

Editorial

Regulation and Enforcement in the EU: Regimes, Strategies and Styles

Madeleine de Cock Buning
Annetje Ottow
John Vervaele*

Introduction: A RENFORCE special issue

This special issue of the *Utrecht Law Review* focuses entirely on the topic of ‘Regulation and Enforcement in the EU: Regimes, Strategies and Styles’, a subtopic of the Utrecht Law School’s RENFORCE research programme. The Utrecht Centre for Shared Regulation and Enforcement in Europe (RENFORCE) focuses on the relationship between regulation and enforcement at the interplay of national, European and other levels of government as well as private spheres of regulatory enforcement. RENFORCE, hosted by the Europa Institute of Utrecht University, seeks to combine legal research with research from other disciplines, such as economics and political science, that helps to provide a better understanding of these phenomena. About 30 senior researchers and a number of PhD students participate in the Centre. RENFORCE initiates and stimulates collaborative research among its researchers (who have professional backgrounds ranging from EU law, criminal law, economic public law, social law, administrative law to civil law) and with researchers from outside our group. RENFORCE is also a platform for the exchange of ideas between academics and practitioners.¹

The special issue reflects on the current discussions on mixed regulation and enforcement regimes in the EU and aims at gaining an insight into the variables that determine which regulatory and enforcement instruments, and at which level, are most suitable for attaining the set policy goals: the quest for the optimal mix.

The issue consists of two separate, but connected, parts. The first part is dedicated to shared private-public regulatory and enforcement regimes. It harbours research that maps these alternative forms of regulation and enforcement, and it also analyses this research and contributes to the main research question: ‘Which factors determine the optimal mix of regulation and enforcement instruments?’ These key factors are identified through several case studies (media, gender, competition), in order to discover how the effectiveness of regulation and enforcement is influenced. The second part focuses on shared national-European regulatory and enforcement regimes. This part is comprised of research on the

* Prof. M. de Cock Buning (e-mail: m.decockbuning@uu.nl), Professor of Copyright, Media and Communications Law, Utrecht University School of Law, chair of the Dutch Media Authority and vice-chair of the European Regulators Group for Audiovisual Media Services. Prof. Dr. A.T. Ottow (e-mail: A.T.Ottow@uu.nl), Dean of the Faculty of Law, Economics and Governance, Utrecht University, and a non-executive board member of the British Competition and Markets Authority. Prof. Dr. J.A.E. Vervaele (e-mail: J.A.E.Vervaele@uu.nl), Professor of Economic and European Criminal Law, Utrecht University School of Law and Professor of European Criminal Law, College of Europe/Bruges. The guest editors are affiliated to the Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE).

1 For more information see <<http://renforce.rebo.uu.nl/en/over-ons/#>>.

interrelations between European and national regulatory and regimes and the tendency towards shared regulatory and enforcement strategies between the EU and the Member States.

1. Part I: Shared private-public regulatory and enforcement regimes

1.1. Research context

The section of this issue on the search for the optimal mix of private and public arrangements should primarily be situated in the current discussions on the need for stricter compliance with the law through different supervisory arrangements (national and European) and different enforcement instruments, on the one hand, and a smaller government with a lower budget on the other. In fact, regulators have to attain better results with fewer resources. The resources available to supervisory authorities and enforcement agencies have decreased significantly due to the financial crisis.² Secondly, merging regulators seems to be the trend in order to increase efficiency and effectiveness. This also leads to the search for new forms of enforcement. See, for instance, the merger of the National Competition Authority (NMa) with the Independent Post and Telecommunication Authority (OPTA) and the Consumer Authority to form the ACM, the Authority for Consumers and Markets in the Netherlands, or the merger between the Office of Fair Trading (OFT) and the Competition Commission to form the CMA, the Competition & Markets Authority in the UK.

Apart from these trends, there is a general movement towards shifting the responsibility for compliance to society (trust-based supervision), in order to decrease the costs of regulation and to contribute to the efficiency and effectiveness of enforcement. Enforcement should be done together with citizens and the sector by means of shared responsibility creating public value for a better society.³ Furthermore, a number of research reports have been published in the last few years which were initiated with the objective of mapping the causes of failed supervision.⁴ These reports usually conclude that supervision in that specific area has failed (to a greater or lesser degree) and needs to be adapted, thereby increasing the need for more supervision. At the same time these reports prompt others to scrutinize supervisory authorities as they raise questions as to whether 'they are doing their job'. This increases the need for more accountability: the authorities need to clarify how they deploy their resources and whether they work effectively. Results must be measurable. All these developments together stage the quest for an optimal mix.

