



Co-funded by the  
Erasmus+ Programme  
of the European Union



Jean Monnet Network on EU Law Enforcement  
Working Paper Series

## Differentiation, uniformity and level playing fields in the enforcement of EU law\*

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### Abstract

EU law often aims to establish a level playing field. This paper discusses the implications this has for the enforcement of EU law. In particular, it looks at whether the creation of level playing fields requires uniformity in the enforcement of EU law or whether it may also allow for (or even require) differentiated enforcement. It does so by dissecting the concepts of ‘uniform enforcement’, ‘differentiated enforcement’ and ‘level playing field’ and the relationships between them. The analysis shows that the three concepts are multidimensional, allowing for different combinations in different circumstances. Depending on the type of level playing field that is central to a specific piece of EU law, cases can be made for different combinations of differentiated and uniform enforcement. Through this analysis, the paper aims to contribute to a more systematic and explicit consideration of the choice between uniform and differentiated enforcement in the EU.

### Keywords:

Differentiation, uniformity, level playing field, enforcement

\* Ideas for this paper were presented at the EULEN conferences ‘Enforcement of EU Law: Level Playing Field versus Differentiated Enforcement’ (Utrecht, 20 and 21 April 2023) and ‘The Rule of Law in the Enforcement of EU Law: Shortcomings and Future Standards’ (Heidelberg, 23 and 24 June 2023). The authors would like to thank the participants in these conferences for their valuable input and feedback, which have greatly enriched this paper.

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## 1. Introduction

The enforcement of European Union (EU) law seems to pose a dilemma. On the one hand, EU law leaves considerable room for member states to make choices regarding the way in which it is enforced. Studies in effective enforcement stress that effective enforcement (or indeed: effective policy-making more generally) often requires some form of sensitivity and adaptation to the specifics of local circumstances and the case at hand. As a result, the use of different enforcement approaches by different member states may lead to better outcomes.<sup>1</sup> Likewise, selectivity, a focus on risks, proportionality and responsive regulation have been argued to be important prerequisites for effective compliance strategies.<sup>2</sup> This implies a degree of differentiation and non-uniformity in the enforcement of EU law, which can be called ‘differentiated enforcement’.<sup>3</sup>

On the other hand, creating a level playing field is an important goal of EU policies. The importance of consistent implementation and enforcement to achieve such a level playing field has been a recurring theme in European Commission documents on the topic. For instance, in the 2022 communication ‘Enforcing EU Law for a Europe that Delivers’, the Commission argues that ‘[f]ull and consistent application of EU rules by Member States is important for legal certainty and the trust placed by people and businesses in national institutions and the EU at large’, adding that ‘it is key that equality and non-discrimination are respected throughout the EU and that citizens can benefit from the same level of protection of their rights wherever they live in the EU.’<sup>4</sup> Similar lines of argument were put forward in earlier Commission communications<sup>5</sup> and are reflected in academic studies that stress the importance of uniform enforcement for obtaining a level playing field.<sup>6</sup>

The quote from the Commission communication raises a number of questions that are of more general importance for the debate on the enforcement of EU law. What does it mean for enforcement to be ‘full and consistent’? Is that the same as ‘uniform’ enforcement or does it leave room for (certain forms of) differentiation? And should the enforcement of EU law (always) aim at achieving a level playing field? These are the questions that will be discussed in this paper. More specifically, we will focus on the question whether uniform enforcement is required for creating a level playing field. To answer this question, this paper explores the relationship between the notions of differentiation, uniformity and level playing field. In doing so, insights from both legal studies and political science/public administration are used.

In this way, we aim to contribute towards two ends. First, to make considerations of differentiation and uniformity a more explicit part of debates on (the enforcement of) EU legislation. Currently, these debates are often informed by implicit understandings of the benefits and drawbacks of differentiation and uniformity. By making explicit the issues and trade-offs involved in these different approaches to enforcement, better-informed choices and analyses can be made. The second objective is to help clarify the relationship between differentiated enforcement and level playing fields. By analysing the concepts of ‘differentiation’, ‘uniformity’ and ‘level playing fields’, we will show that each has multiple dimensions. Distinguishing these dimensions may form the basis for a more nuanced and better-informed debate.

Our exploration proceeds in a number of steps. We begin by dissecting the notions of ‘differentiated’ and ‘uniform’ enforcement in order to clarify their meaning and provide an overview of the different enforcement models that are used in the EU. This is followed by a closer look at the notion of ‘level playing field’. Building on these conceptual foundations, we then develop a normative framework for thinking about the conditions under which differentiation and uniformity are called for in the enforcement of EU law. Subsequently, we extend the debate to objectives that go beyond the notion of level playing field. We end with a number of more general conclusions and implications.

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<sup>1</sup> See e.g. Thomann E, ‘Eva Thomann. 2019: Customized Implementation of European Union Food Safety Policy: United in Diversity? Cham: Palgrave Macmillan, International Series on Public Policy.’ (2019) 5 *European Policy Analysis* 136, in particular the conclusions on page 198.

<sup>2</sup> OECD 2014. See p. 14 for a brief overview of the best practice principles for good enforcement.

<sup>3</sup> Cf. the notion of ‘differentiated implementation’; Princen 2022; Zhelyazkova et al. 2024.

<sup>4</sup> European Commission 2022, p. 4-5.

<sup>5</sup> European Commission 2017; 2020.

<sup>6</sup> See e.g. Versluis 2007, p. 50, who introduces her study of the practical implementation of the EU Safety Data Sheets Directive by noting that ‘[t]he main objectives of European integration are unification, uniform rule application and a setting up of equivalent conditions for all member states and therefore of equal competitive positions for all regulated actors’.

