From legal to administrative subsidiarity

Diagnosing enforcement of EU border control

Prof. Dr Adriaan Schout
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Clingendael Report

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Netherlands Institute of International Relations

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" Effective oversight is possible – provided democratic leaders take design problems seriously (Majone)

*   Majone, G. (1998). Europe's 'democratic deficit': The question of standards. European Law Journal, 4(1), 5-28. P25, emphasis added.

Executive summary

Towards multilevel enforcement systems

Enforcement is a major challenge in the EU's multilevel system. **Solving the tensions between sovereignty and interdependencies requires internalisation of the core values and objectives** embodied in EU legislation. Internalisation depends on strong involvement in all phases of policy-making through teamwork. States in the EU's multilevel administrative system have to regard themselves as fully responsible for EU policies. High levels of interaction among experts in enforcement contribute to the required professional cultures. In organisational terms, a multilevel (subsidiarity-based) administrative system is based on cooperation in which the centre (the Commission and/or EU agencies) assumes essential managerial roles without eroding the integrity of the member countries. The roles of the centre can often to a large extent be limited to ensuring that policy objectives are clearly identified, multilevel quality control and enforcement systems are in place, the relevant administrative networks function effectively, and organisational weaknesses are regularly diagnosed at national and EU levels.[1] **The centre needs to manage not to do everything itself: public management is managing through other organisations.** Ownership is not created through centralisation of tasks. It is the role of the centre to facilitate tightly connected inter-state cooperation. This includes a responsibility for managing mutual enforcement systems. It also necessitates that national officials see themselves as European public managers and not only as national negotiators. They have to know how to design enforcement systems. A legal *acquis* is not enough for EU policies to deliver results.

Subsidiarity is generally seen as a legal principle. This paper presents the practical governance consequences of subsidiarity. Subsidiarity is well grounded in the EU treaties. Yet, the implications are little understood by policymakers when it comes to creating the conditions for effective EU policies at the shop floor of national administrations.

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1   Schout, A. & Jordan, A. (2005). Coordinated European governance: Self-organising or centrally steered?. *Public Administration, 83*(1), 201-220.

In addition, when it comes to **enforcement, essential requirements that have to be met at the shop floor include transparency and depoliticization of fact finding**. This underlines the relevance of agencies at arms-lengths of governments. Combined, **this results in a subsidiarity-based model for enforcement centred around EU agencies and their national counterparts**. Apart from separating tasks, team-based agency networks help to build a shared professional culture. Relying on this approach, the EU has, despite major economic, historical and cultural differences between member states, been able to build effective multilevel administrative systems in areas such as food safety, aviation safety, competition policy, and approving medicines and chemicals.

Applying subsidiarity-based enforcement to the Schengen Evaluation Mechanism (SEM) and Frontex's Vulnerability Assessment we can **explain the difficulties Frontex experiences in being trusted as partner in regard to its place in EU border control**. Despite the legal classification as a decentralised agency, Frontex is regarded with apprehension due to the flavour of a centralised authority. In contrast, SEM has incrementally developed into a trusted monitoring and enforcement system that subsequently contributes to ownership. Nevertheless, SEM also has issues with transparency and politicization. The pragmatic development of SEM and Frontex has created confusion about what kind of administrative model the EU is designing when it comes the sensitive area of border control.

The interviews show why the SEM and the Vulnerability Assessment have *emerged* as they are. The experts involved have little expertise when it comes to *designing* effective, subsidiarity-based enforcement systems. This explains to some extent the difficulties the Schengen zone has with arriving at a working border control system. Both systems can be regarded as **'half-way houses'** in terms of agency-type arrangements (separation of roles of agency and Commission, teamwork, transparency, depoliticization).

The analysis allows the following **policy advice**:

1   Administrative subsidiarity is essential for the **integrity of national administrations** and for creating the **ownership for EU agreements** and values. Complex systems in dynamic environments have to be decentralised.
2   **Policy officials need to see themselves as European public managers**. Negotiating legislation is not enough. Policies should be implemented and enforced through well-designed multilevel European administrative systems that are transparent and based on reliable facts (depoliticised). Organisational expertise is required at EU and national levels that ensures that legal texts are transposed into effective, subsidiarity-based and transparent administrative structures.

3   **The design of both enforcement systems for border control (SEM and Frontex) are incomplete both in terms of subsidiarity-based governance and of EU agency arrangement**. SEM operates much more as a subsidiarity-based network compared to the rather centralised Frontex Vulnerability Assessment. As a corollary, the team-based SEM contributes to peer pressure and a professional culture. However, the transparency of the reports and recommendations is limited. SEM would benefit from an agency-type arrangement outside the Commission to ensure a separation between fact finding and reporting (agency task) and the formulation of recommendations (political task of the Commission). Frontex is less team-based and has even more issues with transparency. Hence, it would benefit even more from the elaboration as subsidiarity-based agency.

4   As a proactive initiative, a **wide analysis of EU enforcement structures should be initiated** to see whether they are subsidiarity-based and at sufficient distance from political decision making.

The findings of this policy brief can be generalised to other policy fields. Box 4 shows areas in which the EU may have followed, with limited or varying degrees of success, forms of centralised approaches. For example, arguably, the position of DG Ecfin could be reconsidered from the perspective of a network-based organisation whereas it now functions as central monitor and enforcer.

This paper builds on the idea that a strong EU has be based on strong member states.[2]

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2   (2017) *supra*. "The EU's existential threat: demands for flexibility in an EU based on rules", in: Pirozzi, N. (ed.) EU60: *Re-founding Europe*, Rome: IAI. http://www.iai.it/en/pubblicazioni/eus-existential-threat.

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1   Introduction: From enforcement to subsidiarity-based enforcement networks

How can the European Union be made more resilient? This question can be addressed by looking at the intersection between two related requirements of European law: **enforcement and subsidiarity**. Trust in the EU is based on, among others, its ability to deliver what has been agreed. Delivery involves creating national and European administrative systems that are able to implement, monitor and enforce agreements. Enforcement in the EU is organised on the basis of subsidiarity: member states are the primary enforcers. Moreover, subsidiarity is required in European administrative systems to ensure ownership. Yet, subsidiarity is not enough because monitoring and enforcement also demand interdependence: national supervisors need to be supervised. **How can multilevel enforcement systems be designed that do justice to both subsidiarity and interdependence?**

This policy brief examines whether difficulties with enforcement is a sign of deep-rooted problems in the relation between the EU's and national administrative systems. If a private sector organisations runs into difficulties, consultants are hired to diagnose and reform the organisational design of the company. At EU level, being confronted with policy failure, the primary reflex is to create new (generally: more) legislation. Organisational adaptations are rare, meaning that the EU is prone to **public management deficits**.[3] There is little attention for organisational diagnosis and there is **even less attention for diagnoses of multilevel organisational structures**.