The research questions that the first part of this issue on 'Regulation and Enforcement in the EU: Regimes, Strategies and Styles' aims to answer are: Which enforcement strategies can be identified? What kind of enforcement mix of public and private instruments is used? Which factors are of influence, and which instruments have been chosen? Which conditions can be identified to effectuate these instruments? What lessons can be learned from the shift reverse from private to public? What lessons can be learned for policy makers in general?

2 M. Morawski et al., 'Trends in toezicht: middelen, prestaties', 2013 *Tijdschrift voor Toezicht*, no. 2, pp. 43-51.

3 WRR Report 'de Toekomst van de Nationale Rechtsstaat', no. 63, 2002 and WRR Report 'Toezien op publieke belangen, naar een verruimd perspectief op Rijkstoezicht', no. 89, 2014.

4 In the Netherlands five such reports have for instance been published in the last few years: A.J.C. de Moor-van Vugt et al., *De bevoegdheden van De Nederlandsche Bank inzake Icesave, onderzoek in opdracht van het Ministerie van Financiën*, 2009, available at: <<http://hdl.handle.net/11245/1.308394>> (last visited 27 November 2014); Commissie Scheltema, *Rapport van de commissie van Onderzoek DSB Bank*, 2010, available at: <<http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2010/06/29/rapport-van-de-commissie-van-onderzoek-dsb-bank.html>> (last visited 27 November 2014); Nationale ombudsman (A.F.M. Brenninkmeijer), *Rapport over rol UMCG en IGZ in zaak ernstige handicap jongen na behandeling UMCG, Rapportnummer 2011/357*, 2011, available at: <https://www.nationaleombudsman.nl/uploads/rapport_2011-357_zonder_voorblad_voor_plaatsing_op_website_0.pdf> (last visited 27 November 2014); Onderzoeksraad voor Veiligheid, *Het DigiNotarincident: waarom digitale veiligheid de bestuurstafel te weinig bereikt, Projectnummer S20110V0902-03*, 2012, available at: <http://www.onderzoeksraad.nl/uploads/items-docs/1094/Rapport_Diginotar_NL_web_def_20062012.pdf> (last visited 27 November 2014); C.B. Ameling et al., *Gezondheid in de IJmond: Monitoring medicijngebruik in relatie tot luchtkwaliteit, RIVM Rapport 601357015*, 2013, available at: <<http://www.rivm.nl/dsresource?objectid=rivmp:235587&type=org&disposition=inline&nc=1>> (last visited 27 November 2014).

1.2. Towards new forms of supervision and enforcement

Regulators, competition and consumer authorities and other types of enforcement agencies are searching for new and effective forms of enforcement and ways to decrease the costs of regulation. This has indeed led to alternative enforcement strategies; mixed regulatory regimes in which public and private cooperation are essential.⁵ Taking the objectives of effectiveness and cost reduction into account, it remains to be seen whether these instruments can contribute to achieving these goals.

As we learn from the contributions in this special issue of the *Utrecht Law Review*, it actually depends on specific circumstances whether a shared regulatory arrangement can indeed be effective.⁶ For this, also the approach to effective regulation and enforcement by Sparrow can give a useful perspective.⁷ His approach is characterized by problem-solving techniques, not by legal instruments. According to Sparrow, problems can be solved in various ways. This can best be done by identifying the problem and searching for the best solution to that problem. There is no 'one size fits all' solution, but the specific circumstances of the case must be taken into account ('find a problem and fix it!'). Solutions do not always have to involve legal instruments, but can be practical tools to ensure that the goals of regulation can be attained. A good example of such a non-legal instrument is the ACM's Energy-coach, which informs consumers about energy prices and facilitates transition between suppliers in order to reach a higher level of competition in the market.⁸ Tools are created by the supervisory authority to empower consumers to take action themselves.⁹

In the context of the private-public discussion we can also point to Sparrow's recent article, 'Managing the Boundary Between Public and Private Policing', where he points out that the motivations of private parties will rarely, if ever, be fully aligned with public interests. He also points out that in, for instance, the domain of public security as the police engage in partnerships and networked relationships involving private organizations, they become less the *deliverers* of security and more the *orchestrators* of security provision.¹⁰ This is a valuable insight for shared public-private regulation and supervision arrangements.