## 2. Preliminary considerations

Before entering the substantive discussion, it is important to clarify two issues. First, a note on the concept of ‘enforcement’, which is central to this paper. Enforcement can be conceptualized in a narrow and broad sense, along two dimensions. Along the first dimension, enforcement in a narrow sense includes all activities aimed at detecting and sanctioning non-compliance. This encompasses the monitoring of behaviour by the addressees of legal norms, investigations into (potentially non-compliant) behaviour and the imposition of sanctions.<sup>7</sup> In a broad sense, enforcement also includes other activities that are meant to improve compliance, such as providing information and guidance and other preventive measures.<sup>8</sup> Along the other dimension, enforcement can relate only to the activities of state actors (‘public enforcement’) or also include enforcement activities by private actors (‘private enforcement’).<sup>9</sup> Within the focus on public enforcement, a further distinction can be made by including only administrative enforcement or also enforcement through criminal law.

These different conceptualizations of enforcement are relevant to the debate on uniformity and differentiation, as arguments about the desirability of uniformity or differentiation may depend on the specific conceptualization one has in mind and may vary between different elements in that conceptualization. In this paper, we will start from a broad conceptualization of enforcement. Where this is relevant to the argument, further distinctions will be made within this broad concept.

Second, it is helpful to say a few words about the relationship between the debate on differentiated enforcement and earlier debates on (differentiated) regulation. What would a contribution to differentiation, uniformity and level playing fields add to the already wealthy literature on EU regulation? What is so specific about enforcement that it merits a specific contribution? It is indeed true that there is a degree of overlap between the regulation and enforcement of EU laws, and so there should be. Yet we do believe that a separate contribution on enforcement of EU law has added value, for a number of reasons. First of all, the fact that EU norms must be ‘enforced’ under EU law may also change the character of the norms and, consequently, the requirements for and content of the regulatory process. This is most apparent in criminal law (including punitive administrative law), where a violation of EU rules by economic actors or individuals becomes a criminal offence, which in turn has consequences in light of, for instance, Art. 49 of the EU Charter of Fundamental Rights (the legality principle), but also for the institutional design of the applicable enforcement mechanisms (institutions, tasks, powers and safeguards to be applied). Related to this is, secondly, the fact that law enforcement is a sensitive area that is closely linked to state sovereignty. One notices these sensitivities both in the legal competences of the EU when it comes to enforcement, as these competences are usually more confined than elsewhere, but also in legislative and operational practice. Thirdly, the debates on the regulatory governance of the EU and the arguments used in it, do not necessarily reflect the particularities of law enforcement. We can illustrate this point by taking the notion of discretion as an example. Without doubt, this notion is vital in both regulatory studies, as well as enforcement studies. Yet the desired degree of discretion in governance – confined by such notions as democracy or political responsibility – is different than in enforcement studies. Law enforcement not only pertains to the democratic legitimacy of the statutory framework or the enforcement policies, but is very much also interpreted in light of such notions as ‘impartiality’, ‘independence’ (certainly from the political powers that be) or fairness in the – another concept unknown in regulatory studies – ‘proper administration of justice’. Finally, the enforcement of EU law – and the required degree of differentiation or uniformity – is not only a concern for the legislative branches in the EU legal orders, but also, and much more than in regulatory studies, a matter for the executive and the judicial branches of ‘state’ (in a functional sense).

## 3. Varieties of differentiation and uniformity

In the debate on level playing fields and differentiation/uniformity in enforcement, the concepts of differentiation and uniformity are one half of the equation. It is therefore important to zoom in on these concepts to determine what they mean in the context of this debate. In a general sense, ‘uniformity’ means that

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<sup>7</sup> Vervaele (1999).

<sup>8</sup> The OECD takes such a broad approach to enforcement; see OECD 2014, p. 11.

<sup>9</sup> In political science and public administration studies, most attention has gone to public enforcement. For exceptions in the study of international and EU regulation, see Eilstrup-Sangiovanni and Sharman 2021 and Mizarhi-Borohovich, Newman and Sivan-Sevilla 2024. On private enforcement in legal studies, see inter alia De Cock Buning and Senden (2020). Most legal studies deal with the private enforcement of competition law; cf. Rodger, Ferro and Marcos (2023).

things are done in the same way in all situations whereas ‘differentiation’ means that different approaches are taken in different situations. In the context of enforcement of EU law, these notions can be specified in two distinct ways, depending on the angle that is taken. This gives rise to two different forms of differentiated (and, as a corollary, uniform) enforcement in the EU.

### 3.1 Territorial differentiation

The first form of differentiation relates to differences between different territorial units within the EU. Usually, these units are member states but the same argument can also be applied to sub-national units, such as regional governments or municipalities.<sup>10</sup> In this approach, ‘differentiated enforcement’ means that enforcement occurs differently in different member states. Often, EU law leaves (considerable) room for such differences. Beyond the general requirements flowing from EU law (such as the requirements that penalties be ‘effective, proportionate and dissuasive’ and comparable to the penalties for similar violations of domestic law<sup>11</sup>), the room for member states to differentiate in their enforcement strategies and practices is determined by the specific requirements laid down in the applicable EU legislation.<sup>12</sup>

EU legislation offers room for differentiation at several levels. At the legislative level, member states are often allowed to go beyond the rules laid down in EU legislation and/or include exemptions into domestic implementing legislation. In addition, they normally need to specify general rules contained in EU legislation and define specific sanctions.<sup>13</sup> This also includes the specific roles of and relationships between public and private enforcement in a member state.<sup>14</sup>

At the executive level, the enforcement of most EU policies is done by member state authorities, which have considerable leeway in determining overall enforcement strategies and individual enforcement practices. However, the extent to which the room in EU law translates into actual differences between member states in this regard also depends on the level of coordination that takes place between enforcement authorities from different member states, through EU agencies, European regulatory networks or ad hoc coordination.<sup>15</sup>

