and Zürn 2019). Normative theory can therefore offer a fruitful starting point for examining empirical legitimacy – for instance as a source of analytical categories or hypotheses about conditions for legitimacy. The relationship between normative and empirical legitimacy is unavoidably circular, but the circle is virtuous, and the concepts remain analytically distinct. I return to the methodological implications of this circular relationship in Section 3 below.

An upshot of this focus on justified authority and *reasons* to comply is that legitimacy assessments may apply to different types of institutions, including international organizations, not only sovereign states. Recent contributions in political theory have in this vein not only postulated that “the full set of criteria for legitimacy will vary depending upon the function of the institution” (Buchanan 2018, 74) – they have sketched out how and why legitimacy criteria varies between institutions, for instance based on their *functions* (Erman 2018) or *political power* (Scherz 2021). This dissertation continues in that tradition, positing that citizens’ substantive reasons for complying with the directives of an institution, and hence the institution’s legitimacy criteria, might vary based on characteristics of the institution in question. In order to allow for such variation between institutions, an additional criterion is that the system as a whole, i.e. all institutions and the interplay between them, does not leave any gaps (see

Buchanan 2013). In other words, legitimacy must meet a functional criterion (at the level of institution) and a structural criterion (at the level of the system).

The above discussion has clarified what legitimacy is as an overarching concept. Many academic debates over legitimacy proceed at a lower level of abstraction, discussing concrete criteria that an institution must meet in order to be legitimate. This dissertation focuses on the EU, and in particular on its agencies. EU agencies are part of a larger context whose legitimacy has been debated for decades. In order to understand EU agencies in context, I will therefore take the debate over the EU's legitimacy as a starting point. Then I go into more detail on the legitimacy of non-majoritarian institutions – and of EU agencies in particular.

The legitimacy of the European Union

What does it take for the European Union to be legitimate? Scholars of EU legitimacy often structure the debate along the lines of input, throughput, and output legitimacy (*Scharpf 1999; Weiler 2012, 825; Schmidt 2020*). Some authors explicitly discuss their contributions as part of such a “systems-theoretical” approach to EU legitimacy (see e.g. *Schmidt 2013*). Others view the division between input and output more as a device to classify the various theoretical approaches to EU legitimacy.³

The paradigm identifies input, output, and sometimes throughput as the main mechanisms for democratic legitimacy. Input focuses on the popular-sovereignty component of democratic legitimacy, like representation and responsiveness to the concerns of the constituency (*Bellamy 2010, 5*). Output legitimacy focuses on the substantive *content* of policy choices and whether they effectively provide for the common good (*Schmidt 2020*). *Throughput* adds a procedural criterion to the mix, often presented as a way of opening up the “black box” between input and output (*Schmidt 2013*). When using the systems-theoretical scheme as a device to systematize the literature, most of what its proponents label as

³ This arguably applies to the person often credited as the originator of the approach, Fritz Scharpf, himself (*Scharpf 1999; Steffek 2019*). He in turn builds on the works of David Easton, but it is Scharpf who introduced the scheme to EU studies and international relations.

throughput may be subsumed under the input or output categories (Steffek 2015, 269–70). I maintain that the systems-theoretical paradigm is most useful as a sorting device, and it is in this sense I will use the framework here.

Input-oriented approaches

Input-oriented approaches share the broad commitment that the people is the ultimate source of legitimacy. The dominant questions for theorists committed to an input idea of legitimacy are: Who constitutes the people, and what should be the link between the citizens and the EU's institutions? It is widely held that the EU as a whole falls short on input legitimacy. The EU suffers from a “democratic deficit”; European integration has “meant an increase in executive power and a decrease in national parliamentary control” (Føllesdal and Hix 2006, 534). The discussion of input legitimacy at the EU level is therefore a discussion about remedying this deficit. Different scholars have given different diagnoses of what is lacking and proposed different remedies.

Much of the input-oriented debate is concerned with the role and scope of the EU's *demos*. One strand of the literature says that the EU should become more like a liberal democratic nation state (see e.g. Beetham and Lord 1998, 31). This approach requires the awakening of a latent EU-level *demos*. A second strand is *communitarian*. An EU-level *demos* is unfeasible and legitimacy must build upon the democratic communities already in place—the member states. In a strict version, the EU is only indirectly legitimate through it being recognized by states which are themselves democratically legitimate (Scharpf 2009; Weiler 2012; Moravcsik 2002; cf. Beetham and Lord 1998, 31; Cheneval and Schimmelfennig 2013, 339). Despite early critiques (Beetham and Lord 1998; E. O. Eriksen 2009), the idea has proven resilient. For instance, more recent contributions like Murray and Longo (2018) maintain that member states are the appropriate source of legitimacy for the EU. Another communitarian approach may be labeled *democratic intergovernmentalism* (Wolkenstein 2020; see Bellamy 2019, 2006; Cheneval and Schimmelfennig 2013; Nicolaidis and Viehoff 2017). Major recent trends in debates over EU legitimacy, like some *republican* and the *demoicratic* approaches, fall in this category. They are skeptical towards the possibility of a thick EU-level *demos*, but hold that derivative legitimacy is not sufficient for the EU's legitimacy (Cheneval and Schimmelfennig 2013).

Representative institutions for both states and citizens are required. A fourth strand may be described as *deliberative and cosmopolitan*.⁴ It holds that the EU might not have a single *demos*, but it does not need one. Instead, deliberative procedures combined with a set of basic individual rights and democratic procedural arrangements will both compensate for the lack of a European *demos* in the short run and help create a “value-based community” in the long run (E. O. Eriksen 2009, 72; Habermas 1992). The EU should therefore be seen as a “rights-based union.”

The problem with all these approaches, for our purposes, is twofold. Focusing too much on input representation overlooks the fact that many functions in modern democracies are delegated to unelected experts without much protest and sometimes with explicit citizen support. As I will return to below, there might even be good *normative* reasons to insulate some decisions from input-democratic procedures. Moreover, input-oriented debates over legitimacy are overly focused on determining the scope and depth of the EU’s *demos*. The EU is increasingly exercising power not only over its own citizens but also over third-state nationals. None of the above approaches (with a possible exception of the cosmopolitan) are able to capture the potential illegitimacy that arises in such cases. Does output legitimacy fare any better against these two objections?

Output-oriented approaches

Output-oriented approaches bypass the debate over what the *demos* of the EU is and should be altogether. They hold instead that it is sufficient that the content and substantive outcomes of EU policies contribute to the common good.

The clearest development of the output-based account of the EU’s legitimacy is found in Majone’s contributions to the regulatory state literature (Majone 1994, 1996, 1999). The EU, according to this literature, is not a *positive* but a *regulatory* state. It has limited powers of taxing, spending and coercion, and exercises power mainly through rules and

⁴ The labels “cosmopolitan,” “post-national,” “deliberative,” “rights-based,” “rights-orientated,” “communicative” are all labels that have been used to describe what I take to be the same general argument.

regulation. It exists first and foremost to correct market failures and produce Pareto-efficient outcomes. Therefore, theories that are devised to account for the legitimacy of a (positive) nation state are not appropriate when theorizing the EU's legitimacy. The EU's legitimacy depends on credible commitments to long-term policy goals like price stability and regulatory standards. Giving elected politicians more control over such matters would in fact be detrimental to the legitimacy of such arrangements. Politicians have incentives to pursue short-term gains and might lack the necessary epistemic qualifications. According to this line of argument, any judgment of a decision as output legitimate depends on a prior judgment over the decision's technicality or Pareto efficiency (e.g. *Føllesdal and Hix 2006, 542*). Just as for the communitarian view above, the output legitimacy of the EU therefore depends empirically on the (restricted) scope of its power.

Many would deny that output is a sufficient source of legitimacy for the EU today, not least because its powers has vastly expanded since the debates of the 1990s. Even Majone has admitted that, especially after the Eurozone crisis, European integration comes with costs as well as benefits, and that his mid-90s denial that there is any problem of legitimacy in the EU no longer holds (*Majone 2014*). The EU's increased power and scope makes it harder to justify decisions by Pareto efficiency, especially in cases where costs and/or benefits are unevenly distributed among citizens or member states. This is an empirical objection that takes the EU as a whole as its unit of analysis. But, as both Majone and Fritz Scharpf point out, some delegation to non-majoritarian institutions happen without much controversy within nation states. Perhaps there is still an output-legitimacy case to be made for the non-majoritarian parts of the EU system—especially its agencies and central bank.

First, however, a conceptual problem with the output-oriented approach needs sorting out. Output legitimacy is commonly understood as *effectiveness* or *efficiency* (see for instance the contribution by *Majone 2014* referenced above). While efficiency may be a source of legitimacy in a strictly empirical sense—people might support an institution that gets the job done—it is a poor source of normative legitimacy by itself. An institution's normative legitimacy requires the *robust* satisfaction of the standards that ground its right to rule (*Sandoen and Scherz 2022, 7*). Sure,

an institution that effectively delivers the goods might enjoy public support, but the basis of that effectiveness might be purely incidental. Without some robust legitimizing mechanism, we have no reason to trust that such an institution will continue to generate efficient outcomes in the future, nor do we have means to constrain it if it begins to perform poorly (Fjørtoft and Michailidou 2021, 4). If there is a *normative* case to be made for output-oriented legitimacy, it must imply something beyond pure efficiency or effectiveness.

In line with Jens Steffek (2015), I maintain that there is, in fact, an important normative and democratic dimension to output legitimacy. The two reasons introduced above—checks on majority power and ensuring the epistemic quality of decisions—are rightly understood as *democratic* reasons to delegate to unelected expert bodies. But the term “output” does not capture well the thrust of this type of justification. The input-output paradigm forces us to parse our analysis of legitimacy according to stages of the political process. If we by legitimacy mean *content-independent reasons for complying with an institution’s directives*, we have no reason to assume that the relevant reasons will be limited to one or the other stage of the political process. This is why I prefer the term *technical legitimacy*. Parts of technical legitimacy are procedural. For instance, adherence to the scientific method might be a source of legitimacy. Another part of technical legitimacy may be more input oriented in the sense that the common good could be agreed upon through deliberation and not *ex ante* assumed (for a discussion of this point, see Steffek 2015, 271–74). And, yes, part of the idea is output-oriented. At least in the negative case: An institution is likely to be normatively illegitimate if its outputs systematically undermine the common good.

Technical legitimacy and non-majoritarian institutions

Shifting the focus from output legitimacy to technical legitimacy gets us closer to a theory of the *democratic* legitimacy of unelected bodies. While the idea that technical legitimacy is a sufficient foundation for the legitimacy of the EU as a whole, there might be a stronger case to be made about the EU’s non-majoritarian institutions—like its agencies and the European central bank. These institutions are, after all, *by design* insulated from electoral politics.

Technical legitimacy, as I will define it, exists both as an empirically observable legitimation strategy and as a normative category of legitimacy. It builds on four main elements.

First, technical legitimacy presupposes that there exists a stable and identifiable *common good*, which democracy has an obligation to bring about (see, e.g., Pettit 2004; Landemore 2017; Holst and Molander 2019; Anderson 2006 for different expressions of this idea).⁵ For instance, in the regulatory state literature, regulatory agencies are legitimate insofar as they make decisions leading to *Pareto-efficient* outcomes, not redistributive ones (Majone 1996; see also Tucker 2018). A truly Pareto efficient outcome, where no one is made worse off and at least some are made better off, is plausibly an uncontroversial contribution to the common good. In a similar vein, Bickerton and Invernizzi Accetti describe technocracy as advancing an “unmediated conception of the common good” (Bickerton and Accetti 2021, 3). According to Richard Bellamy, the strong version of the non-majoritarian argument says that there is in some areas a “science of the public good” that specialists have access to knowledge about (Bellamy 2010). Scharpf (2009, 188) claims that governments are under an obligation to “use the powers of government for the common good of the polity.” Claiming that democracy contains an obligation to ensure the common good contrasts with purely aggregative theories of democracy, which hold that the task of democracy is to ensure that the “will of the people” rules (Christensen and Holst 2017; Moravcsik and Sangiovanni 2003). Here, any delegation to experts would be a move away from the democratic ideal.

Second, technical legitimacy requires *expertise*. Following Alvin Goldman’s definition, experts are those who “have more beliefs ... in true propositions and/or fewer beliefs in false propositions ... than most

⁵ Note that this does not imply that technical legitimacy is incompatible with pluralism or cleavages in a society. As Majone points out, non-majoritarian decision-making mechanisms may be “more suitable for complex pluralist societies than are mechanisms that concentrate power in the hands of the political majority” (Majone 1996, 286). Delegation may even be a form of “cleavage management,” a way to avoid gridlock between competing factions. Nonetheless, even this justification implicitly appeals to the existence of an overarching and “real” common good that transcends existing cleavages.

people do (or better: than the vast majority of people do)” (Goldman 2001; cited in Holst and Molander 2017, 237–38; see also Christiano 2012). If there exists a unitary common good, non-majoritarian institutions need to be able to access it and know when they have done so. And they need to be better equipped to do so than, for instance, elected politicians. It is widely acknowledged in the empirical and normative literature that independent expertise is the “raison d’être” for EU agencies (Commission of the European Communities 2002; Ossege 2015; Busuioc and Rimkutė 2020b). We can understand this prerequisite as a safeguard that EU agencies remain truth-tracking. It would be risky to delegate power to an unelected body that did not possess any distinct expertise. For instance, we entrust a central bank with far-reaching powers in part because we trust that its experts, building on macroeconomic theory, are able to track the true state of the economy and to make correct assumptions about the causal effects of potential interventions.

Third, technical legitimacy requires a degree of *independence* from majoritarian politics. The justification for this is two-pronged (see Majone 2001). In economics and the regulatory state literature, the idea of credible commitments is central. Some decisions that serve the long-term common good must be shielded from the influence of politicians who seek short-term gain (Jacobs 2016). This is the standard justification behind delegation to independent central banks, ensuring for instance a credible commitment to an inflation target (see e.g. Kydland and Prescott 1977). The credible-commitments argument extends to all instances of regulation where there is a time-inconsistency problem, i.e., where an independent regulator would be seen as more credible due to its insulation from electoral politics (Maggetti 2010, 3). We find the same idea in republican theories on the tyranny of the majority (The Federalist Papers 1787; see also Pettit 2004 for a modern take). Furthermore, even in instances of delegation that are not made to ensure credible commitments, independence might protect the epistemic integrity of institutions against political distortions (Steffek 2015, 271). It is not feasible for citizens or elected politicians to have a grasp on all complex technical matters. The best way to safeguard the quality of such decisions, therefore, is to delegate them to experts. The upshot is that unelected expert bodies are depoliticized *by design*, not by accident.

Fourth, and finally, technical legitimacy requires that institutions are *value free* in their technical conduct. It must be conceptually possible and practically feasible to separate technical evaluations from political (value-based) considerations. This premise underlies many arguments about the proper place of unelected experts: Citizens, through elected politicians, set the aims; agencies use their expertise to find the means to reach that specified aim (E. O. Eriksen 2021; Christiano 2012; Vibert 2007). Zeynep Pamuk describes the division-of-labor approach, premised on experts' value-freedom, as the "dominant twentieth-century solution to the problem of expertise" (Pamuk 2021, 24).

The empirical pervasiveness of technical legitimacy

In analyses of the EU, there is by now a standard narrative that an era of permissive consensus has given way to a *constraining dissensus* (Hooghe and Marks 2009). A core feature of the permissive consensus was that European integration happened in a quiet, technocratic and depoliticized mode – so-called integration by stealth (see e.g. Sangiovanni 2019). The EU could be legitimated in terms of efficiency and stability because it dealt mainly with market integration and the provision of cross-border public goods. When EU issues got politicized, that mode of integration became infeasible. Add to this the increasing contestation of expertise in the EU, in line with a more general trend towards "post-truth politics," whereby the "very notion of expertise and expert advice is increasingly losing authority" (Abazi, Adriaensen, and Christiansen 2021, 2–3). According to these accounts, then, technical legitimacy may have been empirically feasible in the past, but is no more.

Other accounts suggest that reports of the death of technical legitimacy are greatly exaggerated. One main claim of this dissertation will be that large-scale, sweeping assertions about legitimacy and its sources are ultimately unhelpful. We need a more fine-grained understanding of the *conditions* under which expertise and the other components of technical legitimacy are trusted or distrusted, normatively warranted or unwarranted. To this end, many analyses suggest that, while the days of elite-driven European integration by stealth are over, the tenets of technical legitimacy thrive – at least under certain conditions.

For one thing, the institutional position of unelected bodies does not seem to diminish. Frank Vibert (2007) describes a “rise of the unelected”; epistemic logics occupy an increased space in parliaments and policymaking (Fischer 2009); and the EU’s own development after the Eurozone crisis has if anything made policymaking in the EU more technocratic, with new competences to the Commission, the European Central Bank, and to EU agencies (Christensen and Holst 2021, 54). Technical legitimacy is also a pervasive feature of many diverse strands of the academic literature.

In the literature on *knowledge use*, a core claim is that knowledge and expertise are used in politics not only for “problem-solving” purposes but also for strategic purposes: to increase an institution’s (perceived) legitimacy (Weiss 1979; Sabatier 1978; Boswell 2009; Littoz-Monnet 2020). The core claim here is that the appearance of rationality, objectivity or technical neutrality is a source of public trust and authority (Porter 1995). Analysts in this tradition are often skeptical towards the sincerity of such claims. Actors *use* the claims to achieve their political objectives, appealing to neutrality or objectivity to give their decisions a “veneer of technocratic legitimacy” (Rothstein, Borraz, and Huber 2013, 217). A related strand of literature deals with “risk-based regulation” (Black 2005; Hutter 2005; Paul 2021). Here, too, a core claim is that risk analysis and similar analytical tools, the use of which has exploded in recent decades, are often adopted for legitimacy-seeking reasons. This strand of literature is especially relevant for studies of Frontex. Spurred by Andrew Neal’s (2009) seminal contribution, analysts have described how Frontex has relied on the quiet, technocratic notion of “risk,” as opposed to the political spectacle of security, to harmonize European border control (Horii 2016; Paul 2017). For our purposes, we do not have to take a stance on the degree to which the uses of knowledge are sincere or strategic. The takeaway is instead that these studies consistently find that the appeal to value-neutral expertise is a powerful source of trust and *empirical* legitimacy in the public eye.

Some contributions attempt to delineate the *conditions* under which different uses of expertise prevail (Rimkutė 2015; Schrefler 2010; Radaelli 1999b; Dunlop et al. 2012). There is a clear commonality in many of the contributions. They suppose that the prevalence of different types of

scientific knowledge use depends on the availability, tractability, or certainty of scientific evidence on one axis, and on the issue area's political salience or level of conflict on another (*Gormley 1986; Radaelli 1999b; Schrefler 2010; Rimkutė 2015* all present variations on this two-dimensional scheme, even though their explanatory goals diverge slightly). These contributions have increased our understanding of knowledge use in the EU and in regulatory agencies more generally. I maintain, however, that they assume and hold constant what is most interesting to examine. For any strategic or political use of expertise to succeed, it needs to have trust and authority among citizens—i.e., empirical legitimacy. And it seems reasonable that the conditions under which the political use of knowledge is theorized to be most likely, where salience is high and scientific tractability low, would also be the conditions where citizens have the least reason to trust an argument for technical legitimacy. This is a possible paradox. In this dissertation, I continue the search for scope conditions, but I focus more on the conditions for empirical and normative legitimacy than on explaining different types of knowledge use per se.

Another strand of research that contains an idea of technical legitimacy is the bureaucratic reputation literature (*Carpenter 2010* is the seminal work). A core idea in this literature is that an organization's reputation is a crucial source of regulatory power and authority (see *Busuioc and Rimkutė 2020b* for an application to the EU context). Reputation consists of different dimensions which an organization may choose to cultivate. Carpenter calls one of these dimensions *technical conduct*, which is exactly what my idea of technical legitimacy taps into. A crucial takeaway from the bureaucratic reputation literature is that reputation is multidimensional. Technical conduct is only one of four potential sources of reputation. This dissertation builds on this insight and maintains that legitimacy, both empirical and normative, is multidimensional. But legitimacy and reputation are nonetheless different concepts. Some reputation scholars tend to treat legitimacy as a purely descriptive term—a resource to be cultivated and, ultimately, “a product of successful reputation-management” (*Busuioc and Rimkutė 2020b*, 6). Others, like Maor (2015, 19), note that the bureaucratic reputation frame of reference “differs from the one that underpins the concept of legitimacy.” Legitimacy is concerned with an organization's fit with established norms and expectations, while

reputation is concerned with the organization's standing compared to its peers (see also *Deephouse and Carter 2005; Foreman, Whetten, and Mackey 2012*). I treat legitimacy, even in its empirical cast, as a concept with normative origins and consequences, and hence conceptually distinct from reputation.

Finally, the notion of technical legitimacy is found in empirical studies of legitimacy that tap directly into public perceptions through surveys and similar. These findings pose a challenge to sweeping claims that we are living in a moment of post-truth distrust in expertise. Bertsou (2021) finds that citizens prefer the involvement of independent experts over national elected representatives in policy design and implementation stages, across a range of political issues. Strebel, Kübler, and Marcinkowski (2019, 488) find that “output evaluations are the most important driver for citizens’ choice of a governance arrangement.” Bertsou and Caramani (2022) find that technocratic attitudes are pervasive in European publics—and, interestingly, that they overlap to a large extent with populist attitudes (see also *Bickerton and Accetti 2021; Elliott 2020*).

Summing up, the idea of technical legitimacy is found, in different guises, in a wide range of empirical studies. We should keep this in mind when encountering claims that we live in an era of rampant politicization and distrust in experts and science. In many instances, technical expertise is, in fact, an uncontroversial source of trust and authority. There is still work to be done, however, in delineating the scope conditions under which this appeal to expertise is effective. This dissertation contributes to closing that knowledge gap. Furthermore, legitimacy is often treated in a purely descriptive sense in these studies. I aim to move one step further and also evaluate the conditions under which a claim to technical legitimacy is *normatively* appropriate.

Normative worries over technical legitimacy

Given the empirical pervasiveness of technical legitimacy claims, it is surprising that many normative accounts are quick to disregard them altogether. Take Radaelli (1999a) as an example. He claims that modern technocrats believe that a “vast number of policy areas should be insulated from the ‘mess’ of democratic policy making,” and continues: “This claim is fundamentally flawed from a normative point of view” (Radaelli 1999a, 7). He cites three reasons: that politics has to do with values, that technocratic rationality is only one type of rationality and democracy needs normative rationality as well, and that the social sciences are plagued with empirical uncertainty about the basic mechanisms of political life. All of these claims are true, and we find variants of them in many refutations of technocracy, output legitimacy, or technical legitimacy. But the claims do not sufficiently justify the conclusion that *no* (or only very few) policy areas could legitimately be insulated from democratic policy-making.⁶

The first worry, that facts and values are *empirically* difficult to disentangle, is one of the most widespread arguments against the notion of technical legitimacy. Take Bellamy again as an example: “Most ‘purely’ technical decisions raise normative issues and are often less clear-cut empirically than is claimed.” (Bellamy 2010, 9; see also the many authors cited in A. Eriksen 2021b, fn1). While this empirical observation is clearly true, I agree with Holst and Molander (2017) that we need to separate between the empirical and logical levels. The fact that things are “often” intertwined does not imply that they are “always” or “necessarily” indistinguishable (Holst and Molander 2017, 240). It might make sense to uphold the distinction even if it is often empirically muddled. Moreover, I will argue that thinking of value-freedom as a dichotomy is needlessly constrictive. Some decisions require more value input than others. The entanglement of facts and values is a matter of degree.

The second worry, that democracy needs different rationalities, is undoubtedly valid as a basic warning against technocratic overreach. Not

⁶ To be fair, depending on what we mean by “vast number,” the claim as it stands might be defensible. Perhaps only a moderate number of policy areas can be legitimately insulated. But this makes the term ‘vast’ do all the heavy lifting.

everything should be subsumed under the logic of technical legitimacy. If we by technocracy mean a mode of government that *exclusively* legitimates power on the basis of solving social problems (after *Friedman 2019*), Radaelli's worry is well placed. But the argument goes both ways—we cannot exclude the possibility that there is such a thing as *majoritarian* overreach as well. It might still be legitimate to isolate *certain* decisions from majoritarian procedures.

The third worry is—in general terms—that empirical knowledge is uncertain and that knowledge claims therefore are a poor source of legitimacy. *Friedman (2019)* describes technocracy as adhering to a “naive technocratic realism” which holds that solutions to social problems are self-evident. Against this, he cites the “fact of technocratic disagreement”: Even technocrats disagree about the scope, causes, and solutions to social problems. *Friedman* agrees with *Radaelli* that the problem is compounded in the social sciences, where prediction is elusive due to “ideational heterogeneity”: People, unlike electrons and celestial bodies, do not behave uniformly. This is a fairly standard critique of social science with explanatory or predictive aspirations. But this line of argument is vulnerable to the same critique as the second worry. It can only work as a critique of technical legitimacy applied as a single, overarching logic that applies to the entire system of government. However, there is surely variation in the empirical uncertainty of knowledge claims, including predictive claims about social phenomena.

Normative responses to the idea of technical legitimacy, then, show why holding technical legitimacy as the *only* source of legitimacy for a society is untenable. We can reserve the term “technocracy” for this overreach by the technical logic of legitimation. But the responses still leave space for technical legitimacy being normatively appropriate under certain, albeit restricted, conditions.

My positive normative contribution is twofold. First, I argue that legitimacy is a multidimensional concept. Different agencies might face different legitimacy demands. Moreover, this variation between agencies is *systematic*; it depends on specified scope conditions. I develop this view in Articles 1 and 4. In Article 1, I show that the empirical legitimacy demands facing an agency depend on its scientific “hardness” and its

public salience. In Article 4, I generalize the thesis, arguing that the level of political value input required for an agency to be *normatively* legitimate depends on its level of inductive risk. Inductive risk is the risk of being wrong about a knowledge claim—a function of the probability of error and the consequences of that error. This concept forms the basis of a two-dimensional framework that takes seriously the *epistemic* justification for establishing such agencies, without making recourse to naive and sweeping claims about their political neutrality or epistemic infallibility.

The second argument is that legitimacy is structural. Different agencies may contribute with different things in democratic governance, but they must be combined in a way which ensures that no gaps remain at the systemic level. In this way, the legitimacy of an institution depends on its institutional context. This view resembles Allen Buchanan's *ecological view* of the legitimacy of international human rights institutions (*Buchanan 2013*). I demonstrate in this dissertation that a structural conception of legitimacy is applicable to the EU and its agencies.

Research design

This dissertation takes a mixed-methods approach to answering its research questions. By this, I mean not only that I employ quantitative as well as qualitative methods. I also mean that I combine normative and empirical analysis. This section will, accordingly, first outline the overarching analytical strategy, including my take on the combination of normative and empirical methods. I will then dive deeper into the dissertation's empirical methods, including some considerations on research ethics and philosophy of science.

The combination of empirical and normative research

There are two sides of this dissertation's research question. I ask when the delegation of power to unelected expert bodies is legitimate, which is a question that has a normative as well as an empirical answer. I maintain that the two depend on each other. This dissertation follows a two-stage approach, where I first examine the question via empirical methods and then approach the question normatively, informed by the empirical findings. Such combinations are relatively rare in political science, but they need not be.

There is an ongoing debate among political theorists between ideal and non-ideal theory. Ideal theorists maintain that the principles they are interested in, like justice, are logically independent of empirical considerations or only subject to moderate feasibility constraints (Estlund 2019; Rawls 1971). Non-ideal theorists hold that normative theories must be fact-sensitive and take real-world constraints seriously (Farrelly 2007; Mills 2005; Ypi 2010; Valentini 2012; Gilabert and Lawford-Smith 2012; Herzog and Zacka 2017; Longo and Zacka 2019). As a result, normative theory today is, in some parts, no longer as idealized as it used to be, and many theorists build actively on empirical research and observations when making their arguments.

No similar development has happened in empirical political science. The discipline is unique among the social sciences (with the possible exception of normative economics) in that normative political theory is a recognized subfield. Nonetheless, the field is characterized by a clear division of labor. Most empirical political scientists do not engage with normative theory. This division of labor, I suspect, is partly caused by political science's aspirations towards a value-free science. Political science strives to be objective (Taylor 1985). In a sense, political scientists are themselves seeking technical legitimacy. We want not only to study the world's problems but to solve them and have an impact on public policy, and the best way to ensure trust and authority, according to this argument, is to credibly claim to be a value-free science (see King 2014 for an example). It is easy to see how a strict separation of normative and empirical work might follow from these premises.

Objectivity and trust are undoubtedly important goals. But interpreting the value-free ideal so strictly as to abstain from engaging normative theory in empirical research (and vice versa) is detrimental to both. I will not have the space to go into a detailed argument here. But in brief, my stance is this: The value-free ideal is a strong social norm in political science, but it incentivizes researchers to overstate the value-freedom of their conduct. If, for instance, the argument from inductive risk holds, certain value judgments are inevitable in the internal stages of research (see, e.g., Douglas 2009 and this dissertation's Article 4 for an elaboration). Insisting on strict value freedom in this context would, in fact, be detrimental to objectivity (Douglas 2004). Political science has the tools to

explore the normative premises behind, and implications of, empirical findings. Furthermore, we deal with concepts that have both normative and empirical components, like democracy or – like in this dissertation – legitimacy. As I have argued, a complete understanding of legitimacy depends, in a mutually constitutive way, on understanding its normative and empirical components. A tighter integration of normative and empirical theory will therefore, in many cases, make for more transparent, justified, and convincing empirical, as well as normative, conclusions.

Note that this argument does not aim at the fact-value distinction as such. I do not take it to be the case that facts and values are impossible to disentangle or that we should, for instance, abandon the idea of objective truth. Facts and values are conceptually distinct. Nor do I make an argument for motivated reasoning. The dictum that “I want X to be true, therefore X is true” is never permitted (Douglas 2004, 469). Empirical research is, and should be, truth tracking.

If we accept that normative and empirical work should be integrated, the next question is how they should be. In this dissertation, I take an iterative approach. The integration of normative and empirical research is not linear; neither side has logical priority over the other. It is therefore not the case that we can first establish the facts and then dive into normative theory (or vice versa). My approach is inspired by coherentist approaches to justification, of which Rawls’s method of reflective equilibrium is perhaps best known (Rawls 1951, 1971; see also Goodman 1955).⁷ I hold that there is no fixed point on which to build our theories. Normative theory can inform empirical research, whose findings may again inform normative theory. I therefore move iteratively between normative and empirical work. The goal is to have an acceptable coherence between the two, whereby they mutually justify the acceptance of each other.