Another publication with relevance in this respect is the article by Honingh and Helderma. They have identified in their publications the preconditions necessary to effectuate so-called systemic supervision.¹¹ This type of supervision is an interesting way of decreasing costs and placing more responsibility upon undertakings, or associations of undertakings. In this systemic approach the supervisor determines the framework and the conditions, but the application and control of the system is in principle left to the sector. Examples in practice are aviation, health care, digital signatures (Diginotar) and the Dutch Bar Association. Honingh and Helderma indicate that systemic supervision can only be successful under strict conditions, and the expectations for the success of systemic supervision are generally too high. The conditions that they have identified are the following: (1) an uniform market with uncomplicated products, (2) the self-interest of the sector (e.g. quality is an essential factor), (3) adequate internal control mechanisms, (4) societal pressure, and (5) dispute settlement. They have found that because of systemic supervision, costs have not decreased dramatically, but the approach to supervision has changed. Co-regulatory arrangements will create learning organisations. Such organisations have a much larger chance of future improvements. This learning ability may very well be one of the largest advantages of co-regulation in a sector.¹² This learning effect between the public and private domains will amount to the prevention of future violations of norms by organizations in the audiovisual sector. It is through such means that regulatory authorities try to find creative ways of internalizing the regulatory norm.

5 A.T. Ottow, *De Markt Meester?* (inaugural speech Utrecht University), 2007.

6 E. Lachnit, 'Compliance Programmes in Competition Law: Improving the Approach of Competition Authorities', 2014 *Utrecht Law Review* 10, no. 5, pp. 31-50. M. de Cock Buning, 'Towards a Future-Proof Framework for the Protection of Minors in European Audiovisual Media', 2014 *Utrecht Law Review* 10, no. 5, pp. 9-30, and L. Senden 'The Multiplicity of Regulatory Responses to Remedy the Gender Imbalance on Company Boards', 2014 *Utrecht Law Review* 10, no. 5, pp. 51-66.

7 His approach has been implemented by many supervisory authorities in the Netherlands (AFM, DNB, ACM). Lachnit, *supra* note 6.

8 M.K. Sparrow, *The Character of Harms. Operational Challenges in Control*, 2008; M.K. Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance*, 2000.

9 E.g. <<https://www.acm.nl/nl/onderwerpen/energie/warmte/warmtetarieven/>> (last visited 27 November 2014).

10 M.K. Sparrow, 'Managing the Boundary Between Public and Private Policing' 2014 *New Perspectives in Policing Bulletin*, National Institute of Justice, NCJ 247182, available at: <<https://ncjrs.gov/pdffiles1/nij/247182.pdf>> (last visited 27 November 2014).

11 M.E. Honingh & J.K. Helderma, 'Voor wie of wat is systeemtoezicht zinvol?', 2010 *Tijdschrift voor Toezicht*, no. 2, pp. 6-25.

12 *Ibid.*, p. 25.

In this special issue we learn that another reason to consider co-regulation in a sector is that the subject matter involves fundamental rights. For instance, the protection of children against harmful audiovisual media content. When children's rights have to be protected one cannot entirely rely on the good intentions of private actors providing voluntary measures as self-regulation. On the other hand, freedom of information can, as a fundamental right, result in a reluctance towards the vertical top-down regulation of media content. The protection of minors against harmful content indicates co-regulation as described by De Cock Buning in her article 'Towards a Future-Proof Framework for the Protection of Minors in European Audiovisual Media'.¹³ Although the Dutch system of co-regulation can in this respect indeed be a model, many hurdles will still have to be cleared before such a European co-regulatory system can be successfully put in place. De Cock Buning points these out and focuses on the lessons that can be learnt from other domains.¹⁴