When it comes to private enforcement, even if legal arrangements are harmonized the practical use that private actors make of these arrangements is beyond the scope of EU harmonization and coordination. This may lead to different enforcement patterns depending on the strength of private actors in different member states. At the same time, similar to the role of European regulatory networks in public enforcement, domestic private actors may themselves coordinate their activities in order to reduce disparities and achieve broader pan-European objectives.<sup>16</sup>

Finally, at the judicial level, courts in different member states may apply EU law differently, depending on the specifics of domestic implementing legislation and the domestic legal system in which courts operate. Here, too, the EU system offers ways to obtain a degree of uniformity, formally through the preliminary procedure and informally through judicial dialogues. Studies in law have for instance highlighted how the judiciary has taken the lead in the development of – what has been called – a *lingua franca* or a shared narrative to which actors in all national systems can relate, also in areas where the legal framework has not been subjected to strong harmonization or unification.<sup>17</sup>

It is important to realize, therefore, that when talking about (territorial) differentiation in relation to enforcement, the various state actors involved may very well represent different interests that are not always aligned. To that extent, it may even be deceptive to present nation states – Member States – as monolithic entities in the debate. In fact, different state actors have different tasks and perspectives or even conflicting interests when it comes to the creation of a level playing field or the definition of the required level of differentiation (or uniformity) in doing so. This also explains why, for instance, relatively strong level playing

<sup>10</sup> For a study of differentiation in the enforcement of EU law between municipalities in one member state, see Bondarouk and Liefferink, 2017.

<sup>11</sup> CJEU Case 68/88 (Greek Maize), ECLI:EU:C:1989:339, para. 23-25.

<sup>12</sup> Cf. Van den Brink 2017 for a typology of discretion in EU legislation.

<sup>13</sup> For an overview of the relative occurrence of different types of discretion in EU directives between 2006 and 2015, see Princen et al. 2022, p. 11.

<sup>14</sup> See e.g. the differences in the relative weights of public and private enforcement in the implementation of the EU’s Consumer Rights Directive; Smekal et al. 2022, p. 26ff.

<sup>15</sup> See e.g. Scholten 2017; Van Boetzelaer and Princen 2012.

<sup>16</sup> See Mizarhi-Borohovich, Newman and Sivan-Sevilla 2023, who analyse such pan-European coordination among domestic NGOs in the private enforcement of the EU’s General Data Protection Regulation.

<sup>17</sup> Cf. Delmas-Marty (2009); Mitsilegas (2020).

fields are sometimes created in areas where legal ‘uniformity’ is low.<sup>18</sup> Executive powers may seek cooperation and cooperation, despite reluctance or resistance to create a level playing field in legislative terms.

### 3.2 Case-based differentiation

The second form of differentiation relates to individual cases. The point here is not that enforcement strategies or practices vary between territorial units but that they vary between (different types of) cases. The basis for differentiating between cases is formed by a risk assessment, in which enforcement efforts are focused on cases which involve the greatest risk of non-compliance. This can be done by relying on records of past (non-)compliance or by identifying cases through an assessment of risk factors.<sup>19</sup> In the literature on regulatory enforcement, these types of risk-based enforcement have been defended as more effective than a ‘one-size-fits-all’ type of uniform enforcement.<sup>20</sup> In legal studies, the emphasis on the proper administration of justice, and related concepts like ‘fairness’, ‘proportionality’ and ‘equality’ (implying that similar cases are treated similarly, but also that different cases are treated differently) often leads to similar arguments for differentiation at the level of individual cases.

An influential variety of this line of argument has been put forward by Ayres and Braithwaite in their theory of ‘responsive regulation’.<sup>21</sup> In this approach, enforcement proceeds through various stages, in which enforcement efforts are progressively stepped up in response to non-compliance by firms or other legal subjects. This starts by giving guidance and information and goes via shaming and light sanctions to ‘big stick’ sanctions such as criminal prosecution and withdrawal of licenses to operate.<sup>22</sup>

An underlying rationale for differentiating enforcement practices in this way is the observation that non-compliance may have different causes. Whereas some instances of non-compliance are the result of laxity or the unwillingness to comply (and, in the extreme, the conscious choice to violate rules), many cases of non-compliance are the result of insufficient capabilities to comply.<sup>23</sup> The latter may be caused by insufficient information or expertise, insufficient (financial) means or limited organizational capacities. An enforcement approach that does not tie in with these underlying causes will not be effective or proportionate. Just as professional drug dealers will not be deterred by educating them about the illegality of their practices, small firms that lack the capacity to implement some regulatory framework will not be moved towards compliance by simply imposing a fine. This requires a case-based assessment of the risks of and reasons for non-compliance in a specific case.<sup>24</sup>

When linked to territorial differentiation, two subtypes of case-based differentiation can be discerned. In one subtype, each member state takes its own approach to risk-based enforcement in terms of the applicable legislation and/or operational practice. This means the legal design of and/or approach to enforcement, as well as the methodology used to differentiate between cases may differ between member states (and, as it may be, subnational jurisdictions). An example of this is formed by the enforcement of EU occupational health and safety law.<sup>25</sup> In the second subtype, the design, approach and methods used in risk-based enforcement are harmonized or at least coordinated at the EU-level. Uniformity then is not achieved at the level of actual enforcement practices but by structuring at EU-level the (legal and institutional) design and the process through which enforcement activities in a specific case are to be determined. Examples are the imposition of procedural requirements for implementation in EU air quality legislation<sup>26</sup> and the guidelines for a risk-based approach to anti-money laundering and terrorist financing supervision issued by the European Banking Authority.<sup>27</sup>

<sup>18</sup> See e.g. the example of European railways policy in Knill and Lehmkuhl 2002, p. 271-275.