Fig. 1 shows the circular and iterative progress of this dissertation. I iterate both between the normative and empirical and between the general and particular analytical levels. I first develop analytical categories from

⁷ Note that the comparison to reflective equilibrium is intended as an analogy or illustration of a type of coherentist justification. I do not use reflective equilibrium as a method in the sense that Rawls defines it.

normative theory, and test the conditions for their prevalence, in Article 1. In a next step, I move on to empirically examine how technical legitimacy plays out in a “least-likely” case: Frontex (Article 2). Articles 1 and 2 are both empirical analyses. In Article 3, I move to the normative level and analyze the *normative* implications of the developments uncovered in Article 2. The brunt of the article focuses on the particular case of Frontex and the European border regime, but its argument is more general. Finally, in Article 4, I take a step back and return to a general normative assessment of the legitimacy of unelected bodies. This final step may in principle spur future rounds of empirical and normative inquiry.

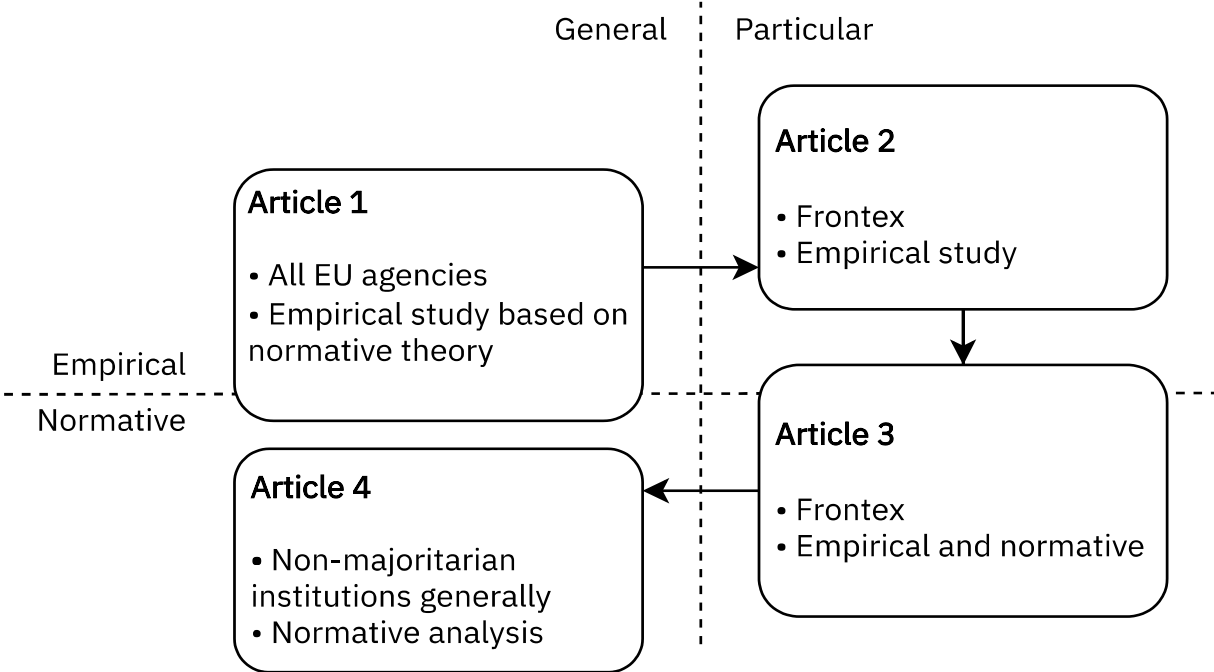


Figure 1: An iterative model of this dissertation’s four articles

Empirical methods & Data

The overarching goal of the dissertation’s empirical sections is to understand processes of legitimation and delegitimation of EU agencies – and the role of technical legitimacy therein. Article 1 analyzes media debates, while Article 2 analyzes the process leading up to a new mandate for the European Border and Coast Guard Agency, Frontex, in 2016, and its immediate aftermath.

Mixed-methods text analysis

Article 1's ambition is descriptive and explanatory. It aims to describe patterns of legitimation and delegitimation and to test expectations about the conditions under which different legitimating arguments are prevalent in media debates. To these ends, we gather data on Swedish media coverage of all EU agencies in the period 2005–2019. We analyze search data on all EU agencies and full-text articles about three selected agencies: Frontex, the European Banking Authority (EBA), and the European Environmental Agency (EEA). We take a dictionary-based approach, where we define one term list for each of our four ideal-typical legitimacy arguments and count, for each article in our corpus, the number of matches with terms in the dictionaries (*Rooduijn and Pauwels 2011; Busuioc and Rimkutė 2020a*). In a next step, we select the articles that score the strongest on each dictionary for qualitative content analysis. More in-depth information on the methodological approach is found in the article and its appendix.

The advantage of taking a dictionary-based, quantitative approach is that it allows us to map the entirety of news articles about all EU agencies over a period of 15 years. What the approach gains in generality, however, it lacks in detail. We therefore combine it with a qualitative study, giving us both validation of our dictionaries and their operationalization, as well as context and empirical depth to our findings. It should be noted that this is a decidedly pragmatic approach. It allows neither thick interpretation nor precise estimation of causal effects. But it allows an empirical take on a question with both normative and empirical implications, namely when we can expect different legitimation arguments to take hold in public debate. The approach is also flexible. The dictionaries and models may be applied on new data and by other researchers.

Process tracing and case selection

The second article aims for detailed insights into the legitimizing role of expertise in one specific agency: Frontex. I select this agency because it has increased rapidly in power and competences since its establishment, it is working in a highly salient field, and its expertise is at a remove from hard science. This configuration allows me to explore how technical legitimacy

plays out under conditions that we would theoretically expect – based on the theory and findings of Article 1 – to be inhospitable.

I focus on the negotiations over the 2016 Regulation, which formally renamed Frontex to the *European Border and Coast Guard Agency*. One of the most controversial points in the regulation was the new *vulnerability assessment procedure*. This procedure grants Frontex the power to assess the readiness and capacity of every member state, issue recommendations, and ultimately trigger the newfound *right to intervene*. This is a significant transfer of supervisory power to the agency (Fjørtoft 2022; see also Deleixhe and Duez 2019). I ask: To what extent, and how, were appeals to neutral, technical expertise used to legitimize more supervisory and executive power to Frontex in the 2016 Regulation?

In answering this question, I carry out a process-tracing case study. The defining trait of process tracing, and its comparative advantage, is its ability to uncover causal mechanisms (Beach and Brun Pedersen 2016). This is often explained by way of the “black box”: If you have an independent variable X and a dependent variable Y , process tracing aims to uncover the *mechanism* through which X causes Y – it opens the black box between a cause and its effect (see e.g. Gerring 2008). Beyond this focus on causal mechanisms, there is much variation in the process tracing literature about what, exactly, the method is geared to do and how one should do it (see for instance the variety of angles in Bennett and Checkel 2014). I will not review the debate here – simplified, it maps roughly onto the explanatory–interpretive debate in the social sciences.

The core of process tracing, in my approach, is its use of *evidence* to test, or generate, explanations of a single case (Bennett 2009). I interpret “causal mechanisms” rather broadly, and do not believe that a focus on causal mechanisms implies methodological individualism. Some causal mechanisms operate at the institutional level even if every social phenomenon ultimately happens through individual actions (List and Spiekermann 2013; Tilly 2001). The emphasis on evidence means that empirical observations have a different status than in frequentist inference. The observations’ explanatory force comes not from their values or counts, but from the information they can give us about the

hypothesized causal mechanisms. Not every piece of evidence carries the same informational value.

In this sense, the logic of process tracing relates closely to Bayesian logic (see, e.g., *Bennett and Checkel 2014*, Appendix). Bayesianism is concerned with establishing the probability of a hypothesis *given* the data: $P(H|Data)$. (Frequentist null-hypothesis significance testing, by contrast, determines the probability of observing the data given a null hypothesis: $P(Data|H_0)$.) A Bayesian starts out with a prior probability that is updated in light of new data. The same goes for the process tracer. Some evidence may strongly update our prior in the direction of increased confidence in a hypothesis: We observe a piece of evidence that we expect to be present if our hypothesis is true and absent under competing hypotheses. Some evidence may, conversely, strongly *decrease* our confidence in our hypothesis: We strongly expected to observe it if our hypothesis were true, looked for it everywhere, and did not find it. Some rare pieces of evidence may both increase our confidence in a hypothesis and decrease our confidence in competing hypotheses, and some evidence only weakly updates our prior.⁸ I do not believe that all instances of process tracing benefit from taking a formal Bayesian approach whereby we assign numerical probabilities to our priors, likelihood ratios, and posteriors. Bayesianism, in this context, should instead be understood as a logic of reasoning about what we can learn from each piece of evidence.

Article 2's process-tracing evidence comes from semi-structured interviews and document analysis. I interviewed officials working in and with Frontex, and I analyzed public documents and documents obtained through freedom of information requests.

One challenge of conducting interviews in this context is secrecy. Frontex is at its core a law enforcement agency. Many of the risk analysis and vulnerability assessment products are classified, and access to personnel working in the agency was limited. I therefore had to rely on freedom of information requests to access certain documents (some were denied), and on snowball sampling of respondents. It proved easier to recruit

⁸ These four types of evidence correspond to Van Evera's typology of smoking gun, hoop, doubly decisive, and straw-in-the-wind evidence (*Van Evera 1997; Collier 2011*).

respondents when I was already “vouched for” by a previous respondent. Even though the resulting sample of respondents is decidedly non-random and of a limited size, triangulation between the statements of different respondents and official documents increases the reliability of my findings.

A related methodological challenge is the validity of this type of elite interviews. Frontex analysts are not neutral observers of their own role. They might for instance have incentives to hide their true views on controversial topics or to downplay some aspects and highlight others, due to, for instance, loyalty, confidentiality, or a temptation to place themselves in a good light (*Berry 2007*). Again, cross-checking findings against other informants and official documents helps alleviate this problem. Moreover, statements should be interpreted with a certain degree of skepticism and not automatically taken at face value. The researcher should always ask why an informant chooses to say certain things and not others – elite interviews are most useful not as accurate sources of the true state of affairs but as glimpses into actors’ own interpretation of themselves, their situation, and the events they have been part of.

Research ethics

Research ethics is both a set of formal rules and guidelines and a set of norms, held by the scientific community, about proper scientific conduct. I have taken every measure to ensure that this dissertation is in compliance with established research ethical demands as codified in the Norwegian National Research Ethics Committees’ (NESH) Guidelines for Research Ethics in the Social Sciences and Humanities.⁹

The use of human informants triggers special research ethical obligations. These are outlined in the NESH guidelines’ section B and in the EU’s GDPR. For this dissertation, this applies primarily to my use, in Article 2, of semi-structured interviews. The Norwegian Center for Research Data (NSD) has assessed that the processing of personal data in this project is

⁹ See <https://www.forskningsetikk.no/retningslinjer/hum-sam/forskningsetiske-retningslinjer-for-samfunnsvitenskap-og-humaniora/> (at the time of writing, the most recent guidelines are only available in Norwegian).

in accordance with data protection legislation (reference number 659981). Before each interview, the informants received an information letter outlining the project's purpose, details on the interview and its data management plan, and their rights (for instance to access the data or request that it be deleted). Where the informants consented to it, I recorded the interviews including a verbal statement of express consent to the terms outlined in the letter. All interview transcripts and sound files were handled anonymously.

The articles

Article 1: Beyond Expertise: The Public Construction of Legitimacy for EU Agencies

With Asimina Michailidou; published in *Political Research Exchange* 3(1), 2021.

Article 1 contributes to debates on EU agencies' empirical legitimacy as well as to normative debates on legitimacy generally. In it, we ask: How is the power of independent agencies legitimized? Earlier research has privileged technical expertise as the predominant source of legitimacy for such agencies. While recent contributions have challenged this assumption, we have seen few attempts to systematically analyze the conditions under which different sources of legitimacy are established in public discourse. We address this gap by proposing a conceptual framework of four legitimation arguments and test their prevalence through an empirical analysis of the public legitimation of EU agencies.

We theorize that different agencies might face different legitimacy demands. Building on central contributions in the normative and empirical literature on legitimacy, we identify four main types of justificatory arguments for the legitimacy of unelected bodies:

- The *evidence-based* argument refers to technical legitimacy as I have developed the term in this chapter. Agencies' technical-scientific conduct, not their answerability to elected politicians or responsiveness to citizens' immediate concerns, gives them their legitimacy.

- The *legislators' command* argument maintains that answerability to, and control by, elected politicians is the proper source of legitimacy even for independent institutions like EU agencies. Typical examples would be calls for accountability or stronger political control with the agencies.
- The *public participation* argument says that citizens' direct participation in agencies would ensure the agencies' legitimacy. This is not a call for representative democracy but for direct citizen involvement through hearings and consultations, partnership agreements with civil society, and so on.
- The *fundamental rights* argument says that an agency first and foremost needs to respect or promote fundamental rights in order to be legitimate. It is a minimal precondition of legitimacy that we might expect all agencies to meet.

We hypothesize that the prevalence of each argument depends on characteristics of the agency, especially its scientific 'hardness' and its public salience. We test our hypotheses in three steps. We first combine automated text classification and qualitative content analysis to analyze Swedish news media coverage of three EU agencies, 2005–2019. We collect a full-text corpus of all news articles in Swedish press about the European Banking Authority (EBA), the European Environmental Agency (EEA), and Frontex (the European Border and Coast Guard Agency from 2016). We create a dictionary for each legitimizing argument, containing terms that we consider to be indicators of that argument. The terms are derived from academic texts and policy documents. This approach lets us first get a quantitative overview of the prevalence of each argument for each agency. We then qualitatively analyze a subset of the most distinct articles for each agency-argument pair. We code, on the sentence level, instances of each legitimizing argument along with contextual features like their valence and source.

In a third step, we quantitatively analyze aggregated data on the Swedish news coverage of *all* EU agencies 2005–2019. In this stage, we rely not on full-text data but on aggregate data: the yearly number of hits on an agency-dictionary pair. We additionally operationalize our theoretical

scope conditions. For *salience*, we use the yearly number of questions for written answer about an agency in the European Parliament. For scientific *hardness*, we develop a coding scheme and assign each agency a rating of hard, medium, or soft.

We find more evidence-based discourse in coverage of hard-science agencies, and more legislators' command discourse where agencies are 'softer' or more salient. This is in line with our theoretical expectations. It suggests that there are, in fact, different legitimacy requirements towards different agencies – at least in the public eye.

We do not, however, find any changes in the words used about an agency *over time* if its salience changes. This suggests that the legitimizing discourse about an agency is not very sensitive to fluctuations in the agency's public attention.

Moreover, we find that public participation terms are not used much at all in our corpus. This might suggest that public participation, despite recent academic interest, is not high on the public's wishlist.

Our findings are relevant for ongoing normative and empirical discussions on the legitimacy of independent agencies. We argue that legitimacy should be understood as a multifaceted concept, where different types of institutions might appropriately face different demands. Moreover, we show that the variation in legitimacy demands is *systematic*. The legitimizing arguments used about an agency depends on its scientific hardness and, although to a lesser extent, its public salience. Future research could fruitfully build on our theoretical framework and methodological approach to test the generality and scope of our findings.

Article 2: More Power, More Control: The legitimizing role of expertise in Frontex after the refugee crisis

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Article 2 provides a deeper understanding of the *process* of legitimation in one selected agency. According to the framework and findings of Article 1, Frontex is a "least-likely" case for technical legitimacy. It is an EU

agency operating in a highly salient field, removed from hard-science “gold standards” of evidence, where member states have been reluctant to delegate power and sovereignty. Article 1 showed that the evidence-based argument figured relatively rarely in coverage of Frontex.

At the elite level of negotiations over the agency’s mandate, however, things are different. Article 2 shows how the appeal to depoliticized expertise did, in fact, work to legitimize increased supervisory and executive power to the European Border and Coast Guard Agency, Frontex, after the 2015 refugee crisis.

I focus on one crucial new task for Frontex under the 2016 Regulation: its capacity to carry out so-called *vulnerability assessments*. The agency now carries out a yearly assessment of each member state’s capacity and border vulnerabilities, which leads to recommendations and, as a last resort, interventions, by the agency. This new task impinges on the member states’ sovereignty and was, not surprisingly, one of the most contested parts of the regulation in negotiations. I therefore ask: To what extent, and how, were appeals to neutral, technical expertise used to legitimize more supervisory and executive power to Frontex in the 2016 Regulation?

I present two main theoretical approaches to the use of expertise. The *epistemic* approach says that an agency relies on expertise because it helps problem-solving, contributes to better decisions, or increase the rationality of policies. This will almost always be the official justification for relying on expertise in an organization (see *Boswell 2009*). By contrast, the *political* approach says that agencies may make use of expertise to infuse policymaking with an appearance of rationality, hence increasing their perceived legitimacy (*Weiss 1979; Sabatier 1978; Boswell 2009; Schrefler 2010; Rimkutė 2015; Christensen 2018*).

To figure out which of the two were most prominent during the negotiations over the 2016 Regulation, I employ a process-tracing case study. I analyze primary documents and semi-structured interviews with officials working in risk analysis, vulnerability assessments, and who have participated in the negotiations over the 2016 regulation. I trace the negotiations leading up to the 2016 Regulation and its immediate aftermath.

I find that appeals to technical neutrality, quantification, and objective indicators were central when a new mandate for the agency was negotiated. Contrary to what earlier contributions have found, however, this appeal was not something that only EU-level actors used strategically to advance their goal of more EU-level harmonization. Instead, all actors appealed to the promises of technical legitimacy for their own purposes. The commission framed vulnerability assessments as an apolitical and objective procedure. But instead of contesting this line, member states introduced an even heavier reliance on the promises of technical neutrality in the final regulation. Vulnerability assessments take a much more quantitative approach than the existing risk analysis procedure. Member states trusted that this move would hold the agency and the vulnerability assessment procedure in check. All the while, the epistemic uncertainty of the assessments is rather high. The procedure leaves much space for analyst discretion, and clear criteria for evaluation were lacking at the time. This suggests that the negotiating actors' heavy reliance on the assessment's objectivity and neutrality was driven by political rather than epistemic considerations.

By focusing on an agency at a remove from the natural-science archetype, this article contributes to the literature on knowledge use in independent agencies. It suggests that technical expertise can be a powerful source of legitimacy even in a field removed from "hard" science.

After the article was finalized, yet another Frontex regulation entered into force. The most important innovation in the 2019 Regulation is the Frontex Standing Corps. (In Article 3, I and Hallvard Sandven take stock of what this development means for the agency's legitimacy.) Even if Article 2 does not cover this most recent development, its conclusions are only reinforced in light of the new state of affairs. With the standing corps, Frontex has received substantial executive powers to complement its existing supervisory and coordinating functions. The vulnerability assessment procedure remains central as it provides the evidence base of Frontex recommendations and interventions – which may now happen with Frontex's own personnel and equipment.

Article 3: Symmetry in the Delegation of Power as a Criterion of Legitimacy: The case of the European border regime

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Article 3 picks up where Article 2 left off, this time integrating normative and empirical analysis. We start from the observation that the EU's power is expanding, which calls for reassessments of its normative legitimacy. In the article, we propose a novel criterion for assessing the EU's legitimacy, with a particular emphasis on its agencies: symmetry in the delegation of power. We illustrate the usefulness of this criterion through an analysis of the European border regime.

The empowerment of Frontex did not end with the 2016 regulation. Its mandate was updated again in 2019, this time making the agency in charge of its own uniformed border guards. This is a significant increase in the agency's executive and operational power – an increase which is hitherto underappreciated in the empirical literature. Existing analyses of the border regime have tended to dismiss it as weak and intergovernmental. We show, to the contrary, that it is both strong and weak. The EU wields significant powers in border control but lacks power altogether in asylum policy. Our empirical aim in this article is to offer an intervention into the debate around the European border regime – especially in contributions informed by the *core state powers* approach – by pointing out this lopsided development.

Our normative aim, and the article's main contribution, is to offer an argument about the implications of this lopsided development for the regime's, and ultimately the EU's, normative legitimacy. Frontex itself, as well as EU-level policymakers and academic observers, justifies the agency's power by reference to its purely coordinating, technical, and apolitical nature – a justification that runs into problems with the agency's recent increase in power. We do not believe that the problem lies with the increase in powers as such, but rather with the increase's contingent and asymmetrical structure. Our argument is that wherever there is asymmetrical delegation within the same policy domain, illegitimacy will persist because, in such cases, the institutional structure will make room for unaccountable exercises of power deflecting responsibility. In the case of Frontex, the asymmetry has rendered the EU incapable of discharging the moral responsibilities that arise in migration control, for instance via

the power to adjudicate asylum claims. The EU, through Frontex, exercises force on behalf of the member states, but has no powers to make those states take responsibility for the lives of the migrants subject to that force.

We argue that the symmetry criterion is general and not limited to the area of migration. We agree with analysts in the core state powers tradition that the integration of core state powers will be more difficult to achieve than market integration. In the short-to-medium run, then, only “easy” areas of core state powers—for instance those whose underlying incentive structure is favorable to agreement and cooperation—will get integrated. When a policy area contains an internal discrepancy in incentive structures, like the European border regime, asymmetrical delegation of power is likely to emerge. Through a brief case study of the European Monetary Union, we demonstrate the plausibility of this generalization.

The article contributes to the overarching goal of this dissertation by developing a criterion of legitimacy that comes into play in instances where technical legitimacy falls short. The delegation of core state powers to EU agencies breaks the mold of the natural-science-based and regulatory agency on which much existing theory is based. When an agency passes a certain threshold of executive power, it must be evaluated not just on its own terms but by taking into consideration its place in a larger institutional landscape.

The article also fleshes out some implications of the findings in Article 1. The integration of core state powers might lead to fundamental rights becoming a more salient criterion in future debates over EU legitimacy. And assessments of agencies’ legitimacy should be informed by their place in a larger institutional structure. This article shows how fundamental rights and a structural view of legitimacy interact.

Article 4: Inductive risk and the legitimacy of non-majoritarian institutions

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Article 4 is a normative-theoretical contribution that starts from the dilemma presented at the outset: Technical legitimacy is both widely challenged and widely appealed to in modern democracies. I have so far demonstrated that different EU agencies face empirically different legitimacy demands as a function of their hardness and salience, found that technical legitimacy has a surprisingly broad appeal and is a source of legitimacy and trust even in border control and migration, and developed a substantive legitimacy criterion for the special case of the delegation of core state powers. In this article I develop an overarching framework that accounts for these findings and arguments. I introduce a concept from philosophy of science to the debate over the legitimacy of unelected bodies—the concept of *inductive risk*. This concept has some appealing features. It shows why a naive appeal to technical legitimacy generally fails. But, and crucially, it also gives us the conditions under which technical legitimacy might nonetheless be appropriate.

In philosophy of science, the argument from inductive risk is one of the most convincing arguments against the value-free ideal. It starts from the observation that scientists must make choices at all stages of the research process. These choices are often underdetermined by the evidence alone. In particular, when there is a risk of making a wrong choice—for instance of accepting bad data or rejecting a correct hypothesis—and there are non-epistemic consequences of that error, scientists must consider the consequences of being wrong. The choice about what consequences they are more willing to accept is unavoidably informed by (non-epistemic) values. Therefore, in these cases, values are not only warranted but *required* in the internal stages of science.

In the article, I apply the concept of inductive risk as a yardstick of the legitimacy demands facing a non-majoritarian institution. I argue that *the degree of democratic value input required for an institution's legitimacy depends on the institution's degree of inductive risk*.

Inductive risk is a function of a decision's epistemic uncertainty, i.e. the probability of being wrong, and the consequences of error. I argue that non-majoritarian institutions, too, differ in their epistemic uncertainty and the consequences of their decisions (including their epistemic errors). These two dimensions can therefore be used to assess the legitimacy

demands facing an institution. An institution that makes decisions characterized by low epistemic uncertainty, with restricted powers and a limited scope, will have low inductive risk. The technical legitimacy argument is most likely to be appropriate for such institutions. When uncertainty and/or consequences increases, an institution's inductive risk increases too.

The two-dimensional scheme of uncertainty and consequences may be seen as a normative reframing of Article 1's two-dimensional scheme of scientific "hardness" and public salience. All else equal, it is plausible that "hard-science" agencies are characterized by lower uncertainty in their epistemic claims. Salience, as I argue in the article, may be seen as a measure, however noisy, of the *degree of importance* attached to issue, which tracks an institution's consequences.

When an institution's inductive risk is higher, the space for value judgments increases, and this places higher demands on the mechanisms for democratic value input into the institution. Delegation to an expert institution with high independence may still be appropriate, but it is a decision associated with risk. The risks must be balanced against the expected benefits of delegation. Any decision to delegate to unelected experts is therefore a decision over acceptable risk.

Implications and contributions

The dissertation contributes to larger debates in political science in several ways.

Through the dissertations' empirical sections, I contribute to the empirical literature on EU agencies, their legitimacy, and their reputation management (*Rimkutė 2019; Busuioc and Rimkutė 2020a; Wood 2018*). While we know a lot about EU agencies' self-presentation, self-legitimation and reputation management strategies, we know less about how their legitimacy is conceptualized and discussed, and which normative categories are prevalent, in public debate. And while we know a lot about how appeals to technical legitimacy work in regulatory agencies based on "hard" science, we know less about agencies with other kinds of evidence bases, like in border control. I suggest that different agencies face different

legitimacy demands as a function of their scientific “hardness” and public salience. I therefore agree with Busuioc and Rimkutė’s (2020b) critique of the idea that independent expertise is the “be-all-and-end-all” criterion for agencies’ legitimacy. At the same time, I offer a rejoinder to the bureaucratic reputation literature’s concept of legitimacy as successful reputation management. I aim for a tighter integration of normative and empirical legitimacy, building my typology of justificatory arguments on categories drawn, in large part, from the normative literature on legitimacy.

Next, the two papers on Frontex make not only an intervention into the specific research on Frontex but also into the literature on the EU’s integration of core state powers (*Genschel and Jachtenfuchs 2016, 2018*). An underappreciated observation in this literature is that the EU’s border regime today is asymmetrically integrated. Frontex’s power has vastly increased since 2015, while the EU’s competences over asylum policy have been at a standstill. Appreciating this asymmetry not only provides for a more accurate image of the European border regime—it points to a reassessment of the regime’s normative legitimacy.

Normatively, the dissertation offers an intervention into debates over the legitimacy of the EU and its non-majoritarian institutions. My main thesis is that assessments of an institution’s legitimacy should be made at the systemic level, combining a functional and a structural criterion.

The functional criterion says that the legitimacy demands facing an institution depend on characteristics of the institution in question. To this end, I introduce the concept of inductive risk, which originated in philosophy of science, to debates over unelected bodies’ legitimacy. The concept offers a novel way of grounding the legitimacy of non-majoritarian institutions, one which avoids the pitfalls of excessive technocracy and excessive majoritarianism.

The structural criterion says that a full assessment of an unelected body’s legitimacy must take into account its institutional context. EU agencies diverge widely in power and competences. With such a divergence within a single policy area, the asymmetry that ensues may lead to novel legitimacy worries that have no parallel in the sovereign nation state. This

argument feeds into debates over the EU's legitimacy in a period characterized by increasing integration of core state powers.

Policy implications

The findings of this dissertation have implications for policy at three levels of generality: the European border regime, EU agencies, and non-majoritarian institutions.

The European border regime should, according to our argument in Article 3, become more symmetrical. Border management and asylum policy should be roughly comparable in power and scope. Note that this symmetry may be ensured one of two ways: either by empowering asylum policy or by scaling back the power delegated to Frontex. Making an argument about which of the two directions are appropriate requires further substantive normative analysis.

This dissertation furthermore suggests that policymakers designing EU agencies should ensure proper procedures for values to influence agencies' conduct. A first step is to avoid naive claims to technical legitimacy (which are, as we have seen, widespread today) when justifying the power of such institutions. A next step is to pay particular attention to the agencies' level of inductive risk, which may indicate just how comprehensive the procedures for value input should be in each individual case. This is a choice made at the level of individual agencies; there is not one institutional design that will fit every agency across policy fields, expertise types, and degrees of power. A third step is to pay attention to the agencies' institutional context. The EU and its member states should not be permitted to arbitrarily empower an agency without making sure that the system as a whole still ensures everything that democracy demands.

Finally, most recommendations in the previous paragraph apply to unelected bodies more generally, both at the domestic and international level. Politicians should not shy away from designing non-majoritarian institutions that can fulfill the legitimate need, in modern democracies, to isolate certain decisions from majoritarian politics. But they must ensure that these institutions do not overstep their bounds. They must therefore

move away from naive claims to value-freedom towards a careful consideration of each institution's risks, benefits, and institutional context.

Conclusion

The overarching ambition of this dissertation is to examine the conditions under which the delegation of power to unelected bodies is democratically legitimate. Such delegation has often been justified by reference to what I call *technical legitimacy*. This is the idea that certain institutions are based on value-free expertise and set up to ensure outcomes in the public interest – and that such institutions are legitimate despite, or even because of, their independence from majoritarian politics. Some academic observers have joined politicians and practitioners in embracing the idea. This dissertation shows that it is a powerful legitimizing device in practice. Many other observers, however, view technical legitimacy with skepticism. I wish to shift away from a binary debate for or against non-majoritarian delegation – for or against technical legitimacy. Instead, I act on the suspicion that institutions are set up to do different things, and that this variation leads to variation in what is required of them to be legitimate.

In summary, this dissertation finds that unelected bodies face different legitimacy criteria depending on their epistemic uncertainty (of which scientific “hardness” is a proxy) and the potential consequences of their errors (operationalized as salience and power). Technical legitimacy is most appropriate where uncertainty is low or where the consequences of errors are limited. Under other conditions, more direct value input might be needed, and technical legitimacy falls short. Moreover, even though every institution may face different standards, legitimacy requires that the totality of institutions in a policy field does not leave any democratic gaps.

Several avenues for future research remain. The conditions explored here do not comprise an exhaustive set of possible conditions for legitimacy. Future research could for instance examine the conditions for individuals' acceptance of technical legitimacy, using survey experiments, in-depth focus groups, or similar. The framework and methodology in Article 1 may fruitfully be applied to new data and other national contexts. It presents a general theory, but further research is needed to corroborate its

findings. In normative terms, future research might elaborate on the dissertation's symmetry thesis and test its generality both in other parts of the EU system and in other instances of delegation more generally. Finally, the dissertation leaves key issues of institutional design to future research. Finding the best way to ensure symmetry between institutions requires substantive and case-specific normative analysis. And if we evaluate an institution as needing more value input than technical legitimacy offers, how should we go about? The answer might be to rein it in under the control of elected officials, but this is not the only answer. There might be ways to cash in the benefits of non-majoritarian delegation while ensuring the appropriate value input, for instance through deliberative participatory procedures or mechanisms that make sure an institution's experts are themselves attuned to the values we take to be relevant. In any case, assessments of legitimacy should be built from the bottom up, accommodating the diversity of institutions that make up modern democratic systems.

