Chapter 2

EU (SHARED) LAW ENFORCEMENT: WHO DOES WHAT AND HOW?

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ABSTRACT: *Enforcement of EU law has changed considerably in the last decades. By bringing the recent developments together, this chapter offers a 'bird's-eye view' of the 'what, who and how' concerning enforcement of EU law. It discusses the many ways of enforcement under the three scenarios and zooms in on the most intrusive enforcement power, i.e., the sanctioning power. All in all, it shows that enforcement of EU law has been done differently in different policy areas, which demonstrates an ongoing search for the conditions and factors of when EU law enforcement can be enforced more effectively and what role there is for sanctions to play.*

KEYWORDS: *enforcement – models – sanctions – EU*

2.1. Introduction

The European Union (EU) has rapidly evolved from being an international organization to become a supranational polity with autonomous regulatory and enforcement powers. Its regulatory power, which is derived from hard, case and soft law, has expanded from pure 'economic' areas, such as the original coal and steel sector, to include other policy fields like environmental policy. What is more, in recent decades, the enforcement power of the EU has increased drastically in various ways, including direct enforcement powers by EU enforcement authorities (EEAs)

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vis-à-vis private parties.[1] Enforcement implies monitoring compliance with laws, investigating an alleged violation of a law and the sanctioning for a violation.[2] It is essential for the implementation of any policy as it can rectify non-compliance and promote the attainment of policy goals.[3] At the same time, enforcement power, and especially its sanctioning stage, implies interfering in activities and with rights and freedoms of the affected parties. Therefore, it is essential that the enforcement power is exercised in accordance with the rule of law ideals – legitimacy and necessary controls to prevent the abuse of power and arbitrary interferences – which is challenging in a multi-jurisdictional legal order of the EU.

Enforcement of EU law has been experiencing many changes in recent years. Many actors have appeared at the EU and national levels to prescribe enforcement standards, by being involved in direct enforcement and sanctioning and supervising the direct enforcers. The differences between enforcement processes in different policy areas are not that easy to explain and it seems that the development has occurred quite sporadically and in different forms and speeds in different sectors.[4] This is alongside the fact that there are different ways as to how law can be enforced in general and EU law in particular, also as to whether sanctioning takes part (or should take part) in the enforcement process or not and of what type.[5] So, who does what in EU (shared) law enforcement and what sanctions can be involved? I will start with defining enforcement (section 2). On these premises, I will discuss different enforcement scenarios that have emerged in varied sectors (section 3). Then, I will zoom in on the most far reaching enforcement power, namely the sanctioning power (section 4). In section 5, I present some conclusions. Overall, this chapter aims to show who does what in the enforcement of EU law, building on existing literature[6] and information presented in other chapters of this book.

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[1] M. Scholten, M. Luchtman, *Law Enforcement by EU Authorities: Implications for Political and Judicial Accountability* (Edward Elgar Publishing 2017).

[2] J. Vervaele, 'Shared Governance and Enforcement of European Law: From Comitology to a Multi-level Agency Structure?', in C. Joerges, E. Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Hart Publishing 1999) 131.

[3] C. Knill, and J. Tosun, *Public Policy: A New Introduction* (NY Palgrave Macmillan 2012); G. Falkner, O. Treib, M. Hartlapp, S. Leiber, *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (Cambridge University Press 2005).

[4] M. Scholten, 'Mind the Trend! Enforcement of EU law has been moving to 'Brussels'' (2017) 24 *Journal of European Public Policy* 9, 1348.

[5] In this light, it is important to note that the differences in enforcement mechanisms, types of sanctions and institutional characteristics of enforcers in different jurisdictions in the EU is an additional concern for ensuring enforcement of EU law in a consistent manner, especially where cross-jurisdictional cooperation is necessary.

[6] This chapter is also informed by useful insights gained from semi-structured interviews and meetings during a number of research projects supporting the 'veni' project (fn **) that I have

2.2. Defining EU law enforcement and its types

Since the very beginning, the EU has been set up to make rules. These rules can relate to the entire breadth of Union law – from the free movement of goods, services, capital, and people to environmental law and cooperation in criminal law matters. Once these norms have been set, they will then need to be 'enforced' so as to prevent a violation or to respond to an existing violation of the norm. But what is law enforcement? Enforcement is a process that aims at "preventing or responding to the violation of a norm" in order to promote the implementation of the set laws and policies.[7] According to Vervaele, "[L]aw enforcement comprises monitoring, investigating and sanctioning violations of substantive norms".[8] These stages in turn can be exercised by different enforcement powers such as the power to request information for monitoring and/or investigating stages and the power to impose fine (of administrative and/or criminal nature) and/or publish a public notice. These powers can be granted to an enforcement authority by EU and/or national law and may vary from sector to sector and member state to member state, which may make cooperation in shared enforcement more challenging.

Enforcement of EU law can be understood broadly and narrowly.

In a board way, it can even include the stage of registration of specific entities at a supervising-enforcement authority to be supervised, such as the case with the credit ranking agencies at the European Securities and Markets Authority.[9] After registration, the stage of monitoring takes place, relevant authorities check whether natural and/or legal persons are adhering to the law. If the monitoring of persons leads to a certain degree of suspicion, the competent authority can then start an administrative and/or criminal investigation during which it gathers further information. If the investigation concludes that there has been a violation of the law, the competent authority can then sanction the natural and/or legal person in question. The decision of the competent authority may be then enforced by another institutions, such as the court, or appealed by the affected person before a Board of Ap-

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been part of: 'verticalization of enforcement' at the Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE), two projects for the European Commission upon the 'Hercule' funding schemes and the 'the rule of law' project organized with Prof. Alex Brenninkmeijer at RENFORCE.