<sup>19</sup> Blanc and Faure 2020, p. 1408.

<sup>20</sup> Blanc 2018; OECD 2014; May and Winter, 2012.

<sup>21</sup> Ayres and Braithwaite 1992.

<sup>22</sup> See Braithwaite 2011: 482.

<sup>23</sup> This distinction also underlies different approaches to (understanding and fostering) compliance with international law by states. See Tallberg 2002.

<sup>24</sup> Cf. Bardach and Kagan’s notion of the ‘good inspector’, which they juxtapose to a strict and uniform ‘legalistic’ approach; Bardach and Kagan 1982, p. 123ff.

<sup>25</sup> Blanc and Faure 2020, p. 1410-1411.

<sup>26</sup> Bondarouk and Liefferink 2017.

<sup>27</sup> EBA 2021.

### 3.3 Differentiation and uniformity in the enforcement of EU law

The discussion above shows that the relationship between differentiation and uniformity is not unidimensional but has to be seen on two dimensions. This leads to three idealtypical<sup>28</sup> combinations of differentiation and uniformity:

- Full uniformity: the same enforcement approach is used across member states and cases. This implies both territorial and case-based uniformity.
- Harmonized case-based differentiation: each member state sets own approach, but according to harmonized procedural standards. This is a combination of territorial uniformity and case-based differentiation.
- Territorial differentiation: each member state sets its own approach, according to its own criteria. This is a form of territorial differentiation, in which member state need to obtain a result that is prescribed at the EU-level but have the freedom to choose their own enforcement approach. Whether or not case-based differentiation takes place depends on member state choices. This may lead to combinations of uniform approaches in some and a differentiated approaches in other member states.

## 4. Models in the enforcement of EU law

How much room is or should be left to differentiated enforcement depends greatly on the enforcement model that is chosen in a particular area of EU law. Such choices appear to be largely path-dependent and/or the result of institutional battles.<sup>29</sup> Enforcement models often build on specific institutional choices that were made in the past, not necessarily with an enforcement goal in mind. The existence of a European agency, body or institution may make it easier, for instance, to task such an authority with enforcement tasks than in areas where such bodies are not present. The scope and degree of the required level playing field will also vary as a result of the enforcement model.

There are roughly four models in the enforcement of EU law. These models build on two variables, related to the issue of who has the enforcement competence (is this an exclusive or shared competence?) and the level of competence (the EU or its Member States?). Combining the two variables, we can discern four enforcement models of EU law.

The most far reaching model is the model wherein the enforcement competence is entrusted exclusively to an EU authority. In this model, legislative and enforcement competences and activities are defined and exercised at EU level, implying that divergences in policy outcomes are less likely to occur. This model may be chosen, for instance, in areas where enforcement has become ‘too big to fail’ for the national level – think of the financial markets (including crypto markets) or the tech industry. A typical example of this first model is the Single Supervisory Mechanism (SSM), wherein enforcement competences – including punitive administrative enforcement – are put exclusively in the hands of the European Central Bank.<sup>30</sup> National authorities certainly play a role in these models, yet are subordinated to the EU level.<sup>31</sup> This is done, for instance via the integration of national civil servants in the functional structures of the SSM-mechanisms (Joint Supervisory teams, for instance), under the lead of ECB officials.<sup>32</sup> Remaining enforcement policies at national level must be set aside if they come into conflict with the EU policies.

In the second model, enforcement competences are shared between the EU and its (participating) Member States, as is for instance the case in the field of the protection of the EU’s financial interests. There, we see enforcement authorities at the EU level, both in the area of criminal law (the European Public Prosecutor’s Office), as well as administrative law (OLAF).<sup>33</sup> Though it was originally proposed that the EPPO should have exclusive competence in the area within its mandate, the adopted regulation gives the EPPO priority competence over national authorities, under a complicated mechanism for dealing with conflicts of

<sup>28</sup> Idealtypical because none of these types will occur in reality in their pure form. However, these types can be used to typify actual patterns of enforcement by showing which of the types they are closest to.

<sup>29</sup> See also: Van Kreijl (2019).

<sup>30</sup> See Regulation 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ EU L 287/63. See Allegrezza (2020) and Lasagni (2021).

<sup>31</sup> Luchtman, Ligeti & Vervaele (eds. ) (2023).

<sup>32</sup> Karagianni (2022).

<sup>33</sup> Bovend’Eerdt (2023).

jurisdiction between the EU and national levels. The legal framework of the EPPO regulation is largely decentralized, a choice which has been motivated by the fact that the EPPO, brings its cases before the criminal courts of the Member States.<sup>34</sup>

The third model puts the enforcement competence exclusively in the hands of a particular Member State. One stop shop mechanisms exist in the area of financial supervision (home state control mechanisms)<sup>35</sup> and also data protection (enforcement of the GDPR),<sup>36</sup> where certain national authorities take the lead in enforcement operations. There is a connection to EU free movement laws (freedom of establishment), as the national competent authority is in principle the national Data Protection Authority (DPA) of the state of establishment. Those authorities operate on the basis of the applicable legal rules of their state, which can either be a directly applicable EU regulation or national (implementing) laws. National authorities from other states are usually called to assist the lead authority in cross-border cases on the basis of the principle of loyal cooperation and mechanisms implementing or supporting that principle.