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Article 1

Beyond Expertise: The Public Construction of Legitimacy for EU Agencies

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Abstract: How is the power of independent agencies legitimized? This is a central question in modern democratic societies. Earlier research has privileged technical expertise as the predominant source of legitimacy for such agencies. While recent contributions have challenged this assumption, we have seen few attempts to systematically analyze the conditions under which different sources of legitimacy are established in public discourse. We address this gap by proposing a conceptual framework of four legitimation arguments and test their prevalence through an empirical analysis of the public legitimation of EU agencies. We hypothesize that the prevalence of each argument depends on characteristics of the agency, especially its scientific "hardness" and its public salience. We test our hypotheses in three steps. We first combine automated text classification and qualitative content analysis to analyze Swedish news media coverage of three EU agencies, 2005–2019. In a third step, we quantitatively analyze aggregated data on the Swedish news coverage of *all* EU agencies 2005–2019. We find more technical-expertise discourse in coverage of hard-science agencies, and more political-control discourse where agencies are "softer" or more salient. Our findings are therefore relevant for ongoing normative and empirical discussions on the legitimacy of independent agencies.

Keywords: democracy, expertise, EU agencies, legitimacy, public sphere

Introduction

A steadily growing array of policy tasks in the European Union (EU) has been delegated to EU agencies. These are EU-level non-majoritarian institutions set up at an arm's length from elected officials to perform a specified task. They are created by secondary law, staffed by specialists or experts, and are not led by, nor under the direct command of, democratically elected representatives (Wonka and Rittberger 2010). A central issue is how such institutions can be legitimized, given their removal from majoritarian electoral politics.

A prominent argument in academic literature and EU official discourse is that independent expertise can legitimize EU agencies. Expertise has been described as the “be-all-and-end-all criterion for legitimacy in the EU regulatory state” (Busuioc and Rimkutė 2019b, 5). This perspective, however, overlooks the potential for domination that arises when unelected experts in EU agencies gain power at the expense of democratically elected politicians (Holst and Molander 2019). This is a pronounced risk particularly seen from normative approaches that regard democracy “as aggregative, participatory, and intrinsically justified” (Christensen and Holst 2017). In contrast, a “deliberative, elite, and epistemically justified” approach to democracy would accept expertization more easily, if not outright recommend it (Christensen and Holst 2017, 821). These contrasting ideas of democracy, and in particular the tension between epistemic and (majoritarian) democratic concerns (Krick 2021), may give rise to different arguments about a non-majoritarian institution's legitimacy.

In this paper, we explore the idea that different agencies may face systematically different legitimacy demands. In order to get a better understanding of the conditions under which different arguments about agencies' legitimacy come into play, we empirically examine legitimation arguments about EU agencies in the public sphere. While we have a fine-grained understanding of EU agencies' establishment, accountability, self-presentation, and reputation management strategies (Busuioc and Lodge 2016; Busuioc and Rimkutė 2019b; Rimkutė 2019; 2018; Wood 2018; Thatcher 2011; Majone 1997; Wonka and Rittberger 2010; Scholten 2014), we know less about how the legitimacy of EU agencies is negotiated,

promoted and contested in the media. We treat legitimacy as a multidimensional concept, and ask: *Which legitimization arguments about EU expert agencies are present in the public sphere, and under what conditions do we find each argument?*

While there are several channels for debate in the public sphere, we take news media to be one of the most central. Our empirical strategy is a mixed-methods approach comprising three analyses of EU agencies' news coverage in Swedish news media from 2005 to 2019. In the first and second analyses, we focus on full-text news coverage of three EU agencies that give us high variance along our variables of interest—the European Border and Coast Guard Agency (Frontex), the European Environmental Agency (EEA) and the European Banking Authority (EBA). A quantitative text analysis is combined with a qualitative content analysis of news articles selected from the same corpus. The third stage is a keyword-based analysis of *all* 36 EU agencies 2005–2019.

This paper contributes to existing literature by taking a novel approach to the study of EU agencies' legitimacy. We present and operationalize a conceptual scheme that empirically examines four normative legitimization arguments. We find that technical expertise underpins (de-)legitimation claims only under certain circumstances. Where hard science evidence is lacking or public salience is high, political control is a more prominent category. Fundamental rights discourse is much more prominent in the coverage of Migration and Home Affairs agencies. The findings offer a starting point for a new direction for the study of EU legitimacy. The determinants of different legitimacy arguments warrant closer attention from several angles, both through empirical studies and normative theory.

Our paper proceeds as follows: We first discuss four conceptualizations of legitimacy (the *evidence-based*, *legislators' command*, *public participation* and *fundamental rights* arguments) that can serve as the basis for the public (de-)legitimation of independent expert bodies. We then formulate hypotheses towards their prevalence in the media coverage of EU agencies. Next, we elaborate on our overarching methodological framework. We then present the design and discuss the results of the three studies sequentially.

Expert bodies and democracy

EU agencies are a special case of what we can call non-majoritarian institutions (Thatcher and Sweet 2002). They are by design operating at an arm's length from electoral politics, with a legal personality and a specified mandate (Wonka and Rittberger 2010). Earlier research has studied many central aspects of this rapidly growing phenomenon in EU governance. Early contributions were concerned with agencies' establishment and the act of delegation (Majone 1997; Thatcher 2011). Others have focused on the agencies' formal independence (Wonka and Rittberger 2010) or accountability (Scholten 2014; Font and Pérez Durán 2016). More recent studies have turned toward the agencies' self-presentation and reputation management strategies (Busuioc and Rimkutė 2019b; Rimkutė 2019; Wood 2018). Many of these studies aim to categorize agencies along some formal or empirical trait, for instance whether they are regulatory or informational, decision-making or advisory, by their policy field, or by their political salience. This paper aims to continue in this tradition and explore variation between EU agencies, this time addressing a gap in the literature by focusing on public legitimacy. To be sure, the legitimacy of non-majoritarian institutions is much debated, but most contributions are either theoretical or based on a single case. We aim to move beyond this by examining whether there might be systematic variation in the type of legitimation arguments used about different agencies.

The general concern about the legitimacy of non-majoritarian institutions is this: Democratically elected politicians can delegate some of their power to institutions removed from their direct control. But they cannot delegate their legitimacy (Majone 1999, 7). According to some observers, delegation therefore implies a "net loss" of legitimacy for the political system as a whole (Maggetti 2010, 3). Non-majoritarian institutions need to find a legitimacy basis other than their direct control by citizens through elected politicians. In order to get a better idea of what such a basis may be, we suggest four ideal-typical arguments justifying the legitimacy of non-majoritarian institutions, drawn from normative literature. We then suggest hypotheses about when each argument should be prevalent.

We define legitimacy as “the generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate” within a social system (Foreman, et al. 2012, 184). Legitimacy is at its core an evaluative normative measure, but it is used in social science both normatively and empirically (Beetham 2013; Buchanan 2011). One question is whether the public accepts an institution's power as legitimate (empirical legitimacy). Another question is which arrangements, institutions, and justifications thereof should be described as legitimate from a normative-theoretical standpoint. In this paper, we stipulate that empirical legitimacy depends on normative legitimacy in the sense that people view an institution as legitimate if it fits with some preconceived normative standards they hold. Individuals may not be explicit about their normative standards, but we can use normative theory to get at the standards we can plausibly expect people to hold. In this sense, empirical and normative legitimacy is empirically related while analytically distinct (Tallberg and Zürn 2019).

An influential theoretical approach to legitimacy, especially in the study of the EU, is the *systems-theoretical framework*. This framework structures the debate along the lines of input, throughput, and output legitimacy (Scharpf 1999; Schmidt 2013). Input-oriented approaches focus on the popular-sovereignty component of democratic legitimacy, in essence that decisions should be responsive to the concerns of the constituency (Bellamy 2010, 5). Output-oriented approaches focus on the content of policies and whether they effectively provide for the common good (Schmidt 2020). Throughput is sometimes added as a procedural criterion, presented as an opening of the “black box” between input and output (Schmidt 2013), concerned with the “quality of governance processes as judged by (...) accountability (...), transparency, inclusiveness and openness” (Schmidt and Wood 2019, 728). The systems-theoretical framework offers a useful heuristic to systematize normative debates over legitimacy. Our concern is more specific: the discursive legitimization of non-majoritarian agencies. This requires us to go beyond the categories of in-/through-/output and focus on how the power of institutions are *justified*. We maintain, however, that such justifications should be understood as appeals to different aspects of *democratic* legitimacy.

As Jens Steffek (2015) points out, the systems-theoretical scheme is sometimes taken to imply an understanding of democracy where *democratic* legitimacy is equated with input, while output legitimacy simply requires that an institution provides efficient problem-solving as something entirely unrelated to democracy. We agree with Steffek that this is a reductive understanding. Instead, we take democracy to entail a commitment both to popular sovereignty and to the common good (Pettit 2004). Output legitimacy demands that an institution must be evaluated by its contribution to the common good. This is, by implication, an argument about its *democratic* legitimacy. For this argument to be persuasive, however, we need it to be grounded in something more than pure efficiency – it must also credibly provide a mechanism that ensures the common good. For instance, an independent central bank is legitimized by reference to its institutional independence and its economic expertise, which together will secure price stability – an outcome in the long-term public interest (Steffek 2015, 271). The same goes for independence: It seems unlikely that citizens would find a powerful institution without any clear expertise basis, accountability mechanisms, or participatory procedures legitimate simply because it is independent from electoral politics – even if it has generated efficient or “good” (however defined) outcomes so far. In this scenario, we have neither reason to trust that such an institution will continue generating efficient outcomes in the future, nor do we have means to constrain it if it begins to perform poorly. In addition to independence, then, the power of a non-majoritarian institution must be justified with reference to some legitimizing argument (E. O. Eriksen 2021a, chaps. 1–2).

The systems-theoretical framework remains underspecified about what such legitimizing arguments might be. We aim to identify which dimensions of democratic legitimacy an agent might appeal to when justifying the power of a non-majoritarian institution. Some arguments are more in line with input-oriented approaches, some are more in line with output-oriented ones, but they are all geared towards the specific context of non-majoritarian institutions. They therefore presuppose *some* degree of institutional independence and insulation from electoral politics.

Four types of discursive legitimation

Building on central contributions in the normative and empirical literature (E. O. Eriksen 2021b; Bellamy 2010; Maggetti 2010; Majone 1997; Scharpf 2009; Buchanan 2011), we identify four main types of justificatory arguments for the legitimacy of non-majoritarian institutions: The *evidence-based*, the *legislators' command*, the *public participation* and the *fundamental rights* arguments. The first three categories are based on, and get their names from, the typology developed in E.O. Eriksen (2021b).

These arguments may be treated as empirically observable analytical categories derived from dominant normative ideas of legitimacy. They are not mutually exclusive nor necessarily competing. It is conceivable that different institutions have different legitimacy bases, and one institution may draw on different legitimacy arguments at different points in time. We hypothesize that the prevalence of any of these four types of justifications depends on two main variables: An agency's scientific "hardness" and its public salience. The general idea of a "hierarchy of the sciences" has been with us since the days of Auguste Comte. While there is some academic debate on the empirical tractability of different sciences' hardness (see Fanelli and Glänzel 2013; Hedges 1987), we are here concerned with *perceived* scientific hardness in the public eye, and not the metaphysical status of a given discipline. As Smith et al. (2000) show, public perceptions of the hardness of different sciences follow Comte's scheme quite well: Respondents on average ranked physics and chemistry at the top, biology, medicine and psychology a little lower, economics in the middle and sociology at the bottom. We define *salience* as the amount of attention given to an agency. This can be measured by the number of media articles about an agency or the number of parliamentary questions mentioning it (Koop 2011; Wood 2018). We use both measures in turn and return to the exact specifications below.

As we have seen, there are several other ways to systematize EU agencies, for instance by their formal independence or their regulation, information, or decision-making powers. We do not suggest that such traits are less important than the salience of an agency or the hardness of its expertise. An analysis of relative importance would require a different research design, which, although interesting, is outside the scope of this study.

The evidence-based argument

In the literature on independent agencies, much attention has been given to agencies' role as independent *expert* bodies. The standard account is that the agencies' technical-scientific conduct – not their place in a “chain of command” from electorates to legislators and governments – gives them their legitimacy (see e.g. Majone 1997; 2001; Ossege 2015; Radaelli 1999). This argument is most clearly developed in the *regulatory state* literature (Majone 1994; 1999) and overlaps with notions of “output legitimacy” and “technocratic justification” (Boswell 2009; Scharpf 1999). According to the evidence-based approach, non-majoritarian institutions need not be responsive to politicians or the public, because their conduct is based on a validation procedure that ensures that objective *truth* (and ultimately a commitment to the common good) guides the agency's conduct. This validation procedure would typically be the scientific method, but other validation procedures – for instance risk assessment – would also fall under this category (Rothstein et al. 2013).

The European Commission's own rhetoric encapsulates this idea. In a 2002 communication, the Commission writes: “The main advantage of using the agencies is that their decisions are based on purely technical evaluations of very high quality and are not influenced by political or contingent considerations” (Commission of the European Communities 2002, 5). As Eriksen (2020) points out, however, “hardly any analyst agrees with this claim.” There is widespread agreement in the academic literature that an agency's technical assessments are often intertwined with political values.

Drawing on the above, we theorize that an appeal to science or technical expertise can be a powerful legitimizing device under certain circumstances. We hypothesize that two main factors determine the argument's prevalence. First, the agency's policy field should matter. It is reasonable to assume that appeals to objective evidence are more readily accepted in some fields than others. For instance, the regulation of medicines is predominantly based on randomized controlled trials – so-called “gold standard” scientific evidence (Maor 2007). But border control, for instance, has no “gold standard” to appeal to; the appeal to science might therefore be more difficult to accept in such a field (Fjørtoft 2020). Note that there is a difference between an agency being *based on* hard

science and being discussed in evidence-based terms. We expect there to be a correlation, but we will test this expectation, not assume it. Second, the salience of an agency should matter. If a matter is highly salient or politicized, then—all else being equal—we expect the evidence-based argument to be less accepted. When stakes are high, a “limited deference” to agencies’ judgment and technical expertise might arise (Gormley 1986, 614).

If the argument is challenged, we expect it to happen along two main lines. One is a radical *anti-technocratic* line: The experts do not represent the people or the common good, and are therefore illegitimate (E. O. Eriksen 2021b, 20). This line would be skeptical to the authority of scientific objectivity altogether. Another is a less radical *neutrality-questioning* line: Scientific objectivity is a valid source of authority, but the agencies do not live up to it. They may be too close to industry or political interests, or have too limited an evidence base. In summary, this gives the following hypothesis:

H1: The evidence-based argument is prevalent in fields with high access to “hard” science procedures and/or low public salience.

The legislators’ command argument

The legislators’ command argument maintains that the route to legitimacy is answerability to, and control by, elected politicians. EU agencies may be non-majoritarian, but they cannot escape one core attribute of democratic rule: that they should be accountable (Lord and Beetham 2001, 446). This argument emphasizes the need for agencies to be responsive to their constituencies, i.e., the public as mediated through elected politicians (Flinders 2004). Non-majoritarian institutions, including EU agencies, have often been criticized for their *accountability deficit* (Schillemans 2011; Landwehr and Wood 2018). Institutionally, the legislators’ command argument would call for, for instance, accountability to the European Parliament, safeguards that limit expert discretion, political control on the hiring of executive directors, or member states’ representation on agencies’ management boards.

We can expect the legislators’ command argument to take hold under two conditions. First, contrary to the evidence-based argument, we expect that

the public more readily calls for legislators' command in fields that are less technical (less "hard science") and more value laden (Gormley 1986). If there is no readily acceptable technical or scientific foundation, we expect that expertise and independence are valued less, and political control and accountability valued more. Second, the degree of public salience could matter. When an issue is salient, it by definition receives more attention from politicians. The dynamic might extend to the public debate. We theorize that public calls for elected politicians to exercise control over an agency are more rampant if the issue area is contested or highly salient (Gormley 1986).

We expect the main challenge to the argument to fall along the lines of *undue politicization*. Political parties and political elites are sometimes seen as corrupt or illegitimate. We might therefore imagine that under certain conditions, political attempts to control an agency will be seen as an undue act of influence and power instead of an exercise of democratic accountability and a strengthening of legitimacy. This counter-justification is most developed in the economic domain, where credible commitments and the time-inconsistency problem are widely accepted grounds for delegation to independent central banks (Kydland and Prescott 1977; cf. van't Klooster 2020). We see that there is a certain symmetry between the legislators' command and evidence-based arguments. The conditions under which we expect the evidence-based argument to succeed are the ones where we expect the legislators' command argument to run into challenges – and vice versa. This gives the following hypothesis:

H2: The legislators' command argument is more prevalent in fields with less access to "hard science" procedures or with high public salience.

The public participation argument

We call the third argument the public *participation* argument. The academic debate on a "participatory turn" describes the pressure to open up policymaking to the public as a major trend in modern governance (Krick, Christensen, and Holst 2019). The argument is that non-majoritarian institutions need the direct participation of lay citizens to be legitimate, or that participation has epistemic merits of its own (Fischer

2009; Brown 2009; Jasanoff 2011). The idea builds on the direct model of democracy: it sees direct participation as a better source of legitimacy than indirect representation through elected representatives. Its normative potential is evident: Participation offers a clear link back to the public. It can both compensate for excessive technocratic developments and offer protection against partisan politicization, and may as such be well-placed to resolve the “epistemic-democratic challenge” (Krick 2021, 2). Institutionally, participation is often achieved through the involvement of civil society, for instance through so-called partnership agreements on the EU level. We also treat transparency and public access to information as central components of participation. These values are prerequisites for meaningful involvement and have “arguably attained ‘quasi-religious significance’ in contemporary debates about legitimacy and good governance” (Hood 2006, 3, cited in Krick, Christensen, and Holst 2019).

We expect that public participation will be requested or accepted in issue areas that are highly salient in the public debate. Attention is a limited resource. It is reasonable to assume that people accept or request more participation in issues where they have a lot at stake (Røed and Wøien Hansen 2018, 1447). This can in principle happen in any type of policy area. We therefore do not expect the scientific “hardness” of the issue to be consequential – only its public salience. We furthermore expect that if public participation is challenged, it will be along one of two lines. Its potential lack of representation can be questioned, given that only a select few are realistically able to participate in the workings of an agency. Another critique is epistemic: Some issues are complex and demand specialized expertise – perhaps these are best left to the experts (E. O. Eriksen 2021b, 27). In summary, the hypothesis is:

H3: The public participation argument is more prevalent in fields with high public salience.

The fundamental rights argument

The literature on EU legitimacy has been overwhelmingly concerned with legitimacy as a debate between effectiveness and quality on the one hand, and representation or participation on the other. A typical example is the debate between input-oriented and output-oriented legitimacy. This debate, however, overlooks one fundamental component of legitimacy:

Human rights.¹⁰ Recent analyses of the normative legitimacy of states and international organizations have argued that the respect for human rights is a minimal precondition of legitimacy (Buchanan 2011; Scherz 2019). Nevertheless, this dimension has been largely lacking in normative treatments of the EU's legitimacy.

The reason for this blind spot may be exactly the fundamental nature of human rights commitments. The respect for human rights is so basic that it is taken for granted. If we understand EU as a limited organization dealing mostly with "cross-border economic activity" (Føllesdal and Hix 2006, 551), this backgrounding of human rights may make sense. But the EU and its agencies are continually expanding in competences and scope (Genschel and Jachtenfuchs 2016). When the EU's power expands to *core state powers*, previously taken-for-granted minimal preconditions might come to the foreground. The EU is becoming an actor that not only regulates markets but engages in direct "factual" or operational conduct towards citizens and third state nationals – conduct that does not involve the adoption of legally binding acts. One example is the physical act of preventing persons from entering a territory (Fink 2020, 533). With such conduct, the EU has the capacity to violate fundamental rights in a direct way. Moreover, human rights are expected to be especially salient in external contexts. A relatively minimal view of human rights says that "human rights set standards for states' foreign policy, and particularly for the legitimacy of foreign intervention" (Valentini 2012, 182). Whatever else we take human rights to do, they at least do this. Therefore, when EU agencies take on state-like tasks with consequences for people and states external to the union, we expect fundamental rights arguments to be especially prevalent.

In summary, we expect fundamental rights arguments to be prevalent in (1) policy areas that deal with people and states outside of the EU itself, or (2) agencies whose conduct is "factual" (operational) rather than regulatory (Fink 2020). In order to test this expectation, we leverage the fact that most agencies that satisfy one or both of these two conditions are under the responsibility of the European Commission's DG Migration and

¹⁰ Official EU discourse prefers the term "fundamental rights" to "human rights" in the EU-internal context. We use the terms interchangeably in this article.

Home Affairs (DG Home 2021). There are two EU agencies dealing with fundamental rights as a *policy area*, the Fundamental Rights Agency (FRA) and the European Institute for Gender Equality (EIGE). We expect coverage of these agencies to feature many fundamental rights terms, but this is not the kind of coverage we are focusing on here. These agencies, however, are *not* under DG Migration and Home Affairs. Our results will therefore not be driven by these agencies. Since the respect for human rights is a widely accepted norm, we expect explicit critiques of the norm itself to be rare. Instead, we expect that the human rights discourse will be relatively absent in the coverage of agencies that do not satisfy the conditions outlined above. In hypothesis form:

H4: Fundamental rights arguments will be more prevalent in coverage of Migration and Home Affairs agencies than other agencies.

Method and data

This paper follows a methodological triangulation strategy (see e.g. Neuendorf 2017), comprising three analyses (two quantitative and one qualitative). All analyses are based on a dictionary approach (Busuioc and Rimkutė 2019a; Rooduijn and Pauwels 2011). We define *a priori* four sets of keywords that we consider to be indicators of the four legitimacy arguments, giving four legitimacy dictionaries (see Appendix). These terms are derived from academic texts and policy documents. For a full list of terms and a detailed explanation of how these were selected, see the Appendix.

In a first step, we quantitatively analyze full-text media coverage of three EU agencies from 2005 through 2019 in Swedish media. The second, qualitative step allows for a more fine-grained understanding of how and under which conditions the legitimacy discourse about the three agencies differ and gives a validation of the quantitative findings. In the third step, we analyze aggregate data on the Swedish news coverage of *all* EU agencies 2005–2019. This iteration between small, medium, and large *N* allows us to leverage the relative strengths of each approach while mitigating their relative weaknesses.

As we are interested in variation over time and between agencies, we choose to keep the geographic dimension constant and focus our analysis on one country: Sweden. The country's absence of strong distorting factors in its political and media systems—it is not extreme in any relevant sense—makes Sweden well suited as a domain for this paper's theory building and testing. The country's high level of trust in science and expertise makes it a most-likely case for the evidence-based strategy and a least-likely case for deviations from it. Deviations from the evidence-based strategy found here might therefore plausibly generalize to national contexts with lower trust (Levy 2008). Although Sweden is a relative late-comer in the EU and a rather reluctant member-state with a number of opt-outs (most notably, it is not part of the Eurozone), it has one of the lowest rates of infringement of EU legislation and is among the most compliant member-states in terms of transposition of EU directives into national legislation (European Commission 2019). Crucially, Swedish citizens have a positive outlook of the EU and its future at a rate that is well above the EU average, while their trust in EU institutions has also been above EU average and stable over a long period of time (Eurobarometer 2019). Two additional factors render the Swedish case especially suitable for a study of the public legitimacy of EU agencies. The first one is its political tradition of consensus politics (Christiansen et al. 2010). The second is its democratic corporatist media system (Hallin and Mancini 2004), whereby political parallelism has coexisted and developed alongside a strong mass-circulation press, a high level of journalistic professionalization and a strong tradition of limits on state power, including an early development of freedom of the press. The combination of a high baseline level of social trust and favorable conditions for public debate makes Sweden a suitable environment to test our theoretical expectations. All research designs entail trade-offs between generality, feasibility and parsimony (Wiedemann 2013). Our restriction to a single country is warranted for a study like this, which aims to develop theory as well as to test it (Flyvbjerg 2011). A cross-national comparative perspective would introduce more complexity with only marginal benefits for theory development.

Our corpus of news articles is collected from the Swedish news media database *Mediearkivet*. The database allows us to access articles from

almost all news media sources in Sweden, not just elite broadsheets or selected tabloids. This broad approach therefore gives a complete view of Sweden's media discourse. It is also preferable to an analysis of EU-level elite newspapers like *Politico*. Such papers might offer a "bird's eye" comparative perspective by focusing on the EU as such and not a single country, but their specialization and elite readership make them less well suited to pick up (de-)legitimation debates as they play out in a broader public sphere.

Analysis 1 and 2: Full-text analysis of three EU agencies

Design

For the full-text analysis, we select three European Union agencies that display variation along the "scientific hardness" and salience axes, and that operate in areas that have all, at different times, been high on the agenda and endured crises (Immigration, climate change and financial regulation): The European Border and Coast Guard Agency (Frontex), the European Environment Agency (EEA), and the European Banking Authority (EBA). Frontex is tasked with the management of the Schengen area's external borders, and was established in 2004. EEA was established in 1990 and is mandated with providing environmental information to policymakers and the public. EBA was established in 2011, in the aftermath of the 2008 financial crisis. It is part of the European System of Financial Supervision. Its main objective is "to maintain financial stability in the EU and to safeguard the integrity, efficiency and orderly functioning of the banking sector" (European Banking Authority 2020).

For this analysis, we can draw up a "hard-to-soft" axis from the EEA, based on the natural sciences, via the EBA, based predominantly on economics (for the "hardness" of economics, see Akerlof 2020), to Frontex, which relies mainly on intelligence, policing, demographics and related fields. We use the number of news articles in Swedish media as our salience indicator. While there is large variation in salience between the three agencies analyzed here, they are all relatively salient compared to most EU agencies. This is necessary to have enough news articles for the qualitative analysis (most EU agencies receive very little media attention). See the total number of articles mentioning an agency in Figure 1.

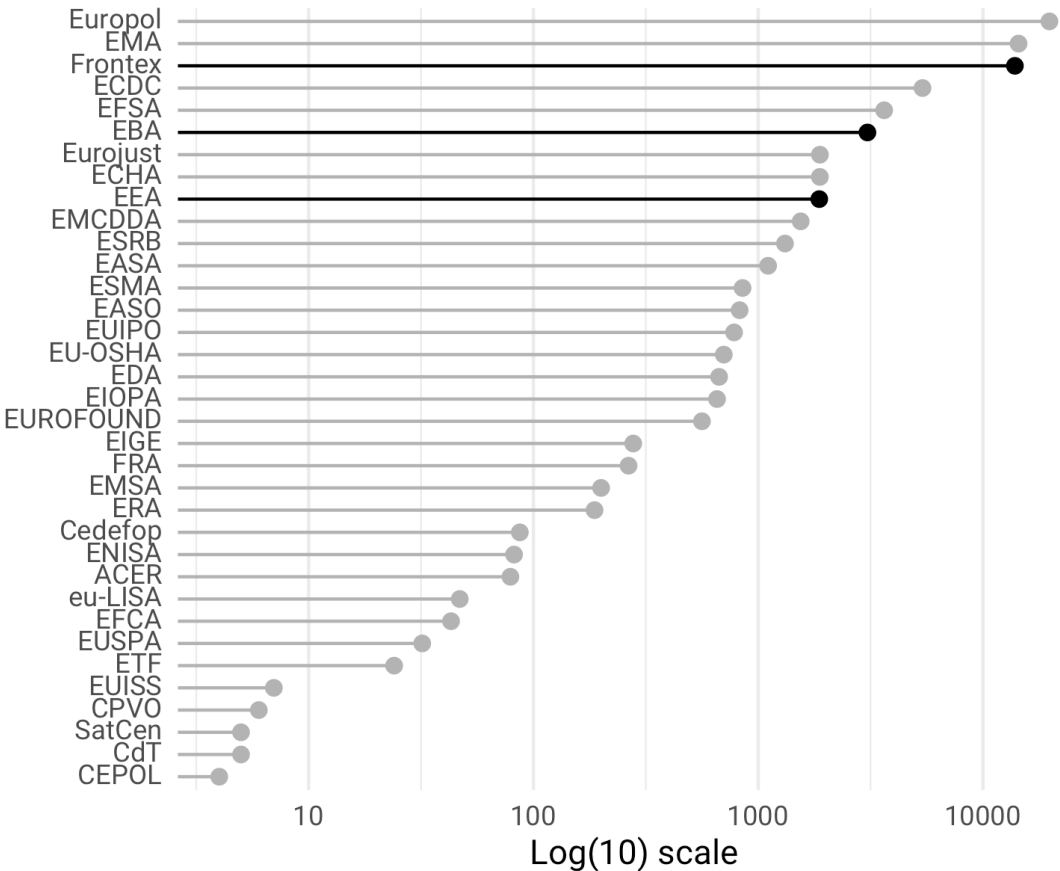


Figure 1: Total number of articles mentioning each agency, 2005–2019.

Our analysis is based on full-text media articles. We downloaded all articles mentioning an agency *and* at least one term in one of our legitimacy dictionaries over the period 2005–2019 (N = 8302).¹¹ Details on the data collection are given in the Appendix.¹²

For the quantitative stage, we calculate term frequencies for each term and article by counting the number of times a term in a legitimacy dictionary

¹¹ In this first stage, we download articles that match agency *and* a set of context terms defined by the authors. For instance, Frontex’s context terms are (here translated) **migrant(s) OR refugee(s)**. Adding such a context filter to the searches removes very few articles—almost all articles about an agency also mention our context terms (details in Appendix). We therefore use unfiltered searches in analysis 3.

¹² Note that the EBA was only established in 2011. Figure 6 in the Appendix replicates Figure 2 here, with the years before 2011 excluded. The numbers and their interpretation remain unchanged. As we wish to keep as much data as possible, it is therefore appropriate to run our main analyses on the full corpus, 2005–2019.

appears in an article. We finally calculate each term's TF-IDF by dividing its term frequency (how many times it appears in a document) by its *inverse document frequency*, i.e., how often the term appears across all documents in the corpus (Rajaraman and Ullman 2011). These measures are summarized within each legitimacy dictionary, giving each article one total term frequency and one total TF-IDF for each legitimacy dictionary.

For the qualitative analysis, we selected the top 40 articles by TF-IDF in each dimension for each agency for qualitative content analysis. This gives, after accounting for ties and some categories with less than 40 articles, a total of 344 articles for the qualitative stage of analysis. One author read each article and coded any passage matching any of the four legitimacy arguments. Articles are coded on a sentence level, so each article may contain multiple passages with different codes. The coder also coded, where applicable, whether the passage is negative (delegitimizing) or positive (legitimizing), the role of the speaker (e.g. politician, agency representative, NGO, etc.), as well as other categories inductively emerging during the analysis process. For this stage of our analysis we followed a qualitative, interpretative approach (Hijmans 1996). To ensure dependability of the coding, text extracts selected by author 1 were discussed among the authors and collaboratively interpreted, until consensus was reached in the formulation of codes and their use to interpret the selected texts. The codes are designed to triangulate the findings of the quantitative analysis from Step 1. They are applied to the most relevant articles in our corpus, not a representative (random) sample of them. We therefore interpret their content rather than their frequencies.