[7] V. Röben, 'The enforcement authority of international institutions' in A. von Bogdandy *et al* (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2009) 819-42.

[8] Vervaele (fn 3) 131.

[9] See for instance, M. van Rijsbergen, M. Scholten, 'ESMA Inspecting: The Implications for Judicial Control under Shared Enforcement' (2016) 7 *European Journal of Risk Regulation* 3, 569; J. Foster, M. van Rijsbergen, 'Rating' ESMA's accountability: 'AAA' status', in M. Scholten, M. Luchtman (eds), *Law Enforcement by EU Authorities* (Edward Elgar Publishing 2017).

peal or the court. The grounds for appeal could include procedural and/or substantive arguments, depending on relevant laws.

In a narrow sense, enforcement can be pictured as actions of police and judicial authorities of the investigative and sanctioning stages.

Scholars have delineated direct and indirect administration in the EU.[10] In light with these terms, one could classify direct enforcement as monitoring, investigating and sanctioning vis-à-vis those subjects that are subject to substantive norms, e.g. companies and citizens.[11] In light of concerns about national sovereignty, direct enforcement of EU law has been largely kept at the national level, with the only exception of EU competition law where the EU Commission has played traditionally a great role in enforcing EU competition rules vis-à-vis undertakings. What the EU has been doing in enforcement in other sectors can therefore be called indirect enforcement, i.e. "the supervision of the application of the law by public authorities – and foremost of the Member States – but not directly over whether citizens as such obey it."[12] The EU Commission (e.g. the Food and Veterinary Office) and later also EU agencies such as the European Maritime Safety Agency (EMSA)[13] and the European Court of Auditors have been among the key actors in checking upon EU member states. As I investigated elsewhere, next to late transposition, there are different procedural and substantive reasons for non-implementation.[14] Procedurally, the member states could be late in transposing EU legislation at home and could lack financial and human resources to apply and enforce EU law properly. Substantively, an incorrect transposition (whether or not this is on purpose) and (political) unwillingness could lead to non-implementation.[15] In addition, differences in national laws and procedures could result in disparities in the uniform application of EU law and the ineffectiveness of EU policies.[16]

The growing number of infringements and the variety of sources causing those infringements have led to modifications of the strategies that the Commission would

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[10] J.H. Jans, S. Prechal, R.J.G.M. Widdershoven, *Europeanisation of Public Law* (Europa Law Publishing 2015), H.C.H. Hofmann, A.H. Türk, *Legal Challenges in EU Administrative Law: Towards an Integrated Administration* (Edward Elagar Publishing 2009).

[11] Vervaele (fn 3) 129-50; W. Duk, *Recht en Slecht: Beginselen van Algemene Rechtsleer* (Ars Aequi Libri 1999); G. Rowe, 'Administrative supervision of administrative action in the European Union', in H. Hofmann, A. Tűrk (eds), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration* (Edward Elgar Publishing 2009) 136-67.

[12] Rowe (fn. 11).

[13] Please, see chapter by Alberti in this volume.

[14] Scholten (fn 4).

[15] *Ibidem*; E. Thomann, A. Zhelyazkova, 'Moving beyond (non-)compliance: the customization of European Union policies in 27 countries' (2017) 24 *Journal of European Public Policy* 9, 1269.

[16] Scholten (fn 4), see also M. Scholten, A. Ottow, 'Institutional design of enforcement in the EU: the case of financial markets' (2014) 10 *Utrecht Law Review* 5, 80.

employ in indirect enforcement and the proliferation of EU direct enforcement power.[17] The growth of the EU's authority in regulating matters of national enforcement and establishing various new modes of enforcement are among the most recent developments in this respect. Generally, enforcement of EU law has become more and more 'shared', though, as this book also shows, what is shared, how it is shared and among whom it is shared have found different formulas in different policy areas. This expansion of the EU competences from one (regulatory) step in the policy cycle to another (enforcement) can be explained from a functional spillover perspective: if the implementation of EU law is facing difficulties at the national level, enforcement at the EU level is likely to follow.[18]

2.3. EU (shared) law enforcement in different policy areas

Vervaele observes that "it is not a secret that the European Communities founding fathers underestimated the importance of the enforcement of Community law. Apart from a few exceptions in primary Treaty law, such as the obligation for Member States to criminalize violations of Euratom confidentiality or perjury in front of the European Court of Justice, they maintained a resolved silence concerning Community law enforcement."[19] The situation has changed with the years. Who does what and what is exactly shared, between whom and how? As this section and this edited volume show, this varies greatly in different sectors and even within the same categories of actors, such as EU agencies. My initial search for 'models of enforcements' have faced a challenge of distinguishing 'models', including the search for an appropriate term for various enforcement processes and procedures that have appeared in the EU recently.[20] It seems to depend on a particular departing point of what kinds of, to use this term for the sake of example, 'models' can be distinguished. This in turn may depend on the overall purpose of why such 'modelling' exercise has been undertaken in the first place. One could determine models in relation to what rules are being enforced, including for instance, primary or treaty obligations against national governments or private actors. They could be determined by departing from the question of 'who' – which institution, such as the Commission, the European Central Bank or the Court of Justice – undertakes an enforcement action and at what level. The fact remains that using different departing points is likely to lead to different numbers and

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[17] Scholten and Luchtman (fn 1); see also Scholten (fn 4).