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3   Kassim, H. (2015). Revisiting the management deficit: Can the Commission (still not) manage Europe?. *Critical perspectives on International Public Sector Management*, 4. 41-62. DOI: 10.1108/S2045-794420150000004003. See also: Metcalfe, L. (1992). After 1992: Can the Commission manage Europe? *Australian Journal of Public Administration, 51*(1), 117-130.

Figure 1 Frontex and Schengen evaluation and enforcement systems

Schengen Evaluation Mechanism (announced)	Frontex Vulnerability Assessment
A Standard questionnaire covering relevant legislation, agreed recommendations and best practices, is sent to the evaluated member states	A common VA methodology is created by the MB, at the proposal of the ED and in close cooperation with member states (e.g. in the VAN)
The commission plans the missions in a five year cycle, and creates a team out of nominated national experts	Frontex VA Unit sends a questionnaire to all member states on a yearly basis in which availability of technical equipment, systems, capabilities, resources etc. is assessed
An evaluation report including recommen-dations is drawn up by the team, and is sent to the Commision for final drafting	The VA Unit makes a preliminary VA and shares this with the member states concerned, to which member states can comment
The Commission communicates the draft report to the evaluated member states, on which it comments	The ED shall make recommendations in case the VA indiciates any weaknesses, in consulatation with the member states
The Commision proposes the recommendations, which are not open for discussion with the member states, to the Council	The ED monitors the implementation of the recommended measures
The Council adopts the recommendations	If there is the risk the member states misses the time limit for this implementation, the ED will inform the related MB member and enquire of the relevant states authorities the reasons for delay
The member states provides the Commission and Council with an action plan to adress deficiencies	If the member states has missed the deadline, the ED refers the matter to the MB and notifies the Commission
The Commission monitors the follow up (possibly through unannounced on-site visits)	The MB adopts a decision on the basis of the ED's proposal, which shall be binding on the member states
	If the member states does not comply, the Commission can propose in consultation with the Agency to the Council to take measures such as RABIT or deploying the standing corps
	The ED decides on an operational plan for this intervention, consultation with the member states
	If the member states does not comply with the council decision, the Commission can propose to the Council to reïntroduce border control (procedure at 29 (EU) 2016/399)

This makes the EU vulnerable to 'centralisation by default'.[4] Similarly, reflections on the roles of the European Commission, e.g. in relation to enforcement or to the management of European networks, are rare in EU policy circles. Yet, policy makers have more than a legal responsibility for sound policies: they are also **public managers** who have to ensure that the complexity of policy objectives are supported by sufficiently equipped multilevel administrative systems (see Box 1 on the difference between public and private management)**. But do (national) policy officials act as (European) public managers when for instance negotiating legal texts?**

The EU's policy challenges are never one-dimensional. EU crises, such as food safety, economic divergence, and consecutive migration crises, can only be understood through combining legal, political, economic and administrative lenses. The latter has received insufficient attention in policy-making circles. Section 2 discusses enforcement in terms of tension between the paradoxical relation between the sire for sovereignty and interdependence. Although interdependence often triggers claims for centralisation (as frequently happened in the interviews), this tension goes to the heart of international governance when subsidiarity-based solutions have to be found that combine respect for forms of sovereignty and management of interdependence. Subsidiarity-based management of interdependence is discussed in Section 3 and applied to enforcement in two case studies in border control (Section 4). Section 5 reviews achievements in border control. To underline the relevance of a subsidiarity-based administrative analysis, Section 6 concludes with policy recommendations.

This policy brief is based on two case studies of monitoring and enforcement of EU, viz. the Schengen Evaluation Mechanism (SEM) and the Frontex Vulnerability Assessment (VA). SEM is based on teams consisting largely out of national experts, whereas the latter is more centralised. Neither the SEM nor Frontex can be classified as effectively designed agency-type arrangements. This study utilizes information from 30 interviews that were conducted with experts and politicians specialized in the area of borders and migration management.

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4   See Schout, A. See also: Scipioni, M. (2018). Failing forward in EU migration policy? EU integration after the 2015 asylum and migration crisis. *Journal of European Public Policy, 25*(3), 1357-1375; Jones, E., Kelemen, R. D., & Meunier, S. (2016). Failing forward? The euro crisis and the incomplete nature of European integration. *Comparative Political Studies, 49*(7), 1010–1034.

Box 1   European public management

Management sciences is about ensuring effective and efficient design of processes and structures in private sector organisations.[5] How can management science be applied to effective European policies? *Private sector management* concerns the *internal management of the own firm* or organisation. *Public management* is about formulation of societal objectives that have to be implemented *through other organisations*. *European public management* is about getting things done through other *countries*.

Whereas management in the private sector can rely on hierarchical control within the direct line of control (internal management), public sector management relies on persuasion and co-optation of other actors (external management or 'governance'). The toolbox in the private sector includes the hierarchy and authority of command and control; the public sector toolbox is filled with different instruments. European public management requires loyal cooperation of EU member states. But loyal cooperation within the EU does no emerge automatically. Administration, management and governance can be used interchangeably and denote the deliberate attempts -including the instrumentalization- to shape and improve cooperation within and between organisations. 'Management' however emphasizes that 'getting things done' involves both ensuring cooperative processes as well as designing cooperative arrangements. This requires governance tools and structures.[6]

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5   Mintzberg, H. (1989). Mintzberg on management: Inside our strange world of organizations. New York City, NY: Simon and Schuster.
6   Schout, A., & Jordan, A. (2005). Coordinated European governance: Self-organizing or centrally steered? *Public Administration, 83*(1), 201-220.

2   The challenge of interdependence: EU border control

Border control goes to the heart of national **sovereignty**: it entails control over who enters the country. Regarding sovereignty, border control is on par with policy areas such as economic governance, social protection systems, and defence. In EU context, member states are highly **interdependent** in particular as a result of the internal market (four freedoms), shared stakes in common economic and political security, integrated banking (minimum requirements of capital buffers and financial accounting), etc.[7] In open markets and areas of free movement, supervision and enforcement are necessary to prevent shirking behaviour (e.g. waving through migrants) and begging thy neighbour policies (e.g. minimizing entitlements or closing borders individually). While governments are inclined to cut corners, the Commission struggles with its deliberative and political enforcement approaches.[8] This triggered former Italian prime minister Monti to issue a clear warning against politicisation and argued for "healthy impoliteness" in when it comes to enforcement.[9]

In terms of incentives to manage borders effectively, 'frontline countries' where migrants arrive are generally not migrants' preferred destinations. Countries of arrival and of transit have been given little incentives to monitor borders carefully and duly process migrants. Dilemma's of interdependency have included ineffective pressure on destination countries to share in relocation, entry countries refusing to accept assistance in controlling borders due to feelings of sovereignty, and member states not delivering the requested technical and material support. Moreover, Schengen countries (and, as appeared in interviews, also Frontex personnel) have violated human rights of migrants.