Results

Deploying our dictionaries on our corpus of Swedish news articles, the first quantitative stage aims to map out (1) how the three agencies differ along the legitimacy dimensions, and (2) whether there is any variation over time. Panel A of Figure 2 shows the mean number of words belonging to any of the four dimensions per article, by dimension and agency. Panel B of Figure 2 shows how the measure has developed over time. While there are some spikes, the legitimacy dimensions are relatively stable over time. A summary of the main qualitative coding frequencies is reported in the Appendix's Table 9. The claims analyzed are

put forth by a range of different actors. We report the role and affiliation of speakers where relevant, and a full overview is found in the Appendix's Table 8.

Next, we move on to evaluate our hypotheses. In this section, we integrate the quantitative and qualitative evidence from analyses 1 and 2.

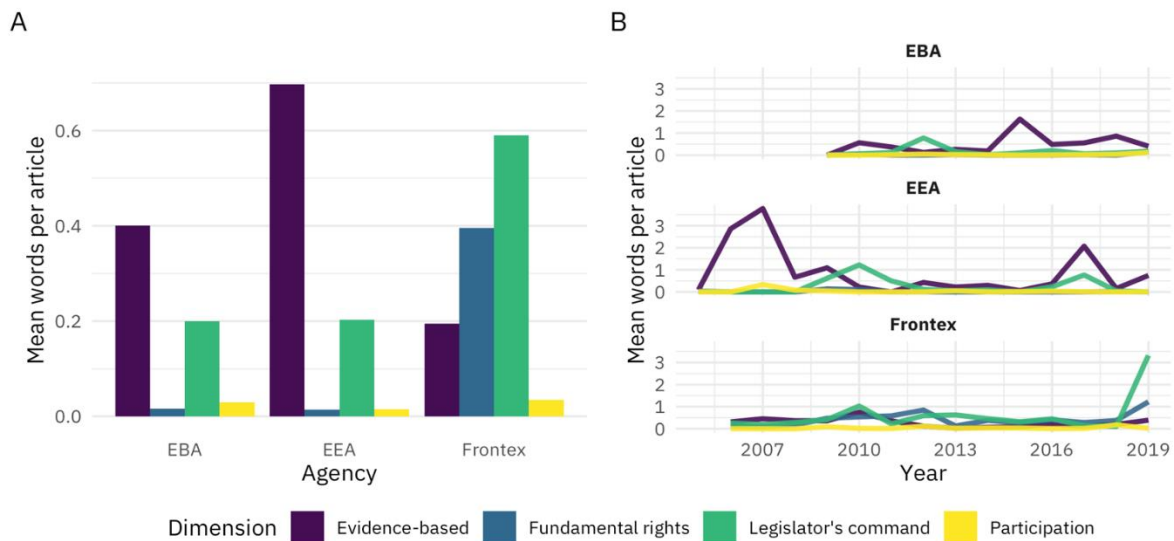


Figure 2: Panel A: Mean no. of legitimacy terms per article, by agency and legitimacy dimension.

Panel B: Yearly mean no. of legitimacy terms per article, by agency and legitimacy dimension.

Hypothesis H1: Evidence-based arguments depend on hard science and low salience.

The first part of hypothesis H1 says that we would find more emphasis on the evidence-based dimension in fields characterized by hard science. We find quantitative support for this hypothesis (Figure 2). For the agencies relying on “harder” expertise, EEA and EBA, we see that the evidence-based dimension is clearly the most common. We also find support for this hypothesis in qualitative terms. The EEA and EBA are very often referred to as neutral arbiters of facts and numbers. While we rarely find *explicit* legitimation (of the form: “agency X is staffed by highly qualified experts and therefore deserves our support”), we count this taken-for-granted position as a source of data, evaluations and facts as an implicit form of evidence-based legitimation.

Notably, the EEA sometimes explicitly criticizes EU policies. Its numbers are also used by media sources critical towards the EU's environmental policies. In a manner we do not find for the other two agencies, the EEA is portrayed in the media as a "watchdog": more like an external institution than an EU agency. The EEA acts as a kind of an *ombudsman* for the environment: A horizontal accountability institution that offers an internal check on other branches of the EU system. Its main source of credibility, and hence legitimacy, nonetheless lies in its provision of accurate numbers and facts.

The EBA is most often mentioned in the media for its stress tests. In articles about the agency, its evidence-based dimension is often linked to the need for trust in markets and institutions. This quote from two Swedish MEPs for the Social Democrats is an example: "Every country must show respect for [the EBA's] work and make sure that the domestic banks that receive a bad test score immediately plug the black holes" (Göteborgs-Posten 2011).¹³ This emphasis on credibility is a classic case of evidence-based legitimacy. Positive and negative evaluations of the agency are often linked to the perceived accuracy, performance and "toughness" of these tests. For instance:

Anders Kvist, finance director at the SEB, states that this year's test was 'much tougher' than earlier, which he welcomes. "It's about creating trust among investors, analysts and the general public about the risks in the banking sector as a whole," he says.

(Gefle Dagblad 2011)

The EBA is not often criticized in evidence-based terms. But we find some evidence-based delegitimation when it fails to use its expertise in satisfactory ways. For example, the EBA stress tests received critique for failing to foresee, at various points, bank collapses in Cyprus, Ireland and Belgium (see e.g. Svenska Dagbladet 2013).

One important prerequisite for evidence-based legitimacy is independence. When the independence of the EBA is criticized, this should therefore be taken as an instance of delegitimation. What we find

¹³ All quotes from Swedish media are translated to English by the authors.

is that the EBA has at various points been criticized for being either too close to the banks *or* too close to politics – or both. For example, in a story about new regulations on financial technology, a startup entrepreneur complains that the EBA is “fully on the side of the banks” (Ny Teknik 2017). In another story, the EBA’s stress tests are criticized for being too vulnerable to member states’ political pressures, making it impossible to include certain realistic but politically sensitive scenarios in the tests (Svenska Dagbladet 2011a). Finally, another article highlights the need for independence both from financial lobbies and member states to make the EBA “more robust” and to build up its “authority and weight” against pressures from the financial lobby and national interests (Svenska Dagbladet 2011b).

Frontex is also sometimes discussed in the evidence-based discourse, but here the picture is not as clear-cut. We find positive legitimization of Frontex in stories about the agency sending experts to border areas, for instance in Greece. The type of expertise highlighted is not hard science-based: One story run by 15 outlets reports that the EU sends 175 specialists with expertise in “counterfeit documents, stolen cars, dog handlers, illegal border crossings etc” to the external borders (Barometern 2010). On the whole, however, the dominant story about Frontex is more critical and less concerned with evidence or expertise. We explore this further in the next section.

In summary, we find that both critique and praise using evidence-based arguments is more common for the EEA and EBA than Frontex. Independence, “toughness” and the provision of facts are the most important components. This supports hypothesis H1.

Frontex’s status as a neutral facts provider is more disputed. A typical line of critique is represented by this op-ed writer:

It is exactly this cold political consciousness that is presented as functional economic policy for the Swedish nation and the European Union, when it in fact has strong streaks of inhumanity.

Frontex and the EU's member states carry detailed statistics on police interventions against migrants and deportations, but do not count the number of deaths.

(Värmlands Folkblad 2019)

In this reading, even the statistics themselves – the hallmark of technical expertise – have humanitarian repercussions. Frontex is here delegitimized in evidence-based terms and portrayed instead as an “inhuman” actor, showing how the different legitimacy arguments are sometimes presented in opposition to each other.

Hypothesis H2: Legislators' command argument more prominent in value-laden fields or where salience is high

In fields with lower access to hard science or where salience is high, we expect higher demands on oversight and control by elected officials – be it member states or the European Parliament. Frontex is a more salient agency than the two others in our corpus. If we additionally accept that Frontex's expertise is of a “softer” kind than the two others, this hypothesis finds quantitative support. For Frontex, the legislators' command dimension is nearly three times as common as the evidence-based (Figure 2).

Demands for parliamentary control of Frontex in our corpus are often coupled with humanitarian arguments, as this excerpt illustrates:

We want Frontex employees to be educated in order to ensure compliance with asylum law. We also want the European Parliament to scrutinize the agency to a larger extent, says Philip Amaral from the Jesuit Refugee Service in Brussels.

(Miljömagasinet 2010)

This quote represents rather clear delegitimation along the legislators' command axis. Frontex is described as lacking in legitimacy because it lacks accountability both to member states and the European Parliament. We do not find this kind of critique against the other agencies.

In the rare occasion when Frontex makes a claim in an article, we see that the agency uses its mandate to deflect criticism:

A Frontex spokesperson says, however, that it is not the agency's task to control whether or not human rights are respected, and points out that the agency's task is "purely coordination."

(Miljömagasinet 2010)

Restricting the agency's mandate to "purely coordination" is an act of depoliticizing the agency, shifting responsibility to the member states – an attempt at legislators-command style legitimation.

We qualitatively find that Frontex in some periods is a top political issue. Before the 2019 EP elections, Frontex features frequently in articles discussing different parties' general policy positions. When the EU at large is discussed, Frontex is often part of the discussion. In contrast, the other two agencies feature in narrower, more specialized debates.

We expected that the legislators' command dimension would be less prominent – or even negatively discussed – in articles about the EBA and EEA. The theoretical argument goes that there can, in some instances, be too much "legislators' command." This is what we have called *undue politicization*. In the literature, such an argument is often found in relation to independent central banks. As we also saw under Hypothesis H1 above, we find traces of this rationale in our corpus when the politicization of the banking sector is problematized. In articles such as this one, the emphasis is on the ECB, but the EBA's stress tests are mentioned as part of a system that might restore popular trust in European banks:

In several important countries, the banking sector is heavily politicized. [...] Especially in the heavily indebted countries, the question arises about how the ECB assesses their risks. What will the consequences be in the financial markets? For the ECB's own balance sheet? The conflict of interest is obvious.

(Svenska Dagbladet 2013)

In summary, hypothesis H2 finds support in our data. Frontex is rather clearly discussed using legislators' command arguments, and in the

banking sector we find warnings *against* too much legislators' command in the form of politicization.

Hypothesis H3: Public participation legitimacy for high-salience, high-stakes issues

We hypothesized that topics of high salience would give rise to more debate along the participation dimension. This hypothesis is not confirmed by the data in our corpus. From a quantitative perspective, as we have seen, very few articles contain any of our participation words. In the qualitative phase, no (de)legitimation claims were coded as participation for the EEA. Only a handful of statements were coded as participation for the EBA and Frontex.

In general, therefore, the main impression is that participation justifications do not feature prominently, neither in positive nor negative terms, in Swedish media debates about these agencies. Hypothesis H3 does not find supporting evidence in our corpus.

Hypothesis H4: Fundamental rights a prominent discourse for externally-oriented or operational agencies

Lastly, we expected to find more human rights arguments in the one Migration and Home Affairs agency in our corpus: Frontex. The quantitative evidence supports this hypothesis. Only in the media coverage of Frontex are human rights invoked to any significant extent (see Figure 2).

The qualitative evidence also supports the hypothesis. Frontex is often portrayed in our corpus as a vessel for the militarization of EU borders – an executive arm of the “Fortress Europe.” We also find charges of hypocrisy: Politicians talk of humanitarianism while they simultaneously allow migrants to drown in the Mediterranean. One example: “For migrants, the military operation [including Frontex] has made the journey over the Mediterranean more dangerous – a fact the EU’s politicians are conscious of” (ETC Lördag 2019).

Altogether, 64 statements in our corpus are coded with the topic “humanitarian” – all of them about Frontex. The strengthening of the agency is in many cases seen in direct opposition to the right to asylum: Because Frontex makes it more difficult to cross the external borders, it

also makes it more difficult to apply (safely) for asylum in Europe. This has been a consistent issue long before the 2015 refugee crisis. Here is Amnesty International in 2009:

One finds it very easy to agree on measures for border controls and more money to Frontex [...]. It should have been just as easy to cooperate about the duties we have towards refugees, says Amnesty lawyer Madelaine Seidlitz.

(Trelleborgs Allehanda 2009)

In line with our hypothesis H4, only Frontex is discussed – and most often negatively – using human rights arguments.

Analysis 3: A quantitative study of all EU agencies

To test the general application of our findings and hypotheses, we next gather data on *all* EU agencies in the period 2005–2019. To do this, we take a keyword-based approach. Whereas the units of analysis were full-text articles in the previous section, we are now working on aggregated data. The unit of analysis here is the agency-year.

Design

Due to limitations on text downloads from *Mediearkivet*, we are not able to download full-text news articles about all agencies. Instead, we leverage the portal's analysis tool, which allows us to download the yearly number of hits for a series of searches. For each agency i , we carry out five searches and download the yearly number of hits for each. The searches return the number of articles that match the following criteria, respectively:

- agency $_i$ AND any word in evidence dictionary
- agency $_i$ AND any word in legislators' command dictionary
- agency $_i$ AND any word in participation dictionary
- agency $_i$ AND any word in fundamental rights dictionary
- All hits for agency $_i$

This gives us a dataset of 36 agencies by 15 years by 5 searches – 2700 observations in total.

Dependent variable: dictionary hits

The dependent variable is dictionary hits as described above. A drawback with the current approach is that we are not able to give more weight to articles with *more* hits in a given dictionary. We only count the number of articles with *any* hits on a given dictionary. Comparing the search data with the analysis of full-text articles in the previous section, however, gives little reason for concern. The *relative* prevalence of each legitimacy dimension is not substantively different between the keyword-based and full-text approaches. See a comparison in the Appendix. For independent variables, we operationalize the concepts of *salience* and *scientific hardness*, as discussed below.

Salience

We define salience as the amount of attention given to an agency. Until now, we have used the total number of news articles about an agency as a measure of the concept. However, our dependent variable in this analysis – the number of hits on a dictionary – depends strongly on the total number of news articles about an agency. Using all articles about an agency as a measure of salience would not allow any inferences about the relationship between salience and the dependent variables. We choose to control for the total number of articles about an agency when estimating the relationship between salience and legitimacy arguments and, therefore, we opt for another measure of salience.

Several authors (Wood 2018; Koop 2011) use parliamentary attention as a partial measure of salience. Due to the above concerns, we will focus on the parliamentary dimension of salience here and count the yearly number of European Parliament “questions for written answer” mentioning each EU agency.¹⁴ The advantage of using parliamentary questions is that they reflect the EU-level political salience of an agency, while also giving us an “out-of-sample” independent variable.

Since salience in principle might vary over time, there are two ways to measure its association with legitimation arguments: Between agencies

¹⁴ The questions are collected from the European Parliament Public Register of Documents.
(<http://www.europarl.europa.eu/RegistreWeb/search/simpleSearchHome.htm?language=EN>)

and over time *within* agencies. For the model that compares *between* agencies, we calculate the sum of all variables across all years so that each observation is one agency. Since the counts are relatively high in this case, we treat the variables as ratio-scaled and fit an OLS linear model. As we have seen, all the counts are heavily positively skewed – agencies differ by orders of magnitude. We therefore log-transform all variables and estimate one model for each of the four legitimacy dictionaries:

$$\ln(Y_i) = \beta_0 + \beta_1 \ln(P_i) + \beta_2 \ln(A_i) + \epsilon_i,$$

where each unit i is an agency, P is the count of parliamentary questions mentioning an agency and A is the total count of articles about a given agency.

For the model that leverages variation *within* agencies over time, we fit an agency-level fixed-effects model with cluster-robust standard errors:

$$\ln(Y_{it}) = \beta_1 P_{it} + \beta_2 A_{it} + \gamma_i + \epsilon_{it}$$

Where i is an agency observed in year t and γ_i is the agency-fixed effects. P_{it} and A_{it} is the count of parliamentary questions and total articles, respectively, about an agency i in year t – both are scaled and centered. Since the counts disaggregated by year are much lower and include a large number of zeroes, we also estimate the same model specification using a model designed for discrete counts: a negative binomial model.

Hardness

A fine-grained measure of scientific hardness would be hard to defend. We therefore develop a simple ordinal three-point scale, from “soft” to “hard.” There is no clear answer as to where the cutoff points should be placed, but we believe the overall direction of our classification is uncontroversial. More details on the coding and every agency’s classification are reported in the Appendix.

Agencies are coded as hard (3) if they deal with the natural sciences, including physics, chemistry, medicine, environment or climate science, and biology. Agencies are coded as medium (2) if they deal with economics, finance, or banking – broadly, the discipline of economics. The rationale here is that while economics is a social science, it is widely

considered “harder” or more “scientific” than the other social sciences (e.g., Fourcade, Ollion, and Algan 2015). Agencies are coded as soft (1) if they operate in the social sciences or law, or if their operation is not clearly related to any particular *expertise*. An agency’s hardness is not expected to vary over time. This measure is therefore coded once for each agency.

In order to explore the relationship between legitimation and scientific hardness, we work on aggregated data across years. We treat the hardness variable as categorical and calculate the proportion of articles matching each dictionary in each of the three hardness categories. To obtain a nonparametric measure of the uncertainty in the estimates, we carry out 2000 bootstrap resamples of the agency-level dataset (Davison and Hinkley 1997). In each resample, we calculate the proportion of articles that match each legitimacy dictionary. We take the mean of the 2000 proportions as our point estimate and estimate a 95 % confidence interval empirically from the distribution of proportions – set at the distribution’s 2.5 and 97.5 percentiles.

External and operational agencies

Hypothesis 4 says that the fundamental rights discourse is more prevalent in the coverage of the 6 agencies working under DG Migration and Home Affairs. Notably, the agencies dealing explicitly with fundamental rights (EIGE, FRA) are not under the Migration and Home Affairs umbrella.¹⁵ What we aim to pick up here is not an agency’s substantive focus on fundamental rights but rather their “factual” conduct and/or external orientation. Here, too, we take a simple and flexible approach: We compare the mean score of these 6 agencies with the mean of the other 30 agencies and calculate 95 % confidence intervals.

Results

Figure 3 shows the results of four OLS regressions on the aggregate data (i.e., where each observation is one agency). We see that the number of parliamentary questions is positively associated with the legislators’ command dimension but not with any other dimension – when we control for the total number of articles about an agency.

¹⁵ See https://ec.europa.eu/home-affairs/what-we-do/agencies_en#4.

Salience

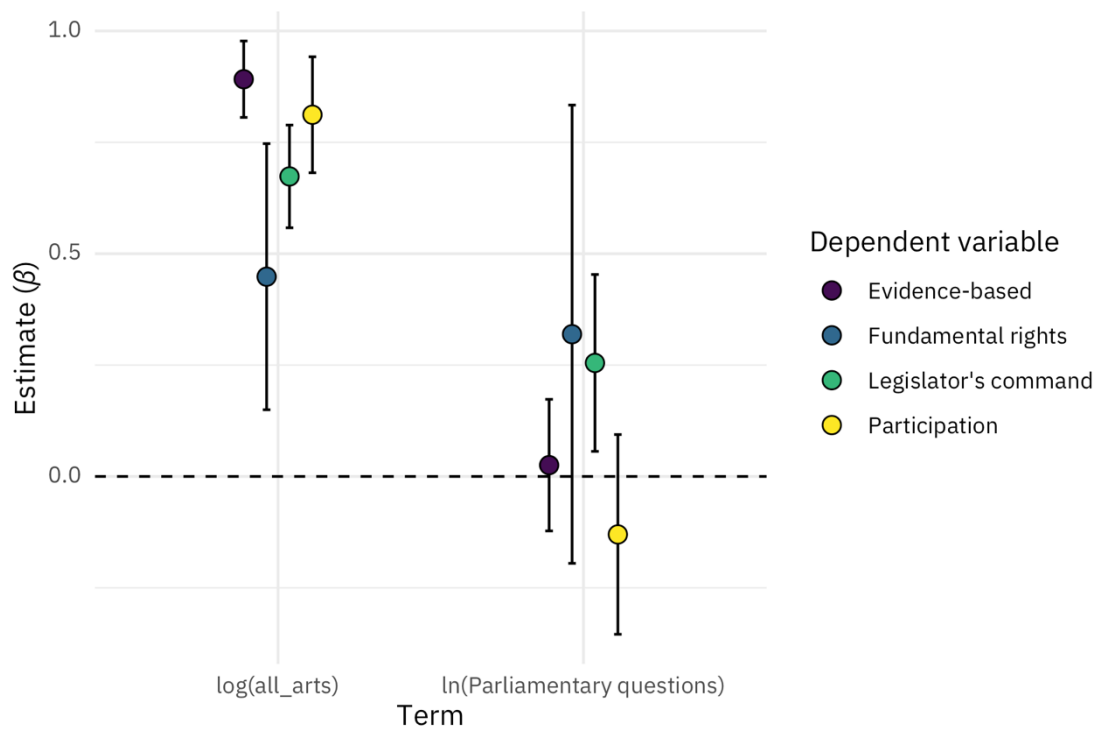


Figure 3: Regression coefficients from four OLS models. All variables are log-transformed. 95 % confidence intervals.

Hypothesis 1 is therefore left unsupported. We expected a negative association between the prevalence of evidence-based arguments and salience, but the estimated association is zero. The findings are, however, in line with our hypothesis 2, which expects legislators’ command arguments to be more prevalent in the coverage of high-salience agencies. The findings do not support our hypothesis 3—that participation arguments are more prevalent where salience is high. In fact, participation seems negatively associated with parliamentary questions, albeit not significantly different from zero at the conventional 95 % threshold.

There is less supporting evidence about the effect of changes in salience over time on the prevalence of legitimacy dimensions. Table 11 in the Appendix shows the output of fixed-effects OLS and negative binomial regressions, none of which show a significant relationship between salience and any of our legitimacy dictionaries *within* agencies.

Hardness

Next, we examine whether an agency’s hardness is associated with hits on each of our four legitimacy dictionaries.

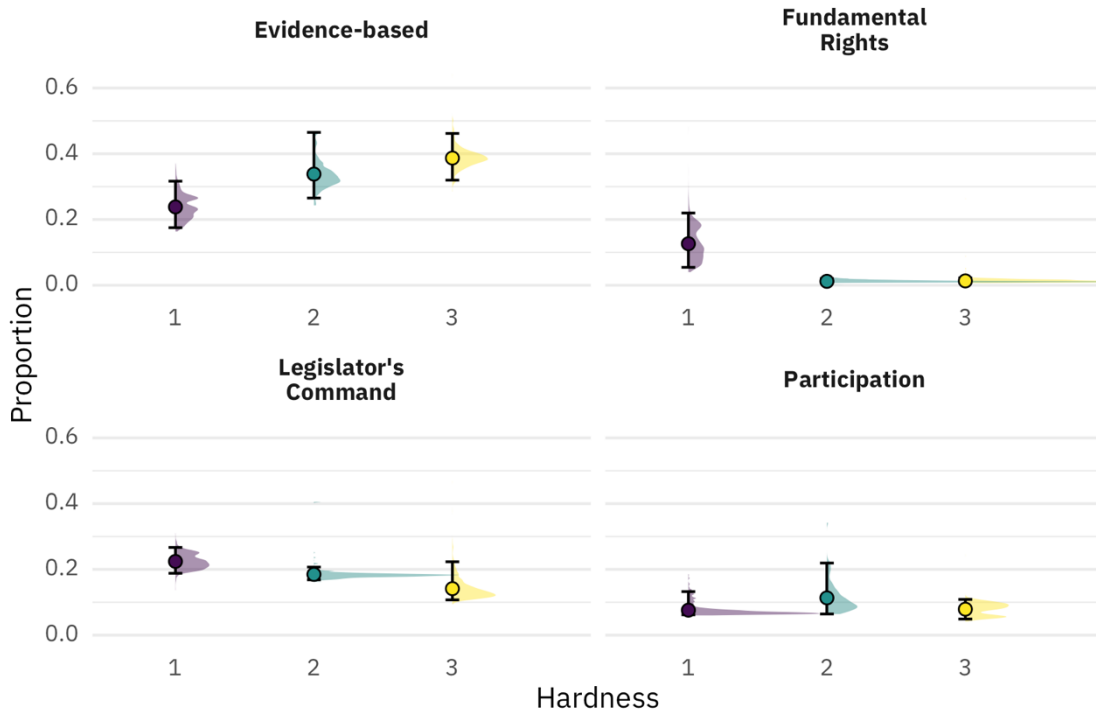


Figure 4: Point estimates, 95 % confidence intervals, and distributions, all estimated from 2000 bootstrap samples.

The estimates in Figure 4 are clearly in support of hypotheses 1 and 2. In line with hypothesis 1, the evidence-based argument is significantly more prevalent in harder agencies. In line with hypothesis 2, this association is reversed for legislators’ command. We also expected there to be no association between hardness and participation claims. This is supported by the evidence.

Fundamental rights and external agencies?

Testing hypothesis 4, we aim to examine whether fundamental rights discourse is more prevalent in coverage of Migration and Home Affairs agencies. Figure 5 shows that over 10 percent of articles about the MHA agencies contain at least one fundamental rights term, versus less than 4 percent of articles about other agencies. This supports hypothesis 4.

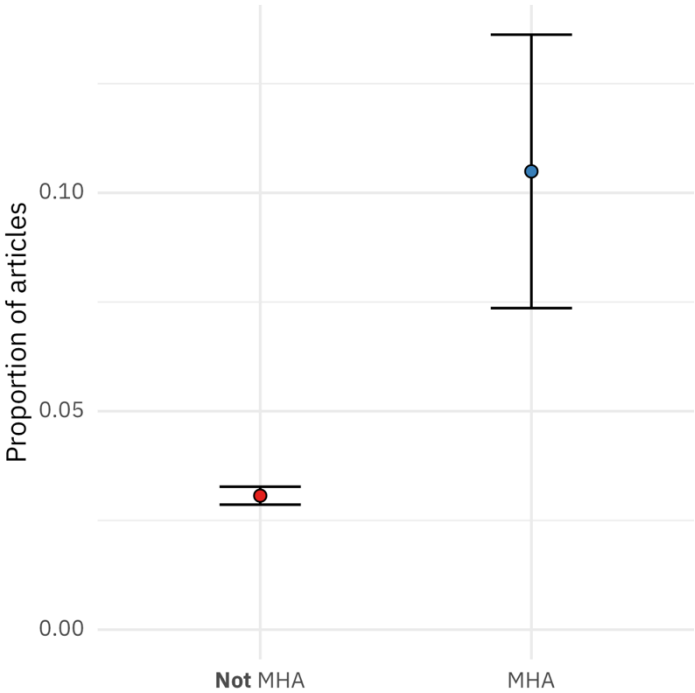


Figure 5: Mean proportion of fundamental rights hits for Migration and Home affairs agencies versus other agencies

Discussion

The analysis of data on all EU agencies in Swedish news coverage largely confirms the insights generated in the smaller-*N* study. Hypotheses 1 and 2 are largely supported. When comparing agencies, we find that the keywords in the evidence-based dictionary are significantly more prevalent in hard-expertise agencies. Keywords in the legislators’ command dictionary are more prevalent in soft-expertise agencies. These measures mirror each other, supporting our theorized notion that more evidence-based discourse gives less legislators’ command discourse (and vice versa)—and that this depends on an agency’s “hardness.” We have limited evidence that salience is associated with different legitimation discourses—the relationship is significant only for the legislators’ command dictionary. And we have no evidence that salience affects legitimation discourse over time within agencies. This may suggest that the coverage of an agency is relatively stable over time. But it may also be the case that our yearly data is too coarse to pick up the relevant changes in salience and discourse. Future research should examine this hypothesis

with more granular data that is better able to pick up short-term changes in salience and media discourse.

Hypothesis 3 is not supported: Participation discourse is generally low and does not vary much depending on salience or hardness. This is in line with our qualitative and article-based quantitative evidence.

Hypothesis 4 is supported: The data shows that fundamental rights terms are most often absent, but they are more prevalent in media coverage of Migration and Home Affairs agencies. If the EU's integration of *core state powers* continues, we might expect explicit fundamental rights (de-)legitimation of the EU and its agencies to come increasingly to the fore.

Some limitations remain. First, we have focused on the media discourse in a single country, Sweden. We have argued that Sweden offers a favorable context for building our theory due to its consensus governance, EU stance, and quality and freedom of its media. It is therefore plausible that our findings will generalize to other national contexts. Nonetheless, only comparative studies can say this conclusively. Sweden is, for instance, not part of the Eurozone. Whether the public debate in Eurozone countries is different from the Swedish debate remains an interesting question for future research. Second, the use of word counts to uncover latent meanings has its inherent weaknesses. Word counts are only proxies for the underlying theoretical categories we are interested in. Any choice between different methods is a trade-off between specificity and generality, and this design is no exception (**Wiedemann 2013**). While the paper's quantitative parts will not capture nuance or complex meanings, they have the advantage of being general, transparent, and replicable. For instance, Study 3 is based on all articles about all agencies 2005–2019, and is designed to minimize the number of undocumented researcher choices in the counting and categorization of articles. We also mitigate the shortcomings of the quantitative approaches by combining them with qualitative insights in Analysis 2.

Conclusion

We have conceptualized and operationalized four dimensions of legitimation in this paper, firmly embedded in theoretical literature and

earlier empirical studies. Our evidence suggests that there is systematic variation in the legitimation arguments used about different agencies. Technical expertise is an important (de-)legitimizing device. But, contrary to what some earlier contributions have found, expertise is not the be-all-and-end-all criterion of agencies' public legitimacy. Our findings suggest that an agency's evidence base matters: Technical expertise is more central to legitimacy for agencies based on "hard" science. The legislators' command discourse, on the other hand, is more central for agencies based on "soft" expertise.

An agency's salience, however, does not matter as much as we expected theoretically. In line with hypothesis 2, an agency's higher salience is associated with more legislators' command terms. But neither participation nor evidence-based terms vary systematically with an agency's salience. And we find no evidence that a *change* in an agency's salience affects the terms used about it. Lastly, the evidence supports our expectation regarding fundamental rights. Migration and Home Affairs agencies are discussed using more fundamental rights terms than other agencies.

In summary, we make three contributions to the study of the legitimacy of non-majoritarian institutions in general, and EU agencies in particular, in this paper. (1) We propose and operationalize a novel conceptual scheme that captures normative conceptions of legitimacy directly and demonstrate its utility in an empirical analysis. Since our theoretical argument is general and does not depend explicitly on the national context, future research may apply this scheme to new data and other contexts. They might for instance gather a larger corpus of full-text data on a wider selection of agencies, study other countries, analyze *who* does the speaking (agencies vs. their critics/supporters), or model support/critique more explicitly.

(2) Our findings have theoretical implications for future empirical research on legitimacy. One is that the prominence of each type of legitimacy argument depends on an agency's access to "hard-science" evidence and (to a lesser extent) its public salience. Future research should pay closer attention to these scope conditions for legitimacy. Another theoretical implication is that while human rights is normally in the

background, it is a more important part of the (de-)legitimation of agencies that are externally oriented or “factual” in their conduct. As the EU continues its development from a regulatory to a positive state (Genschel and Jachtenfuchs 2016), this dimension could get more important. Research on EU legitimacy should therefore theorize the role of fundamental rights more explicitly (Buchanan 2011; Sangiovanni 2019).