[18] Scholten (fn 4); M. Scholten, D. Scholten, 'From regulation to enforcement in the EU policy cycle: A new type of functional spillover?' (2017) 55 *Journal of Common Market Studies* 4, 925.

[19] J. Vervaele, *European Criminal Justice in the Post-Lisbon Area of Freedom, Security and Justice* (University of Trento 2014), p. 11, available at: http://eprints.biblio.unitn.it/4399/1/COLLANA_QUADERNI__VOLUME_5__VERVAELE_FORNASARI_SARTORI__02.09.2015.pdf.

[20] I am grateful for our continuous debate on this issue with Prof. Michiel Luchtman.

types of such models, bringing into question the usefulness of such an exercise.[21] Moreover, the term 'model' can lead to misleading considerations, especially for experts with different scientific backgrounds. Therefore, I leave the 'modelling' exercise and the question about its usefulness for future research and debate. In this section, I describe three scenarios as to how EU law can be enforced, which seem to accommodate various actors and policy areas, also included in this book. The question of whether this is an attempt for 'modelling' I leave up to the reader to assess and for future research to finetune. These scenarios are being distinguished based on two considerations: 1. interrelations between relevant actors and 2. material scope of laws to be enforced.

Scenario 1

EU laws set up norms for different actors, primarily national governments and private actors.[22] Therefore, the first scenario concerns enforcement of EU legislation and policies by EU and/or national authorities vis-à-vis public and/or private actors in the EU. Starting from the Treaties, Article 2 TEU, for instance, promotes the core values of the Union, such as democracy and the rule of law and, next to the Treaties, secondary law imposes various standards and procedures to adhere to in order to achieve the aims of the Treaties. For instance, in accordance with Article 191 TFEU 'a high level of protection' is required for the purposes of EU environmental policy, which is then supported further by more than 200 pieces of EU secondary legislation (mainly directives) to be further implemented and enforced at the national level.[23]

First, the most typical case here is that the Member States must implement particular primary and secondary legislation adopted by the EU legislator. They are oftentimes free to choose which type of enforcement to use in order to enforce substantive norms. For example, Member States can choose to enforce a substantive norm regarding environmental law by creating an agency or delegating the task to a ministry, also through sanctions derived from administrative, criminal, or private law. In most cases, it is up to the Member States to choose a sanction or combination of sanctions. This derives from the principle of national institutional autonomy,[24] with some limitations. Enforcement sanctions must be equivalent,

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[21] See, for instance, an interesting 'modeling' for the purpose of a specific study on the interactions between EU and national levels: M. Luchtman, J. Vervaele, 'Comparison of the legal frameworks', in M. Luchtman, J. Vervaele, *Investigatory powers and procedural safeguards: Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB)* (Utrecht University 2017) 248-253.

[22] P Craig, G de Brca, *EU Law: Text, Cases and Materials* (Oxford University Press 2015).

[23] See chapter by Munari in this volume.

[24] Jans, Prechal, Widdershoven (fn 10).

effective, dissuasive, and proportional.[25] Also, the Member States must observe fundamental rights, general principles of Union law, and the Treaty freedoms.[26] The large margin of discretion in the choice of sanctions has, since the mid-1980s, decreased and the EU has increasingly prescribed which (type of) sanctions the Member States ought to impose.[27] From the beginning of the 21st century, this has also led to the EU no longer limiting itself to prescribing administrative sanctions, but also punitive sanctions for violations of substantive norms in fields such as environmental law.

When enforcement is entrusted in national authorities, the EU executive actors, such as the Commission, EU agencies and networks, largely monitor the implementation of EU laws by national governments and private actors. In other words, they identify if the policy goals and core values are adhered to. As Alberti mentions in this volume, the number of such monitoring EU agencies has been increasing. This is the case, for instance, for the European Chemicals Agency, European Fisheries Control Agency, the newly established European Labour Agency, to name but a few, where information gathered by such agencies may lead to further actions, including sanctioning at the national or EU levels. Next to monitoring, the 'infringement procedure'[28] is available to ensure that the national governments comply with the implementation of EU secondary laws. In short, if a Member State does not live up to its obligations under the EU law, the EU Commission or other Member States can start an infringement procedure in order to force the Member State to enforce the specific norm (Articles 258-260 TFEU).[29] As Prete mentions in this volume, this possibility has not been there since the outset but came about later with the Treaty of Maastricht.[30] This procedure has two pre-judicial and judicial phases and both the Commission or the Member States can initiate it. First, the Member State of the perceived failure is informed about the breach, which the Member State can then counter. Subsequently, the Commission can issue a 'reasoned opinion' on the issue. This reasoned opinion will include a time limit for the breach of EU law to be ended.[31] If the breach of EU law is not resolved by the end of the time limit, the Commission can bring the case to

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[25] 68/88, *Commission v Greece (Greek Maize),* ECLI:EU:C:1989:339.

[26] See the chapter by Lazzerini in this volume.

[27] Jans, Prechal, Widdershoven (fn 10) 281.