Lachnit approaches the topic of shared private-public regulatory and enforcement regimes in this issue by focusing on compliance programmes in the field of competition law.¹⁵ Compliance programmes are forms of voluntary governance whereby companies or organizations express their commitment to certain rules and to the values or objectives on which they are based. Instead of increasing deterrence by sanctioning illicit behaviour after it has taken place, supervisory authorities attempt to increase the understanding of and a commitment to the rules beforehand. This approach, which is sometimes referred to as the increase in normative commitment,¹⁶ is based on the assumption that compliance may stem at least as much from a personal commitment to law-abiding behaviour as from a fear of punishment.¹⁷ Since compliance programmes obviously cannot be imposed vertically, a true commitment by market parties is necessary, thus crossing the public-private domain. Therefore these programmes include actions intended to assist companies in building a genuine culture of compliance. Compliance programmes are used in many fields: environmental law, safety regulations, food and health regulation and competition law. It is the latter that Lachnit focuses upon. She discusses the approach to compliance programmes by two national competition authorities: the Dutch Authority for Consumers and Markets and the French *Autorité de la Concurrence* and points out a striking difference in the approach of both competition authorities. Lachnit discusses in her contribution the advantages and pitfalls that these two competition authorities have so far experienced with the challenges that come with the introduction of these programmes. In her final section she discusses the ways in which supervisory authorities can improve their approach to compliance programmes by looking at the three important substantive conditions she derives from the literature (the role of the compliance officer, business culture and targets), as well as two procedural issues discussed (guidance and reduced fines).

1.3. Shift from private to public

The trend towards co- and self-regulation is counterbalanced by another current development. There are sectors in which private enforcement regimes have been replaced or supplemented by public enforcement strategies. For instance, self-regulation in the Dutch fisheries sector was not enough to decrease illegal fishing. Self-regulation in the foodstuffs industry is also under great pressure, due to scandals relating to labelling and quality.

Also with regard to the achievement of more male/female diversity in the boardroom a shift from the private to the public can be observed. In her contribution 'The Multiplicity of Regulatory Responses to Remedy the Gender Imbalance on Company Boards' Senden charts the large variation in regulatory and enforcement regimes that have been developed in Europe to tackle the problem of the under-representation of women on company boards.¹⁸ By providing a comparative analysis Senden seeks to

13 De Cock Buning, supra note 6.

14 Pan European Game Information (PEGI), an age classification system for computer and video games; *Green Paper Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values*, Brussels, 24.4.2013 COM(2013) 231 final.

15 Lachnit, supra note 6.

16 J.G. van Erp, 'Motieven voor naleving van regelgeving', in T. Barkhuysen et al. (eds.), *Recht realiseren. Bijdragen rond het thema adequate naleving van rechtsregels*, 2005, p. 16.

17 J. Jackson, 'Why do people comply with the law? Legitimacy and the influence of legal institutions', to be published in *British Journal of Criminology*, but more importantly: T.R. Tyler, *Why people obey the law*, 2006.

18 Senden, supra note 6.

offer insights into how public and private regulators interact with each other to solve this problem. She identifies the different self- and co-regulation/enforcement regimes as well as the hard law approaches involved in addressing what factors are relevant in determining the chosen types of instruments. Are hard quota law approaches more effective than soft(er) shared public and private approaches? What emerges in particular from her analysis is that in an increasing number of European states self- and co-regulatory regimes have proved to be stepping-stones for the establishment of command-and-control approaches in the form of hard law quota regimes moving beyond mere reliance on industry for overcoming persisting gender inequalities in the boardroom. She explains this by the insufficient level of progress brought about by self- and co-regulatory regimes. According to Senden self- and co-regulation can however be seen as indispensable steps towards creating a basis of support for the policy goal of diversity. It can be a mechanism for creating more industry, political and public awareness and for rethinking appropriate and effective responses. In the end, such responses often entail a mixed toolbox of instruments, the exact contents of which may however depend on the context, time and place.