The fourth – and most common – model is one wherein national authorities are competent in parallel (concurrence). This model leaves ample room for differentiation at the national level. A prominent example is found in the Area of Freedom, Security and Justice, where the EU has obtained a functional competence in the domain of criminal justice. Art. 67 (1) TFEU states that the ‘Union shall constitute an area of freedom, security and justice *with respect for fundamental rights and the different legal systems and traditions of the Member States* [our italics]’. The default in EU criminal justice remains the competence of the national legislator to determine the territorial scope of its criminal laws and, consequently, the enforcement competences of its police, prosecutors and courts. By implication, this model not only requires mechanisms to deal with the many imminent conflicts of jurisdiction – mechanisms which prove particularly difficult to establish<sup>37</sup> – but also rules for transnational cooperation which are often lengthy legal documents, precisely because mechanisms for forum choices or conflicts of jurisdiction are lacking. There is a tendency, however, to align national criminal policies in the area of serious cross border crimes, often with the help of Europol or Eurojust. Moreover, one notices considerable effort in the area of procedural criminal law wherein minimum rules were introduced for defendants and victims in criminal procedures. The Court of Justice also makes considerable effort to guarantee full access to court and judicial review in cross-border criminal cases, to support the full application of instruments that implement the principle of mutual recognition of judicial decisions.

Obviously, elements of the various models can be merged. New initiatives in the enforcement area show models wherein indeed multiple models are mixed, for instance by creating strong network structures of authorities with comparable tasks and competences, as defined by EU law. Those networks operate under the supervision of EU authorities that may step in and take over enforcement procedures where national enforcement efforts fall short, as is the case for instance in banking law.

## 5. Varieties of level playing fields

The notion of ‘level playing field’ originates in the field of the internal market, where it denotes a set of market conditions that allow for competition between providers on equal terms. However, for the purpose of the debate on differentiation, uniformity and level playing fields in enforcement matters, it is important to broaden the concept to encompass other ends of EU law as well. This ties in with the debate on differentiated integration in the EU, in which tensions have been put forward between differentiation and a set of other values that are all, in their own way, related to ‘equality’ and thereby creating some sort of level playing field.

Looking at the notion of level playing field from that angle, at least five different forms can be discerned, all defining the material scope of the level playing field differently. The first is the level playing field in the context of the internal market, which was already noted above. The central idea here is that a market can only function well if the producers that are active on it are subject to the same legal standards. If not, producers that are subject to laxer rules would obtain a competitive advantage vis-à-vis their competitors that are subject to stricter rules. Those standards must also be enforced, either at EU or national level, which usually

<sup>34</sup> Regulation 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’), OJ EU [2017] L 283/1.

<sup>35</sup> See for instance Arts. 5 *et seq.* and 67 *et seq.* of Directive 2014/65/EU on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ [2014] L 173/349.

<sup>36</sup> See Arts 55 *et seq.* Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ EU [2016] OJ L 119/1.

<sup>37</sup> Cf. Ligeti and Robinson (2018).

also requires changes in the enforcement systems of Member States. Since the effects of rules on producers are not only determined by the substantive standards but also (and, perhaps, crucially) by the way in which these rules are enforced, this type of level playing field argument can also be applied to enforcement practices. A level playing field, in this sense, then is a market in which the enforcement of rules leads to equal competitive conditions for all producers on that market and that prevents forum shopping by economic actors or individuals.

The second form of level playing field concerns the equal protection of rights. This argument is most pronounced in relation to fundamental rights, but it can also be applied to rights that are normally not seen as fundamental rights in a strict sense. Examples of the latter are occupational health and safety standards or animal welfare standards. Even if the protection of those rights has no cross-border effects in a strict sense, their equal protection is deemed important for intrinsic reasons: because each citizen (or, in the case of animal welfare, each animal) is entitled to the same level of protection, regardless of where in the EU they live. In most cases, this type of level playing field refers to a minimum standard that needs to be met.

Third, a level playing field may refer to (equality in/equivalence of) rule of law standards. The key point here is not to guarantee some equal outcome (be it market conditions, policy results or the protection of substantive rights) but to ensure that cases are dealt with in a fair and equitable way across the EU. This is one of the underlying themes in the debate on the rule of law in Hungary and Poland. Although in itself procedural, the emphasis on fair and equal procedures is regarded as a constitutional corner stone of the EU legal order (cf. Art. 2 TEU) and is also seen to serve a number of other objectives, such as the equal protection of rights, the creation of equal market conditions for firms from different member states, and the protection of the EU's financial interests. Moreover, equivalent rule of law standards are said to be vital to foster mutual trust and, on that basis, promote new forms of transnational enforcement cooperation<sup>38</sup> In addition, a fair procedure itself provides a level playing field, in the sense of an 'equality of arms' between the parties involved. Whether or not these arguments imply calls for a level playing field depends on the way they are specified. In one version, fair procedures relate to the (constitutional) guarantees that must be in place to ensure fairness (judicial independence, for instance) and that need to be met but that member states or individual enforcement authorities may go beyond. A stricter version would require some form of equality so as to provide the same guarantees for all, all over the European Union.

The fourth form of level playing field relates to policy outcomes, also in relation to the applicable enforcement model. An argument against (territorial) differentiation within the EU is that it may lead to shirking or cherry picking by member state authorities. If given the option to do more or less, they may opt for doing less if this is politically or administratively more convenient, which will lead to suboptimal policy outcomes or enforcement deficits. This is particularly so if the policy involves cross-border externalities or protects interests that are of particular concern to the EU, but not its Member States (such as the protection of the EU's financial interests). Member state authorities have an incentive to focus only on the effects of a policy on their own territory. Effects on other jurisdictions will then tend to be ignored or at least be given a less prominent place in domestic policy choices. The existence of cross-border externalities has therefore played an important role in arguments for and against differentiation in the EU.<sup>39</sup> This relates to enforcement (efforts) as well. To the extent that enforcement by a member state authority has effects on or in another member state, that authority may not choose an enforcement strategy that is optimal from a pan-European perspective. Arguments that relate to the prevention of forum shopping again play a role, yet this time focus on the possibility of forum shopping by authorities.