[28] Craig, de Búrca (fn 23) 429 and on the functioning of the infringement procedure under Article 258 TFEU, see 431.

[29] *Ibidem.*

[30] See Prete's contribution to this volume.

[31] Craig, de Búrca (fn 22) 431 and 435. See also: E. Korkea-Aho, 'Watering Down the Court of Justice: The Dynamics between Network Implementation and Article 258 TFEU Litigation' (2014) 20 *European Law Journal* 649.

the Court of Justice of the EU. If the Commission considers that the Member State does not comply with the conclusion of the Court, it can bring the case before the Court once more. During these proceedings the Court can impose a fine (lump sum) as punishment for the continued breach of EU law. An interesting development in the recent years has been the establishment of 'EU pilots' mechanism, which promotes resolving possible non-implementation by the Member States without opting for a lengthy and costly infringement procedure.[32]

Two separate specific procedures that can be brought under this scenario are the enforcement procedures under Article 7 TEU and for the Economic Monetary Union (EMU). These procedures involve the Member States being in charge of enforcing specific primary and secondary EU laws, whereas the EU institutions monitor and can sanction violations, yet in procedures established specifically for these cases. As Bonelli describes in this volume, "Article 7(1) TEU allows the Council to determine, after obtaining the European Parliament's consent, the existence of a 'clear risk of a serious breach' of EU values in a Member State of the EU" (section 4.1.). The Commission or the European Parliament can initiate this 'preventive' procedure to set a dialogue between EU institutions and the Member State in question. The sanctions can be imposed under Article 7(2-4) TEU if the European Council determines 'a serious and persistent breach' of values of Article 2 TEU.[33] As Costamagna and Miglio discuss in this volume, Article 126 TFEU and the Stability and Growth Pact lays down the powers to monitor the decision taken by national authorities concerning their budgets and impose fines if they deviate from the agreed benchmarks.[34]

At the same time, since recently, we witness the proliferation of the so-called EU enforcement authorities, which can be involved in enforcing EU law together with national authorities or even do this on their own. Some use the term 'shared enforcement' to describe this situation,[35] although this term may be misleading in consideration of the processes where different – EU and national – actors are being involved. This brings us to the second scenario.

Scenario 2

This scenario can be characterized by the establishing of a more direct link between EU authorities and private actors, although this happens with the involvement of

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[32] On the EU pilot schemes, Craig, de Búrca (fn 22) 435. See also: D. Hadrousek, 'Speeding up Infringement Procedures: Recent Developments Designed to Make Infringement Procedures More Effective' (2012) 9 *Journal for European Environmental and Planning Law* 235.

[33] See the chapter by Bonelli in this volume.

[34] See the chapter by Costamagna and Miglio in this volume.

[35] M. Scholten, M. Luchtman, E. Schmidt, 'The proliferation of EU enforcement authorities: a new development in law enforcement in the EU' in M. Scholten, M. Luchtman (eds), *Law Enforcement by EU Authorities: Implications for Political and Judicial Accountability* (Edward Elgar Publishing 2017).

relevant national authorities in the process of enforcement. The monitoring function of the Commission is then altered as relevant courts, parliaments and other controlling actors become overseers of such enforcement processes. This so-called 'direct shared enforcement' by an EU authority has been known in the area of EU competition law for a long time.[36] The Commission has had enforcement powers to investigate and sanction private actors almost from the outset of EU integration. For the protection of the financial interests of the EU and the fight against fraud a specific office – the European Anti-fraud Office (OLAF) – was set up in 1999. It can conduct administrative investigations within the EU institutions and the Member States.[37] Since the beginning of the 21st century, more and more of such authorities started to be created. The reasons why some authorities are created in the shape of an agency or a body or why the enforcement of EU law by national authorities should be helped by an EU coordinating network are yet to be better explored.[38] It is also unclear why some of such authorities have more enforcement powers than others, and to what extent they truly share enforcement with national authorities. The following observations stand out here.

First, from the functional perspective, these authorities can be subdivided into two groups: those, which enjoy powers to realize all the enforcement stages (monitoring, investigation and sanctioning) and those, which do not have all those powers and have to rely upon national authorities. The former includes, for instance, the EU Commission in the area of competition law, European Securities and Markets Authority and European Central Bank within the Single Supervisory Mechanism (SSM). The latter includes the Anti-Fraud Office, European Medicines Agency, European Aviation Safety Agency and European Fisheries Control Agency.[39] In addition, the European Public Prosecutor's Office (EPPO) will be soon operational as an independent and decentralized prosecution office of the European Union, with the competence to investigate, prosecute and bring to judgment crimes against the

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[36] *Ibidem*, 6.; see also Calzolari in this volume.

[37] Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) [2013], OJ 2013 L248/1. See, also See, also M. Luchtman, M. Wassmeier, 'The political and judicial accountability of OLAF' in M. Scholten, M. Luchtman (eds), *Law Enforcement by EU Authorities: Implications for Political and Judicial Accountability* (Edward Elgar Publishing 2017).

[38] L. Van Kreij, 'Towards a Comprehensive Framework for Understanding EU Enforcement Regimes' (2019) 10 *European Journal of Risk Regulation* 3, 439; M. Scholten, 'Shared Tasks, but Separated Controls: Building the System of Control for Shared Administration in an EU Multi-Jurisdictional Setting' (2019) 10 *European Journal of Risk Regulation* 3, 538. See also the respective blog: M. Scholten, 'Shared Tasks, but Separated Controls. How to build a system of control for EU shared administration?', in *EU Law Enforcement blog*, available at: https://eulawenforcement.com/?author=2.