Interdependence in border control is regulated by a considerable *acquis* (Box 6 and 7). The challenge is enforcement. A brief comparison of the Frontex' Vulnerability Assessment and SEM shows that SEM is subsidiarity-based by working through mutual inspection teams composed of 2 Commission officials and 6-8 national experts (Figure 1). In contrast, the Vulnerability Assessment is a centralized monitoring system without on sight inspections. The methodology is produced in consultation with the national experts in the Vulnerability Assessment Network (VAN) but the evaluation is carried out by the Agency and the recommendations are formulated and bilaterally negotiated by the Executive Director with the member states individually. Frontex sends out the questionnaire, analyses the feedback, and discretely presents the recommendations.

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7   Vernon, N. (2020). The Wirecard debacle calls for a rethink of EU, not just German, financial reporting supervision. *Bruegel*. Retrieved from https://www.bruegel.org/2020/06/the-wirecard-debacle-calls-for-a-rethink-of-eu-not-just-german-financial-reporting-supervision/.

8   Andersen, S. (2012). *The enforcement of EU law: The role of the European Commission.* Oxford, UK: Oxford University Press.

9   Monti, M, (2011). Europe's problem – too deferential and too polite. *Financial Times*. Retrieved from http://www.emmabonino.it/press/world/9392

Box 2   Ownership for border control: Migrants drowning in Spanish waters

On the 6th of February 2014, Spanish border guards stopped illegal migrants from entering European soil near Ceuta, a Spanish enclave on the Northern shore of Morocco's Mediterranean coast. They did so by using riot-gear including rubber bullets, eventually leading to fifteen migrants drowning. This resulted in discussions in the Spanish media and parliament about the use of violence in border protection.[10]

This case shows the importance of ownership in combining sovereignty and interdependence. If the borders would have been guarded by European border guards, the EU would have always received the blame if migrants got through as well as in case of fatal accidents. Although guided by EU legislation, it is the responsibility of a member state to decide how to defend its borders (strict or flexible, through repression or via bilateral agreements). Moreover as the Spanish case shows, these fatal incidents lead to national investigations as well as EU investigations and public debates. This case highlights the sovereignty regarding border control and the need to preserve the national responsibility. Yet, it also underlines the EU legislation that acts as the reference point for the national and EU scrutiny. Whether it concerns national or EU legislation is of secondary importance, this discussion after the accident underlines the ownership in the national political debates.

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10   Abad, R. (2015). Investigation into death of 15 migrants on Ceuta beach dropped. *El Pais*, Retrieved from https://english.elpais.com/elpais/2015/10/16/inenglish/1444983469_974647.html. See also: Aribau, E. (2014). Spain says policy fired rubber bullets at migrants trying to swim to enclave. *Retuers*. Retrieved from https://www.reuters.com/article/us-spain-migrants/spain-says-police-fired-rubber-bullets-at-migrants-trying-to-swim-to-enclave-idUSBREA1C1MY20140213

3   Subsidiarity-based governance

Subsidiarity, sovereignty and ownership

In a joined-up world characterised by interdependencies, **member states can only be sovereign if values and objectives converge**. The feeling of sovereignty results from **ownership** (internalisation) of objectives and limits imposed by EU legislation (Box 2). This does not mean that room for manoeuvring is seriously impeded by EU legislation because, as in chess, rules open up a huge variety of options. Rules constrain as well as empower and can result in shared sovereignty if countries internalise the values. So, how can ownership of EU legislation be ensured? Part of the answer lies in two interlinked EU principles of 1) subsidiarity and 2) monitoring and enforcement. Subsidiarity ensures involvement -being part of it all- and requires matching political values, while enforcement puts a check on shirking behaviour and requires respect for the value of interdependence. Involvement and enforcement demand well designed EU networks. Such networks do not emerge out of thin air and are not self-steering; they have to be designed and managed.

The team-based approach in SEM and the centralisation in case of Frontex highlight important differences in ways of working and preferences. Some interviewed policymakers displayed a marked **preference for centralised solutions** with the strongest proponent of centralisation stating that "EU member states are a basket with some very rotten apples" and suggesting that some unwilling countries cannot be "educated" (Interview 9). Yet, organisational science posits that complex and dynamic systems demand decentralised (subsidiarity-based) structures with a view to being adaptive and closely linked to local circumstances and preferences.[11] However, references to 'centralisation' or 'decentralisation' are misleading – they are two sides of the same coin. Any form of decentralisation requires adaptations at central level. Hence, subsidiarity cannot be understood outside the EU's system of horizontal and vertical governance and enforcement. **Preferences for either centralisation or decentralisation in the interviews display a wide-spread lack of knowledge of the design of subsidiarity-based governance structures composed of national roles, EU roles, network arrangements and the various instruments to support the functioning of the system**.

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11   Simon, H. A. (1988). The science of design: Creating the Artificial. *Design Issues, 4*(1/2), 67-82. See also: Mintzberg, H. (1979). An emerging strategy of "direct" research. *Administrative Science Quarterly, 24*(4), 582-589.

Box 3   Subsidiarity in article 5.3 of the Treaty of the EU

"Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol."

Box 4A   Task complexity in border management

EU border management links to a wide spectrum of tasks. This includes very practical matters such as customs (levying duties, preventing illegal trade) and guarding Border Crossing Points (BCPs) to check legal and illegal migration flows. Border control also demands mechanisms for asylum including offering assistance regarding fundamental rights, managing return operations and detaining, crime prevention. In addition, border control also demands risk assessments concerning possible external threats. These tasks are specified in EU legislation and code books such regulation 2019/1896 on the European Border and Coast Guard Agency, regulation 2016/399 on the Schengen Border Code, the Dublin Convention, the Charter of Fundamental Rights, and Frontex' Code of Conduct guidelines.

Box 4B   Institutional complexity: organisations involved in border management

At the national level, the EU's multilevel system of border control involves coordination between national land border and sea border guards, army, police, customs, anti-fraud units, the relevant ministries and their executive offices (e.g. asylum or detaining offices), national parliaments and municipalities.

At the European level, there are the related European Border and Coast Guard Agency (EBCGA), Schengen Evaluation Unit (SEM) of the European Commission, European Commission, European Council, European Parliament as well as the related EU agencies (Eurojust, European Asylum Support Office (EASO), Europol, Interpol, European Maritime Safety Agency (EMSA), European Fisheries Control Agency (EFCA), European External Action Service (EEAS), European Satellite Center (EU SatCen), and the European Agency for Fundamental Rights (FRA). Numerous NGOs are involved, such as Amnesty International, European Council on Refugees and Exiles, Human Rights Watch, Medicins sans Frontiers, Red Cross, Save the Children and, UNHCR.

