

# 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 generalizes 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 (for example, 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 power. 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 characterized 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 I 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 II 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 III, we demonstrate the generalizability 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. The last section concludes.

## **I. The Asymmetry of the EU's Border Regime**

### *Research Design and Case Selection*

Whilst 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 II, however, our argument plausibly generalises 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 European Asylum Support Office (EASO) regulation (Regulation (EU) No. 439/2010); public draft versions of the new European Union Agency for Asylum (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 programmes 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 unauthorised 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 studies 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 co-ordinating (Börzel and Risse, 2018; den Heijer et al., 2016; Schimmelfennig, 2018). For instance, Genschel and Jachtenfuchs (2018) argue that ‘the Schengen agencies (...) are fairly small, weak and intergovernmental in structure’ (p. 183). Similarly, in a recent article, Kelemen and McNamara (2022) 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’ (p. 979). They argue that European leaders have treated external border controls in a legalistic manner, seeking co-ordination 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 (2022) 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’ (p. 981). 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 (2022) claim that ‘not one person directly employed by the EU is authorized to use coercive force to enforce EU policies’ (p. 972). Again, this fails to consider the border guards now directly hired by Frontex as part of the Standing Corps (see, for example, 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 recognize 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.<sup>1</sup> 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 co-ordinating agency (see, for example, Regulation 2007/2004,

<sup>1</sup> That said, we also disagree with the wholesale dismissal of the 2016 Regulation as inconsequential and without any supra-national elements. Notably, Frontex was granted the right to intervene with Member States. See, for example, Niemann and Speyer (2018, p. 28).

Art. 1(2)). It was small, wielded a relatively limited budget and held no supranational powers (Deleixhe and Duez, 2019; Wolff and Schout, 2013).

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-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. Whilst 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 (Deleixhe and Duez, 2019; European Commission, 2015b; Fjortoft, 2022; Niemann and Speyer, 2018).

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 institutionalisation 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 authorised 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. Whilst 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 recognises the link between a state and its officers as the action of the state, the same is not the case for the EU. Whilst 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 (CEAS).

### *The CEAS*

No corresponding development has happened in the CEAS. According to Sandra Lavenex (2018), whilst Europeanisation has been relatively strong for the strengthening of the EU's external borders (p. 1203), no meaningful integration steps resulted from the CEAS crisis (p. 1198). The CEAS has been labelled a 'continuing failure' (den Heijer et al., 2016).

One highly publicised 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 (den Heijer et al., 2016; European Commission, 2015a). 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 co-ordinating 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.

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In summary, an asymmetry has emerged in the European border regime between border control, which is increasingly supranationalized, 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.

## II. 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 (for example, 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. Focusing 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).<sup>2</sup>

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 fails 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 supports their claim to rule. An upshot of the lack

<sup>2</sup>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.

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 co-ordinating kind, harmonizing 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 co-ordinating rules for other institutions to enforce, and those that regulate directly, setting and enforcing rules (see 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 destabilized.

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 co-ordinating powers to executive powers, their internal structures of decision-making will make it harder to assess the individual contributions of each



authorizing agent, since there is discretionary authority on the part of the institution itself.<sup>3</sup> 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, creates 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 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 jeopardizes 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 characterized 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 characterized 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

<sup>3</sup>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 authorizing agents themselves.

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 stave 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 characterized 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 power to 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 do 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 focused on Frontex's behaviour. Instead, it should be recognized 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 (Cusumano, 2019; Lavenex, 2018; Murray and Longo, 2018; 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, whilst it avoids their overdetermination. Their analyses, being inherently sceptical towards the 'securitization of migration' (Chillaud, 2016; Horii, 2016; Léonard, 2010; Neal, 2009; 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

securitization, then the border regimes of states that take part in 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 (Tritschler, 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 overburdening 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.

### III. The Asymmetry Thesis Generalizes

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 are 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 (Eilstrup-Sangiovanni, 2021; Ripoll Servent, 2018). 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 characterised by a fundamental asymmetry. Amy Verdun notes that the European monetary union (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, p. 65). When the 1992 Maastricht Treaty was negotiated, policy-makers 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, p. 80). Just like in the case of immigration policy, the simple discrepancy in incentive structures might explain why one part of the regime was supranationalized and not the other.

The EU's pharmaceutical policymaking is another area that has been described as asymmetric. Permanand and Mossialos (2005) describe, 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, p. 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', that is, where integration is easily achieved. This has resulted in a strong bias towards industry interests in the regulatory regime (Permanand and Mossialos, 2005, p. 705). For instance, the European Medicines Agency (EMA) governs marketing authorization 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 Bertelé, 2001). Garratini (2016, p. 8) 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, p. 704).

These two policy areas are different in most respects, but share the general structure of asymmetry. Easy parts of the policy area are supranationalized, whilst difficult parts remain under Member State control. To be sure, we are not the first to point out the asymmetry in these areas. But, to the best of 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 (Borrás et al., 2007; Crum and Merlo, 2020; Schmidt, 2020; Wood, 2021). These analyses do not capture what we find to be most salient. If we are correct, input-focused or output-focused reforms of particular institutions within a policy area – for instance, through the innovative use of public hearings in the EMA (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.<sup>4</sup> Hence, our proposed symmetry criterion can be read as a precondition for more substantive legitimacy standards (for example, 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 World Trade Organization (WTO) and is frequently participating in its dispute settlement mechanism both as a complainant and defendant (Igeler, 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, for example, Meunier and Nicolaidis, 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 recognize the fundamental asymmetry that characterizes that regime. An upshot of our analysis is that a one-sided focus on Frontex and its behaviour is non-exhaustive of a legitimacy 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

<sup>4</sup>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, p. 127).



Frontex of some of these powers, relegating it to a co-ordinating 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 generalizes. 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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