[39] Scholten (fn 4).

EU budget, such as fraud, corruption or serious cross-border VAT fraud.[40]

Secondly, these EU enforcement authorities do not replace relevant national authorities. This has led to using of the term 'shared' enforcement to such cases.[41] A closer look at these authorities[42] reveals the many facets of such sharedness and what it can mean. This sharedness does not seem to follow a particular logic, such as for instance the functional subdivisions considered in the previous paragraph. The European Securities and Markets Authority is, for instance, an agency enjoying the powers to monitor the performance of specific financial market participants, such as credit rating agencies, or to investigate the cases of suspicion and sanction for violation of EU laws. In this particular function, it may delegate certain tasks to be performed by its national counterparts, but it would remain in charge of the enforcement process, including the sanctioning stage.[43] In this case, reliance upon national counterparts is at ESMA's discretion and would take place only for a particular part of the enforcement process, such as when making an online inspection.[44] The case of the European Aviation Safety Agency sheds a different light upon the term 'shared enforcement'. Here, it can be observed that the task of enforcement of the aviation safety laws is shared between EU and national relevant agencies but with a clear division of competences and procedures. The EASA is in charge of ensuring the safety of a particular type of an aircraft, whereas the national authorities look after the individual units of that type.[45] The term 'shared' in the case of the

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[40] *Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO')* [2017], J. Vervaele, 'Judicial and political accountability for criminal investigations and prosecutions by a European Public Prosecutor's Office in the EU: the dissymmetry of shared enforcement', in M. Scholten, M. Luchtman (eds), *Law Enforcement by EU Authorities: Implications for Political and Judicial Accountability* (Edward Elgar Publishing 2017).

[41] See also M. Scholten, M. Maggetti, E. Versluis, 'Political and Judicial Accountability in Shared Enforcement in the EU' in M. Scholten, M. Luchtman (eds), *Law Enforcement by EU Authorities: Implications for Political and Judicial Accountability* (Edward Elgar Publishing 2017).

[42] Scholten and Luchtman (fn 1).

[43] *Van Rijsbergen and Scholten (fn 9); see also: Van Rijsbergen and Foster (fn 9). A. Karagianni, M. Scholten, M. Simonato, 'EU 'vertical' report 'The exchange of information between national and EU authorities'',* in M. Simonato, M. Luchtman, J. Vervaele (eds) *Exchange of information with EU and national enforcement authorities: Improving OLAF legislative framework through a comparison with other EU authorities (ECN/ESMA/ECB)* (Utrecht University 2018) 7-32.

[44] I have conducted a number of interviews and held talks with experts from and on ESMA, which revealed that ESMA did not seem to use this function that often and may be unlikely to be using it due to a number of considerations. This includes, for instance, the fact that ESMA registers the entities to be supervised where its national authorities do not normally have any supervision over those entities, which may diminish the necessity and useful of the help from their side.

[45] L. Mustert, M. Scholten, 'Controls in the case of the EU civil aviation safety rules' in M. Scholten, A. Brenninkmeijer, *Controlling EU Agencies. The Rule of Law in a Multi-jurisdictional Legal Order* (Edward Elgar Publishing 2020) and Luchtman and Scholten (fn 1).

European Central Bank reflects also on the shared enforcement but more on the shared structures used in enforcement. For instance, the monitoring stage over the 'big banks' is organized by the so-called joint supervisory teams, where both ECB and relevant national staff work together and employ both relevant EU and national law for substance and procedure.[46] Finally, for example, to ensure effective enforcement of authorization and supervision of medicinal products (Regulation 726/2004), the European Medicines Agency (EMA) has come to share enforcement stages of monitoring, investigating suspicious cases via national authorities, and imposing fines via the Commission.[47] While the EMA has no authority to investigate the premises of authorization holders directly, it can, for example, order the initiation of such investigations by national investigators, who may be accompanied by an expert appointed by the Agency (Article 8 of Regulation No. 726/2004).

These observations are important as they make it clear that enforcement takes place in different settings in all the above cases. It also shows that these differences will have different implications for other pertinent questions, such as legitimacy, controls and legal protection for the shared enforcement.[48] The clearer the division of tasks between EU and national authorities is, the clearer the rules for controls (political, judicial, etc.) are likely to be. In any case, however, the new complex interactions between EU and national enforcement actors results in complex enforcement procedures, which in turn may lead to decisions, which can be checked only by appropriate, sophisticated systems of controls.[49]

Scenario 3

A peculiar situation exists in the area of EU Common Foreign and Security Policy (CFSP)[50] in which sanctions have been imposed against other states and individuals.[51] Thus, this scenario features other types of actors and procedures and interaction with International law. Beaucillon captures this in the beginning of her chapter

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[46] A. Karagianni, M. Scholten, 'Accountability Gaps in the Single Supervisory Mechanism (SSM) Framework' (2018) 34 *Utrecht Journal of International and European Law* 2, 185; see also Allemand in this volume.

[47] M. Chamon, S. Wirtz, 'Complex procedures as hurdle to accountability: verticalization of pharmaceutical enforcement' in M. Scholten, M. Luchtman (eds), *Law Enforcement by EU Authorities: Implications for Political and Judicial Accountability* (Edward Elgar Publishing 2017).