From legal subsidiarity to administrative subsidiarity: The case of enforcement

Network-based enforcement systems offer not only practical advantages, there is also a legal imperative (see Box 3) that boils down to the obligation to safeguard the ability of member states to act.[12] Centralisation might offer advantages in individual areas but collectively it erodes national institutional capacities and will negatively affect involvement in EU policy-making and national ownership. Questions of administrative subsidiarity are at stake in probably most EU policy areas. Box 5 lists a number of policy areas where administrative subsidiarity might need to be reconsidered in view of safeguarding the integrity of national governance systems.

The legal preference for subsidiarity-based design does not mean that every EU-related task can be organised on the basis of national administrations and expertise. There are contingency factors to be taken into account. A distinction can be made between:

1 **Full subsidiarity**: All member states have their own capacities. This can be regarded as the standard option in which interdependence is organised through EU cooperative systems.
2 **Selective subsidiarity**: Not all member states can afford, or need to have, a department for a specific task. For example, a fully equipped national aviation safety agency is not always necessary or feasible e.g. because the national airport is not an international hub.
3 **Centralisation** (supranationalisation): Tasks can also be organised directly at EU level. It is hard to see which tasks should be really centralised both in terms of centralisation of final responsibility and of organisation. Competition policy (exclusive competence), for example, was first centralised in 'DG IV' and is now managed through the European Competition Network. Technically, even supervision of 'too-big-too-fail-banks' –an ECB task- could be done through teams of national experts. Full centralisation is probably primarily the result of political preference, distrust or ignorance regarding alternative –subsidiarity-based- governance modes.[13]

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12 European Parliament (n.d.) The principle of subsidiarity. *Fact sheets of the European Union*. Retrieved from https://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity. It is important to note that the Treaties mark a legal distinction between an exclusive and non-exclusive competence. From a public management perspective, this distinction does not exist. Tasks can be executed by member states (subsidiarity) under the authority of the Commission. For example, competition policy is an exclusive competence but national authorities occupy equal positions in the European Competition Network (ECN). Similarly, questions can be asked concerning the strong role of the ECB in economic and monetary policy and why national Central Banks have not acquired more prominent roles in, for example, writing studies.

13 Compare to the more general tendency to monopolise expertise in the Commission at the expense of the position of member states. See also: Schout, A. & Nunes, A. (2019). The European Commission in balance? Ambition, organisation and power. *Clingendael*. Retrieved from https://www.clingendael.org/publication/european-commission-balance.

Box 5 Examples of areas with insufficient attention for subsidiary-based governance/enforcement

The available comparative sector reviews suggest that a common notion of multilevel European enforcement is missing. As a result, the creation of a shared professional culture has been lacking and this can be regarded as one of the reasons for the lack of ownership for EU norms.

– **EMU:** attempts have been made to set up independent national economic and fiscal authorities. **DG Ecfin** and the **European Fiscal Board** dominate this area and they do not seem to function as network bodies implying a *centralisation* of economic and fiscal supervision. The functioning of the national economic and fiscal bodies is highly uneven across the member states. The question is why, after a decade of experimenting with national and EU supervision, a subsidiarity-based European monitoring system is not emerging. Similarly, **the ECB** could have relied more on the national Central Banks e.g. in terms of producing studies EMU related studies. Knowledge, expertise, and hence ownership, slips away to Frankfurt.

– In **banking supervision** there also seems to be a discussion about either central or decentralised supervisions. The scandal in the German fintech company Wirecard resulted in a demand from the EU Commission for an inspection by the EU's banking agency ESMA partly because of differences in national supervision. Centralised inspections instead of mutual inspections appear to be preferred.[14]

– Although not directly linked to enforcement, the **European Investment Bank** is a huge financial institution. It also works with national investment banks. Yet, the question has to be raised whether maximum use is made of the subsidiarity principle in the (mutual) selection and (mutual) monitoring of projects and whether a team-based system exist of visitations of the national bodies.

– **Rule of Law**. Although there are numerous networks tying the different strands related to the quality of rule of law together, these networks seem to be highly uneven in terms of functions and strengths.[15]

– **European statistics** are current gathered by all national statistical offices that each collect the full gamut of statistics. 'Vision 2020' of the EU Commission envisioned a specialisation of EU statistics so that not all member states would continue to have their own independent statistical offices.[16]

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14 Rotteveel, M. (2020). Laat een Spaanse toezichthouder eens naar Duitse bedrijven kijken. *Financieel Dagblad*. Retrieved from https://fd.nl/beurs/1349510/laat-een-spaanse-toezichthouder-eens-naar-duitse-bedrijven-kijken?utm_medium=social&utm_source=twitter&utm_campaign=SHR_ARTT_20200630&utm_content=beursradar. See also Genschel, P. & Jachtenfuchs, M. (2016). More integration, less federation: The European integration of core state powers. *Journal of European Public Policy, 23*(1), 42-59.

15 Schout, A., and M. Luining: 'Rule of law policy: ambitions without strong networks', in: Schout, A. and W. Zweers (2018) (eds), *State of the Union 2018: towards better European integration*, The Hague, Clingendael. https://www.clingendael.org/pub/2018/clingendael-state-of-the-union-2018/11-eu-rule-of-law-policy/

16 Schout, A., & Mijs, A. (2016). The governance of the European Statistical System: coordinating expectations. *Clingendael*. Retrieved from https://www.clingendael.org/sites/default/files/pdfs/The_Governance_of_the_ESS.pdf.

Enforcement, depoliticization and agencies

Monitoring and enforcement are first of all activities of **depoliticised fact finding and reporting**. The subsequent step is the political phase of deciding on recommendations. This entails political value judgements including on how fast changes can be implemented. The final judge-like legal enforcement demands depoliticisation. Hence, depoliticization is not the opposite of political decision-making but **depoliticization is part of political decision-making** (fact finding, reporting and the actual enforcement).

Complementing independent monitoring and political enforcement can be done by separating tasks through creating agencies staffed with independent experts instead of national officials. Inspired by good practices at national levels, the EU started to experiment with enforcement agencies in the 1990s and incorporated it in its Good Governance policies.[17] In practice, EU agencies work in close cooperation with national agencies (subsidiarity-based governance). The **advantages of working through EU agencies** organised on the basis of cooperation with national agencies are:

– EU agencies contribute to separating fact-finding and political decision making. By working with national agencies, EU agencies contribute to better governance throughout the EU. Team-based EU agencies contribute to the development of shared professional values in national and EU experts. Hence, EU agencies can contribute to ownership for EU values.
– Agency-networks keep the integrity of national administrative systems intact. There is only a limited number of tasks that can be taken out of national administrations without eroding the full political responsibilities and potentials of national governments.