The fifth and final manifestation of what is a level playing field relates to the enforcement model that is chosen. As we have seen in the previous section, level playing fields are sometimes created by the introduction of single EU enforcement areas wherein EU authorities literally overcome national borders. Those models make use of such concepts as 'European mandates' or 'European territoriality,' for instance to protect common European goods, markets or interest that are not adequately protected by Member States. The notion of European territoriality, meaning that EU authorities are given the power to execute their enforcement tasks all over the territories of the participating Member States, leads to a level playing field in two ways. First of all, these models do away with time consuming arrangements for transnational cooperation, while, secondly, the development of enforcement policies and outcomes is put into the hands of a single actor. The concept of 'level playing field' is then defined in an institutional sense, as a transnational EU-level institutional framework for the enforcement of EU law.

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<sup>38</sup> Luchtman (2017).

<sup>39</sup> See e.g. Lord 2015.



Having outlined these forms of level playing fields, it is important to note that a single piece of EU legislation (or a provision therein) may aim for more than one form of level playing field. For instance, the legal safeguards inherent in fair procedures can also be seen as a fundamental right or as a way to ensure equal market conditions. Likewise, animal welfare rules in agriculture may be premised on both an internal market rationale (creating equal competitive conditions for farmers across the EU) and an equal rights rationale (protecting animals for their own sake). This combination between economic and universalistic rationales is typical of many internal market rules. Legally, this is reflected in article 114 TFEU (the legal basis for harmonization in the field of the internal market), which provides that proposals ‘concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection’. Politically, the existence of multiple rationales behind one and the same piece of legislation leads to the existence of so-called Baptist-bootlegger coalitions, in which firms and public interest group both support strict regulatory standards but for different reasons.<sup>40</sup>

Nevertheless, it is useful to distinguish between these different forms of level playing fields, as one or some may be most important in a given situation. Depending on which form is central, the relationship with differentiated enforcement may be different.

## 6. Differentiation and uniformity as ways to achieve level playing fields

Having explored the different notions of ‘differentiation’ and ‘level playing field’, as well as the various enforcement models, is it possible to identify the parameters under which differentiation is detrimental to or rather supports the attainment of a level playing field? Obviously, such an exercise would entail much more study and effort than we can offer in this paper. Yet we do believe that there are a number of such parameters emerging.

In this section, we offer a set of considerations that may inform a debate on the choice between (varieties of) uniformity and differentiation in the enforcement of EU law. A good point of departure are the different meanings of ‘level playing field’ discerned above. Depending on what type of level playing field is sought, uniformity or differentiation may be more suitable.

### 6.1 Creating equal market conditions

Level playing fields in terms of creating equal market conditions (including market access) will often require relatively uniform enforcement across member states and cases. A clear example here is the enforcement of customs regulations at the EU’s borders, which needs to be done uniformly in order to prevent different treatment of the same goods arriving in different points of entry in the EU.<sup>41</sup> A similar arguments applies to EU rules that fix the specifications of products to be marketed across the EU, such as the technical design specifications for automobiles.<sup>42</sup>

What these cases have in common is that they all concern clearly defined standards relating to individual actors (private persons or legal persons) or products that move widely across the EU. The combination of rules relating to actors or products (rather than more abstract policy goals) and the strong effects of enforcement in one member state on outcomes in other member states is what requires a relatively high degree of uniformity between member states in terms of common standards, including the legal requirement to prevent, investigate, prosecute and sanction violations of those standards.

Yet, even in these cases there may be scope for case-based differentiation at the executive and judicial levels, as the risks of non-compliance may not be distributed equally across all producers and/or traders. If so, some form of harmonized case-based differentiation seems appropriate, in order to promote a level playing field across the EU.

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<sup>40</sup> Vogel 1995, p. 20-22.

<sup>41</sup> This is underlined by a recent study of Erkoreka and Blas (2023) on the problems arising from differentiated enforcement of EU customs rules across the EU.

<sup>42</sup> Partly, the Volkswagen ‘dieselgate’ scandal could arise because enforcement of car emissions standards was done differently (and not always to the required standard) by member state enforcement authorities; see Braun and Van Erp 2022, p. 191.

## 6.2 Equal protection of rights, fair procedures and the rule of law

The situation is different when the primary rationale of EU law is to guarantee the equal protection of some right or to establish fair procedures and safeguard the rule of law. In such cases, the focus on equality as a value in itself requires a relatively high level of uniformity across member states and cases. At the same time, norms relating to rights, fair procedures and the rule of law typically define a minimum level of protection that member states may go beyond but may not fall below. When it comes to the substantive rights, this is the case both for fundamental rights and in areas such as occupational health and safety and animal welfare. In relation to fair procedures and the rule of law, EU law also allows territorial variation beyond a threshold level.

This leads to an approach in which territorial differentiation between member states is combined with an emphasis on equality and uniformity within member states. A good example of this combination is offered by the Court of Justice's approach toward the procedural autonomy of member states as exemplified in the *Rewe* principles of equivalence and effectiveness.<sup>43</sup> According to these principles, member state judicial procedures for the protection of rights under EU law cannot be less favourable than those for similar domestic rights (equivalence) and should not make it (practically) impossible to exercise those rights (effectiveness). In the *Greek maize* case, this twofold approach was extended to enforcement by public authorities.<sup>44</sup> This approach implies a specific combination of differentiation between and uniformity within member states. While the principle of effectiveness defines a minimum level of protection between member states (which allows for differentiation beyond that minimum), the principle of equivalence requires a degree of uniformity within member states.