[48] Scholten, Maggetti, Versluis (fn 41); T. Binder, A. Karagianni, M. Scholten, 'Emergency! But What about Legal Protection in the EU?' (2018) 9 *European Journal of Risk Regulation* 1, 99.

[49] Scholten (fn 35). M. Scholten, A Brenninkmeijer *Controlling EU Agencies. The Rule of Law in a Multi-jurisdictional Legal Order* (Edward Elgar Publishing 2020).

[50] European Commission - *Service for Foreign Policy Instruments (FPI)* available at: https://ec.europa.eu/fpi/what-we-do/sanctions_en.

[51] *Ibidem* See also Craig, de Búrca (Fn 22) 344 on the Common Foreign and Security Policy (CFSP).

in this volume, "to what extent does respect for human rights in Syria, the Iranian nuclear crisis or the international fight against terrorism fall within the scope of the enforcement of European Union law?" And as both Beaucillon and Spagnolo show in this volume, the EU seems to promote its values and laws also beyond its territory via instruments of restrictive measures and sanctions against third countries and individuals. According to Spagnolo, "as of today, more than thirty unilateral sanctions adopted by the EU against third countries are in force, demonstrating the vitality of the instrument and the frequency of its use. Within them, a large number of sanctioning regimes are 'autonomous', namely adopted outside – or in addition to – the framework of a resolution of the UN Security Council. In other words, the EU adopts sanctions without any authorization from the UN" (*section 1*); Title IV TFEU governs the procedure on the adoption of 'restrictive measures'.[52]

The number of countries under CFSP sanctions has increased dramatically, from six in 1991 to almost thirty in 2018.[53] As of February 2018, the EU has ten sanction programs implementing UN measures, eight cases in which it applies its own additional sanctions in parallel to UN sanctions, and 24 autonomous sanction programs.[54] The composition of sanction programs in place by April 2018 was as follows: 30 asset freezes, 27 visa bans, 21 arms embargoes, 9 commodity trade restrictions, 7 bans on exports of equipment for internal repression, 7 financing, banking and investment restrictions, 3 bans on dual-use exports, 3 flight bans and 2 shipping bans.[55]

The measures and sanctions adopted under the CFSP serve several objectives, including: safeguarding the EU's values, preserving peace, consolidating and supporting democracy, and preventing conflicts and strengthening international security.[56] They can be aimed at governments, entities, groups, or individuals.[57] There is a wide range of possible restrictive measures that could be imposed by the EU. These include: arms embargoes, economic and financial sanctions, diplomatic sanctions, suspensions of cooperation, boycotts of events, and restrictions on admission (such as visa and travel bans).[58] Individual sanctions within the EU amongst others form a

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[52] See also Craig, de Búrca (Fn 22) 348.

[53] M. Russell, *EU sanctions: A key foreign and security policy instrument* (Briefing, European Parliamentary Research Service 2018) 2, available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621870/EPRS_BRI(2018)621870_EN.pdf.

[54] *Ibidem*, 4.

[55] *Ibidem*.

[56] Council of the European Union - *Sanctions: how and when the EU adopts restrictive measures* (2019) available at: https://www.consilium.europa.eu/en/policies/sanctions/.

[57] Council of the European Union, *Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common and Foreign Security Policy* (2018) 5.

[58] European Commission, *Restrictive Measures* (2008) 3-5. See also, notably, joined cases C-402 and 415/05 P *Kadi v Council and Commission*, ECLI:EU:C:2008:461.

part of the broader counterterrorism strategy, mainly pursuing objectives of the European Arrest Warrant[59] and the European Security Strategy.[60] After all, terrorism has been identified as the first of five key threats to European interests.[61]

2.4. EU enforcement and sanctions

An important element of any enforcement process is the sanctioning stage. Not necessarily the imposition of the sanction as such but the possibility thereof may have the necessary deterrent effect and enhance compliance.[62] The possibility to impose sanctions puts even stronger emphasis on the necessity of relevant mechanisms of controls for enforcement, such as access to the courts to challenge a fine, political controls over sanctioning policy of a supervisor and the existence of other safeguards and principles, such as the principle of proportionality and fundamental rights.[63] This is because the sanctioning stage has an intrusive effect upon the rights and freedoms of the parties subject to sanctions.[64] As Montaldo mentions in this volume on the principle of proportionality, "the more intense a public power and its effects on individuals are, the more demanding this principle becomes. This is why proportionality is of a particular significance in the domain of sanctions, where the magnitude of public coercive powers reaches its peak" (section 7.1).

Sanction can be defined as "a strong action taken in order to make people obey a law or rule, or a punishment given when they do not obey."[65] A strong action can be corrective (in order to make people obey a law) and penalizing (to punish). Irrespective of the scenarios of shared enforcement outlined before, the EU sanctioning

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[59] Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism OJ 2002, L 164/3 and Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1. For a more extensive discussion on the European Arrest Warrant (EAW) see: Craig, de Búrca (fn 22) 990-996.

[60] C. Eckes, 'Test Case for the Resilience of the EU's Constitutional Foundations' (2009) 15 *European Public Law* 3, 351.

[61] C. Eckes, 'Sanctions against Individuals. Fighting Terrorism within the European Legal Order' (2008) 4 *European Constitutional Law Review* 2, 205, 208. See also: Craig, de Búrca (fn 22) 347.