The EU has created relatively few agencies (40-60; depending on the definition of 'agency') and most have not developed into independent bodies due to overreliance on the Commission, restrictions in terms of tasks and transparency, and political interference (see border control below).[18] Yet, some highly successful networked EU agencies exist in for example food safety, aviation safety and competition policy. These are team-based with a relatively small EU agency that acts as hub in the network of national counterparts. Even though these areas are also of major political, economic and cultural importance, subsidiarity-based governance has proven to be effective.

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17   White Paper on Good Governance. COM(481) 2001.
18   Schout, A. (2018) *EU agencies after 25 years, Clingendael, Policy paper*, 17 December 2018.
     https://www.clingendael.org/publication/eu-agencies-after-25-years

Box 6   Current regulations governing EU external border management

Official name(s)	Regarding	Details
Treaty on EU & Treaty on Functioning of the EU	General	(TEU) art 3.2 and (TFEU) art 67 and 77 form the **legal basis** for common external border management policy.
Regulation (EC) 539/2001	Visas	Further governs which TCNs are subject to visa requirements to enter the Schengen zone, and which are exempt from it.
Regulation (EC) 767/2008	Visa Information System (VIS)	Defines the purpose, functionalities and responsibilities of the VIS, specifically relating to conditions and procedures for the exchange of data between member states on applications for **short-stay visas** and the decisions taken.
Regulation (EU) 439/2010	European Asylum Support Office (EASO)	Establishes the Asylum Support Office to **strengthen and develop coordination between member states in the field of asylum**.
Regulation (EU) 603/2013	Eurodac	Establishes a system for the comparison of **fingerprints** for the effective application of Regulation (EU) 604/2013.
Regulation (EU) 604/2013	Dublin III regulation	Establishes (and revises) criteria and mechanisms for determining the member states **responsible for examining an application** for international protection lodged in one of the member states by a TCN or a stateless person
Regulation (EU) 1051/2013	Reintroduction of internal border control	Provides common rules on the temporary reintroduction of border control at internal Schengen borders in exceptional circumstances
Regulation (EU) 1052/2013	The European Border Surveillance System (EUROSUR)	Establishes EUROSUR to strengthen the exchange of **information and operational cooperation** between national authorities and Frontex by providing infrastructure and tools needed to improve situational awareness and reaction capability
Regulation (EU) 1053/2013	The Schengen Evaluation Mechanism (SEM/Scheval)	Establishes an evaluation and monitoring mechanism to verify the application of the Schengen acquis in 6 areas, including external border management.
Delegated Regulation (EU) 1271/2013	Framework financial regulation	Establishes broad principles and basic rules applicable to Union bodies that receive contributions charged to the budget.
Regulation (EU) 515/2014	The Internal Security Fund (ISF)	Establishes, as part of the ISF, the instrument for financial support for external borders and visa.
Regulation (EU) 516/2014	Asylum, Migration and Integration Fund (AMIF)	Establishes the Asylum, Migration and Integration Fund.
Regulation (EU) 656/2014	Surveillance of external sea borders	Establishes rules for surveillance of external sea borders in the context of operational cooperation coordinated by Frontex.
Regulation (EU) 2016/1624	The European Border and Coast Guard Agency (EBCGA)	Establishes and regulates the **EBCGA**, a decentralised agency in charge of coordinating and monitoring member states external border management (for instance through its VA), as well as monitoring migration flows (through its RA).

4 Subsidiarity-based enforcement of EU border rules: Scheval and the Frontex Vulnerability Assessment

Monitoring and enforcing the rules that define the EU borders is a major challenge. Apart from feelings of sovereignty and major differences in border control practices and cultures, difficulties are also caused by the EU's external land borders stretching over 10.000 km, including approximately 300 international airports, and covering 43.000 square kilometres of sea.[19] Across these borders, there has been a total passenger flow of 293 million border crossings in 2019. Illegal border crossings increased from approximately 43 thousand in 2012 to approximately 1,2 million in 2015 and has since then dropped steadily. Managing the Schengen sea, land and air borders encompasses a wide set of tasks (box 4A), governed by EU legislation, practices (consolidated in code books) and forms of formalised solidarity. The tasks also relate to a wide set of related institutions and organisations (Box 4b).

These sensitivities, complexity and dynamics stand in sharp contrast to the carefree removal of internal borders that was agreed in Schengen on June 14th in 1985.

Both SEM and Frontex play important and overlapping roles in the coordination and monitoring of external border management and protection. In its conception in 1985, the Schengen convention was basically regarded as a spin-off of the Common Market programme. Gradually it became part of the EU's securitization in the face of an unfriendly external world and developed pragmatically in relation to new situations such as the terrorist attacks in 2001 and 2004, and new migration flows following the Arabic spring and the refugee crisis of 2015-2016. The introduction of open borders can with hindsight be regarded as a leap into the dark with little concern for pitfalls or multilevel design in terms of required capacities and enforcement mechanisms. Lack of concerns for the appropriate design and the meaning of subsidiarity in border control can be read in the minutes of the Dutch Cabinet meetings disclosed in 2017. The minutes demonstrate that the accession of Greece in 1991 did not result in concerns over its porous borders next to unstable regions. The Greek question was discussed in relation to the feared loss of interest in the UK to join the Schengen agreement. Politics, not the technical details mattered (not unlike other leaps into the dark that caused serious enforcement problems such as Monetary Union and the big-bang enlargement).

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19   Brady, H. (2012). *Saving Schengen. How to protect passport-free travel in Europe. London*, UK: *Centre for European Reform*.

Regulation (EU) 2017/2226	The Entry/Exit System (EES)	Establishes the EES to register entry and exit data and refusal of entry date of TCNS crossing the external borders of member states and determines conditions for access to the EES for law enforcement purposes.
Regulation (EU) 2018/1240 and (EU) 2018/1241	European Travel Information and Authorisation System (ETIAS)	Establishes possibilities to collect information, in a centralised manner, on the **movements of non-EU nationals that do no require visa to enter the Schengen area.**
Regulation (EU) 2018/1726	The European Union Agency for the Operational Management of Large-Scale IT systems in the Area of Freedom, Security and Justice (eu-LISA)	Revises the mandate of **eu-LISA**, responsible for the operational management of SIS, VIS and Eurodac, giving the agency further capacities to contribute to border management, law-enforcement cooperation and migration management.
Regulation (EU) 2018/1861	Schengen Information System (SIS)	Further develops **SIS** as an essential tool for the application of the provisions of the Schengen acquis as integrated into the framework of the European Union, by supporting **operational cooperation** between national authorities, border guards, the police, customs authorities, immigration authorities, and authorities responsible for the prevention, detection, investigation or prosecution of criminal offences or execution of criminal penalties.
Regulation (EU) 2019/817	Interoperability	Establishes a framework of **interoperability** between EU information systems in the field of borders and visa, specifically pertaining to SIS, VIS, Eurodac, EES and ETIAS.
and Regulation (EU) 2019/1896	The European Border and Coast Guard Agency (EBCGA)	In 2019, the EBCGA's mandate was expanded, and it received its own means and powers to protect external borders, for instance with its **standing corps with executive powers**.