(3) Our analysis has implications for normative theory. To be sure, we cannot build a normative argument on empirical observations alone. Nevertheless, we maintain that “actual” normative legitimacy depends on discursive legitimation, even if it is beyond the scope of this paper to defend the point at length. If we accept that premise for now, however, our analysis suggests that different types of agencies have different normative legitimacy foundations. There is no one-size-fits-all standard of democratic legitimacy against which the entire EU should be assessed. Instead, different agencies might face different legitimacy standards. This conceivably extends to non-majoritarian institutions beyond the EU system. The point is that different types of institutions are geared to do different things. Every single institution must not fulfil everything that democracy demands – so long as the system, as a whole, does. It is in this institutional view of legitimacy we expect to resolve the tension between the epistemic and participatory dimensions of democracy.

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Article 2

More Power, More Control: The Legitimizing Role of Expertise in Frontex after the Refugee Crisis

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ABSTRACT: This article explores how the appeal to depoliticized expertise worked to legitimize increased supervisory and executive power to the European Border and Coast Guard Agency, Frontex, after the 2015 refugee crisis. Frontex is an EU agency operating in a highly salient field, removed from hard-science "gold standards" of evidence, where member states have been reluctant to delegate power and sovereignty. Through a process-tracing case study, this article finds that appeals to technical neutrality, quantification and objective indicators nevertheless were central when a new mandate for the agency was negotiated, giving Frontex unprecedented supervisory and executive power. They were also important resources for member states concerned about Frontex's increased powers. By focusing on an agency at a remove from the natural-science archetype, this article contributes to the literature on knowledge use in independent agencies. It suggests that technical expertise can be a powerful source of legitimacy even in a field removed from "hard" science.

KEYWORDS: border control, European integration, expertise, Frontex, legitimacy

Introduction

Border control has historically been a core task of the sovereign nation state. The idea of a centralized EU institution in an area considered a core task of the nation state is “a hard sell to most member states” (Boin, Busuioc, and Groenleer 2014, 426). Accordingly, the European Union’s member states have long been reluctant to give up control of their own borders to a supranational entity. Nevertheless, the EU today has a borderless Schengen area and an EU agency for border management: Frontex. In 2016, Frontex got a new mandate for the third time, turning it into the European Border and Coast Guard Agency (EBCG; Regulation 2016/1624).¹⁶ Despite arguments that legitimation through technical expertise is no longer a tenable strategy in the EU (e.g. McNamara 2018), or that national leaders are hesitant to engage in European integration because of pressure from Euroskeptic parties (Hooghe and Marks 2009; Rauh, Bes, and Schoonvelde 2020), the 2016 mandate delegated *more* supranational power to Frontex and its unelected experts. How did this increase in power for Frontex come about? This article explores the role of appeals to technical expertise in legitimizing increased power to Frontex.

Two new powers are especially important in the 2016 regulation. First, Frontex is granted a supervisory power it did not have before, in the form of Vulnerability Assessments (Article 13). The agency now carries out a yearly assessment of each member state’s capacity and border vulnerabilities. This is “a major innovation” (Deleixhe and Duez 2019, 928). Second, a member state’s failure to comply with Frontex’s vulnerability assessment recommendations may trigger an intervention by the agency. The so-called *right to intervene* (Article 19) gives Frontex the power to deploy border guards to a member state if the functioning of the Schengen area is threatened—subject to a Council decision. This is “unprecedented in the integration process of the EU’s external border management” (Deleixhe and Duez 2019, 922; see also Niemann and Speyer 2018, 27).

¹⁶ Following Regulation (EU) 2016/1624, Frontex is formally called the European Border and Coast Guard Agency. Yet recital 11 of the regulation states that it “will continue to be commonly referred to as Frontex.” This is also what I will do in this article.

While previously lacking in operational capacity and supranational power, Frontex has always had an important expertise function: risk analysis. Earlier studies have explored how risk analysis in Frontex has functioned as a *risk-based governance* tool (Horii 2016; Neal 2009; Paul 2017). More generally, scholars have pointed out how technocratic legitimacy has long been a central feature of the EU system (e.g. Scharpf 2009; Majone 1997; Busuioc and Rimkutė 2019). Other scholars have argued that the EU's recent crises have led to a backlash against technocratic legitimacy, expert delegation, and European integration at large (see McNamara 2018; Rauh, Bes, and Schoonvelde 2020; Hooghe and Marks 2009). In particular, the refugee crisis was met with calls for the member states to take back sovereign control over national borders.

The renegotiation of the Frontex mandate—and in particular the vulnerability assessment procedure—is therefore a pertinent test case for the legitimizing role of technical expertise under *least-likely* conditions: A policy area at the core of the sovereign nation state, with high political salience, at a time where Euroskepticism was at a peak and trust in experts and elites was at a low. The question guiding this article is: To what extent, and how, were appeals to neutral, technical expertise used to legitimize more supervisory and executive power to Frontex in the 2016 Regulation?

I start out by presenting two theoretical approaches to the use of expertise: the political and the epistemic approach (see Boswell 2009; Rimkutė 2015). I then specify how this general distinction fits with the theory on risk-based governance, a useful theoretical approach to the study of risk analysis and vulnerability assessment in Frontex. The empirical analysis is a process-tracing case study of the process leading up to the adoption of the 2016 Frontex regulation and its implementation in practice, with a particular emphasis on vulnerability assessments. I find that appeals to technical neutrality, quantification and objective indicators were central when a new mandate for Frontex was negotiated.

The article makes two main contributions. First, the article offers a rejoinder to the theory on risk-based governance as it has so far been applied to Frontex. The theory offers a compelling analysis of how and why the framing of policy problems in terms of risk is appealing to decision-makers. But earlier contributions have emphasized how EU-level

actors—Frontex and the Commission—have used these promises strategically to achieve more European integration of border management. That argument does not find support in the present case. Instead, the article suggests that the appeal to technical expertise works because all actors have faith in its promises. Member states as well as the Commission and the Council appealed to the promises of risk-based governance for their own political purposes.

Second, it expands on the literature on knowledge use in independent agencies by focusing on an under-studied type of agency: One far removed from the “hard” natural sciences and operating in a highly salient policy area. It finds that even in a field with no scientific “gold-standard” validation procedures (see Maor 2007), the appeal to objective neutrality and technical expertise was an effective legitimizing device.

Two theoretical approaches to the use of expertise

It is well established that expertise is one of the key resources of EU agencies—it is their “raison d’être” (Ossege 2015, 101; Radaelli 1999; Majone 2001; Commission of the European Communities 2002, 5; Eriksen 2020). Studies have found that technical expertise may be a source of legitimacy both for EU agencies and the EU at large. For instance, Rauh, Bes, and Schoonvelde (2020, 2) describe the *technocratic resilience* argument, which says that executives “aim to shield European integration from the fallout of domestic politicization” by resorting to technical, scientific and managerial language (see also Wood and Flinders 2014). Technical legitimation is also a key tenet of the regulatory state literature (see Busuioc and Rimkutė 2019 for a critique). Majone has argued that expertise has always been a source of legitimization of regulatory agencies (Majone 1997, 157). The notion of *output legitimacy* similarly describes legitimacy through effective outcomes, compared to the *input legitimacy* of majoritarian democratic procedures (e.g. Scharpf 2009). The bureaucratic reputation literature’s idea of technical reputation reflects the same logic (Carpenter and Krause 2012; Maor 2007). In summary, the EU has historically been able to present itself—and in particular, its agencies—as technical and apolitical in order to obtain legitimacy. While some of these studies emphasize how language, self-presentation and signaling may be a source of authority and legitimacy, others emphasize the functional,

problem-solving benefits of relying on expertise. These are two distinct approaches to the appeal of expertise: The *political* and the *epistemic* approach. These two approaches allow us to theorize the dynamics underlying these widespread appeals to technical expertise. They thereby provide an analytical distinction that is useful both for description and for explanation.

The standard account of expertise use in an organization is that it helps problem-solving, contributes to better decisions, or increases the rationality of policies. This will almost always be the official rationale for relying on research or expertise in an organization. I will term this the *epistemic* use of expertise. As Christina Boswell (2009, 30) argues, this idea of knowledge use is so widespread that it is usually taken for granted by researchers as a basic premise. Under the epistemic approach, an organization may derive legitimacy from its use of expertise. But it is a side-effect: Organizations make use of expertise to enhance their outputs, which in turn may increase their standing and legitimacy. Now, as several researchers have shown, the epistemic account is not the only way to understand expertise use. Sometimes legitimacy is the primary concern.

The literature on knowledge utilization, of which Carol Weiss (1979; see also Sabatier 1978) was an early proponent, criticizes the standard account that knowledge is used in politics purely for “problem-solving” or epistemic reasons. Weiss presents different types of “research utilization” in policymaking and argues that expertise may also be used to infuse policymaking with an appearance of rationality, hence increasing its (perceived) legitimacy (see Christensen 2018). More recently, Christina Boswell (2009) builds on these insights, offering a fine-grained typology of different strategic and symbolic uses of expertise (see also Schrefler 2010; Rimkutė 2015).

The contributions above are mainly concerned with the use of science and academic research. But the argument is more general. As Wood and Flinders (2014) show, a focus on technical, managerial, and scientific discourses is a central piece of depoliticization as a large-scale phenomenon. Contributions from political sociology, particularly policy instrumentation, argue that the choice of any particular policy instrument or tool is never just a technical decision. Tool choices are “profoundly

political” as they give some actors, and therefore some perspectives, an advantage over others (Salamon 2002, 11). Lascoumes and Le Gales (2007, 4) argue that many policy instruments use a functionalist or technical approach, but that this “conceals what is at stake politically.” There are unavoidable power relations associated to the choice of instruments (see also Hood 2007).

In the European Union, many policy instruments have been described as attempts to increase the rationality or evidence base of policymaking. In particular, *ex-ante* evaluation measures have gained increasing attention (Paul 2020). For instance, regulatory impact assessment (RIA) is a core component of drives towards “better regulation” both in individual states and in the EU (Dunlop and Radaelli 2015). In line with the discussion above, RIAs are found to have not only epistemic (“instrumental”) uses but also political (or “perfunctory”) uses (Dunlop et al. 2012). Another prominent *ex-ante* instrument is risk analysis (Rothstein, Borraz, and Huber 2013; Borraz et al. 2020). The literature on risk-based governance (see Black 2005; Hutter 2005) has analyzed how “risk” is being promoted as “a universal organizing concept for improving the quality, efficiency, and rationality of governance” (Rothstein, Borraz, and Huber 2013, 215). It is a policy instrument that emerged in natural science fields, such as radiation, food, and chemicals (Rothstein, Borraz, and Huber 2013, 216). But it has a potential to “colonize regulatory regimes” and become a ubiquitous governance tool across policy fields (Rothstein, Huber, and Gaskell 2006). This type of expertise is especially central for Frontex (Paul 2017; Horii 2016; Neal 2009). We will therefore return to risk analysis in more detail below. For now, note that a key finding in this literature is that risk analysis may be used politically as well as epistemically.

While the different contributions discussed do not always agree on terminology and a clear-cut typology of expertise use, they all criticize the standard account that knowledge and expertise are always, or even primarily, used as functional problem-solving tools. They all maintain a distinction between problem-solving, functional knowledge use on the one hand and one or more kinds of symbolic, strategic or political knowledge use on the other. Since it is the one thing all contributions have in common, I hold the epistemic-political dichotomy to be the most

important distinction. I will therefore build on this dichotomy rather than attempting to pinpoint more fine-grained *types* of political expertise use.

More fundamentally, the contributions challenge the idea that facts and values are easily separated in policymaking. The epistemic approach says that politicians set the goals, while experts merely choose the best means to get there (see e.g. Weiss 1979, 427–28). The experts are free to decide on technical issues where there is no conflict over values or interests, thus increasing the common good. These premises only work if facts and values are, conceptually and empirically, clearly distinguished. While the epistemic approach is premised on a positivist notion of value-free expertise and rational research utilization, the arguments supporting a political approach are unavoidably of a more constructivist nature (see Albæk 1995).¹⁷ The contributions discussed so far run the gamut from a relatively “thin” constructivism that challenges the epistemic role of expertise only on empirical terms (claiming very few policy decisions are free from conflict over values or interests), to “thicker” variants that question the philosophical possibility of value-free science and expertise altogether. The problem with taking a thick approach for our purposes is that even looking for empirical evidence of an epistemic approach would be futile. I treat both the epistemic and political approaches as empirically possible analytical types. And while they are conceptually distinct, the approaches may overlap and interact in practice (see also Paul 2020). It is mistaken to view the dichotomy as one between “pure” and legitimate epistemic knowledge use on the one hand and completely “cynical” and illegitimate political scheming on the other. As Boswell (2008, 474) points out, the “symbolic use of knowledge need not involve a reflected calculation,” but instead reflect, for instance, actors’ deeply ingrained ideas of appropriate action. Since the approaches are not mutually exclusive, this article’s empirical focus is the *degree* to which we find each approach, and the interactions and tensions between them.

The above discussion shows that expertise, in various forms, is not only used for its problem-solving functions. It can also have political uses. This is a general argument that applies to many different types of expertise across policy domains. The next step is to situate the argument in the

¹⁷ I am grateful to an anonymous reviewer for raising this point.

context of European border control. In Frontex, one type of expertise is central: Risk analysis (and, by extension, vulnerability assessment).

The promises of risk-based governance

Risk analysis has right from the start been a core task of Frontex (Horii 2016). The theory on risk-based governance provides a useful analytical framework to understand the centrality of risk analysis in Frontex and European border management. The theory is itself agnostic on the political-epistemic distinction. Rothstein, Borraz, and Huber (2013) illustrate the two sides in this debate. On the one hand, in the face of increasing public salience and legitimacy pressures, risk-based governance may offer organizations a defensive decision-making rationale that “carries the veneer of technocratic legitimacy” (Rothstein, Borraz, and Huber 2013, 217; Porter 1995; Power 2007). The use of words like “veneer” implies that this appeal to risk is mostly symbolic. On the other hand, proponents have argued that risk-based approaches may improve the accountability of decision-making by providing formal “rationalizations of the limits of what governance interventions can, and should, seek to achieve” (Rothstein, Borraz, and Huber 2013, 217; see also Black 2005; Black and Baldwin 2012)—which is more in line with the epistemic approach.

In an analysis of risk analysis in Frontex, Regine Paul argues that risk-based governance brings with it three main rationalization promises: Efficiency/effectiveness, transparency gains, and depoliticization effects (Paul 2017, 695). In this section, I build on her typology and apply it to the new vulnerability assessment procedure. Table 1 sums up the dimensions as they relate to the emergence of vulnerability assessment. The differences between the epistemic and political approaches become clearer as we move down the table.

First, vulnerability assessment can help decision-makers allocate scarce resources to where they matter most (Rothstein, Borraz, and Huber 2013, 216). This is a matter of *efficiency and effectiveness*. Risk analysis and vulnerability assessment enable legitimate spending on high-risk border sections while saving costs on lower-risk sections. By extension, vulnerability assessment could be used to filter out member states’

unfounded urgency claims and identify legitimate vulnerabilities. A risk-based approach accepts that one cannot prevent all possible harms, and aims instead to target interventions where they exceed acceptable risk levels (Rothstein et al. 2006; Black 2005; Borraz et al. 2020, 2).

Second, the *transparency* dimension promises the systematic EU-wide comparison of risks and vulnerabilities and hence a more consistent, more predictable and fairer system. This happens in part through quantification, which allows for comparison and benchmarking, and in part through the open identification of “bad performers” or “weak border spots” (Paul 2017, 696; see also Demortain 2010).

The third promise is *depoliticization*. Here the approaches start to differ more substantially. The main *political* benefit of depoliticization is that the successful portrayal of policy issues as technocratic and managerial may increase the agency’s legitimacy and scope for action. In Paul’s words, “the ‘rational,’ ‘impartial’ and ‘objective’ character which regulators ascribe to risk analysis may serve to create a perceived neutral ground” to settle conflicts about European border control (Paul 2017, 697). Quantification plays a part also here, as decision-makers’ and the public’s “trust in numbers” (Porter 1995; see also Desrosières 2002) might be stronger than trust in non-quantified claims. For example, in food safety, we have seen how quantitative risk scoring helped inspectors defend themselves against complaints about subjective and inconsistent practices (Borraz et al. 2020). The main *epistemic* benefit of depoliticization is that it safeguards a truth-tracking procedure against undue inference from outside. Quantification, for instance, would here be preferred because of its epistemic properties (precision, comparability, etc) rather than its political effects.

For depoliticization to be credible, it needs to appeal to a truth validation procedure. It is the experts’ “claims to knowledge, supported by tests of validity,” that accord them influence and social power (Haas 1992, 17). But such tests of validity can take many forms. Different knowledge systems are connected to different validation procedures (Eriksen 2011, 1170). The “gold standard” example is the randomized controlled trial (RCT) used in clinical trials and many other fields (Maor 2007). Risk analysis is a framework that originated in the natural sciences with its own set of

validation procedures. Compared to the natural sciences, however, migration risks are hard to assess (Paul 2017, 691). An important piece of the empirical analysis is therefore to examine whether a validation procedure is present (or assumed to be), and what it looks like. If the analysis finds a truth-validation procedure to be missing while Frontex and decision-makers still pursue depoliticization, it would strengthen a political interpretation. If, on the other hand, we find a truth-validation procedure that is clear and widely accepted, it would count in favor of an epistemic interpretation.

Table 1: Three dimensions of risk-based governance. Based on Paul (2017).

Dimension	Indicator
Effectiveness/ Efficiency	Enables optimal use of scarce resources
Transparency	Risk analysis used to foster benchmarking and incentivize MS coordination;
Depoliticization	Use of quantification as benchmarking Claims to neutrality/rationality/objectivity; Risk analysis and vulnerability assessment used to moderate conflict or address coordination issues; Appeal to (quasi-)scientific or technical truth-validation procedures

Now we have established an analytical distinction between political and epistemic expertise use and specified the expertise type dominant in Frontex. Together, these allow us to develop theoretical expectations towards the use of risk analysis and vulnerability assessment in Frontex after the refugee crisis.

Political use of risk analysis

A good example of the political approach to risk-based governance in Frontex is Paul (2017): Border control is a weakly integrated domain. Member states are reluctant to give up competences. Therefore, risk analysis may “be utilised by Frontex and the Commission to legitimise EU-level interventions and increased coordination in European border control,” in an “attempt to institutionalize border controls as a genuine Community task” (Paul 2017, 690–92). This perspective offers a meta-twist on the concept of risk itself: Frontex does not only manage external migration risks, it also manages its own institutional risks of (losing) legitimacy, of organizational failure, and of accountability pressures. The

question now is whether this analysis extends to the new vulnerability assessment procedure.

The political approach would explain the emergence of vulnerability assessments in three steps: (1) The refugee crisis exposed clear weaknesses in the European system of border management. (2) This increased the political contestation around border control and migration, and in turn added pressure on the agency. Many European states reinstated internal border controls during and immediately after the refugee crisis in 2015 (Ripoll Servent 2018, 90). This was a challenge to the legitimacy of, and trust in, the European-level management of external borders – including Frontex. (3) Expertise was one of the key resources that Frontex and policymakers mobilized in response to this contestation. The introduction of vulnerability assessment is the most tangible result of this mobilization.

Epistemic use of risk analysis

The epistemic approach says that risk analysis is valued primarily for its functional, problem-solving qualities. Extended to vulnerability assessment, the epistemic approach would say that the refugee crisis exposed knowledge gaps in the European system of border management, which vulnerability assessment was introduced to address. The crisis acted as a “wake-up call”: As Haas (1992) notes, decision makers do not always recognize that their problem definitions and understandings of an issue are limited. It often takes a crisis to spur decision-makers to seek help from an “epistemic community” of experts (Haas 1992, 14).

To support the epistemic approach, we would need evidence that the refugee crisis was a crisis caused, or made worse, by a gap in Frontex’s knowledge about member states’ vulnerabilities (see Boswell 2009, 85). Policymakers introduced vulnerability assessment because it was seen as the best way to gain knowledge about these vulnerabilities. It therefore ensured a more efficient execution of the agency’s mandate.

The approach expects a sequence of two steps. 1) The refugee crisis was first and foremost a *functional* problem. It exposed weaknesses in the entire European management of borders and migration, including Frontex. 2) As a response to the functional shortcomings of Frontex, decision-makers saw the need for more knowledge in the agency – they

recognized that they *needed help* from experts to achieve a higher problem-solving capacity. Note that the negotiation of the Frontex mandate, like all EU legislation, is by design a political process. But political actors can have epistemic concerns: According to the epistemic approach, we should observe evidence that decision-makers were willing to defer to the experts' judgments about appropriate measures and solutions. In short, we would expect the design of the vulnerability assessment procedure to be driven by epistemic rather than political concerns.

Method and Data: Process tracing

This article is based a process-tracing case study. Process tracing is a single-case method concerned with mapping out how a causal process has developed over time rather than making cross-case comparisons. The core of the approach is to analyze “evidence on processes, sequences, and conjunctures of events within a case for the purposes of either developing or testing hypotheses about causal mechanisms that might causally explain the case” (Bennett and Checkel 2014, 7). While this article starts out from a set of predefined theoretical expectations and hence has deductive features, it remains open to inductive insights.

It is important to note what types of evidence process tracing looks for. Process tracing is not concerned with variables as understood in a statistical analysis. Instead, it looks for *evidence* that a hypothesized causal process has been in play. The observations' explanatory force, therefore, comes not from their values or counts, but from the information they can give us about context, process or mechanism (Dunning 2014, 215). This article relies on document analysis and semi-structured interviews with public servants for such process-tracing evidence.

The documents assembled are public documents (communications, risk analyses, annual reports, meeting minutes, methodology documents), legal documents (the old and new Frontex/EBCG regulations and their accompanying communications, impact assessments etc.), and previously limited documents released under freedom of information requests. In this latter category are both Frontex-internal documents and several versions of amendments and suggestions from the negotiations of the new regulation. The earliest document is from 2008, when the first calls for

member state evaluation arose. The most recent is from 2016, when the regulation was adopted. I searched for the phrases “vulnerability,” “assessment,” “analysis,” “evaluation,” and “expertise” in the corpus of assembled documents as an initial filtering device. The documents containing any of these keywords (96 total) were selected for closer analysis. I have furthermore conducted six anonymized semi-structured interviews with central public servants on both the national and Frontex level. Five were on the record and one on background. They were conducted between January 2018 and May 2019. Where the informant consented to it, interviews were recorded and transcribed. See a complete list of on-the-record informants in the *Appendix*. Both the documents and interviews were coded according to the dimensions outlined in tbl. 1 above, and for evidence of epistemic or political uses of expertise.

Process-tracing the evolution of Frontex

This section traces the post-2015 evolution of Frontex and the role of risk-based expertise in legitimizing more power to the agency. The analysis is divided in three main stages. In the pre-2015 stage, risk analysis was a central task for Frontex, but it was restricted to external affairs. This form of risk analysis was also rather open to qualitative methods. The second stage began in early 2015 and ended with the adoption of the EBCG Regulation in September 2016. This stage contains a critical juncture – the European refugee crisis – and the negotiations around a new regulation that followed. Here, we see that concerns about Frontex’s increased power, and the objectivity of the vulnerability assessments, were high on the agenda. The third and final stage began after the Regulation was adopted. Here, the task was putting the regulation into practice. A vulnerability assessment methodology was created – with some disputes about its content and merits.

Pre-2015: The role of risk analysis in Frontex

Frontex was established in 2004, tasked to coordinate operational cooperation amongst member states in order to strengthen security at the external borders. Over time, the agency has grown in budget, mandate, and power into an operational agency in its own right. For instance, it coordinates joint operations at the borders, assists member states in the

return of migrants denied residence in member states, and trains border guard officers. It has also right from the beginning had an important intelligence function: Risk analysis.

Risk analysis is the starting point for all Frontex activities. It also feeds into a range of other border management instruments (Horii 2016). For instance, risk analysis plays an important role in the European surveillance platform EUROSUR, which places the European borders under real-time surveillance (Jeandesboz 2017). In line with the theoretical argument of the political approach, EUROSUR has been described as a series of depoliticized technical fixes, reflecting a tendency to seek agreement over technical issues “in domains considered by member states’ governments as sovereign matters” (Bellanova and Duez 2016, 30). Frontex risk analysis also plays a central role in Schengen evaluations and in resource allocation through the Internal Security Fund (Paul 2017).

Risk analysis in Frontex is based on the Common Integrated Risk Analysis Model (CIRAM), which defines risk as a function of threat, vulnerability and impact. The CIRAM model relies to a large extent on qualitative methods. It states that “the main sources for measuring the magnitude and likelihood of the threats are intelligence, historical analysis and expert judgement” (Frontex 2012, 23). Discussing the vulnerability component of the model, the CIRAM framework states that “vulnerability concerns matters that can, in principle, be carefully studied and for which estimates can be reasonably accurate.” But: “In practice, a high level of assurance in measuring vulnerability is not warranted” (Frontex 2012, 28). While the model is not devoid of statistical indicators, it is skeptical about relying too much on them.

Even if risk in the CIRAM model is a function of threats, vulnerabilities, and impact, the vulnerability component of the model did not, before the 2016 Regulation, contain any systematic evaluation of individual member states. In the original Frontex regulation, there was no mandate for such evaluation, and risk analysis was largely restricted to the analysis of external risks and threats.

The idea of a Frontex-led evaluation of member states, however, is not new. A 2010 Commission impact assessment holds as a problem that there

is “no use of the expertise of the Agency to evaluate Member States’ performance in the area of border management” (European Commission 2010, 16). The report states that mandating Frontex to carry out on-site inspections in member states would have “clear positive impacts on the core objectives of Frontex.” This solution is justified in terms of Frontex’s independence and expertise: “Frontex could provide a source of well trained experts and ensure a high degree of independence for the evaluations” (European Commission 2010, 39). The ultimate goal is “more effective border control.” Here, the two main themes of depoliticization and efficiency gains are clearly at the forefront. The final 2011 regulation contained a provision to assess member states’ equipment and resources. But according to an external evaluation report (Rambøll 2015), this provision was never enforced.

Why was the provision not enforced? The same evaluation notes that “the assessment of vulnerability remains a politically sensitive issue and could be met with resistance by some member states” (Rambøll 2015, 105). This resistance is confirmed in a Commission-initiated study. When member states are asked about their opinions on future tasks of the agency, the “assessment of Member State resources” is the least popular alternative (DG Home 2014, 18). All this suggests that there was before 2015 little political will among member states to accept any supervisory power to Frontex.

The state of the field before 2015 can be summarized as such: Frontex was largely a coordinating agency. Risk analysis was central to Frontex, but the assessment of member states remained unenforced. This is evidence that the assessment of member states’ capacities was seen as politically contentious, while risk assessment itself was not. Moreover, the risk analysis procedure was relatively open to qualitative methods. This is evidence that risk analysis experts, before 2015, did not on the outset privilege a quantitative approach. As we will see, the developments after 2015 move away from this baseline.

The refugee crisis: Frontex in a changing political landscape

In 2015, as Europe experienced an unprecedented influx of migrants, another renewal of Frontex’s mandate came on the agenda. In his 2015 state of the European Union address, Jean-Claude Juncker announced that

the Commission would propose “ambitious steps towards a European Border and Coast Guard before the end of the year” (Juncker 2015). In December, the commission released the proposal for a new regulation (European Commission 2015b). As we will see, the refugee crisis was a critical juncture in the evolution of Frontex. It allowed the Commission to propose more sovereignty-encroaching measures than ever before.

One of the main novelties of the proposed regulation was the so-called right to intervene. The Commission envisioned it as a highly supranational procedure, encroaching substantially on member state sovereignty. Vulnerability assessment is a central component of the right to intervene. If a member state does not comply with the Vulnerability Assessment recommendations, or faces “disproportionate migratory pressures at the external borders,” Frontex would be mandated to deploy European Border and Coast Guard Teams to the member state in question—even against the member state’s will (European Commission 2015b, Article 18).

The Commission suggested that the triggering of this procedure should be subject to an implementing decision by the Commission itself. In the accompanying communication, the Commission states that Frontex needs to be able to intervene when member states cannot cope with challenges on their own. The crisis has exposed that “despite several political calls to do so, some Member States have not activated the available border intervention mechanisms, leaving Frontex unable to intervene” (European Commission 2015a, 5). In other words, the external borders are too important to be left to “political calls” and the judgment of member states themselves. It is better to bypass the political process altogether and treat intervention as a technical matter. This is an act of depoliticization. To ensure the legitimacy of such a drastic intervention process, it needs to be based on a solid, neutral and non-negotiable knowledge foundation. Vulnerability assessments are envisioned to fill that function.

We see here that the refugee crisis is not framed as a problem of *knowledge* but a problem of *inaction*. Decision-makers knew where the vulnerabilities were; the problem was a lack of political will to take action. This observation fits best with the political approach. Vulnerability assessment

seems like a device to increase the legitimacy of the intervention mechanism and not simply a fact-finding device.

The proposal says little, however, about how the vulnerability assessment procedure would achieve the neutrality and objectivity suggested. This concerned some member states. Six member state parliaments submitted opinions to the Commission about the proposed regulation.¹⁸ A notable example is the Romanian Chamber of Deputies, which “considers that the analysis of vulnerabilities should be based on measurable and unitary criteria and should reflect, *in an objective way, the real situation in the respective Member State*” (Romanian Chamber of Deputies 2016, my emphasis). Here we see a member state explicitly voicing concerns about the procedure’s epistemic qualities. Concerns over the power of Frontex were voiced in the European Parliament as well. In a debate in the LIBE committee of the European Parliament, Ska Keller of The Greens worried that Frontex would get more power while fundamental rights protections and parliamentary and public control were not keeping up. “If you’re not changing the fundamental setup of Frontex,” she said, “you will just have another unelected official deciding on what other member states should do, and I don’t think that’s the way forward” (European Parliament 2016, 17:05:40).

The concerns over objectivity were taken into account. In its compromise suggestion of 9 February, the Council introduced a stipulation that “the Management Board shall *approve indicators*” for the assessment (Council of the European Union 2016a, 13, my emphasis), later changed to a “common vulnerability assessment *model*” (Council of the European Union 2016b, Art. 12(1)), before ending up with the common vulnerability assessment *methodology*.

The provisions on objective indicators and a vulnerability assessment methodology are included in the final regulation. Overall, the changes to the vulnerability assessment procedure are minor, compared to the commission’s proposal. The same cannot be said about the right to intervene. The Council managed to water down the proposed

¹⁸ See all submitted opinions at the European Parliament’s documentation gateway ([https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2015/0310\(COD\)&l=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2015/0310(COD)&l=en)).

supranational right to intervene, keeping it under tighter Council control. Nevertheless, the provision in the adopted EBCG Regulation has not lost all its teeth: According to Niemann and Speyer (2018, 27), the procedure still “encroaches substantially upon Member States’ sovereignty.”

The negotiations around a new Frontex regulation shows that member states and parts of the Parliament were concerned about the increased powers to Frontex. The most drastic increase in Frontex power was the intervention mechanism. Vulnerability assessments were presented by the Commission as its evidence base, conceivably an attempt to depoliticize the highly sensitive procedure. Member states did not object to this depoliticizing move. Instead, they placed their trust in depoliticization and took pains to introduce objective criteria and a specified methodology to the mechanism. In the end, they accepted increased powers to Frontex over the assessment of member states. Yet the Commission’s depoliticization attempt had its limits: Member states accepted an intervention mechanism, but under tighter Council control than the Commission had initially proposed.