[62] See M. Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 *European Law Journal* 4, explaining this logic behind the sanctioning stage for accountability process. See also: C.E. Koops, *Contemplating Compliance: European compliance mechanisms in international perspective* (2014) PhD thesis, University of Amsterdam.

[63] See Lazzerini in this volume.

[64] Craig, de Búrca (fn 22) 348-349.

[65] See, for instance, an online Cambridge dictionary: https://dictionary.cambridge.org/dictionary/english/strong.

power can be categorized in different ways and perspectives. Who has the power to impose sanctions? Who is the subject to the sanction? Who has the power to determine which type of sanctioning (if at all) should be used for violation of EU law? As seen from the scenarios above as well as in the chapters of this book, the sanctioning power for violation of EU law has been oftentimes entrusted in an EU or a national authority (courts and public executive entities). In the past decade, the number and type of EU authorities that have acquired a sanctioning power has increased. In addition to the Commission and the Court of Justice, the list now includes the European Council, the Council of the European Union, the European Central Bank, and a growing number of EU agencies. Sanctions could be used vis-à-vis the Member States and EU authorities, private actors, states and individuals. Finally, who has the authority to determine which type of sanction? Via-à-vis the Member States, other states and individuals, it is the EU institutions who play the key role here. Vis-à-vis private actors, the EU enforcement authorities as mentioned above and national authorities are largely in charge of implementing relevant statutes, which *inter alia* regulate the type of sanctions, their amount and the discretion given to those enforcement authorities in determining the sanctions.

What is important to mention is that the legislative authority to establish specific types, amounts and other peculiarities of sanctions has become shared between the EU and national levels. Since the 1980s, the EU legislator has increased its legislative authority on the matters of institutional, procedural and operational issues of enforcement by national authorities, including sanctions.[66] Along with that, the executive actors, including the Commission and EU agencies, have been issuing 'guidance' as to how enforcement should or can take place, for instance by issuing documents such as fining guidelines in the area of EU competition law (see Calzolari in this volume) or ESMA soft law.[67]

Furthermore, the Court of Justice has contributed to the shaping of the sanctioning power of the EU via a number of landmark judgments. Among the key judgments are the following. In the *Greek Maize* case (Case 68/88),[68] the Court held that the penalties that the Member States impose for violation of EU law must be effective, dissuasive, and proportionate. The fact that penalties must be effective and dissuasive can ensure that the goal of enforcement is achieved in practice and the principle of proportionality ensures that the sanction does not go beyond what is reasonable given the gravity of the offence. In *Commission v Council* (Case 176/03),[69] the possibility to prescribe criminal sanctions for the breaches of EU law

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[66] Jans, Prechal, Widdershoven (fn 10).

[67] M. van Rijsbergen, *EU agencies' soft rule-making Lessons Learnt from the European Securities and Markets Authority* (PhD dissertation Utrecht University, 2018).

[68] *Greek Maize* (fn 25).

[69] C-176/03 *Commission v Council*, ECLI:EU:C:2005:542.

by the EU legislator was discussed. Criminal sanctions used to be the prerogative of national administrations, yet the Commission launched the development of criminal sanctions at the EU level.[70] The Court supported the 'initiative' though with a reservation: "a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence […]. However, this finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combatting serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective" (para. 47 and 48). Thanks to this 'blessing' from the Court, the Commission issued in 2011 its communication about the possibility to prescribe criminal sanctions also in other sectors if necessary.[71] Furthermore, in *Bonda*,[72] the Court of Justice concluded that if the investigation concludes that there has been violation of the law, the competent authority can then sanction the natural or legal person in question. Such a sanction can have a restorative character or a punitive character depending on the *Bonda*-criteria, which build upon the *Engel* criteria established by the European Court of Human Rights.[73]

There is a great variety of sanctions that have been used across sectors. At the EU level, these include fines, periodical penalties and interim measures by the Commission: suspension of rights (including the voting right in the Council) warnings, (public) recommendations and fines by the Commission and Council within the Stability and Growth Pact, penalties and fines by the ECB within the SSM, public notices and fines by ESMA and sanctions against third countries and individuals within the CFSP. This is next to sanctions available at the national level where some EU actors, including the Commission and EU agencies, may monitor their imposition. For instance, ESMA supervises the imposition of administrative and criminal sanctions and other types of administrative measures by national competent authorities. In accordance with the Market Abuse Regulation,[74] ESMA publishes an An-

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[70] Concerning the administrative sanctions, since 1980s, starting with the Common Agricultural Policy (CAP), "the Community increasingly required Member States to impose sanctions that went further than simple reparation" Jans, Prechal, Widdershoven (fn 10).

[71] European Commission Communication, 'Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law' (Brussels COM2011) available at: file:///C:/Users/gian9/Downloads/1.2_COM%20(2011)573_final_EU_en.pdf, the Commission proposed to consider criminal law "as an element to ensure the effective enforcement of EU policies." ; J. Vervaele, 'The European community and harmonization of the criminal law enforcement of community policy. A Cessio Bonorum from the Third to the First Pillar?' in K. Nuotio (ed.), *Festschrift in honour of R. Lahti* (University of Helsinki 2007) 119-42.

[72] C-489/10 *Bonda* [2012] ECLI: EU: C: 2012: 319.

[73] *Engel and Others v. the Netherlands*, application no. 5100/71; 5101/71; 5102/71; 5354/72.