The migration crises in the 2010s shook the EU more than the first euro-crisis.[20] It also highlighted ongoing design problems with politicized external border management and internal border control, leading to larger roles for the Commission in approving the reinstitution of internal border control in 2011 and the codification of rules (pertaining to external border management, information systems, combatting crime etc.) in the Schengen Borders Code in 2016 (see Box 8 for an overview of legal changes and codifications).

The current subsidiarity-based design of **the Schengen evaluation mechanism** can be traced back to its intergovernmental origins. At first, a small secretariat was placed in the Council[21] and a supervisory mechanism was added in 1998.[22] In 2013, with the formalization of the SEM (see Box 8), the Commission took over the coordinating role and now acts as a small hub that coordinates and co-chairs (often leading in practice) the evaluation teams. Reports and the proposed recommendations are written by the cross-national evaluation teams, finalized by the Commission and approved by the Council (Figure 1). The interviewees all agreed on the value of this team-based approach.

Tensions surrounding **Frontex**' centralization have existed from the beginning. Its original name was the European Agency for the Management of Operational *Cooperation* at the External Borders, and its most important task concerned monitoring migration flows with its Risk Analyses. However, Belgium, France, Italy and Spain, supported by the Commission, were already researching the feasibility of a European Border Police in 2001. Following the 2015 migration crisis, Frontex transitioned into the EBCGA in 2016 (although in practice the name 'Frontex' remained), and 'cooperation' was taken out of its name. In combination with (EU) 2019/1896 introducing the standing corps of 10.000 border management staff (albeit only a few thousand of these will be Frontex' own border guards), it has grown into an agency with centralizing tendencies demonstrated in its additional tasks (and the obligations for Schengen countries) that go well beyond coordinating and supporting members. These include the deployment of own equipment, Frontex' role in evaluation and enforcement, the creation of Frontex Liaision's Officers in member countries, its roles in establishing relationships with third countries, its involvement in organizing return operations, and its increased influence on border management related policy-making. Although the regulation offers a mixture of language that combines subsidiarity and more centralistic tones, in reality Frontex is rather centralized. As the interviews show, this limits peer pressure and offers little in terms of building a shared professional expert culture.

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20   Börzel, T. A., & Risse, T. (2018). From the euro to the Schengen crisis: European integration theories, polticization, and identity politics. *Journal of European Public Policy*, 25(1), 83-108. DOI: 10.1080/13501763.2017.1310281

21   Council Decision 1999/307/EC

22   SCH/ Com-ex (98) 26 def.

Box 7 Expected and pending priority proposals of legislation governing EU external border management

Official name(s)	Regarding	Details
A new pact on Migration and Asylum	Proposal by the Commission for a new pact regarding migration and asylum	Has been postponed to be published in Q2 of 2020.
2018/0329 (COD)	Returning illegally staying TCNs	Pending proposal for a directive on common standards and procedures in Member states for **returning illegally staying third-country nationals**
2019/0002 (COD)	ETIAS	Pending proposal for a regulation to establish conditions for **accessing other EU information systems for ETIAS purposes** and amending Regulation (EU) 2018/1240, Regulation (EC) No 767/2008, Regulation (EU)2017/2226 and Regulation (EU) 2018/1861
2016/0141 (COD); 2016/0139	Obligatory TCN possession of visas and exemptions	Pending Proposal for a regulation amending Regulation (EC) No 539/2001 listing **the third countries whose nationals must be in possession of visas** when crossing the external borders and those whose nationals are **exempt** from that requirement (Turkey and Kosovo)
2016/0131 (COD)	EASA	Pending proposal for a regulation on the **European Union Agency for Asylum** and repealing Regulation (EU) No 439/2010
2017/0245 (COD)	Reintroduction of internal borders	Pending proposal for a regulation amending Regulation (EU) 2016/399 as regards the **rules applicable to the temporary reintroduction of border control at internal borders**
2016/0132 (COD)	Eurodac	Pending proposal for a regulation on the establishment of **'Eurodac'** for the **comparison of fingerprints** for the effective application of Regulation (EU) 604/2013, for identifying an illegally staying third-country national or stateless person, and on requests for the comparison with Eurodac data by Member states' law enforcement authorities and Europol for law enforcement purposes
2016/0133 (COD)	Dublin III	Pending proposal for a regulation establishing the criteria and mechanisms for determining the **Member state responsible for examining an application for international protection** lodged in one of the Member states by a third country national or a stateless person.
2016/0222 (COD)	Asylum reception	Pending proposal for a directive laying down standards for the **reception of applicants for international protection**.
2016/0223 (COD)	Qualification TCNs, refugees, etc.	Pending proposal for a regulation on standards for the **qualification** of third-country nationals or stateless persons as beneficiaries of international protection, for a **uniform status for refugees** or for persons eligible for subsidiary protection and for the content of the protection granted and amending Directive 2003/109/EC
2016/0224 (COD)	Common procedure international protection	Pending proposal for a regulation establishing a **common procedure for international protection** in the Union and repealing Directive 2013/32/EU
2016/0225 (COD)	Resettlement	Pending proposal for a regulation establishing a **Union Resettlement Framework** and amending Regulation (EU) No 516/2014

Although regulation 2019/1896 underlines that "Member States shall retain primary responsibility for the management of their sections of the external borders …. in accordance with the principle of subsidiarity"[23], the regulation also emphasizes the roles of Frontex in a plethora of articles without referring to possible contributions of the member states. When asked why such a considerable number of articles were centralistic in tone, one of the interviewees wondered: **"should subsidiarity be discussed in relation to each article?"** (Interviewee 11b). This confusion surrounding questions of (legislative) design surfaced regularly in interviews. When discussing the importance of using correctly designed models of subsidiarity and proportionality, an interviewee for instance responded that this was difficult as "you should pay attention to that, yes. But on the other hand, interviews complained about the "hugely" complexity (Interviewee 13a), commented that subsidiarity is a "vague term" and impossible to define (Interviewee 4c), and that "structural ambiguity" about agreements was necessary to arrive at compromises (Interview 30).