Implementing the adopted Regulation: A call for quantification

After the Regulation was adopted, experts in the Frontex Risk Analysis Unit (RAU) were tasked with developing the first version of the Common Vulnerability Assessment Methodology. It eventually became clear that vulnerability assessment would require more resources and personnel than first envisioned, which led to the creation of a separate Vulnerability Assessment Unit. There is some evidence of a discrepancy between the Risk Analysis Unit and the Commission about the methodology:

So in the first meetings, there were very many discussions about where they should place themselves. And it is clear that the Commission had envisioned something else than what they had envisioned at RAU. [RAU] interpreted it based on how they maybe had worked earlier with risk analysis, since they were the ones who got [the task].

(IO3)

Very many member states in VAN [the Vulnerability Assessment Network] thought that one perhaps should take after FRAN [the Frontex Risk Analysis Network], how they worked there, how they in the beginning had a few areas they concentrated on that they developed as the mechanism settled. In the work on vulnerability assessment, my experience was that they started very broadly, very heavy all at once.

(IO5)

We have seen that the Council and some member states pushed for the development of objective indicators for vulnerability assessment. The resulting procedure is heavy on quantitative reporting, at the cost of a rather high workload for member states (IO2; IO4; IO5). The first version of the vulnerability assessment methodology proposed that member states should report on quantified threat levels based on, for instance, the number of illegal border crossings or entries with fraudulent documents detected. They are also to report numbers on installed capacity, covering everything from the number of officers attending basic training, via the amount of equipment and vessels available, to detailed statistics on border sections and checkpoints (Frontex 2016). This was a departure from the way the Frontex Risk Analysis Network works, which is of a more qualitative nature:

The way we have been working in the [Frontex] Risk Analysis Network, when we assess risk, we use a framework called CIRAM. [...] But the focus there has been description, that is, a qualitative approach. Of course we use some data, we have a few indicators to define threats, and some on vulnerabilities, but it is a much more qualitative approach than one has taken to Vulnerability Assessment.

(IO3)

An early version of the Common Vulnerability Assessment Methodology is explicit about the function of the *objective criteria* stipulated in the Regulation: “In this sense, the objective criteria will ensure the establishment of the Vulnerability Assessment as a *technical rather than political exercise*” (Frontex 2016, 12, my emphasis). This is an explicit

attempt at isolating the assessment from politics. Furthermore, the methodology states that the Vulnerability Assessment Network should work towards “proposals for more elaborated and quantifiable objective criteria for the next round of vulnerability assessments” (Frontex 2016, 12). Furthermore: “the quantification of the objective criteria [...] will ensure full transparency on the method used and on the target levels of performance” (Frontex 2016, 28). In other words, it ensures the equal treatment of all member states. These are clear appeals to the promises of depoliticization and quantification. In that regard, this document provides “smoking-gun” evidence (see Collier 2011) that the experts and policymakers involved in drafting the document explicitly believed that quantitative indicators would help insulate the procedure against political interference. This evidence strengthens the plausibility of the political approach. But it is not on its own sufficient to conclude in favor of it. To do so, we need evidence not only that the methodology can fulfill a political purpose but also that its epistemic merits were of secondary concern.

Some risk analysis professionals do seem skeptical towards the promise of quantitative indicators. According to one member state strategic analyst, “the risk analysis shouldn’t drown in quantitative data. That’s not what it is about” (IO3). At other points in the methodology document, we encounter warnings that “the measures employed for assessing threats, vulnerability and impact can be crude, simplistic or misleading. Expressing risk levels numerically may convey a false sense of precision to the decision-makers. [...] In most cases, *it is recommended to rely on qualitative assessments* and to classify risks in categories of significance” (Frontex 2016, 7, my emphasis). There is an inherent tension here: The methodology presents increased quantification as an explicit goal, while other parts of the same document remain skeptical about its utility or precision.

The epistemic merits of quantification

Can the choice of a quantitative approach be explained by epistemic considerations? As we do not have access to the vulnerability assessment reports themselves, it is difficult to evaluate their merit directly. But through second-hand sources, we can get an impression.

A study for the LIBE Committee of the European Parliament, completed in March 2016, is skeptical towards the purported neutrality of vulnerability assessments: “The portrayal of the Schengen Evaluation Mechanism as political, as opposed to the purely ‘operational’ Vulnerability Assessment, seems to ignore the political consequences that possible Vulnerability Assessment findings may have” (Rijpma 2016, 14).

This comparison calls for some elaboration. The Schengen evaluations have received critique for being too political (see Kaasik and Tong 2019). It is a member-state-led process which explicitly seeks to leverage “peer pressure” between member states (Regulation 1053/2013, Recital 11). Still, according to one informant, the benchmarking done in Schengen evaluations provides clearer criteria than the vulnerability assessments do:

It is unclear to me [...] based on which criteria one evaluates findings as vulnerabilities [in vulnerability assessments]. And again, which of these trigger actions. [...] I don’t think it’s apparent in the methodology either, how you categorize something as a vulnerability. Because according to the Schengen evaluation mechanism, things are really quite simple. If you don’t do things according to your obligations – that is, the Schengen borders code, the Visa Code and so on – you’re non-compliant. [...] You have a standard that [makes it] easier. But the vulnerability assessment is to me a little – I think it’s a little bit difficult. I haven’t quite understood it.

(IO5)

According to this informant, the epistemic merit of vulnerability assessments is questionable. It is even weaker than the Schengen evaluations, which is, on the surface, a more explicitly political procedure. The insistence on the technical nature of vulnerability assessments, if in fact they leave substantial space for analyst discretion or if clear criteria of evaluation are lacking, weakens the plausibility of a purely epistemic explanation.

One informant speculated that numbers may be easier for policymakers to trust or accept than “text,” i.e., qualitative evaluations: While the

informant “does not like it,” numbers may be more “concrete to deal with than description” (IO3). Vulnerability assessments are closely linked to recommendations, and a recommendation based on an objective, numerical claim – as opposed to the discretionary judgment of a Frontex analyst – will be perceived as less controversial.

In summary, the final stage shows that the vulnerability assessment procedure that was developed after the 2016 Regulation is more quantitative than the preexisting risk analysis. Furthermore, we have evidence suggesting that this was a choice driven, at least in part, by political considerations. There were early disagreements about the method’s design between the Commission and the Risk Analysis Unit, and the quantitative approach to vulnerability assessment seems hard to justify on epistemic grounds alone.

Vulnerability assessment: Political or epistemic?

The evidence discussed so far reveals a causal sequence of events, in three main stages. (1) In the pre-2015 period, Frontex was a coordinating agency with hardly any supranational powers. Risk analysis was a central task of the agency, but it was largely oriented towards external risks and factors. The procedure furthermore relied in large part on qualitative methods. (2) The 2015 refugee crisis was a major exogenous shock to the European system of border management. As a result, the Commission was quick to propose a new mandate for Frontex, with unprecedented supranational powers. The refugee crisis was a problem of inaction, not one of knowledge. Vulnerability assessments must be understood as an attempt to ground the proposed intervention mechanism in objective evidence, thereby assuaging member states’ concerns about arbitrary or political power. Yet vulnerability assessments also entail supervisory power in their own right. (3) After the regulation was adopted, the vulnerability assessment procedure was designed as a highly quantitative procedure, in an explicit attempt to isolate it from political interference. Yet the possibility of discretion is not eliminated, especially in the translation from quantitative indicators to vulnerability levels and recommendations.

Taken together, the evidence weighs heavier on the side of the political approach. The shift towards more supranational power to Frontex was

associated with a shift towards a stronger reliance on the assessment of member states' vulnerabilities based on objective criteria. This does not seem like a spurious association: Objectivity, neutrality and quantification were central issues when the regulation was negotiated and implemented. In this sense, the appeal to technical expertise helped legitimize increased powers to the agency.

Does this mean that the Frontex vulnerability assessments were introduced solely to legitimize more power to the agency? Some evidence points in the opposite direction. For instance, informants are not completely pessimistic towards the epistemic promise of the procedure. One informant stated that the goal of the vulnerability assessment is to know more. And it has worked – in sum, we now know much more about the situation at the external borders (IO2). Another informant was not convinced that we know more at the moment, but said that the mechanism will make us more aware of our vulnerabilities over time (IO5). A third informant said that the assessment of vulnerabilities was indeed missing under the CIRAM risk analysis model: You had an assessment of challenges and threats, but little evaluation of the current vulnerabilities (IO4). Vulnerability assessment was in this sense a logical continuation of the already established risk analysis procedure. The bulk of evidence nonetheless points towards a political interpretation. It would be too strict to allow for a political approach only if there were *no* epistemic merits to the procedure.

Now, political concerns come in many shapes. Some earlier analyses of Frontex have been premised on an assumption of strategic action only on the part of EU-level actors (notably Horii 2016; Neal 2009; Paul 2017) – an assumption which seems in this case not to hold. Take Regine Paul: “we suggest that *EU-level actors* draw on the rationalization promises of risk analysis (...) to justify increased coordination without challenging member state competency in the weakly integrated domain” (Paul 2017, 697, my emphasis). This argument frames EU-level actors as strategic “users” of risk-based governance, while the member states naively accept their promises – ultimately leading to more EU-level integration even against the member states' interests. This narrative fits poorly with the present case study. Instead, the evidence suggests that also, or especially, member states place their trust in the technical neutrality of vulnerability

assessments to safeguard their own interests. This is also a political or strategic appeal to expertise, but used to hold back EU-level integration rather than to promote it.

Furthermore, while vulnerability assessments play an important role in legitimizing possible Frontex interventions, member states also made sure that the final word on implementing said interventions was given to the Council. This is a transfer of sovereignty, but to a less invasive degree than treating interventions as a more technical question left to the Commission, as originally proposed. Instead, it is a transfer from each member state acting individually to the “club” of member states acting collectively in the Council (see Deleixhe and Duez 2019, 932). Even if member states accept the facts on a given vulnerability, they want the measures to mitigate it to remain a political matter. While the appeal to expertise may have a legitimizing function, it is, in the case of Frontex, still embedded within a system where member states keep their hands firmly on the steering wheel.

Conclusion

This article has argued that technical expertise, through the Frontex vulnerability assessment procedure, played a central role in legitimizing more power to Frontex with the 2016 Regulation. Member states accepted supervisory power for Frontex, but only after ensuring that it would be based on objective criteria, following a largely quantitative procedure, and adhering to a predefined methodology. They also accepted a variant of the so-called “right to intervene,” albeit under tighter Council control than was originally proposed.

As such, the article has more general implications for theories on the legitimacy of the EU and its agencies. It shows a case where the legitimizing appeal of technical expertise—or at least policymakers’ trust in it—is strong, even in a politically contentious field with little access to “hard” scientific evidence. This finding implies that the notion of technical legitimacy may be more resilient than some researchers have suggested. Future research should continue examining the scope conditions for technical legitimacy in the European political system, both through closer

examination of other “corner cases” and through large-N comparative studies.

This article’s findings also have theoretical implications for the risk-based governance literature. Earlier research on risk-based governance in Frontex has portrayed risk analysis as a one-sided use of knowledge by Frontex and the Commission to get member states on board with their policy objectives (Horii 2016; Paul 2017). I suggest instead that the appeal to technical expertise works because all actors appeal to it for their own reasons. The Commission’s stated goal was a stronger Frontex with more supranational power. It appealed to technical neutrality to legitimize such a move. But member states also sought an objective foundation for the new vulnerability assessment, thereby appealing to technical neutrality for their own political purposes. This article therefore challenges the idea that the appeal to technical expertise and risk-based governance is something only EU-level actors use strategically.

The article finally shows how the epistemic and the political may interact in practice: Many decision-makers had a large degree of faith in the epistemic quality of vulnerability assessment. And the procedure is not without epistemic merit. It allows Frontex to know more about member states’ vulnerabilities. Some baseline of epistemic credibility seems necessary for the procedure to fulfill a legitimizing function.

It should finally be noted that this article focuses on member state governments and EU-level institutions—a thoroughly elite perspective. The findings say nothing about the level of citizens and the public. Whether or not citizens and constituencies accept the promises of expertise and technical legitimation—and the *normative* implications of such legitimation in the field of border control—remain questions for future research.

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Appendix

List of interviews

Code	Position	Interviewed
IO1	Frontex public relations official	04.01.18
IO2*	Frontex Management Board member	15.02.19
IO3*	FRAN/VAN member	27.02.19
IO4*	National delegate, Frontex regulation negotiations	04.04.19
IO5*	VAN member	10.04.19

*) Translated to English by the author

Article 3

Symmetry in the delegation of power as a legitimacy criterion

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Abstract: The EU's power is expanding, calling for reassessments of its normative legitimacy. This article proposes a novel criterion for assessing the EU's legitimacy: symmetry in the delegation of power. We illustrate the usefulness of this criterion through an analysis of the European border regime. Existing analyses of the border regime have tended to dismiss it as weak and intergovernmental. We show, to the contrary, that it is both strong and weak. The EU wields significant power in *border control* but lacks power altogether in *immigration policy*. This asymmetry has rendered the EU incapable of discharging the moral responsibilities that arise in migration control, posing a novel legitimacy challenge. Finally, we argue that the symmetry criterion generalises and can shed light on the EU's legitimacy beyond the area of migration.

Keywords: border control; delegation; EASO; Frontex; legitimacy; migration

Introduction

Since the creation of the European Union (EU), there has been debate about its normative legitimacy (e.g., Føllesdal, 2006). The EU differs markedly from the member states of which it is composed. Yet it wields significant power, raising questions about what (could) support(s) its right to rule. Many contributions evaluate the EU's legitimacy by reference to substantive standards such as distributive justice (Sangiovanni, 2019) or, most prominently, democracy (Bellamy, 2010). This article proposes a novel structural criterion for assessing the legitimacy of a multi-level polity such as the EU: symmetry in the delegation of powers. Our argument will be that, wherever there is asymmetrical delegation within the same policy area, illegitimacy will persist because, in such cases, the institutional structure will make room for unaccountable exercises of power deflecting substantial responsibility-taking. An independent and additional concern for symmetry should therefore be included in normative legitimacy assessments of the EU.

To make our case, we draw on our proposed symmetry criterion to offer an in-depth assessment of a highly contentious policy area: migration control. We will demonstrate that the European border regime is characterised by an asymmetrical delegation of power. Contrary to how it is often portrayed by empirical scholars, the regime is no longer weak, intergovernmental, and largely ineffectual. Instead, it is weak when it comes to immigration policy, but strong when it comes to border control. We then argue that this asymmetry generates a distinctively moral problem: it leaves the EU in a situation where it wields significant power over migrants without being capable of discharging the obligations imposed by those migrants' rights. This moral problem is a function of institutional incentives engendered by asymmetry, thereby vindicating a focus on symmetry as an autonomous legitimacy criterion. Moreover, and as we will show, asymmetry can clearly occur in other policy areas, providing our criterion with ample scope.

The paper is structured as follows. Section 1 offers some brief notes on research design and case selection. It then traces the development of the EU's border regime and shows that an asymmetry has emerged between immigration policy and border control. Section 2 offers our normative

assessment of this state of affairs. To that end, we first provide a baseline account of normative legitimacy which highlights how accountability is affected by institutional structure and how accountability relates to minimal rights protection. From this normative account, we show how the European border regime's current asymmetry undermines rights protection and thus poses a clear threat to its legitimacy. In section 3, we demonstrate the generalisability of our thesis by showing how the symmetry criterion has purchase in three other policy areas: the EU's monetary union, pharmaceutical policy, and external trade policy. Section 4 concludes.

The asymmetry of the EU's border regime

Research design and case selection

While the main argument of this article is normative, this section presents a comparative empirical analysis of the European border regime. Since our goal is not explanatory – we do not explain legitimacy but evaluate it normatively – the classic typologies of case selection are of limited utility. Instead, we may treat our case as a 'normative case study' (Thacher 2006), which is selected based on what it can teach us about legitimacy. The European border regime is a crucial test case for our argument because it has, for the last decade, been a policy area with rapid delegation of power to the EU level. Migration control is also a policy area that raises pressing normative concerns in Europe and elsewhere. The importance of normative theory to tackle these concerns thus further justifies our focus on the European border regime. As we will argue in section 3, however, our argument plausibly generalizes to other policy areas. To this end, we rely on a 'most-different' logic whereby we first draw out the general features of the border case and then show how the same features arise in other, very different policy areas (Levy 2008). We also make a 'most-similar' comparison to an area which is comparable to the border regime in many instances, but which is symmetrical in terms of delegated power.

The empirical section relies on a synthesis of existing research as well as a document analysis of relevant EU policy documents. The analysed corpus consists of the adopted versions, as well as drafts, of all Frontex regulations; the previous EASO regulation (Regulation (EU) No

439/2010); public draft versions of the new EUAA regulation (Regulation (EU) 2021/2303); and relevant communications and press releases.

The decoupling of immigration policy and border control

In all border regimes, there is a distinction between immigration policy and border control. We understand immigration policy in the EU as the competences to set rules about which non-European citizens should be granted access to the Schengen area and the terms on which they are granted this access. Immigration policy thus comprises asylum policy, tourist visas, guest worker programs, and so on. Border control, by contrast, refers to the competences to enforce immigration policy through the checking of travel documents, patrolling of land and sea borders, and physically interfering with unauthorized border crossings. Since the advent of the modern administrative state, these powers have operated in tandem, and have thus naturally been analysed as two sides of the same coin. In the EU, however, they are increasingly coming apart.

Recent analyses of the EU have tended to analyse the European border regime as a whole. Such analyses have often concluded that the European border regime is weak, intergovernmental, legalistic, or merely coordinating (den Heijer, Rijpma and Spijkerboer, 2016; Börzel and Risse, 2018; Schimmelfennig, 2018). For instance, Genschel and Jachtenfuch argue that 'the Schengen agencies (...) are fairly small, weak and intergovernmental in structure' (2018, p. 183). Similarly, in a recent article, Kelemen and McNamara argue that the EU's approach to migration policy has not been driven by collective security concerns but has been, 'at least until very recently, (...) driven by a logic of market building' (2021, p. 17). They argue that European leaders have treated external border controls in a legalistic manner, seeking coordination and common rules without giving the EU the capacity or power to enforce those rules.

There is much of value to these analyses, and they aptly depict the pre-2016 European border regime. But after Frontex's 2016 and 2019 regulations, the image they paint is no longer accurate. For example, Kelemen and McNamara write that the 10 000 border guards in the Standing Corps, introduced in the 2019 Regulation, 'will continue to operate under the command and control of the member state where they are deployed' (2019, p. 19). In support of this claim, they cite a report from

2017 (Carrera et. al, 2017). However, given that the Standing Corps was only introduced in the 2019 regulation, this is inadequate for establishing the relevant claim. In fact, the report argues that a shortcoming of the 2016 regulation was the agency's dependence on member state contributions – precisely the shortcoming that the 2019 regulation aims to remedy. Elsewhere, Kelemen and McNamara claim that 'not one person directly employed by the EU is authorized to use coercive force to enforce EU policies' (2021, p. 10). Again, this fails to consider the border guards now directly hired by Frontex as part of the Standing Corps (see e.g., Regulation 2019/1896, Annex V).

We bring up these tensions in Kelemen and McNamara's analysis to illustrate our more general point that the current literature on the EU's border regime exhibits a blind spot. This is the failure to recognise that the EU's border regime is *both* strong and weak. This blind spot is partly explained by the very recent emergence of the Frontex Standing Corps – most contributions were written before the 2019 Regulation came into force.¹⁹ As we will argue, its emergence represents a watershed moment in the development of the EU's border regime, resulting in a state of affairs where immigration policy and border control has come apart. As a result, these must be analysed separately.

Frontex

Under the original regulation of 2004 and its subsequent revisions in 2007 and 2011, Frontex was a strictly coordinating agency (see e.g., Regulation 2007/2004, Art. 1(2)). It was small, wielded a relatively limited budget, and held no supranational powers (Wolff and Schout, 2013; Deleixhe and Duez, 2019).

In 2016, in the aftermath of the European refugee crisis, the agency's mandate was renewed, formally turning the agency into the European Border and Coast Guard Agency (EBCG). With this regulation, Frontex was mandated to carry out assessments of member states' border

¹⁹ That said, we also disagree with the wholesale dismissal of the 2016 Regulation as inconsequential and without any supranational elements. Notably, Frontex was granted the right to intervene with member states. See, e.g., Niemann and Speyer (2018, p. 28).

controlling capacities and vulnerabilities. The regulation also introduced a right to intervene, whereby Frontex may, subject to a Council decision, deploy border guards to a member state to avoid threats to the functioning of the Schengen Area. While the right to intervene was curtailed compared to the Commission's proposal, the vulnerability assessment and right to intervene nevertheless constituted a real transfer of power to the agency (Niemann and Speyer, 2018; Deleixhe and Duez, 2019; Fjørtoft, 2020).

The regulation was renewed again in 2019 (Regulation 2019/1896). The major innovation in this regulation is the so-called Standing Corps – a European border force that is projected to consist of 10 000 border guards by 2027 (Regulation 2019/1896, Annex I). Importantly, almost a third of the Standing Corps will be hired directly by Frontex. In addition, the agency may now purchase its own equipment, including vehicles and sea vessels. In the past, Frontex had to rely on personnel and equipment contributed by member states. The establishment of a Standing Corps is a qualitative leap in the institutionalization of European border controls. In the agency's own words, Frontex is now in charge of Europe's first uniformed law enforcement service (Frontex, 2020).

The main argument for seeing Frontex as a 'weak' agency is that it has been fully reliant on staff and material contributions from member states (Carrera *et al.*, 2017, p. 48). The 2019 regulation undermines this argument. Frontex now has the largest budget of all EU agencies (Frontex 2021) and is mandated to hire its own personnel and buy its own equipment. Frontex statutory staff – the members of the Standing Corps directly hired by Frontex – are authorized to carry firearms and use force to perform tasks and exercise powers for border control and return (Article 82). This is the coercive kind of power usually associated with sovereign states.

Another reason for seeing Frontex as weak is the Standing Corps being subject to the law of the host Member State. Whilst this is clearly true (see Regulation 2019/1896, Article 82(7)), there is an important difference in who the different border guards represent. While member states' police and border guard forces are agents of a state, Frontex-employed staff are ultimately agents of the EU. This is significant both in legal terms and in terms of the respective accountability structures to which these border guards are exposed. Whereas international law recognizes the link

between a state and its officers as the action of the state, the same is not the case for the EU. While member states can be held accountable in front of both national and international courts, in particular the European Court of Human Rights, neither of these options are available for Frontex or the EU at large. Notably, the EU has not acceded to the European Convention on Human Rights (Fink, 2020).

One could thus argue that Frontex – and, by extension, the EU – remains weak because its border guards fully depend on the consent of the relevant Member State for its operation. This is, however, to miss the significance of Frontex’s right to intervene. Granted, the right to intervene is subject to a Council decision and may prove to be politically infeasible. But these objections do not undermine the point that the EU (via the Council) has the formal competence to act as a supranational entity in this regard.

Finally, the strengthening of Frontex has happened without strong political resistance. Both the 2016 and 2019 regulations were negotiated in record time: in both cases, they were adopted less than a year after the Commission’s initial proposal (Carrera *et al.*, 2017, p. 43; European Commission, 2018). As we will see, this is a stark contrast to the stalemate over the Common European Asylum System.

The CEAS

No corresponding development has happened in the Common European Asylum System (CEAS). According to Sandra Lavenex, while Europeanization has been relatively strong for the strengthening of the EU’s external borders (2018, p. 1203), no meaningful integration steps resulted from the CEAS crisis (2018, p. 1198). The CEAS has been labelled a ‘continuing failure’ (den Heijer, Rijpma and Spijkerboer, 2016).

One highly publicized failure was the resettlement schemes proposed after the 2015 refugee crisis. In 2015, the Commission first proposed a scheme for the resettlement of 20 000 refugees among member states, and later the mandatory relocation of 160 000 asylum seekers from Italy and Greece (European Commission, 2015a; den Heijer, Rijpma and Spijkerboer, 2016). Both measures drastically failed, and Hungary and Slovakia contested the mandatory mechanism in front of the CJEU. At the

end date of the scheme, only 37 000 of the 160 000 were effectively relocated (Lavenex, 2018, p. 1204).

Another alleged failure of the CEAS has been the establishment of a European agency for asylum. The European Asylum Support Office (EASO) was established in 2011. A renewed mandate, turning it into the European Agency for Asylum (EUAA), was first proposed by the Commission in 2016. After some provisional agreement in 2017, the negotiations stalled. The Parliament and Council finally found an agreement in June 2021 (Council of the European Union, 2021). But not all parts of the regulation were agreed upon. The Mediterranean countries made sure that several articles of the new regulation only enter into force when agreement has been reached on the rest of a migration package – including on a relocation mechanism (Nouris *et al.*, 2021).

One of the provisions that are kept on hold is notable because it resembles Frontex's 'right to intervene'. It says that the Council may adopt an implementing act to support a Member State if the functioning of the CEAS is threatened (Council of the European Union, 2021: Article 22). It is, however, weaker than Frontex's parallel provision due to the EUAA's lack of material and executive capacity. Moreover, and as mentioned, the provision will not enter into force until agreement has been reached on a replacement of Dublin III.

The new EUAA mandate remains largely coordinating and intergovernmental. The agency will dispose of a 'reserve pool' of 500 experts who may be deployed as asylum support teams to requesting member states. But these experts will be provided by the member states and not directly employed by the agency.

The weakness of the EU's asylum system was the target of the recent New Pact on Migration and Asylum, which was adopted in September 2020. In addition to setting out new procedural rules for arrivals in the Schengen area, the Pact seeks to introduce a set of solidarity mechanisms to alleviate the pressure on the states receiving the highest influx of asylum seekers. This move towards solidarity is meant to rectify the broadly acknowledged problem with Dublin III, namely, that these 'frontline' states were made responsible for an outsized proportion of asylum

seekers, due to the rule that asylum claims should be adjudicated in the state where the claimant first entered Europe. Despite this ambition, however, the Pact falls short of erecting and enforcing burden-sharing mechanisms. Instead, it outlines voluntary contribution mechanisms through which member states can either offer relocation of asylum seekers, contribute with financial and institutional means towards states under strain, or offer what is called a ‘return sponsorship’ by assisting in the return of individuals who have had their applications denied (Carrera et al. 2021). Of course, these developments are new, and thus we have yet to see how particular instantiations of these powers will play out in practice – both legally and politically.

* * *

In summary, an asymmetry has emerged in the European border regime between border control, which is increasingly supranationalised, and asylum, which is not. This asymmetry is unaccounted for in many existing analyses of the border regime, which often analyse it as one unitary domain and therefore fail to distinguish between its constituent parts. As we will argue in the next section, this asymmetry has consequences for the regime’s normative legitimacy. In support of that claim, we will first give a general outline of normative legitimacy, highlighting the relationship between accountability, institutional structure, and minimal rights protection. From there we derive a criterion of symmetry in executive powers, a criterion that the EU’s border regime currently fails to meet.

The normative legitimacy of the EU’s border regime

Normative legitimacy

Understood in its empirical sense, legitimacy tracks the extent to which the subjects of a political order believe they have normative reasons to abide by that order’s directives beyond fear of sanctions for non-compliance (see Weber, 1994, pp. 311–313). In its normative sense, legitimacy tracks whether subjects are right or wrong in their beliefs about their normative reasons for abiding by the directives of political orders. Normative legitimacy assessments evaluate the credibility, and thus

justifiability, of the reasoning underlying the constitution of political orders (Bellamy and Weale, 2015, p. 261).

In its traditional usage, legitimacy pertains to the justification of the coercive power of the state (e.g., Rawls, 1993). However, this understanding of legitimacy unduly narrows the scope of the concept. Many institutions – including the EU – do not rely on coercion in the setting and enforcement of their rules. Yet, they still claim the authority to set and enforce these rules and expect compliance from those subject to them. Moreover, actual human subjects have beliefs about the legitimacy of these institutions. A normative concept of legitimacy capable of evaluating beliefs about the EU's claims to authority should therefore be sufficiently general to capture rules issued by political orders that are primarily non-coercive (Sangiovanni, 2019, p. 14).

A more promising concept of legitimacy is thus one that refers to justified practical authority (Raz, 1986, p. 21). Defining legitimacy in terms of justified authority implies that an institution is legitimate when it supplies content-independent reasons for compliance and non-interference with its directives (Scherz, 2021, p. 634). These reasons are content-independent in the sense that subjects should treat the fact that rules are issued by the institution as supplying sufficient reason for acting, irrespective of their substantive content. This quality explains the difference between legitimacy and the related concept of justice. Whereas justice evaluates the substantive quality of rules, legitimacy evaluates the rule-setting institution (Pettit, 2012, pp. 130–131). Hence, the conceptual possibility of the legitimate imposition of unjust law: since a legitimate institution supplies content-independent reasons, individuals can have normative grounds for complying with an institution even when its rules deviate from the requirements of justice.

On this view, the concept of legitimacy applies generally to political institutions that seek to regulate given domains by setting and enforcing rules. Any such institution claims authority to change individual agents' reasons for action by changing their roles and duties, raising a requirement for legitimation. Following Allen Buchanan, we hold that this requirement is satisfied when the benefits of empowering an institution to regulate a given domain outweighs the corresponding risks (Buchanan,

2018, p. 55). The normative grounds of this general conception of legitimacy can be filled out in a variety of different ways, for example by reference to the value of autonomy (Scherz, 2021). For the purposes of our analysis of the EU's border regime, we will take the relevant basis to be human rights. Focussing on human rights is useful for our purposes because it provides a distinctively moral basis for our argument, but which is still sensitive to actual political commitments of the EU and the constraints imposed by international law. Moreover, in the political theory literature on migration, respect for human rights is universally acknowledged as a fundamental standard for normatively assessing the legitimacy of border control (Sandven 2022; Schmid 2022).²⁰

Thus, on our view, an assessment of an institution's legitimacy depends on an analysis of how that institution impacts human rights protection compared to the non-institutional alternative *and* to available institutional alternatives. Legitimacy assessments are therefore always contextual, requiring ongoing judgement about how our current institutions fare in terms of human rights protection as circumstances change.