[74] Regulation No 596/2014 on Market Abuse [2014] OJ L173/1.

nual Report on the sanctions imposed by national authorities.[75] At the same time, various enforcement procedures do show that the sanctioning stage can be a process of a number of steps, in which the seriousness of a sanction grows with each step, though the sanctioning authority may have discretion as to follow the 'pre-sanctioning' steps or not. For instance, for an Article 7 procedure, next to the sanctions as the suspension of the voting rights, there exists the possibility of a preventive measure and a dialogue with the Member State in question. "The "soft" coordination mechanisms are backed by "hard" sanctions under the Stability and Growth Pact and the Macroeconomic Imbalances Procedure."[76] The area of EU competition law has experienced the development of taking commitment and settlement decisions instead of imposing sanctions.[77] De Hert in this volume mentions the possibility to use deterrence and persuasion that can enhance compliance with the data protection rules.

2.5. Conclusion

All in all, enforcement of EU law has seen many changes, especially in recent decades.

First, the scope of EU law (the 'what') that needs to be enforced has been expanding considerably over the years. Roughly speaking, today it is not 'only' about the rules governing the internal market and competition law, even though the enforcement of internal market regulation is an area that is still in search of an appropriate enforcement mechanism.[78] It is also about how national governments adopt their budgets and go about data protection. It is also about regulation and supervision of major financial actors in the financial markets, such as banks, and the adherence of the Member States to the key values of democracy and the rules of law (Article 2 TEU), including adherence beyond the border of the European Union.

Second, we should note the proliferation of actors ('who') that can enforce EU law, at both the EU and national levels as well as transnationally.[79] We witness a rapid growth of enforcement of powers of the EU institutions as such – EU Commission (different DGs) and the European Central Bank (SSM) – and those of EU and national agencies. Also, various new enforcement structures have appeared, such as joint supervisory teams of the European Central Bank. The interactions

[75] ESMA, Annual Reports, available at: https://www.esma.europa.eu/document-types/annual-report.

[76] See the chapter by Costamagna and Miglio in this volume.

[77] See the chapter by Calzolari in this volume.

[78] From my inform talks with public servants working at the moment of writing on a reform on enforcement for the internal market.

[79] G.J. Brandsma, 'Transnational executive bodies: very effective but hardly accountable?', in *EU Law Enforcement blog*, available at: https://eulawenforcement.com/?author=52.

among those actors – EU and national, private and public – have resulted in complex, 'composite'[80] procedures raising challenging legal questions, such as the choice of jurisdiction, applicable laws and standards to govern and review,[81] which are yet to be investigated and which bring us to the last point.

Finally, there have been changes in 'how' enforcement has or should take place. Here, one sees the growth of laws and principles that shape – facilitate and limit – the process of enforcement. The Charter of Fundamental Rights has affected enforcement as to the way it should be done (for instance, in accordance with the principles of good administration, due process, etc.) and the purpose of why it should be done (for instance, Article 37 to ensure environmental protection).

An important development here has been the growth in both 'quantity and quality' of the sanctioning power for violating EU law. Two trends can be distinguished in this respect as shown in the coming chapters. On the one hand, in light of the proliferating (shared) enforcement, especially by EU authorities, one can talk about the growth of 'hard' sanctioning power of the EU. The EU legislator can prescribe, for instance, not only administrative but also criminal sanctions to be employed for violation of EU law. Also, EU authorities such as ESMA, have received direct sanctioning powers, including imposing fines upon private actors. On the other hand, there seems to be a growing realization of the importance of preventive mechanisms. Among these are pre-judicial stages in the infringement procedure, solid monitoring of compliance before any investigation or sanctioning and correcting via monitoring via dialogue, rather than opting for 'hard' mechanisms, such as lengthy and expensive court proceedings. At the end of the day, enforcement of law is there to ensure the attainment of policy goals and promoting core values, which could be more effective to achieve at the earlier (monitoring) stages of enforcement and by preventive measures, rather than sanctioning.

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[80] P. Craig, 'Shared Administration, Disbursement of Community Funds and the Regulatory State', in H. Hofmann, A. Türk (eds), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration* (Edward Elgar Publishing 2009) 34; G. Della Cananea, 'The European Union's Mixed Administrative Proceedings' (2004) *Law and Contemporary Problems* 68, 197; H. Hofmann *et. Al.*, *Administrative Law and Policy of the European Union* (Oxford University Press 2011).

[81] These issues seem to stand high on (research) agenda where a number of PhD projects have been conducted. See, for instance: H. Andersson, *Dawn Raids under Challenge. A Study of the European Commission's Dawn Raid Practices in Competition Cases from a Fundamental Rights Perspective* (Stokholm University 2017), available at: https://www.diva-portal.org/smash/get/diva2:1051228/FULLTEXT01.pdf. At this moment, I am involved in co-supervising a PhD project of A. Karagianni (together with Prof. Michiel Luchtman and Prof. Rob Widdershoven), investigating these questions for the case of the European Central Bank (Utrecht University). This project runs in parallel with the PhD project of K. Bovend'Eerdt investigating the protection of fundamental rights in the case of OLAF (supervised by Prof. Michiel Luchtman, Prof. John Vervaele and Dr. Stanislaw Tosza). Both projects are funded by the Dutch Research Council (NWO) upon the 'vidi' scheme of Prof. Luchtman.