This points towards a more general normative argument in these cases. Although there is some scope for territorial differentiation, the case for case-based differentiation at the legislative, executive and judicial levels seems more limited for these categories of level playing field. Given the principled character of the rights involved, it is difficult to envisage an approach in which the protection offered to one set of citizens or organizations in a given member state is lower than that offered to another set of citizens or organizations in that same member state. In addition, as Erik Eriksen points out in an analysis of the provision of welfare benefits under EU law, allowing room for differentiation may also lead to legal uncertainty due to the complexity and unclarity it produces.<sup>45</sup> Case-based differentiation is therefore only legitimate if it does not lead to unequal levels of protection.

## 6.3 Promoting equal policy outcomes

The trade-off is yet different when the promotion of equal policy outcomes is at stake. Here, the key challenge in enforcement is to find the best way to promote the attainment of some policy goal, in situations where territorial differentiation still exists. Quintessential examples can be found in the area of EU environmental law (in a broad sense), such as air and water quality, nature conservation and energy efficiency. What is the 'best way' depends on local and case-specific circumstances and requires a tailoring of enforcement efforts to those circumstances.

As a result, the argument for some form of territorially differentiated enforcement is much stronger in these cases. In fact, using a uniform approach in different contexts is likely to lead to suboptimal policy outcomes, because what 'works' in one member state need not be equally effective in another member state. This is reflected in the set-up of many outcome-based environmental enforcement regimes, which give member states a lot of leeway in enforcing standards (which themselves are often also set or at least specified by member states). For the same reason, forms of case-based differentiation may be called for to achieve the best results.

## 6.4 Supporting the notion of European (enforcement) territoriality

As argued in the previous section, the notion of level playing field can also be conceptualized in an institutional sense, i.e. as the removal of (national) territoriality from the enforcement equation. In these models, uniformity is by its very definition a very encompassing concept. It relates to the organizational statutes of the EU

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<sup>43</sup> CJEU Case 33/76 (*Rewe*), ECLI:EU:C:1976:188, para. 5.

<sup>44</sup> CJEU Case 68/88 (*Greek maize*), ECLI:EU:C:1989:339.

<sup>45</sup> Eriksen 2022.

authorities and their national partners, but also to the applicable substantive norms that must be enforced (not necessarily restricted to equal market conditions), as well as to their procedures, including their investigative powers, procedural safeguards and arrangements for effective judicial protection.

The adoption of a centralized enforcement model has implications for the desirable degree of territorial differentiation and uniformity in these underlying substantive and procedural norms. This is exemplified by cases in which a centralized enforcement model is combined with a relatively differentiated set of rules. An example is EU banking law, which exemplifies the first (most centralized) enforcement model discussed in section 4. Although this is a highly harmonized or even unified area of law, particularly the legal enforcement framework still relies heavily on the (implementing) laws of the participating Member States. Moreover, the SSM-system only covers administrative enforcement and is virtually silent on its relationships with criminal law enforcement. Recent legal studies have pointed to the difficulties this causes, both for the executive powers and for the institutions that have been subjected to their supervision.<sup>46</sup>

The degree of territorial uniformity that is required for the second model discussed in section 4 (shared enforcement between EU and member state authorities) is a hotly debated topic at the moment, particularly when it comes to questions of procedural safeguards and legal protection for individuals.<sup>47</sup> As is also the case under the first model, the debate is almost turned upside down. Rather than discussing how much uniformity is needed for a level playing field, the question then is whether these models – that rely heavily on divergent national laws and national authorities – can offer the required degree of coherence to ensure the full effectiveness of EU law (both in terms of effective enforcement and effective legal protection).

The first two models therefore call for a high degree of territorial uniformity to prevent the competent EU authorities from ending up in situations wherein they have to apply a multitude of national laws in the same case. The other two models discussed in section 4, wherein national authorities still play the lead role, do not require this degree of harmonization or even unification. Yet even for these latter two types of models the required level playing field may call for (more) territorial uniformity to guarantee certain policy outcomes or rule of law standards.

These points all relate to territorial differentiation and uniformity. The choice of enforcement model does not, in and of itself, have implications for the desirable degree of case-based differentiation. This depends on the other characteristics of the policy issue and the legal regime, as discussed above. At the very least, however, one would expect a form of what above we called ‘harmonized case-based differentiation’, in which the institutional and procedural approach toward enforcement are harmonized across the EU.

## 7. Differentiation versus level playing fields

The discussion in the previous section proceeded on the assumption that enforcement should lead to a level playing field, in one of the senses that the latter term has. However, the literature also offers arguments for forms of differentiation that lead to unequal outcomes. For a full picture of the debate on differentiation/uniformity and level playing fields it is important briefly to consider these points as well.

Roughly speaking, two types of argument can be given that (may) lead to non-level playing fields. The first argument relates to democratic and sovereignty concerns. Despite increasing integration, the EU is still based on a multitude of national member states with democratically elected governments. Within such a system, member state governments have a certain, autonomous or perhaps even independent claim to democratic legitimacy vis-à-vis the EU-level. Differences between member states can therefore be justified on the grounds that they reflect different democratic preferences or (constitutional) traditions.<sup>48</sup> Such a claim extends to enforcement practices as well. To the extent that enforcement is done by member state authorities, within a domestic legal and political context, member state governments are not mere ‘executors’ of EU-wide decisions but may claim the authority to make decisions on behalf of their citizens.<sup>49</sup>

How wide this room should be and how the balance between member states and the EU-level should be struck in this regard is subject to an ongoing debate and is, in a way, the key question behind the process of European integration. There is no single ‘correct’ answer to this question. Moreover, the position one takes on the role of member states within the EU cannot be derived from arguments about the enforcement of EU law

<sup>46</sup> Allegrezza (2020); Lasagni (2021); Karagianni (2022).

<sup>47</sup> See for instance the opinion of Advocate General Ćapeta in Case C-281/22, *G. K. and Others (Parquet européen)*, EU:C:2023:510 of 22 June 2023.