An important condition for legitimacy is accountability. As a political concept, accountability demands that an actor is held to specific standards by an external agent with the requisite power to impose sanctions if the actor fail to discharge the responsibilities required by that standard (Grant and Keohane, 2005, p. 29). The link between accountability and legitimacy is constituted by the requirement that the benefits of empowering institutions outweigh the associated risks to human rights. In general, this balancing act will fail to confer legitimacy onto institutions that cannot be held accountable for failures to discharge their responsibilities. The possibility of transitioning to alternative institutions with superior accountability mechanisms will mean that the lack of accountability is a continuous legitimacy problem for any institution. In the absence of appropriate accountability mechanisms, institutions will have fewer incentives to satisfy the human rights requirements that normatively

²⁰ For the purposes of this article, we suspend judgement on the further debate about whether respect for human rights is *sufficient* for conferring legitimacy onto claims to regulate migration (see Sandven 2022). Our argument shows that asymmetrical delegation poses a threat even to this minimal normative demand.

supports their claim to rule. An upshot of the lack of such incentives is that, even if an institution *would* in fact satisfy its human rights obligations, that satisfaction would lack robustness: its fulfilment is primarily explained by the goodwill of the relevant institution's officers and not by institutional constraints (Sandven and Scherz, 2022, pp. 7-8). Thus, the satisfaction of that standard will be far more vulnerable to trade-offs and cost-cutting than had it been secured by institutional constraints.

Symmetry in executive powers

Having outlined a human rights-based account of legitimacy, we now turn to our core claim that symmetry in executive powers should be considered an important desideratum on institutional legitimacy. Symmetry pertains to institutional structure and should thus be seen as an additional, not competing, legitimacy criterion to substantive criteria like those derived from considerations of distributive justice (Sangiovanni 2019). After spelling out the basic case for our symmetry thesis in this section, the next section applies this desideratum to a legitimacy assessment of the EU's border regime.

To regulate a given policy domain, institutions require competences. These can be of a coordinating kind, harmonising the actions of a set of agents who retain executive decision-making power. Alternatively, these competences can themselves be executive powers, which means that the institution holds authority to command actions from the agents or third parties. Thus, we can draw a distinction between institutions that regulate indirectly, setting coordinating rules for other institutions to enforce, and those that regulate directly, setting and enforcing rules (cf. Scherz, 2021, pp. 639-640). Normatively, institutions of the latter kind are of particular concern. Since they do not leave the same space for discretion on the part of the agents whose behaviour they regulate, they incur a higher degree of responsibility for the outcomes engendered by their rules. For this reason, executive agents also bear remedial responsibility for the outcomes of these outcomes: they bear responsibilities to rectify these outcomes when they fall short of applicable normative standards (Miller 2007, ch. 4).

We will say that an institution holds symmetrical executive powers if it is capable of discharging the remedial responsibilities that arise in the

domains in which it regulates directly. In the domestic setting, this condition has generally been satisfied by the very constitution of the state. Within its territory, the state claims full jurisdictional authority to determine the scope of its own privileges. An upshot of this maximally expansive claim to authority is that the state is both remedially responsible for upholding individual rights within its territory and empowered to discharge the correlative obligations. However, as states are increasingly relying on the delegation of authority to supranational actors, this symmetry might become destabilised.

There is a weighty general reason, grounded in the concern for accountability, to worry about the legitimacy of asymmetrical delegations of executive power. The reason is the following. If an institution regulates a domain directly – that is, it holds competences to set and enforce rules – without also having powers to discharge the responsibilities that arise in the relevant domain, the very constitution of that institution makes the relation to the agents who have empowered it unclear. When such institutions move from wielding merely coordinating powers to executive powers, their internal structures of decision-making will make it harder to assess the individual contributions of each authorising agent, since there is discretionary authority on the part of the institution itself.²¹ This problem intensifies with institutional complexity because, as complexity increases, each individual agent might justifiably fail to appreciate how their individual contributions support undesirable outcomes. This creates possibilities for what Philip Pettit calls ‘shortfalls’ in responsibility: states of affairs where, to rectify a wrong enacted by the institution, it will be insufficient to hold each agent responsible for their culpable actions (Pettit, 2007, p. 196).

The possibility of responsibility shortfalls, moreover, create a perverse incentive for agents that seek to incorporate. If a set of agents have the capacity to empower an institution in such a way that the institution can regulate the domain in question without erecting proper channels of responsibility between the institution and its members, then those

²¹ For an institution that regulates indirectly this is not a concern because the states of affairs engendered by their rules will still be enforced by the authorising agents themselves.

members are enabled to act to advance their interests without the associated costs of satisfying the standards they would otherwise be subject to (Pettit, 2007, p. 196). The existence of this perverse incentive poses an undue risk to those subject to the relevant institution. As we argued above, failure to subject institutions to appropriate accountability mechanisms jeopardises the robust satisfaction of the standard that grounds the institution's legitimacy. This means that those who depend on that institution's respecting (and perhaps also fulfilling) their rights will be less certain of its willingness to do so. In this case, the asymmetric delegation of power poses a problem for accountability and, by extension, for legitimacy.

Asymmetry in the EU's border regime

In sovereign nation states, the state's border regime is characterised by symmetrical executive powers. The state claims the authority to enforce border control and holds the privilege to discharge the relevant human rights-related obligations that, according to a human rights-based account of legitimacy, provide moral force to this claim to authority. In the context of border control, the arguably most important human right is the right to seek asylum and its associated principle of *non-refoulement*, which prohibits the return of asylum seekers whose safety cannot be guaranteed in their state of origin.

The EU's border regime is characterised by asymmetry. Like the border regime of the sovereign nation state, the EU claims authority to enforce border control through Frontex and its Standing Corps. With this executive power comes the risk of the violation of human rights, either in the form of physical harm done to individuals or in the form of violations of the principle of *non-refoulement*. Unlike a state, however, the EU lacks the privilege to discharge migration-related human rights due to the weak nature of its asylum institutions. Hence, even in cases where human rights-related worries arise, the EU is dependent on the member states to discharge the correlative responsibilities. The problem this engenders is that member states keen to increase their border controlling capacities without having to take responsibility for the human rights of migrants have an incentive to let the EU enforce its borders, whilst withholding competences that would enable the EU to distribute responsibilities for

asylum seekers between member states. Instead, the EU, through Frontex, exercises force on behalf of the member states, but has no powers to make those states take responsibility for the lives of the migrants subject to that force. Moreover, governments can engage in blame-shifting by arguing that responsibility for the non-satisfaction of human rights lies elsewhere and thereby starve off potential contestation from their domestic constituencies (Heinkelmann-Wild and Zangl, 2020). This dynamic is not bettered by the new voluntary solidarity mechanisms outlined in the Pact. In particular, the option of 'return sponsorships' can exacerbate the problem by providing an oversupply of exit where what is needed is relocation and protection within Europe.

In other words, the EU is incapable of taking responsibility for human rights in a domain in which it nonetheless wields significant power. The EU's border regime, therefore, currently provides the space for the responsibility shortfalls outlined above. It is characterised by strong powers to directly regulate migration without corresponding powers to set immigration policy, especially by accepting and adjudicating asylum claims. The expected consequence of this is an erosion of rights protection for migrants. As the EU's enforcement capacities grow, but its responsibility-taking capacities remain weak, vulnerable people seeking protection in Europe will increasingly be faced by a set of institutions that are capable of deterring and expelling them, but which lack robust capacities for protecting their rights. The integration of positive core state powers in the area of border control combined with the absence of positive integration in the area of immigration thus results in a moral hazard: states expose migrants to risks of abuse at the hands of EU border guards without enacting proper accountability mechanisms for holding those guards liable and without granting the EU powers take responsibility for that risk.

In nation states that have not delegated competences in the area of migration to a supranational entity, this responsibility shortfall and its associated risk does not arise. It is important to stress that this does not imply that the border regimes of such nation states are thereby normatively legitimate. After all, nation states can violate human rights even if they can be held accountable, and they can also enact policies that conflict with our best theories of justice. In other words, and more

generally, institutions that enjoy symmetrical competences might fail to satisfy *substantive* legitimacy criteria.

An important implication of our argument is that debates over the EU's border regime should not be one-sidedly focussed on Frontex's behaviour. Instead, it should be recognised that Frontex itself depends for its legitimacy on the state of the European asylum institutions. If those institutions remain weak, then Frontex's new powers will remain illegitimate because they will be the powers of an institution that cannot take responsibility. Thus, the critique of the EU's approach to migration as one of 'organized hypocrisy' is correct, albeit perhaps for a different reason than how it is normally presented. On our analysis, the EU's problem is not only that its border regime fails to live up to the values and principles of its own constitution, or that Frontex is rhetorically committed to fundamental rights without following through in practice (Lavenex, 2018; Murray and Longo, 2018; Cusumano, 2019; Perkowski, 2019). In addition, it is structurally conditioned to fail to satisfy those values and principles. Further, our analysis shows why authors from critical security studies are right to worry about the rapid increase in Frontex's competences, while it avoids their overdetermination. Their analyses, being inherently sceptical towards the 'securitisation of migration' (Neal, 2009; Léonard, 2010; Chillaud, 2016; Horii, 2016; Stachowitsch and Sachseder, 2019), are unable to capture the particular legitimacy concerns that arise due to Frontex being a supranational agent. If the main legitimacy problem with Frontex is its complicity in the process of securitisation, then the border regimes of states that take part that process are *equally* illegitimate. On our view, the unique legitimacy problem faced by Frontex is that it is an agency of an institution – the EU – that cannot take responsibility for human rights in the domain in which it wields significant power.

An important objection to our argument points to cases where the EU's involvement in border control appears to be human rights *promoting*. A crucial example is the Danish Frontex officers who refused to partake in pushbacks on behalf of Greece in the Aegean Sea (Tritchler 2020). This empirical case can seem to undermine our argument. In response, we argue that the asymmetry thesis can accommodate this case by way of its capacity to explain the incentives that leads Greece, as well as Italy, Malta,

and Poland, to engage in pushbacks. As already noted, Dublin III obliged 'frontline' states to adjudicate the asylum claims of migrants who have entered on their territory, which led to an over-burdening of these states' immigration systems. Yet, the rule prescribing that they take this responsibility, as well as the ineffective measures taken to rectify the shortcomings of Dublin III on this point, is a contingent choice made by the member states. If it is reasonable to believe that the frontline states would be less inclined to engage in pushbacks in the absence of their outsized responsibility for asylum seeking in the EU, then these cases pose no challenge to our asymmetry thesis.

The asymmetry thesis generalises

We have proposed that symmetry in the delegation of powers is a useful criterion for assessing the legitimacy of the European border regime. However, we have also suggested that the criterion applies beyond migration control. In order to argue for the generality of the criterion, this section will first argue that the structure of the European border regime is a predictable outcome of its underlying incentive structures. This means that we might find similar legitimacy concerns in areas with similar incentive structures. Drawing on policy areas in the EU that feature different degrees of symmetry, we then argue that asymmetry is, in fact, a general source of legitimacy shortfalls.

Asymmetrical delegation and the logic of public goods provision

Since the integration of core state powers is generally more difficult to achieve than market integration (Genschel and Jachtenfuchs 2018), we expect that only the 'easy' areas get integrated in the short to medium run. Both the existence and shape of this asymmetry is predictable from a few basic assumptions about underlying incentive structures.

Border control is a 'weakest-link' public good. The main challenge in the EU is not that border countries lack the incentives to provide stronger border control, but that they lack the capacity (Ripoll Servent 2018; Eilstrup-Sangiovanni 2021). The allocation of asylum seekers, by contrast, is a zero-sum game. If one Member State accepts more asylum seekers, the 'burden' on others decreases. In zero-sum games, every actor has an incentive to shirk its responsibility and shift the burden to others. Even if

the EU is rhetorically committed to the protection of migrants, this incentive structure makes it difficult to achieve any significant transfer of power over asylum to the EU level (Lavenex 2018).

This discrepancy in incentive structures is not unique to the European border regime. We therefore suggest that our account of legitimacy is not only applicable to other cases of core state powers integration – it is *likely* to come into play.

Symmetry as a structural criterion of legitimacy: Three policy areas

To demonstrate the generality of our thesis, this section discusses two asymmetric areas and one symmetrical: The EU's monetary union, pharmaceutical policy, and external trade policy.

Many commentators have observed that the Eurozone is characterized by a fundamental asymmetry. Amy Verdun notes that the EMU was from the outset designed as an 'asymmetrical' union 'with the almost complete transfer of sovereignty in monetary policy to the European level, but with very limited transfer of sovereignty in economic policy making' (Verdun 1996, 65). When the 1992 Maastricht Treaty was negotiated, policymakers and social partners in fact saw an asymmetric monetary union as an attractive scenario. Price stability and exchange rate stability were important goals and easy to agree upon. They are public goods that benefit all participating states. Integration of fiscal policy, on the other hand, was seen as both unnecessary and undesirable. It is unavoidably redistributive according to a zero-sum game and hence harder to delegate to the European level. All this meant that the economic (or fiscal) part of the union was left 'deliberately underdeveloped' (Verdun 1996, 80). Just like in the case of immigration policy, the simple discrepancy in incentive structures might explain why one part of the regime was supranationalised and not the other.

The EU's pharmaceutical policy-making is another area that has been described as asymmetric. Permanand and Mossialos (2005) describes, using a term from Fritz Scharpf, a 'constitutional asymmetry' between the three dimensions of EU pharmaceuticals regulation: industrial policy, free movement and healthcare concerns, and public health policy (Permanand

and Mossialos 2005, 690). Whereas large parts of industrial policy are transferred to the EU level, issues of social policy (including public health) are more difficult to reach agreement on and remain largely in the hands of member states. The Commission has ‘essentially been forced into developing competencies wherever and whenever it could’, i.e. where integration is easily achieved. This has resulted in a strong bias towards industry interests in the regulatory regime (Permanand and Mossialos 2005, 705). For instance, the European Medicines Agency (EMA) governs marketing authorisation in the entire EU, vastly simplifying the application process for pharmaceutical companies, but important social policy issues of pricing and reimbursement remain under member states’ control (see also Garattini and Bertele’ 2001). Garratini (2016, 1) claims that although the EMA has made some progress towards better respecting consumer interests, it still ‘fails to put patients’ interests first’ due to its bias towards industry interests. Importantly, the bias is a result of the underlying asymmetry: ‘industry is able to exploit the imbalance and is therefore more influential than at national level where other interests may have more say’ (Permanand and Mossialos 2005, 704).

These two policy areas are different in most respects, but share the general structure of asymmetry. Easy parts of the policy area are supranationalised, while difficult parts remain under member state control. To be sure, we are not the first to point out these areas’ asymmetry. But, to our knowledge, few analyses fully cash out the implications of these policy areas’ asymmetry for their *normative legitimacy*. Both areas have seen legitimacy analyses structured around the familiar input-output paradigm, evaluating for instance their output effectiveness, deliberative quality, or procedural quality (Crum and Merlo 2020; Schmidt 2020; Wood 2021; Borrás, Koutalakis, and Wendler 2007). These analyses do not capture what we find to be most salient. If we are correct, input- or output-focused reforms of particular institutions within a policy area – for instance through the innovative use of public hearings in the European Medicines Agency (Wood 2021) – are unable to solve the *structural* source of legitimacy shortfalls we have identified. In order to be legitimate, an agent must be capable of discharging the remedial

responsibilities that arise in the domain in which it regulates directly.²² Hence, our proposed symmetry criterion can be read as a precondition for more substantive legitimacy standards (e.g., Sangiovanni 2019).

Compare this state of affairs to a European policy area that is *symmetrically* delegated: trade. The EU holds exclusive competences over external trade policy, negotiating deals on behalf of all member states. It operates as a single actor at the WTO and is frequently participating in its dispute settlement mechanism both as a complainant and defendant (Iglar 2021). External trade is a close parallel to immigration policy in some respects. It is a core area of a sovereign state's external affairs. It is an area where the EU acting in concert is a more powerful global actor than any individual state. But crucially, since the EU holds close to exclusive powers in the domain, it is equipped to bear responsibility for negative externalities generated by its policy – for instance by meeting as a defendant in WTO dispute settlements. The room for responsibility shortfalls is therefore small. The EU's actual practice as a trade power is still subject to debate, and may well face substantive legitimacy challenges (see, e.g., Meunier and Nicolaïdis 2006), but these are challenges that equally apply to powerful nation states. As we argued above, institutions might fall short of *substantial* legitimacy criteria even if they satisfy our structural criterion.

The survey of different policy areas in this section is unavoidably brief and cursory, and it only builds on existing research. It nonetheless suggests that our normative argument sheds light on areas beyond the European border regime, and hence suggests a new focus for debates over the EU's and its institutions' legitimacy more generally.

Conclusion

This article has made the case that legitimacy assessments of the EU's border regime should recognise the fundamental asymmetry that characterises that regime. An upshot of our analysis is that a one-sided focus on Frontex and its behaviour is non-exhaustive of a legitimacy

²² An early analysis by Verdun is prescient in this regard. She points out that part of the EMU's alleged 'democratic deficit' is a matter of managing externalities – in particular if the EMU moves beyond pure efficiency-oriented policy matters (Verdun 1998, 127).

assessment of the European border regime: Frontex's legitimacy is inherently linked to the functioning of the European asylum institutions.

The normative implication of our analysis is that the European border regime stands in need of reforms that would target this asymmetry. Note, however, that this does *not* necessarily mean that the EASO/EUAA must receive executive competences of the kind Frontex enjoys post-2019. The symmetry criterion could also be satisfied by stripping Frontex of some of these powers, relegating it to a coordinating agency. In which direction the symmetry is pursued will depend on further normative argument. Our criterion is thus non-exhaustive of a full legitimacy assessment of the EU's claims to authority in various areas. But should be read as an important starting point for normative approaches to the legitimacy of European integration.

We have also argued that our proposed legitimacy criterion generalises. The asymmetry we have described is likely to emerge wherever integration is more easily achieved in some parts of a policy area than in others. If the EU continues its integration of core state powers, similar asymmetries are therefore likely to lead to legitimacy worries in other policy areas. Normative debates over European integration should thus pay close attention to the *structure* of that integration. To that end, our article suggests that cross-sectional analyses of the (a)symmetry of institutional competences will be a fruitful avenue for future research on the EU's normative legitimacy.

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Article 4

Inductive risk and the legitimacy of non-majoritarian institutions

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Abstract: In political discourse, it is common to claim that non-majoritarian institutions are legitimate because they are technical and value-free. Even though most analysts disagree, many arguments for non-majoritarian legitimacy rest on claims that work best if institutions were, in fact, value-free. This paper develops a novel standard for non-majoritarian legitimacy. It builds on the rich debate over the value-free ideal in philosophy of science which has not, so far, been applied systematically to the political theory literature on non-majoritarian institutions. The paper suggests that the argument from *inductive risk*, a strong argument against the value-free ideal, (1) shows why a naive claim to value-freedom is a poor general foundation for non-majoritarian legitimacy; (2) provides a device to assess the *degree* of democratic value inputs required for an institution to be legitimate; which (3) shows the conditions under which a claim to *technical legitimacy* might still be normatively acceptable.

Keywords: inductive risk, legitimacy, central bank independence, non-majoritarian institutions, value-freedom

Introduction

What is required for non-majoritarian expert institutions to be legitimate? This central question for modern democracies is only growing in importance as ever more policy tasks are delegated to such institutions. Many debates over the legitimacy of non-majoritarian institutions revolve around the idea that these institutions are value-free. Proponents claim that non-majoritarian institutions are neutral bodies tasked with finding the objectively best way to pursue the goals set by politicians. Skeptics claim that facts and values are difficult or even impossible to disentangle, and that appeals to value-freedom are therefore bound to fail.

Despite value freedom holding such a central place, the political theory literature on the legitimacy of non-majoritarian institutions engages surprisingly little with the lively debate over the value-free ideal in philosophy of science. In the latter literature, the *value-free ideal* is commonly defined as the ideal that “social, ethical, and political values should have no influence over the reasoning of scientists, and that scientists should proceed in their work with as little concern as possible for such values” (Douglas 2009, 1). The ideal has historically enjoyed wide support, but recent arguments have seriously challenged its empirical tractability and normative desirability. One of the strongest arguments against the value-free ideal in contemporary philosophy of science is the *argument from inductive risk* (Rudner 1953; Hempel 1965; Douglas 2009). It says that any scientific decision entails a risk of error, i.e., uncertainty. When making a decision in the face of uncertainty, scientists are forced to choose which type of error they are more willing to accept—false negatives or false positives. What is worse, claiming that a substance causes cancer when it does not, or claiming that it is safe when it in fact causes cancer? Such choices are *value based*. They cannot be determined based on data or observation alone. The strong argument from inductive risk says that when there is a risk of epistemic error, and there are non-epistemic consequences of that error, values are not only warranted but *required* in the internal stages of science.²³

²³ The argument also comes in a weak variant. The weak says that values are warranted while the strong says that they are also required (see Gundersen 2021). The distinction should not make a difference for the argument presented here.

This paper has two goals. The first is to introduce the argument from inductive risk to the debate over the legitimacy of non-majoritarian institutions. I suggest that the argument from inductive risk is able to account for why a naive claim to value freedom is a poor general foundation for non-majoritarian institutions' legitimacy. The second, more ambitious goal is to use inductive risk to determine the legitimacy demands that non-majoritarian institutions face. The argument allows us to go further than simply saying that facts and values are often intertwined. Risk is not a binary; it is a scale. We can therefore use inductive risk as a *measure* of the amount of value input required for a non-majoritarian institution to be legitimate. The thesis I will defend in this paper, in brief, is the following: *The degree of democratic value input required for an institution to be legitimate increases with the institution's degree of inductive risk.*

This paper proceeds as follows. Section 2 surveys the major debates over the legitimacy of non-majoritarian institutions and argues that many strands of the literature may be unified under the term *technical legitimacy*, of which value-freedom is a key component. Section 3 presents the value-free ideal and the *argument from inductive risk* against it, and demonstrates how the argument applies to the legitimacy of non-majoritarian institutions. Section 4 operationalizes the two dimensions that make up inductive risk: uncertainty and consequences. They combine to make up a measure of the legitimacy demands facing different non-majoritarian institutions. Section 5 demonstrates its utility in a case study of an archetypal case of non-majoritarian delegation: independent central banks. Section 6 concludes.

The legitimacy of non-majoritarian institutions

Legitimacy is notoriously understood both as an empirical and a normative term. Empirical legitimacy tracks whether subjects believe they have substantive moral reasons to comply with an institution's directives. Normative legitimacy tracks whether subjects are right in their beliefs about these moral reasons to comply. An institution is normatively legitimate when acceptance of its directives would be expected from a rational person or from a rational process of deliberation (*E. O. Eriksen 2009, 27–28; Buchanan 2018*). There is a presumed link between normative

and empirical legitimacy. A complete lack of social acceptance would count against an institution's normative legitimacy. Empirical legitimacy tracks people's *moral* reasons to comply, not reasons based on fear, self-interest, and so on. The argument presented in this paper is normative, but empirical observations are admissible and informative parts of that argument.

The delegation of power to non-majoritarian institutions raises a basic democratic puzzle. Non-majoritarian institutions are unelected; they are not accountable to citizens in the traditional sense through a chain of delegation (*Maggetti 2010*). How can they then be legitimate?

A technical theory of legitimacy

A large class of answers to the problem of non-majoritarian legitimacy says that these institutions are legitimate precisely *because* of their removal from electoral politics. This premise is shared by analysts from the regulatory state literature (*Majone 1996*) and proponents of output legitimacy (*Scharpf 1999*), and it is echoed in two more recent volumes in the literature on unelected power (*Vibert 2007; Tucker 2018*). In empirical research, the bureaucratic reputation literature's idea of "technical reputation" reflects the same idea (*Carpenter 2010*). Theorists on the political uses of expert knowledge say that an organization may enhance its legitimacy by drawing on neutral expert knowledge – or by being seen as doing so (*Boswell 2009; Sabatier 1978; Weiss 1979*). In this section, I will unpack the underlying idea of technical legitimacy that all these approaches have in common and demonstrate how they depend on a claim to value freedom.

There are two main justifications for accepting or even requiring certain institutions' independence from majoritarian politics. The first is that non-majoritarian institutions ensure credible commitments to a policy that promotes the common good. Some decisions must be shielded from politicians who seek short-term gain (*Majone 1996; see also Tucker 2018; Jacobs 2016*). Politicians may, for instance, have an incentive to manipulate interest rates for short-term political gain, even when that generates inflation which leads to long-term economic loss. When politicians tie their hands by delegating the power to set interest rates to an independent central bank, they credibly commit to a certain inflation target (see e.g.

Kydland and Prescott 1977). The argument extends to all instances of regulation where there is a time-inconsistency problem. In these cases, an independent regulator would be more credible because of its independence from democratic politics (*Maggetti 2010, 3; Jacobs 2016*).

The second justification says that there is a democratic obligation of a political system to ensure the *epistemic* quality of decisions. Modern democracies are complex, and specialized agencies possess expert knowledge that other parts of the political system lack. The best way to safeguard the epistemic quality of certain decisions, therefore, is to delegate them to experts. Here, credibility is not the main concern. Instead, independence ensures that expert evaluations are free from political distortions. The epistemic justification is a large part of the idea of output legitimacy and can also be found in, for instance, republican theories of democracy (see *Holst and Molander 2019; Steffek 2015; Scharpf 1999; Pettit 2004*).

These two justifications often operate in concert. In a 2002 communication on the use of independent EU agencies, the European Commission writes: “The main advantage of using the agencies is that their decisions are based on purely technical evaluations of very high quality and are not influenced by political or contingent considerations” (*Commission of the European Communities 2002, 5*). We find here an explicit appeal to the (epistemic) quality of decisions and to their removal from political considerations.

In summary, credible commitments and the epistemic quality of decisions are often said to justify an institution’s independence from majoritarian politics. I will refer to arguments of this sort as appeals to *technical legitimacy*.

The elements of technical legitimacy

The two justifications above are, however, incomplete as foundations for legitimacy. For technical legitimacy to be defensible, it must ensure the *robust* satisfaction of the reasons that grant an institution’s right to rule (*Sandven and Scherz 2022, 7*). Three factors seem especially important in ensuring such robustness.

First, technical legitimacy does not make sense without the existence of a unitary and identifiable common good. For instance, Bickerton and Invernizzi Accetti describe technocracy as advancing an “unmediated conception of the common good.” There is an objective political truth or a science of the common good that technocrats (and by extension experts) have privileged access to (*Bickerton and Accetti 2021, 3; Bellamy 2010; see also Caramani 2017; Urbinati 2014; Gaus, Landwehr, and Schmalz-Bruns 2020*). A weaker version of the argument says only that experts are more likely to make conscientious and informed decisions about certain policies because they are free from the distorting incentives of majority rule (*Bellamy 2010*). Even the weak version, however, presupposes the existence of a political truth or unitary common good (see *Friedman 2019*) that is separate from the whims and wishes of the political majority.

Second, non-majoritarian institutions need to be able to access the “political truth” and know when they have done so. Technical legitimacy therefore appeals to *expertise* (*Holst and Molander 2017*). This will often be scientific expertise, but could also include risk analysis and other analytical techniques. For instance, we delegate power to a central bank not only because it is independent but also because we believe that it possesses some economic expertise that will lead to the price stability we entrust it to maintain.

Third, technical legitimacy relies on an allegiance to the value-free ideal. I will return to a detailed exposition below. For now, the ideal entails that technical evaluations should be kept separate from (political) values. The ideal is made explicit in the above quote from the European Commission, and it is empirically observed as a central part of agencies’ own legitimation and reputation management strategies (*Busuioc and Rimkutė 2020; Fjørtoft 2022; Fjørtoft and Michailidou 2021; Carpenter 2010*). Value-freedom implies a division of labor. Politicians make value choices and set goals for an agency, and the agency finds the means to reach that goal – guided by “purely technical evaluations” and free from political interference (see *Christiano 2012; Vibert 2007*). This division of labor, modeled on the Weberian division of labor between the bureaucracy and political leadership, has been described as the “dominant twentieth-century solution to the problem of expertise” (*Pamuk 2021, 8*).

In summary, the elements presented here make up a *theory of technical legitimacy*. Non-majoritarian institutions require independence from majoritarian politics to ensure credible commitments to, or the epistemic quality of, decisions. This is justified because they (1) are set up to promote an identifiable and incontestable common good, (2) hold expertise that makes them equipped to bring it about, and (3) engage in conduct that is *value-free*, i.e., restricted to technical matters. An argument claiming technical legitimacy seems more normatively defensible, and plausibly also empirically acceptable, where these conditions are in place. They may, however, be realized to different degrees in different existing institutions. In this paper, I will take aim at the third element: value-freedom.

Critics of technical legitimacy

Critics of what I call technical legitimacy have pointed out that as an empirical matter, facts and values are almost always entangled in political decision-making (A. Eriksen 2021; Føllesdal and Hix 2006). This objection is often phrased in practical or empirical terms, claiming that value-freedom is impractical, impossible, or rare. Take Richard Bellamy's objection as a typical example: "most 'purely' technical decisions raise normative issues and are often less clear-cut empirically than is claimed" (Bellamy 2010, 9). He continues that scientific arguments leave open normative questions about the solutions to problems; expert judgments contain discretion; different economic theories might disagree about interest rate increases or decreases (Bellamy 2010, 9). A slightly different charge is that agencies often perform political tasks *masked* as technical operation (Boswell 2009; cf. A. Eriksen 2021, 785). And scholars in the tradition of science and technology studies (STS) have argued that facts and values are particularly intertwined in *regulatory science*—for instance in the regulation of medicines or toxic substances—due to its place between ordinary research and policy-making (Jasanoff 2011).

Some critics go further than questioning value freedom on empirical terms. They challenge the conceptual possibility of a fact-value distinction altogether. This view is for instance found in the "strong program" in STS and in certain post-positivist approaches to policy analysis (see, e.g., Fischer 2009; Latour and Woolgar 1986; cf. Goldman and O'Connor 2021). Such

claims, however, challenge more than what is necessary for the argument in this paper. In order to make the maximally acceptable case for my argument, I argue instead that the value-free ideal fails even when upholding most premises of mainstream positivist science – including the fact-value distinction, the idea of hypothesis testing, and the premise that science is, and can be, truth-seeking. As such, it is a critique from within. In fact, the concept of epistemic error, a crucial component of the argument from inductive risk, only makes sense if the fact-value distinction holds.

In summary, the theory of technical legitimacy has been thoroughly challenged, but it is thriving as a normative ideal (see e.g. *Vibert 2007; Christiano 2012*) and an empirically observable legitimizing strategy (*Boswell 2009; Fjørtoft 2022; Maor 2007; Paul 2020; Rimkutė 2019*). I believe part of the reason for this resilience is that technical legitimacy is, in some cases, an appropriate standard. It seems clear that many proponents of technical legitimacy are too optimistic about the potential for neutral facts to directly guide policy decisions. But if democracy has an obligation towards the epistemic quality of decisions alongside its majoritarian or representative obligation, some decisions might legitimately be shielded from majoritarian democracy. This is not inherently undemocratic; it is a premise shared by many plausible theories of democracy (see, e.g., *Steffek 2015; Pettit 2004*). We need a measure of legitimacy that is open to non-majoritarian delegation, but which at the same time ensures that technical legitimacy does not overstep its boundaries. I suggest that the argument from inductive risk, from philosophy of science, provides such a measure.

The value-free ideal and the argument from inductive risk

In this section, I will briefly introduce the value-free ideal and show how the argument from inductive risk has been used in philosophy of science to refute it. I will then unpack the argument's constituent parts – uncertainty and consequences – and move on to show how it may apply to debates over non-majoritarian institutions' legitimacy.