2. Part II: Shared national-European regulatory and enforcement regimes

2.1. Research context

Traditionally, enforcing EU law has been an autonomous responsibility of EU Member States and their national supervisory authorities. Yet, great differences in the powers, capacities, regimes and strategies of national supervisory authorities have resulted in inconsistencies and disparities in applying EU law at the national level. Even though institutional and procedural autonomy is the starting point, the influence of European law on the activities and strategies of supervisory authorities is now increasing. This is called 'Europeanisation', and it takes many shapes and forms. In her contribution Buijze provides a broader context to this by exploring the division of regulatory and enforcement competences between the EU and the Member States.¹⁹ She addresses the developments that have led to the Europeanisation of almost all policy fields and predicts that these same developments will likely lead to further Europeanisation even when the principle of subsidiarity is conscientiously adhered to.

There is little doubt, however, as to the fact that the current tension between European enforcement and national implementation will remain in existence in the years to come. While Europe is developing its own enforcement strategies, they need to be implemented in the national legal orders of the Member States in order to have effect (laws, organs, competences). Shared enforcement strategies arise. In this second part of this special issue on 'Regulation and Enforcement in the EU: Regimes, Strategies and Styles' we specifically aim to gain an insight into the variables that determine which European or national instruments are most suitable for attaining certain enforcement goals: the quest for an optimal mix.

The research questions that the second part of this issue aims to answer are: Which forms of shared enforcement can be identified? Which goals of regulation are relevant? How does this shared enforcement work from an institutional / safeguarding point of view?

2.2. From national enforcement to networks to European enforcement

There is a clear trend in many fields of European regulation in which supervisors form networks to collaborate, or in which international networks are transformed into European supervisory authorities. This collaboration is initiated in order to coordinate enforcement and to harmonise enforcement practices. Sectors that have followed this trend are, for instance, environmental protection, consumer protection, energy, the financial sector and telecom services. Apart from the influence of European law on a national level (Level 1), many supervisors have united in networks that are important for the further harmonisation, implementation and enforcement of European law (Level 2). More recently, European supervisory authorities have been established that have gained independent competences *alongside* the competences of national authorities (Level 3). We can summarize the three levels of the influence of European law on regulation and supervision as follows:

19 A. Buijze, 'Shared Regulatory Regimes through the Lens of Subsidiarity: Towards a Substantive Approach', 2014 *Utrecht Law Review* 10, no. 5, pp. 67-79.

Level 1:

Supervision and enforcement is carried out by national authorities, but with the clear influence of European law.

Level 2:

Networks of national authorities have been created which exert (informal) influence on each other's national practices.

Level 3:

European supervisory authorities have been created, with binding (or non-binding) powers. These authorities or agencies take many forms, with different powers and roles. For example, in the financial sector these agencies are called the European Supervisory Authorities, with supervisory and regulatory tasks. In this third level there is in some cases even a transfer of powers from the national to the European level, as is the case in the banking sector, where the European Central Bank has taken over control of the most important banks from the national supervisory authorities.

Obviously these developments make regulation and supervision a complicated field of study, in which there is a 'mixed administration' with a 'multi-layered legal order'. Scholten and Ottow set the stage with their contribution by mapping out institutional models of how enforcement can be organized and they discuss what different models bring in terms of degrees of sharing and the dividing of tasks and, to a certain extent, the effectiveness of enforcement.²⁰ They compare the existing institutional designs of shared enforcement in the area of the EU financial supervisory system. The financial sector is an example in which Europeanization has already taken place and in which national powers have been transferred to the European level. The European Central Bank has completely taken over the supervision of so-called significant banks. This leaves no competences for the national authorities, making them executive organs of the ECB. This is a far-reaching measure, leading to a shift in competence and necessitating new procedures and enforcement mechanisms. By mapping out the institutional characteristics, advantages and challenges of each step in the development Scholten and Ottow help to identify models of how the enforcement of EU law can be organized. They offer a comparative analysis of the identified models as to their institutional structures, the degrees of sharing and the division of tasks, and the possibilities of and challenges to effective enforcement that individual models may face. Scholten and Ottow conclude that in a Union with 28 legal systems, it is impossible to ensure consistent and uniform implementation without the coordination of efforts and an exchange of best practices. Creating common databases and platforms for exchanging information and networks of national enforcement authorities are a must for the great majority of policy areas. In dynamic and highly internationally-orientated markets, such as the financial sector, a stronger EU regulator may indeed be necessary in order to be able to maintain a coordinated policy. The current political realities give this a further context. When markets are more nationally focused and the risks are limited or arise primarily at a national level, a strong EU regulator may be less necessary.²¹