5   EU border management

Achievements: Major improvements but unfortunate trajectories

Frontex and SEM have a reputation of being weak in terms of ensuring effective management of both internal and external EU borders.[24] Despite attempts at strengthening their mandates since 2011/2015, the start of 2020 reflected the apparent problematic shape of Schengen (concerning internal borders and the impact of SEM) and Frontex, with both the impact of the COVID-19 pandemic on intra-EU borders, and the tensions at the Greek-Turkish border. Nevertheless, at the operation level, the quality of border management has been vastly improved over the past 15 years. Border systems

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23   Regulation (EU) 2019/1896 article 7, see also: preambule 22

24   See: Börzel, T. A., & Risse, T. (2018). From the euro to the Schengen crises: European integration theories, politicization, and identity politics. *Journal of European Public Policy, 25*(1), 83-108; Carrera, S., Blockmans, S., Gros, D., Guild, E. (2015). The EU's response to the refugee crisis taking stock and setting policy priorities. *CEPS essay*. Retrieved from https://www.ceps.eu/system/files/EU%20Response%20to%20 the%202015%20Refugee%20Crisis_0.pdf; Deleixhe, M., & Duez, D. (2019). The new European Border and Coast Guard Agency: Pooling sovereignty or giving it up?. *Journal of European Integration, 41*(7), 921-936.; Jordana, J., & Trivino-Salazar, J. C. (2019). EU agencies' involvement in transboundary crisis response: Supporting efforts or leading coordination? *Public Administration*, 1-15; Niemann, A., & Speyer, J. (2018). A neofunctionalist perspective on the 'European refugee crisis': The case of the European Border and Coast Guard. *Journal of Common Market Studies, 56*(1), 23–43.; Schimmelfennig, F. (2018). European integration (theory) in times of crisis: A comparison of the euro and Schengen crises. *Journal of European Public Policy, 25*(7), 969–989.; Slominski, P., & Trauner, F. (2018). How do member states return unwanted migrants? The strategic (non-)use of 'Europe' during the migration crisis. *Journal of Common Market Studies, 56*(1), 101-118.

2016/0176 (COD)	High skill employment TCN	Pending proposal for a directive on the conditions of entry and residence of third country nationals for the purposes of highly skilled employment
2018/0250 (COD)	Internal Security Fund (ISF)	Pending proposal for a regulation establishing the **Internal Security Fund**
2018/0248 (COD)	Asylum and Migration Fund (AMF)	Pending proposal for a regualtion establishing the Asylum and Migration Fund
2018/0249 (COD)	Integrated Border Management Fund (IBMF)	Pending proposal for a regulation establishing, as part of the **Integrated Border Management Fund**, the instrument for **financial support for border management and visa**

have become highly interconnected through a multitude of networks for instance concerning information systems (think of the Entry and Exit System (EES), European Travel Information and Authorisation System (ETIAS), European Border Surveillance System (EUROSUR), Visa Information System (VIS) and the Schengen Information System (SIS). Furthermore, member states are on a regular basis interconnected in a variety of governance mechanisms. For Schengen, this concerns the SEM and the Commission Committees and Council working parties. For Frontex, member states and Frontex cooperate closely in crises situations and meeting in the Management Board, Vulnerability Assessment Network and Frontex Risk Analysis Network in which the methodologies are discussed. The Frontex Liaison Officers also a role in the day-to-day exchanges. These developments, together with the political crisis at the EU's borders and the recent realisations in Italy and Greece that things are different (the waving through of migrants is no longer an option), have resulted in different postures of the Greek and Italian governments.[25] The interviews pointed to a lack of 'bite' but this changed with the renewed political realities resulting from the threat of closing internal borders.

Frontex also contributed to a growth in reserve capacities (e.g. the rapid reaction pool and mandatory contributions of the member states). According to interviews, as the recent crisis showed, the member states are also more willing (and quicker) to contribute, making responses to crisis situations more effective and contributing to a more efficient use of coordinated material.

Subsidiarity-based shared ownership?

SEM has resulted, according to interviewees, in the required professional culture that goes together with the internalisation of objectives. As one interviewee stated: "[I] mentioned a few times mutual trust, collegiality. This is exactly the atmosphere in our [Scheval] teams" (Interviewee 28). Another remarked: "I would prefer it if monitoring [by Frontex] was done in the manner in which 'Schengen' is organized. Then there doesn't need to be a layer above that." (Interviewee 2c) The interviewees pointed to quite some problems they have with Frontex, for instance regarding slow, untransparent and "polished" reporting, albeit Scheval also suffers from this, especially when it comes

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25   Furthermore, Frontex has become better able at providing training to both European and third-country nationals on border management. This includes the training it provides to experts part of the SHEVAL, which it started in 2009. Also, with its growth in budget and capacities, it has acquired its own standing corps and materials, which are operated under European flag. Furthermore, the EU's ability to negotiate deals (for instance with Third Countries) has been considerably more recognised and utilized within the EU as well as externally. Frontex is also strongly represented in a network of border management and related matters through its cooperation with other EU bodies such as EEAS, EASO, Europol, FRA, UNCHR, IOM, EMSA and Europol.

to transparency of results and recommendations open to the public and influenced by the Council. (Interviewees 2c & 21). Some interview (Interviewees 13, 14 & 19) indicated that Frontex has created feelings of uneasiness and is regarded a threat to national sovereignty. One interviewee even remarked how: "you see nonstop when Europol, Eurojust and the EBCG visit [the EP], saying: 'we need more staff, more competences'. That they're almost living an own life. That isn't the case for 'Schengen': there is no one there that visits us for this. I see the EBCG as a person that represents itself, that's not really the case for Schengen" (Interviewee 13b). The interviews refer to tendencies of expanding tasks, stronger cooperation with other external EU agencies, and developments akin to "a European army" (26), a "police agent" (2c), a "master" (2c) and the creation of "Frankenstein's monster" (4b). This case study of Frontex suggests that the image of centralisation creates mixed feelings, including confusion as interviewees often lacked sufficient knowledge to link the experienced conflicts with Frontex and SEM to design issues e.g. regarding transparency or politicization.

The interviews did show that tensions are expected to grow if the standing corps of 10.000 experts matures. Other interviewees welcomed the trend towards centralisation but also emphasised that it is unlikely to be accepted by member states. This again suggests insufficient awareness of proper design and that especially Frontex has not been able to become a highly regarded evaluation and enforcement model focusing on facilitating ownership, subsidiarity, depoliticized fact finding and transparency. Administrative subsidiarity might have to be the starting point for further development and **the interviews suggest that the model of SEM (with a few tweaks to account for transparency and depoliticization) could act as inspiration here.**

6   From design to policy advice: Frontex and the Schengen secretariat as agencies

This analysis does lead to the identification of weakness in subsidiarity-based design and underlines the importance of ensuring that policy officials know more about how to design effective EU systems.