The value-free ideal

The value-free ideal for science is the ideal that “social, ethical and political values should have no influence over the reasoning of scientists, and that scientists should proceed in their work with as little concern as possible for such values.” (Douglas 2009, 1). I follow Heather Douglas’ (2007, 2009) specification of the ideal that the *internal stages of science should be free from non-epistemic values*. There is a widely accepted distinction in philosophy of science between epistemic and non-epistemic values, and between the internal and external stages of science. Epistemic values are those constitutive to the pursuit of knowledge itself, for instance accuracy, internal coherence, and external consistency (McMullin 1982). Non-epistemic values are those that fall outside this demarcation, for instance personal, social or cultural values. The external stages of science regard everything that is conceptually outside the conduct of research: the choice of research topic, ethical limitations on methodology (for instance on the use of human subjects), the application of technologies emanating from the research, and policy implications derived from the research. The internal stage is the research process itself, including the collection, analysis, and interpretation of data.

The use of epistemic values in science, externally or internally, is widely accepted as necessary and desirable in modern philosophy of science. So is the use of non-epistemic values in the external parts of science (Douglas 2007, 121). For instance, we accept that some projects need approval by an institutional review board or an ethics committee before data collection can begin, and it is permissible to let the choice of research subject be guided by moral convictions (see, e.g., King, Keohane, and Verba 1994, 12).

What is problematic, according to the value-free ideal, is the influence of non-epistemic values in the internal parts of science. The value-free ideal offers to protect the epistemic integrity of science against the problem of wishful thinking, political motivations, economic interests, and so on (De Melo-Martín and Intemann 2016). This is intuitively appealing. Non-epistemic values in the internal stages of science seem to threaten the objectivity of, and trust in, scientific findings. According to the argument from inductive risk, however, the value-free ideal is not a good defense against these worries.

The argument from inductive risk

The argument from inductive risk was introduced by Richard Rudner (1953) and given its name by Carl Hempel (1965). In contemporary philosophy of science, the argument is most prominently developed by Heather Douglas (2000, 2009). It begins from the observation that no evidence can *guarantee* the truth of a hypothesis. The decision to accept or reject a hypothesis is therefore associated with risk, since accepting a false hypothesis or rejecting a true one can have serious social or political consequences (Contessa 2021, 354; Douglas 2000, 561). When deciding whether the evidence is strong enough to justify the acceptance of a hypothesis, scientists must make a value judgment over the ethical consequences of being wrong (Gundersen 2021, 163). Whenever such errors have non-epistemic consequences, non-epistemic values are thus not only permitted but required in science (Douglas 2000, 559). Scientists are morally responsible for their conduct as scientists, including the consequences of being wrong.

Take the example of null-hypothesis significance testing. Whether one should place the threshold for statistical significance (i.e., hypothesis acceptance) at a p-value of, for instance, $p < 0.1$, 0.05, or 0.01 is a choice that cannot be based on data, observations, or epistemic values alone. Even where a certain threshold, say, 0.05, is the de facto convention in a scientific community, it is not based on epistemic values or empirical observation. Any choice of threshold entails increasing the risk of either false positives or false negatives. One cannot reduce both types of error at once. One can only make trade-offs from one to the other (Douglas 2000, 566). The choice of threshold therefore comes with inductive risk and should be informed by the consequences of error.

A team of analysts in a tech company might for instance decide on a relatively low (permissive) threshold for hypothesis acceptance when running an A/B test of whether a red button on a website gives more clicks than a blue one. They believe the consequences of being wrong are small. Conversely, when evaluating whether a certain food additive is safe for humans, a team of scientists might set a high (restrictive) threshold for accepting the hypothesis that a substance is safe. They would rather conclude that a safe substance is unsafe than the other way around. Such

decisions are based on a normative judgment of the consequences of error in each case, one that comes conceptually prior to any assessment of evidence.

A classical defense of the value-free ideal says that scientists avoid the problem of inductive risk by refraining from accepting and rejecting hypotheses. They should instead assess the probabilities of hypotheses and communicate the relevant uncertainties to decision-makers. Decision-makers can then make the final decision, taking all risks associated with different options into account (*Jeffrey 1956*). Thus the internal stages of science remain value-free. But uncertainties are not always easily quantifiable and communicable. There is “second-order” uncertainty in the assessment of uncertainty itself, which in turn requires value judgments (*Steel 2016, 2015*). Furthermore, inductive risk permeates *all* stages of the research process and cannot be neatly circumscribed to the final stage (*Contessa 2021, 355*). According to Douglas (2000, 565), “A chosen methodology assumed to be reliable may not be. A piece of data accepted as sound may be the product of error. An interpretation may rely on a selected background assumption that is erroneous.” In all these cases, if there are non-epistemic consequences of being wrong, the researcher should consider non-epistemic values when making choices.

Applying the argument to non-majoritarian institutions

The argument from inductive risk is most often construed as an argument against value-freedom in science. But as we have seen, value-freedom is an ideal for non-majoritarian institutions too, and it is part of the technical argument for their legitimacy. Like scientists, non-majoritarian institutions make choices about the interpretation of data, thresholds for hypothesis acceptance, methodological approaches, the credence of existing research, and so on. The argument therefore bears on the value-freedom of non-majoritarian institutions.

Making the move from science to non-majoritarian institutions requires some clarification. There are two stages where inductive risk might come into play. The first is external, in the decision to delegate. To use conventional principal-agent terminology, the principal runs inductive risk whenever it decides to delegate to an agent. Principals might be wrong in their predictions about agents’ future conduct, and they might

be wrong about the predicted costs and benefits (in broad terms) of delegation. The principals facing inductive risk here are often elected officials. While I believe the concept of inductive risk can be fruitfully applied to this class of decisions, it is not the main target of my argument. Some of the relevant dilemmas are already captured in the delegation and accountability literature's concepts of agency capture and agency drift (See e.g. Schillemans and Busuioc 2015).

The other stage where inductive risk might come into play is internal, in the day-to-day working of unelected bodies. Agency experts face inductive risk in their decisions in a sense that resembles what scientists face in their work. Their actions also have non-epistemic consequences, since they are by design set up to exercise some form of public authority. This internal stage is the target of my argument here. It is not, however, completely decoupled from the act of delegation. It seems reasonable that principals should consider the inductive risk that agency experts will face (to the extent that they can predict it) when they consider whether to delegate to an independent body.

If there is inductive risk in non-majoritarian bodies' reasoning and decisions, technical legitimacy is not automatically an appropriate source of legitimacy. Values are unavoidable parts of the knowledge claims these institutions make. This undercuts the clear-cut division of labor presupposed by (naive) technical legitimacy.²⁴

On this point, the inductive-risk approach lands on the same broad skepticism towards technical legitimacy as many existing critiques. But it does so by another device, and its assessment of concrete cases therefore sometimes differs from existing critiques. Take one example. Analysts in the regulatory state tradition hold that an institution which generates

²⁴ Traces of inductive risk-based arguments, although not explicitly developed, are found in the literature on independent agencies. For instance, Madalina Busuioc implicitly makes an inductive-risk-based argument when she claims that "value judgments on the acceptability of risk are integral parts of scientific decisions and of the decisions of the [European Medicines Agency]" (*Busuioc 2013, 217*). She echoes Douglas's critique of the value-free ideal when she continues: "Such decisions are being taken exclusively by experts, under the guise of a formal, yet in this case de facto meaningless, separation between risk assessment and risk management" (218).

Pareto-efficient outcomes with no distributive consequences is legitimate despite (or because of) its lack of majoritarian democratic input. This argument has been central in discussions about the EU, independent regulatory agencies, and independent central banks (*Majone 1996; Maggetti 2010; Tucker 2018*). Critics have rejected that notion at the empirical level by showing that truly Pareto-efficient decisions are rare or by showing the redistributive consequences of specific decisions (*Dietsch 2020; Føllesdal and Hix 2006*). If a decision has redistributive consequences, the argument goes, it belongs in the political domain. Non-majoritarian institutions should not be allowed to decide who wins and who loses. Neither proponents nor critics, however, attach any probability to their claims about outcomes. They treat the expected outcomes of decisions as relatively fixed and certain.

If we allow for uncertainty around the expected outcomes of decisions, Pareto efficiency is not enough to legitimize non-majoritarian institutions. At this point I depart from, for instance, Føllesdal and Hix's influential critique of Majone (*Føllesdal and Hix 2006*). They hold that Pareto-efficient decisions are empirically rarer than Majone supposes, but they do not challenge the conceptual point that Pareto efficiency *can* be a source of legitimacy. They draw up a continuum from purely redistributive to purely efficient decisions, of which consumer product standards and safety protection are at the "efficient" extreme. They argue that such decisions "might best be isolated from political interferences once the laws and other standards are identified" (*Føllesdal and Hix 2006, 542*). As recent spats over the regulation of the herbicide glyphosate have shown, however, different regulatory agencies may land on opposite assessments of the same substance (see *Busuioc and Rimkutė 2020, 7*). This indicates that epistemic uncertainty is pervasive even at the purportedly efficient extreme of the spectrum. Due to inductive risk, then, value judgments are required even here, and Pareto efficiency is an insufficient basis for legitimacy.

Summing up, inductive risk provides an argument against a clear-cut division of labor between technical experts and value-laden politicians. This is not to deny that there might be good reasons, all things considered, to delegate tasks like consumer product standards and safety protection to an independent agency. But the legitimacy of such arrangements

should not be evaluated by an underdetermined notion of Pareto efficiency or a naive reference to institutions' value-freedom. Instead, it should be informed by the institution's inductive risk.

Note that inductive risk is unlikely to be the *only* salient factor when determining the legitimacy of an institution. My aim here is therefore not to offer a total, encompassing theory of legitimacy. A full assessment of an institution's democratic legitimacy is likely to involve a wider set of normative considerations – for instance, institutions must at least fulfill a “minimal moral acceptability” criterion to respect basic human rights (Buchanan 2018, 59). Moreover, my account is compatible with broader democratic theories that find grounds for legitimate non-majoritarian power in the quality of reasoning or deliberation of agencies and their delegating procedures (Downey 2020; A. Eriksen 2021; Holst and Molander 2017; van 't Klooster 2020). It expands on existing accounts by offering a concrete device by which to assess claims to technical legitimacy. By conceptualizing value input as a matter of degree, it is able to balance skepticism towards naive technical legitimacy against the need in modern democracies to delegate certain decisions to unelected expert bodies.

A two-dimensional concept of legitimacy

The previous section laid out the paper's first goal by providing an inductive risk-based argument against justifying legitimacy in a naive claim to value freedom via, for instance, Pareto efficiency. But the argument from inductive risk allows us to go further than simply saying that facts and values are often intertwined. Risk is not a binary; it is a scale. We can use inductive risk as a *measure* of the amount of value input required for a non-majoritarian institution to be legitimate. Where inductive risk is low, technical legitimacy runs into fewer problems than where risk is high.

When applying the framework of inductive risk to the legitimacy of non-majoritarian institutions, it is more fruitful to speak of an institution's average level of inductive risk rather than that of individual decisions. This shift requires an operationalization of the concept's two dimensions – epistemic uncertainty and consequences of errors.

Let me first clarify what I mean by inductive risk as a measure of legitimacy. It may be objected that the assessment of an institution's inductive risk is itself a decision that runs inductive risk, such that we only move the problematic division of labor one step further out by adopting an inductive-risk-based approach to legitimacy.²⁵ Against this, note that my account is a device for the normative assessment of institutions' legitimacy. It is not intended as a guide for political decision-makers to directly pick up and apply. To be sure, my argument has institutional consequences, which I will return to in brief below. But questions of institutional design and implementation are conceptually distinct from the question of normative analysis.

Second, what do I mean by *democratic value input*? I do not mean direct decision-making by majoritarian means. Epistemic decisions should not be made by plebiscite. The argument from inductive risk does not say that value judgments should play a *direct* role when making scientific decisions. They play an *indirect* role in evaluating the consequences of accepting or rejecting a claim. "Values weigh the importance of uncertainty, but not the claim itself" (Douglas 2009, 103). Making epistemic decisions by direct majoritarian means would give value judgements a direct role, harming institutions' obligation to safeguard the epistemic quality of their decisions. Institutions instead need democratic value inputs in an indirect role.

Third, where should the values that inform institutions' decisions come from? Heather Douglas suggests that scientists should use their own personal values in scientific decisions. This seems too contingent when applied to non-majoritarian institutions (see also Pamuk 2021, 16, for a critique). Instead, I take a cue from Andrew Schroeder's notion of democratic values. His contribution is concerned with trust in science, but translates well to non-majoritarian institutions. Democratic values, which he defines as the values held by the public and its representatives, are what non-majoritarian institutions should appeal to when value judgements are called for (see Schroeder 2021, 553). According to Schroeder, empirically informed political philosophy can tell us how to determine the values of the public. This may include some procedure like

²⁵ I am grateful to an anonymous reviewer for this objection.

a deliberative forum, citizen science initiative, referendum or opinion survey. The resulting values may be “filtered” and “laundered” to remove obviously illegitimate values (like racism) and clean up values based on, for instance, false empirical beliefs. While Schroeder acknowledges that it might sometimes prove difficult to determine what those democratic values are, he maintains that it, in many cases, would not be especially difficult to at least approximate a democratic values approach in science (*Schroeder 2021, 559*). While a full development lies beyond the present paper, it seems plausible that his approach would work equally well in the context presented here.

Epistemic uncertainty

There is epistemic uncertainty – i.e. a chance of being factually wrong – associated with the epistemic choices that non-majoritarian institutions make. The more uncertainty, the higher the associated inductive risk. And conversely, where uncertainty is very low – where we believe there is almost no chance of being wrong – there is little to be gained by considering the consequences of being wrong. This is not different from how we think about risk in everyday life. We do not go around considering the consequences of being wrong about our prediction that the sun will rise tomorrow, because the chance of being wrong is so small (see also *Douglas 2000, 577*).

Many analyses of non-majoritarian institutions implicitly or explicitly appeal to epistemic uncertainty when they construct typologies of expertise or independent agencies. Radaelli (1999) explicitly theorizes that uncertainty is one of two axes along which expertise use in the EU varies. Likewise, using different terms and definitions, Gormley (1986), Rimkutė (2015), Schrefler (2010) and Fjørtoft and Michailidou (2021) all employ concepts that can be restated as epistemic uncertainty. I suggest that institutions may, as a heuristic, be sorted by their expertise basis, where different expertise bases feature different average levels of epistemic uncertainty. It is widely agreed that certain natural sciences, like physics, are characterized by less epistemic uncertainty – for instance, measured by higher predictive accuracy or scientific consensus – than the “softer” sciences (*Smith et al. 2000; Fanelli and Glänzel 2013*).

Consequences of error

The other part of inductive risk is the consequences of error. Given the same error rate, if the consequences are serious in one case and trivial in the other, we expect decisions to be different. And again, determining the “seriousness” of a consequence is a decision based on values. In science, there might be some areas where making a wrong choice has no impact on anything outside that research project itself. In those cases, non-epistemic values do not come into play (*Douglas 2000, 577*). It might be relatively harmless to make a mistake in certain esoteric areas of theoretical physics (but see *Staley 2017* for a counterargument), while errors in nuclear science or in the evaluation of a large-scale policy intervention might have far-reaching consequences. This line of thought applies just as much to non-majoritarian institutions.

The consequences of a single decision can be captured quite straightforwardly. In Rudner’s terms, we should simply assess how serious, “in the typically ethical sense” (*Rudner 1953, 3*), the consequences of (for instance) mistakenly accepting or rejecting a given hypothesis would be. The *average* potential consequences of error in a non-majoritarian institution’s decisions would increase both with the seriousness of the domain in which it holds power and with the degree of power it holds over that domain. Life-or-death issues are more serious, in the typically ethical sense, than commissioning artworks for public buildings. An institution with direct decision-making power can do more damage than one with only advisory power (see e.g. *Scherz 2021*).

It may be objected that the potential adverse consequences of an institution’s decisions should, in fact, count *in favor* of its value freedom. In other words, higher consequences warrant *less* value input. The argument would run something like this: It would be catastrophic to determine by plebiscite decisions over, for instance, nuclear policy. Such decisions should be left to unelected experts precisely because of the potentially adverse consequences of error. Value input would increase the probability of error and is therefore a mistake.

This objection fails to appreciate that there is a distinction between independence, in the form of removing decisions from majoritarian democratic control, and value-freedom. Value input does not entail

granting *majoritarian* control over an epistemic procedure. The inductive risk-based approach only calls for the *indirect* use of values in weighing the consequences of error, not the direct use of values in making an epistemic claim itself. Epistemic claims should not be made by plebiscite at all. There is therefore no tradeoff, in my framework, between value input and epistemic accuracy.

Granted, the objection does show that adverse consequences could be one reason to support an institution's independence from majoritarian politics. But it does not refute the type of value input I am arguing for in this paper. We might in many cases want independent expert bodies deciding over technically complex matters with potentially serious consequences—precisely because we want to get things right. But due to inductive risk, experts in such institutions make all kinds of judgments and choices that are underdetermined by evidence alone. Experts should look to values when making such choices. These values gain more weight when consequences are severe than when they are trivial. And in the context of non-majoritarian institutions, these values should be *democratic values* as outlined above.

An inductive-risk-based measure of legitimacy demands

Combining the two dimensions, we have an operative understanding of inductive risk and its link to legitimacy. Inductive risk is a function of the probability of error and the consequences of that error. Fig. 1 is a graphical representation of the two-dimensional scheme. Inductive risk increases as you move up, to the right, or both.

What does the measure imply in practice, when assessing concrete institutions? I will discuss three scenarios, characterized by low, medium, and high inductive risk.

$$IR = C \times U$$

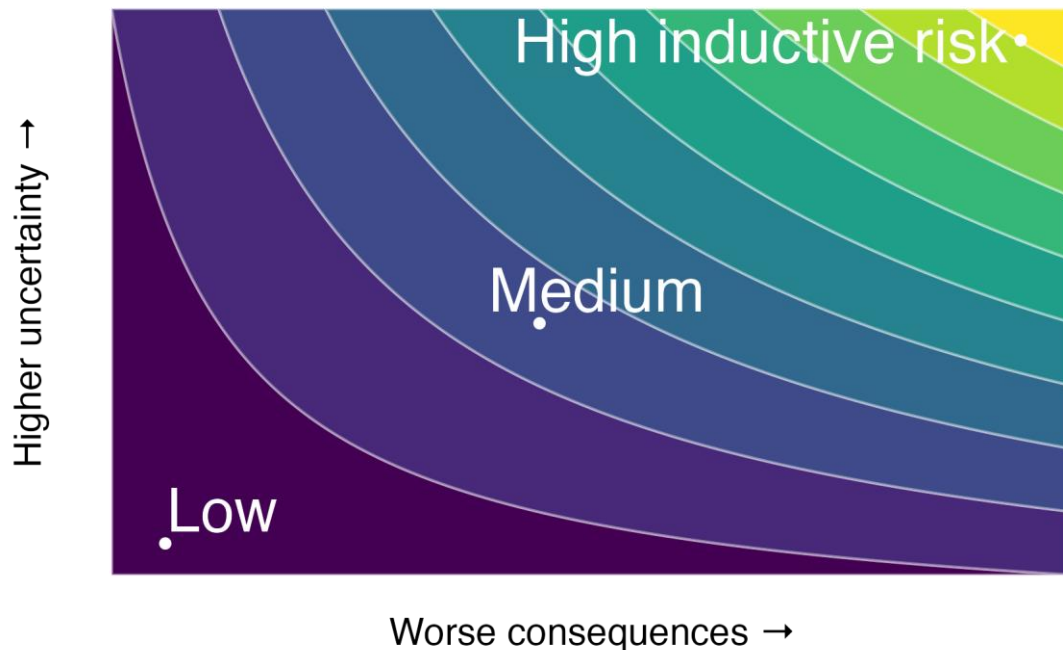


Figure 1: A two-dimensional scheme of inductive risk.

There might be good reasons to give much power to experts, with little political interference, over certain domains. The inductive risk-based approach easily allows this where inductive risk is low, either due to low epistemic uncertainty or low political power. For instance, EU agencies based on hard-science expertise, deciding over issues that are relatively restricted or specialized, might be legitimate even without a strong set of procedures for democratic value input. Importantly, such agencies are not legitimate because of their “purely technical evaluations” or Pareto-efficient outcomes. They are legitimate because their inductive risk is below some threshold for acceptable risk.²⁶ Accountability procedures, public consultations, and other procedures for value input are costly and might simply not be worth the effort. Note that even these agencies cannot claim absolute value freedom. A basic check on their use of values, however limited, is therefore warranted. A simple transparency criterion

²⁶ The important question of how to set that threshold is outside the scope of this paper. For the normative assessment of legitimacy, the threshold might be determined by substantive normative argument. Another option is to treat the threshold empirically as a given society’s risk tolerance.

might be enough. Agencies should be transparent about their value judgments and open them up to public scrutiny.

In the case of medium inductive risk, more value inputs are in most cases required. I will discuss a case of medium inductive risk in the case study below (sec. 5). Here, I show that independent central banks are often conceived as cases of *low* inductive risk, whose high independence is obviously warranted. I argue that their degree of inductive risk is higher and probably belongs in the medium category. Central bank independence cannot, therefore, be justified by reference to pure technical legitimacy. These institutions would benefit from integrating at least some degree of democratic values.

A third class of cases is where inductive risk is very high, either due to high epistemic uncertainty, consequences of error, or both. For these institutions, appeals to technical legitimacy are insufficient, and stronger mechanisms for value input are required for their legitimacy. Take one example. EU agencies exist not only in the classic areas of food safety and medicines regulation but also in fields further removed from “hard” science. For instance, the European Border and Coast Guard Agency, Frontex, has received new powers and a steadily increasing budget over the previous decade, making it a powerful agency with executive powers. It is still set up as an EU agency, which makes it formally independent from elected politicians. Crucially, the agency appeals to its independent expertise and its neutral, objective basis for operations – technical legitimacy – when legitimizing itself (*Paul 2020; Fjørtoft 2022*).

Surely the agency wields significant expertise in its risk analysis and vulnerability assessment units. But this expertise is characterized by high epistemic uncertainty. Migration risks are notoriously difficult to assess. Even in the agency’s own documents, we find warnings against conveying a “false sense precision” to decision-makers (*Fjørtoft 2022, 10*). Moreover, risk analysis and vulnerability assessments are linked to action via the so-called “right to intervene,” meaning that any errors in the assessments may have clear non-epistemic consequences – including direct effects on (prospective) migrants who are subject to Frontex’s Standing Corps. By the standards of inductive risk, therefore, the agency’s technical claim to legitimacy seems to fall short.

This does not mean that Frontex should be disenfranchised, but it means that its legitimacy cannot rest on independence and technical neutrality. Instead, it would depend on a robust mechanism for involving democratic values in the agency's decisions – not only in its operational branch but also in its analytical work. The concrete institutional setup of such an arrangement is beyond the scope of this paper, but a robust mechanism would likely include reform both of the agency itself and of other parts of the border regime (see Fjørtoft and Sandven 2022 for an extended argument).

Inductive risk in central banks: uncertainty and consequences

I have argued that epistemic uncertainty and consequences make up a two-dimensional measure of the degree of democratic value input necessary for an institution to be legitimate. One of the most clear-cut examples of non-majoritarian power in modern democracies is independent central banks' power over monetary policy. Some have gone so far as to label central bank independence a "free lunch" (Grilli *et al.* 1991, 375). But considerations of inductive risk have rarely figured in debates over central banks' legitimacy. If we take an inductive-risk-based approach, we see that the lunch might come at a cost after all.

In classical economic theory, the power to set interest rates is delegated to independent central banks because it solves a time-inconsistency problem. Politicians may have incentives to manipulate interest rates for short-term political gain to the detriment of the economy in the long run. Delegation is necessary for politicians' commitments to price stability to be credible and is therefore in the public interest. A central bank bases its decisions on macroeconomic theory. What happens, then, if there is inductive risk in macroeconomic theory?

Gabriele Contessa (2021) argues that there is. In the mid-20th century, the prevailing view in macroeconomic theory was that there was a trade-off between inflation and unemployment. This relationship – the so-called Phillips curve – was supported by empirical observations. It suggested a dilemma for policymakers: They could try to reduce inflation or unemployment, but not both. This picture started to show cracks in the

1960s. Milton Friedman and Edmund Phelps argued that the Phillips curve failed to take into account the inflationary expectations of economic agents (*Contessa 2021, 356*). Instead of a trade-off, there is a natural rate of unemployment corresponding to the equilibrium in the market for labor and goods. Attempts by politicians or central banks to drive down unemployment by expansionary monetary policy will work in the short term. But in the long run, unemployment will bounce back to its “natural” level while inflation remains high. This is often called natural rate theory. The theory implies that one should not try to control unemployment through monetary policy and that doing so might have detrimental effects. Furthermore, there is little to be lost by setting very low inflation targets, since unemployment is unaffected. If this theory is true, it clearly justifies delegation. Central bank independence, under this view, is a “free lunch.” There are benefits without apparent costs in terms of long-term macroeconomic performance (*Grilli et al. 1991, 375*).

But consider the following inductive risk: What if natural rate theory is not true? What if there is, instead, a long-term trade-off between unemployment and inflation? A zero-inflation target would in this case be poor economic policy. Akerlof and Shiller estimate the costs of pursuing a zero inflation target in such a scenario: “The calculated increase in the unemployment rate of 1.5% would render jobless 2.3 million people [in the US] ... [and] entail a loss of GDP of more than \$400 billion per year.” (*Akerlof and Shiller, cited in Contessa 2021, 360*).

Contessa goes on to present a case study of the Canadian central bank in the 1990s. It interpreted its mandate narrowly, as price stability above all else, believing this would lead to “a healthy economy” (*Contessa 2021, 363*). Yet the policy led to (or exacerbated) a recession in Canada. Pursuing a strict price stability mandate was in this case not only an error by some external benchmark. It was self-defeating by the bank’s own standards. It failed to bring about the central bank’s own goal of economic stability.

Other contributions support the argument that there is more inductive risk associated with central bank independence than has been commonly assumed. For instance, Hansen (2021) shows empirically that banking crises produce larger unemployment shocks when the level of central bank independence is high – but only when banks have a strict inflation-

centric mandate. If these arguments are true, a narrow focus on inflation fails, at least in certain cases, to bring about the outcomes it is theorized to bring about. This is a clear case of the non-epistemic consequences of epistemic uncertainty in macroeconomic theory. It is, in other words, a clear case of inductive risk.

Contessa, to my knowledge, is the only author who has explicitly linked central banks' use of macroeconomic theory to inductive risk. But he has not discussed the implications for central banks' legitimacy. Other recent contributions have been more explicitly concerned with central bank legitimacy and the ethics of delegation, but have not used the framework of inductive risk (see e.g., *Downey 2020; Dietsch 2020; van 't Klooster 2020*).

For instance, Jens van 't Klooster (2020) observes that central banks after the 2008 financial crisis started taking on new tasks. Even if we accept the premise that a narrow price stability mandate was adequate before the crisis, central banks now have “many more instruments to use in pursuit of a much less clearly defined set of goals” (*van 't Klooster 2020, 596*). Central banks now must consider a wider range of public interests, and this requires a rethinking of their mandates. In other words, their power has increased, and with it the potential consequences of their errors. The pre-crisis justification of central bank independence was adequate because the consequences of errors were (ignoring for now the counterarguments discussed above) relatively limited. With greater potential consequences comes greater legitimacy demands.

Taken together, the example of central banks illustrates the two dimensions of an inductive-risk-based account of non-majoritarian legitimacy. Strong central bank independence bound to a narrow price stability mandate is only normatively legitimate if epistemic uncertainty is low or if the potential consequences of errors are relatively limited. Both of these premises may be challenged. The inductive risk associated with central bank independence and the macroeconomic assumptions underlying it may therefore be so large as to undermine the classical argument for central bank independence. An immediate implication is that democratic values must to a greater extent be taken into account in central bank deliberations. Exactly how to ensure such value input, however, is beyond the scope of this argument.

Note that this argument does not invalidate the concept of central bank independence altogether. I agree with Jens van 't Klooster (2020, 587) that “it should in principle be permissible for governments to delegate political choices to unelected experts. ... What matters is whether the government has an adequate justification for its decision to delegate.” By my argument, that justification must include a way for central bankers to appeal to democratic values, instead of requiring them to “cloak their arguments in terms of the price stability mandate” (*van 't Klooster 2020, 597*).

Conclusion

This paper has argued that the amount of democratic value input required for a non-majoritarian institution to be legitimate depends on its inductive risk. Every choice in a truth-seeking procedure comes with uncertainty. There is a chance of being wrong. When there are non-epistemic consequences of being wrong, values are required when deciding what type of error, and therefore what consequences, we are more willing to accept. While the argument from inductive risk originated in philosophy of science, the paper has shown how it is applicable to non-majoritarian institutions.

The inductive-risk-based conception of legitimacy offers an argument against a naive claim to technical legitimacy. It is insufficient to justify the power of an institution by reference to its neutrality and value-freedom alone. Instead, such a claim must be made in consideration of the institution's inductive risk. We should only accept a claim to pure technical legitimacy when that risk is low. When inductive risk is higher, we should expect institutions to appeal more explicitly to democratic values and include a procedure by which to determine those values.

In practice, this means that an institution with limited power over a restricted domain, and whose decisions have low empirical uncertainty, might be relatively cut loose from procedures of democratic value input. But most real-world independent agencies carry some inductive risk, and some carry a lot. Wherever high-inductive-risk institutions are designed as highly independent bodies with a purely technical mandate, they should be reformed.

Some crucial questions are left for future analysis. Notably, a full account of the precise mechanisms for democratic value input is beyond the scope of this paper. By contrast to the dominant division-of-labor model, institutions' own experts must, in my account, make value judgments themselves. It is not sufficient to defer democratic control and accountability to a separate stage after the knowledge claims are sorted out. We need mechanisms that make sure that experts themselves are attuned to the values of their political society.²⁷ A range of mechanisms might be needed, depending on the level of value input required and on characteristics of the institution in question.

Finally, my argument has implications for an issue left untouched by this paper, namely the decision to delegate. Delegation is often unavoidable (at the very least because there is a limited number of elected officials) and often desirable, because it might bring the benefits that technical legitimacy promises. A possible implication of an inductive-risk-based account is that decisions to delegate power to independent expert bodies should be informed by a society's tolerance for risk in the relevant field. When the benefits of delegating certain decisions to experts outweigh the (inductive) risks, delegation should – all else being equal – be permitted (see also *Buchanan 2018*). If this line of thinking holds, two questions must be sorted out – whose answers are themselves characterized by epistemic uncertainty. How should we determine the expected benefits of delegation? How should we weigh benefits against risks? These questions merit further substantive analysis.

²⁷ A. Eriksen (2021) presents one possible model, which requires agencies to ground their value judgments in a publicly accessible framework of reasoning, like their mandate. Pamuk (2021) presents a more radical model of an adversarial “science court,” an idea which might be transferred to the specific context of non-majoritarian institutions.

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