In their contribution Wissink, Dijkersloot and Widdershoven elaborate on the new supervisory structure for credit systems, the Single Supervisory Mechanism (SSM), as a clear example of the tendency within the EU to transfer decisive, regulatory and enforcement powers to the EU level.²² The SSM involves a complex system of mixed administration in order to ensure effective banking supervision within the Eurozone. The authors note that although such mixed administration might very well be necessary in order to achieve effective cross-border supervision, it also creates legal uncertainties due to the different legal orders involved. In their contribution they analyse the effect of the mixed administration on formal and substantive judicial protection with a focus on the right of access to the courts in the case of common procedures and certain ECB decisions. The authors conclude that there is sufficient judicial protection for the relevant parties in most cases. So, although the system is complex, it does not seem to lead to

20 M. Scholten & A. Ottow, 'Institutional Design of Enforcement in the EU: The Case of Financial Markets', 2014 *Utrecht Law Review* 10, no. 5, pp. 80-91.

21 A. Ottow, 'Europeanization of the Supervision of Comparative Markets', 2012 *European Public Law* 18, no. 1, p. 218.

22 L. Wissink et al., 'Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection', 2014 *Utrecht Law Review* 10, no. 5, pp. 92-115.

many gaps in judicial protection. The authors point out that although formal access to the courts is necessary, it is not a sufficient requirement to comply with the rule of law. The courts should also verify whether the competent supervision authorities have complied with the applicable rules and principles (substantive judicial protection). In their article Wissink, Duijkersloot and Widdershoven examine two principles, which are essential for the substantive legality of supervisory activities: (i) the right of respect for the home, which applies to the ECB's on-site inspection of business premises, and (ii) the rights of defence, and they come with two recommendations to improve the system.

As the above authors have stated, the proliferation of European supervisory authorities such as EU agencies can be considered an important institutional development as part of the third layer of Europeanization.²³ Such authorities are considered to be effective tools in implementing EU policies.²⁴ Therefore the scope of the delegation to such authorities has increased not only in quantitative terms, but also qualitatively, implying an increase in their powers.²⁵ They have been given regulatory powers as well. In her contribution Van Rijsbergen points at the delegation of more and more soft regulatory powers to EU agencies that occurs in an increasing number of policy areas, such as aviation, medicines and financial services.²⁶ An argument for the growing scope of the delegation of public authority to such institutions is to enhance the effectiveness of EU policies. However, this also raises doubts concerning their legitimacy. In her article Van Rijsbergen uncovers the problematic aspects of the application and enforcement of soft law rules such as guidelines and recommendations with an uncertain legal status at the national level. By taking the European Securities and Markets Authority (ESMA) as an example, she argues that further procedural and good governance guarantees are required in order to ensure both the legitimacy and the effectiveness of the soft regulatory powers of these institutions. Van Rijsbergen concludes with the realization that 'the more rule-making powers are granted, the more stringent procedural requirements need to be put into place'. This is especially important if soft law has a certain legally binding force.²⁷

2.3. From European enforcement to national implementation

Naturally, enforcement is also developing the other way around, for instance in the case of OLAF (the European anti-fraud office), Europol and Eurojust and, even more so, in the case of the European prosecutor. In this reverse movement, the issues concern the implementation of these European enforcement measures in the national legal order (the applicable procedural law, jurisdiction, rules on proof) vis-à-vis the European competences.

That in this reverse movement it is ultimately up to the Member States to align their systems with European standards becomes obvious in the contribution by Luchtman and Vervaele on European agencies with operational powers in the criminal juridical area.²⁸ As we also learn from their contribution, European agencies can only function when they have been properly established with a clear normative framework. The added value of such agencies lies in the fact that they can deal with issues that national authorities are not able or are unwilling to deal with. However, with regard to the applicable law for their investigative acts, Luchtman and Vervaele notice not a European, but a rather vague mix of some European and mostly national law. This results in legal uncertainty as to the enforcement authority. Furthermore, the authors point at the increasing conflicts of law when it comes to the applicable safeguards and judicial review in the common Area of Freedom, Security and Justice (AFSJ). In answering the question of how shared enforcement in this area should be designed in order to achieve, inter alia, the goals of the AFSJ (effective crime control in conformity with human rights) they emphasize the need for more detailed

23 E. Chiti, 'An important part of the EU's institutional machinery: Features, problems and perspectives of European agencies', 2009 *Common Market Law Review*, no. 5, pp. 1396-1397; D. Curtin & R. Dehousse, 'European Union Agencies: Tipping the Balance?', in M. Busuioc et al. (eds.), *The Agency Phenomenon in the European Union: Emergence, Institutionalization and everyday Decision-making*, 2012, pp. 193-205.