<sup>48</sup> Bellamy and Kröger 2017; Fossum 2015.

<sup>49</sup> Cf. the argument by Hill and Hupe (2003) in their article on implementation in ‘multilayered’ systems.

per se but depends on one's broader vision on the EU and the process of European integration, which precedes discussions about the proper enforcement of EU law. Depending on that position, the legitimate room for specific member state concerns in enforcement will be larger or more limited. However, what we can observe is that in the EU's current set-up member state governments have a clear autonomous political and policy-making role. Against that background, democratic and sovereignty arguments remain relevant in the debate on the enforcement of EU law.

The second argument relates to the potential benefits of experimenting with multiple approaches to the same issue. In many cases, it is not entirely clear what works best to address a problem, both generally in terms of overall policy approach and more specifically in terms of the enforcement approach to be taken. In those cases, trying out different approaches in different (subunits within) member states offers a way to try out what works best. In this vein, in her study of the implementation (including the enforcement) of EU food safety policy, Eva Thomann has shown that the use of different approaches by member states may lead to better outcomes when the issues they seek to address are complex and/or domestic implementation contexts are characterized by high levels of conflict.<sup>50</sup>

In the literature on US federalism, this argument is known as 'laboratory federalism', in which the various states act as 'laboratories' for different approaches.<sup>51</sup> This same line of thought has also been applied to the European Union with its multiple member states.<sup>52</sup> A particular form of this argument can be found in the literature on 'experimentalist governance', in which policies and legal frameworks are adapted over time as actors learn from previous experiences.<sup>53</sup> Case studies have identified patterns of experimentalist governance across a wide range of EU policies.<sup>54</sup> Yane Svetiev recently extended this line of argument to the enforcement of EU competition law, a prime example of a field of law that seeks to establish equal market conditions.<sup>55</sup>

Both arguments imply that, under certain conditions and within certain limits, the (potential) benefits of striving for a level playing field need to be balanced against the (potential) benefits of allowing for non-level playing fields. As for the debate on how to achieve a level playing field through differentiation/uniformity that was sketched above, this choice requires a further analysis of the trade-offs involved. This should include a specification of the general arguments about democracy and experimentation to the specific issues involved in enforcement.

## 8. Conclusions

In this paper, we have outlined an analytical approach to the relationship between differentiated/uniform enforcement on the one hand and level playing fields on the other. We have sought to show that each of these concepts has multiple meanings, which affect the relationships between them. Depending on the types of differentiation/uniformity and the specific meaning of level playing field that is at stake, striving for a level playing field may call for a degree of uniformity, a degree of differentiation or a specific combination of the two.

More specifically, our analysis brings forward five important conclusions. First, in thinking about uniform and differentiated enforcement, it is important to acknowledge that 'enforcement' includes a range of activities. Depending on one's definition of 'enforcement', this range may be broader or narrower but either way uniformity may be called for in relation to some enforcement activities while other enforcement activities may be subject to differentiation.

Second, the concepts of 'uniformity' and 'differentiation' themselves are not always mutually exclusive. Since they relate to both the territorial and case-based dimensions of enforcement, combinations of uniformity on one and differentiation on the other dimension are possible. In particular, forms of territorial uniformity in the application of case-based differentiation have become an important part of EU law in recent decades.

Third, whether or not achieving a level playing field requires uniform enforcement depends on the type of level playing field that is at stake, as well as the degree of heterogeneity between member states and

<sup>50</sup> Thomann 2019, see in particular the conclusions on page 198. See also Matland's (1995) more general argument about the benefits of 'experimental implementation' under certain conditions.

<sup>51</sup> Oates 1999, p. 1132-1134.

<sup>52</sup> Kerber and Eckardt 2007.

<sup>53</sup> Sabel and Zeitlin 2008.

<sup>54</sup> See e.g. Weimer and Vos (2015) and Zeitlin and Rangoni (2023).

<sup>55</sup> Svetiev 2020.

cases. When such heterogeneity is large, applying the same enforcement approach across jurisdictions and cases may actually jeopardise the attainment of a level playing field. Under those circumstances, differentiation may be called for to obtain a level playing field.

Fourth, attaining a level playing field is not the only relevant consideration in the enforcement of EU law. Depending on the issue at hand and one's normative position, democratic and sovereignty considerations may provide arguments for forms of differentiation that lead to non-level playing fields. In addition, the experimentation with different approaches so as to develop more effective enforcement practices may be beneficial when issues are complex and characterized by ambiguity regarding what works best.

Fifth and finally, the trade-off between differentiation and uniformity is not only affected by the substantive objectives that a piece of EU law seeks to attain but also by the institutional model that applies to its enforcement. Once a relatively centralized institutional arrangement is in place, it may require further territorial uniformity in underlying substantive and procedural rules, regardless of the other arguments for or against such uniformity.

All in all, then, our analysis shows the importance of taking a more nuanced approach to the debate on differentiated/uniform enforcement and level playing fields. Key to such a more nuanced approach is the disaggregation of the overall concepts of 'enforcement', 'differentiation', 'uniformity' and 'level playing fields' into more specific elements. Whether or not uniform or differentiated enforcement is called for depends on a careful assessment of each of these elements in relation to the legal regime at issue.

As we argued in our introduction, we believe such an analytical exercise is important to make questions of differentiated and uniform enforcement an integral part of policy debates (including, for instance, in regulatory impact assessments) and to imbue the debate with a greater degree of nuance. An important overall implication of our analysis is that choices for differentiation or uniformity in enforcement are not a matter of all or nothing. Rather, different combinations of differentiation and uniformity offer a wider range of options than the two extremes. Moreover, the choice between these options involves a wide range of considerations, in which no single consideration or argument can be claimed to be decisive. This does not make the debate any easier, but it does make it richer and better-informed.

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