The subsidiarity-based design of the Schengen evaluation has contributed to creating a professional culture and stimulated a sense of ownership. There is a high level of transparency within the teams of the peer reviews, stimulating learning from another and leading to reputational enforcement (interviewees 2c, 11b, 27, 28 & 29). However, concerning **enforcement**, neither the reports nor recommendations are publicly available (and can only be found in general terms in Council conclusions), making public naming and shaming difficult. The advantages of separating fact finding and transparent reporting from the political phase of formulating recommendations and enforcement have not been achieved, as the Council is the one that has to eventually vote on the recommendations – causing political concerns to be taken into account with possible enforcement more than appropriate (interviewees 2c, 13 & 21). As one interviewee describes: "It is still a peer-review based system in the sense it's based on recommendations, but these recommendations are not acted upon. Just the exact same ways as in the Eurocrisis, the Commission does the EU Semester and has recommendations and all of this, and then they just get ignored" (Interviewee 22).

Frontex lacks team-based cooperation with national experts, limiting building ownership and peer pressure. Frontex also has problems with transparency, as the discussed discreetness with which results are discussed and recommendations are presented do not lead to learning, nor to professional or public naming and shaming cycles. Moreover, the role of the executive director in enforcement was a recurrent theme: "[He] is very much a product of the system [the political constellation of member states and Commission], so the Management Board of Frontex loves him. Because he's quite conservative and he's very placating towards the countries – and doesn't make them uncomfortable".

Box 8   An overview of the development of and changes in border management legislation

3A   The development of the Schengen Acquis

Year	Regulation
1985	**Schengen agreement**: the very first agreement to abolish internal borders
1990	**Schengen Convention:** creation of the Schengen area and common visa policy
1999	**Amsterdam Treaty:** incorporation of Schengen agreement into the juridical mainstream
2006	**Regulation (EC) 562/2006** establishing a Community Code on the rules governing the movement of persons across borders: Schengen Border Code
2008	**Regulation (EC) 296/2008** amending Regulation (EC) 562/2006 as regards the implementing powers conferred to the Commission: amended a few articles concerning the implementing powers of the Commission in line with regulation (EC) 2006/512 EC.
2009	**Reguluation (EC) 81/2009** amending Regulation (EC) 562/2006 as regards the use of the Visa Information System (VIS): amended the SBC to rules originating from Regulation (EC) 767/2008 on the VIS, for instance requiring member states to update the EP and the Commission on the amount of visas granted **Regulation (EC) 810/2009** establishing a community code on Visas: the Visa Code
2010	**Regulation (EU) 265/2010** amending SBC and Schengen Agreement as regards movement of persons with long-stay visa
2013	**Regulation (EU) 610/2013** amending SBC, Schengen Agreement in order to align the SBC more with the TFEU and the TEU. **Regulation (EU) 1051/2013** amending SBC in order to provide for common rules on the temporary reintroduction of border ocntrol at internal borders in exceptional circusmtances **Regulation (EU) 1053/2013** establishing an evaluation and monitoring mechanism to verify the appliaction of the Schengen acquis: this regulation created the SEM and repealed Executive Decision (SCH/Com-ex (98) 26 def) on the Standing Committee on the evaluation and implementation of Schengen.
2016	**Regulation (EU) 2016/399** on a Union Code on the rules governing the movement across borders (SBC): codified the 2006 SBC, to clarify it

The interviews displayed a considerable level of confusion regarding the elaboration of Frontex. Essentially, it seems that interviews have little idea of what to expect of an EU agency (and of Frontex). Some interviewees were so frustrated with EU border control that they, on the one hand, felt the compelling need to create **a centralised EU border and coast guard**: a body that is "no longer dependent on the agreement of the member states" (Interviewee 27). However, on the other hand, they also saw that this was politically impossible. This confusion is two-fold. First, interviewees often lacked the organisational knowledge to adequately reformulate Frontex and SEM in terms of subsidiarity- and network-based agencies. Second, the current design of Frontex and SEM just *is* confusing: the evaluation mechanisms SEM and Frontex' VA seem to be **half-way houses**, first of all, somewhere between a normal political bureaucracy and an independent agency. Secondly, somewhere between a – quite centralised – Commission system and a subsidiarity-based system.

This focus on subsidiarity-based design leads to **recommendations** to **turn SEM into an agency format** (subsidiarity-based and with well-defined independence), and to further **decentralise Frontex** (turning it into a subsidiarity-based agency). Concerning the Schengen evaluation mechanism, although the Schengen secretariat in the Commission is not an EU agency, in terms of tasks (inspection) and way of working (working with the first-line inspectorates) SEM could be improved by **separating the Scheval secretariat from the Commission and transform it into an EU agency**. The current staff could, as agency staff, continue to support the high professional standards that currently exist. The separation from the Commission would facilitate **depoliticisation** of fact finding and it will increase **transparency** if, as can be expected from an agency, its fact findings are made publicly available. As a result, a higher level of **peer pressure** can be expected and a stronger push towards the required professional culture.

Member states and EU commission can be **expected to oppose such a transition towards elaborating the subsidiarity-based agency model** for different reasons.[26]

More ownership for EU policy objectives is possible if this is based on profound participation of national institutions in enforcement. However, this will require national and EU policy officials who know how to translate legal subsidiarity into organisational subsidiarity when design EU policies. As it is now, the EU still suffers from management deficits. As it now stands, there is too little attention for, and knowledge of, administrative subsidiarity.

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26   We know from earlier studies that Commission officials are for various reasons not in favour of seeing their position reworked into an agency-function. Moreover, partly based on misunderstandings about the roles of EU agencies and fear of tighter control, member states are also reluctant to create additional EU agencies. E.g. Schout (2011), 'Framework for assessing the added value of an EU agency' Journal of Public Policy, 31(3), 363–384.

3B   The development of the EBCGA ('Frontex'))

Year	Regulation
2004	**Regulation (EC) 2007/2004** on the establishment of the European Agency for the Management of Operational Cooperation at the External Borders of the Member states of the EU
2007	**Regulation (EC) 863/2007** establishing a mechanism for the creation of Rapid Border Intervention Teams: introduced the RABIT options and regulated the tasks and powers of guest officers
2011	**Regualation (EU) 1168/2011** ammending regulation (EC) 2007/2004: further enhanced the role of the Agency in line with the introduction of IBM, as communicated in Council conclusions on IBM in december 2006. Special focus was placed on respect for human rights, specifically the prohibition of refoulement, better planning and implementation of operations, research and risk analysis.
2016	**Regulation (EU) 2016/1624** establishing a European Border and Coast Guard (Agency)
2019	**Regulation (EU) 2019/1986** on the EBCGA: enforced its existing mandate, most importantly through the creation of a standing corps