24 Joint Statement and the Common approach of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, 19 July 2012, p. 1.

25 M. Scholten, *The Political Accountability of EU and US Independent Regulatory Agencies*, 2014.

26 M. van Rijsbergen, 'On the Enforceability of EU Agencies' Soft Law at the National Level: The Case of the European Securities and Markets Authority', 2014 *Utrecht Law Review* 10, no. 5, pp. 116-131.

27 L. Senden & A. van den Brink, *Checks and balances of Soft EU Rule-Making*, Report for the European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, 2012, p. 67.

28 M. Luchtman & J. Vervaele, 'European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor's Office)', 2014 *Utrecht Law Review* 10, no. 5, pp. 132-150.

regulations at the European level. According to Luchtman and Vervaele also the concepts of European territoriality and the free movement of evidence bolster the need for truly transnational defence rights. It becomes apparent that it is up to the Member States to align the cornerstones of their criminal justice systems with the European system even though this might now be against national positions.

That the reverse movement where less Europeanization takes place in supervision has serious downsides is clear from the contribution of Van den Broek.²⁹ In her contribution she demonstrates that a lack of harmonisation can indeed be problematic for the effectiveness of supervision. The European directive regulates efforts to combat money laundering (and terrorist financing) in the European Union but leaves a high degree of freedom for the Member States in designing their own supervisory architectures under the preventive anti-money laundering policy. In her contribution Van den Broek shows the institutional differences between the EU Member States and distinguishes four models of supervision which are used within the European Union. Van der Broek analyses the potential strengths and weaknesses of each model. Whilst she provides us with a first indication of their effectiveness, she points out that effectiveness ultimately depends on the way in which the models are implemented and applied at the national level, thereby once again making it a matter of harmonization. Also Janssen points out a serious challenge in the field of public procurement caused by a lack of harmonization in his contribution on the new public procurement directives that were recently published in the EU Official Journal on 28 March 2014.³⁰ This Directive introduces a crucial provision that leaves room for a variable interpretation in and between Member States. Article 12 contains legal exemptions from the public procurement regime in the case of collaboration between contracting authorities ('in-house exemptions'). It has substantially broadened the applicability of these initially judge-made exemptions, leaving a greater latitude for contracting authorities to decide upon whether or not these authorities wish to make use of transparent and objective competitive procedures when purchasing works, services and goods. The legal uncertainty created by this codification emphasises the enforcement issues that third parties are faced with when initiating proceedings. Janssen therefore calls upon the Member States to clarify these exemptions from EU public procurement law, making it a shared regulatory responsibility to ensure consistent uniform application within the EU.

We hope that you will enjoy this edition of the *Utrecht Law Review* that provides a tour d'horizon of the current state of enforcement in different sectors, not only at the national level, but also at the European level. The state of affairs is a patchwork of different regulatory choices and supervisory regimes, although some trends can be identified. A mix of private and public arrangements does exist, although a shift towards the public domain is visible. At the same time, public supervisors no longer act solely at the national level; they are rather partners in European networks and in some cases their authority has been taken over by European supervisory agencies. These are interesting developments that legal scholars, as well as governments, supervisory authorities and stakeholders should be well aware of. ¶

29 M. van den Broek, 'Designing Supervision under the Preventive Anti-Money Laundering Policy in the European Union', 2014 *Utrecht Law Review* 10, no. 5, pp. 151-167.

30 W. Janssen, 'The Institutionalised and Non-Institutionalised Exemptions from EU Public Procurement Law: Towards a More Coherent Approach?', 2014 *Utrecht Law Review* 10, no. 5, pp. 168-186.