33. Challenges and successes of enforcement of EU law

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1. INTRODUCTION

1.1 Relevance and Origins

This concluding chapter offers a snapshot synthesis of the key trends, observations and findings of the preceding 32 chapters. The 50 experts from different academic fields and practice gathered here have contributed to enhance the understanding, research and practice on the conceptual underpinnings (Part I), institutional (Part II) and sectoral (Part III) foundations of the enforcement of European Union (EU) law. Altogether, these chapters have discussed approximately 1400 academic and policy publications, 300 legal texts and 350 court judgments and other decisions, this rough estimate based on the chapters' references. While these impressive numbers may question the extent to which the enforcement of EU law has been an understudied topic, this chapter argues that the topic does deserve greater research and policy attention. This is because the more we know, the more we realize the extent of our ignorance. This concluding chapter aims thus at synthesizing the key lines of the rich knowledge offered by the team of contributors to outline the elements that can challenge and contribute to the success of enforcement of EU law, and the questions for further research and action. Similar to other chapters of this book, this chapter continues in three sections. Section 2 maps briefly what we know about the enforcement of EU law so far. Section 3 discusses the synthesized elements that can challenge and contribute to the (assessment of) the success of EU law. These elements could serve as a basis for further elaboration in the Union's strategy on enforcement, and build theoretical foundations for such strategy. Section 4 concludes.

2. EVOLUTION OF ENFORCEMENT OF EU LAW

EU integration comes from its origins as an international organization. The processes of enforcement of EU laws and policies initially emerged into the domain of public laws and public administrations. This comes as no surprise, as the Member States were originally and predominantly the addressees of EU acts. The enforcement of EU law vis-à-vis private actors has been traditionally kept at the national level, except in the area of competition law enforcement. The EU-level norms would define common objectives to achieve and rely on national administrations to elaborate these further, especially as to how such objectives could be further implemented and enforced at the national level. Time has shown, however, that the nature of EU law has evolved and that obligations stemming from EU law affect various actors, not only the national public administrations seeking to enforce. In addition, national public administrations have not always been good examples in terms of enforcement of EU law, for various

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reasons, from a lack of human, financial and digital capacities to changing political salience and interests, to name but a few.

Thus, the enforcement system has not been static but has become rather a dynamic process evolving considerably, also in terms of major mechanisms to deploy. First, indirect enforcement has been the key mechanism. This requires the EU and the Commission to monitor Member States' transposition periods and further compliance with relevant laws, also via the infringement procedure if necessary (see Chapters 3 and 7 and the discussion of the theory of executive federalism in Chapter 31). Individuals have been seen as additional effective supervision actors (Case 26/62 *Van Gend & Loos*; see also Chapter 12). Indirect enforcement has been organized and has evolved along the key legal principles of delineation of powers embedded in the treaties and in part developed in the case law of the Court of Justice of the EU (CJEU): the treaty-based principles of conferral, implemented with the help of subsidiarity and proportionality; the principle of national institutional, procedural autonomy (Case 33/76 *Rewe*; Case C-68/88 *Greek Maize*); mutual recognition and trust; the principles of effectiveness and equivalence (Case C-362/12 *Test Claimants*); the protection of fundamental rights (the Charter and case law); and the non-delegation doctrine (Case C-10/56 *Meroni*; ESMA short-selling, see Jans et al. 2015).

Second, the more constitutional and administrative public law focus in EU law has been further broadened to also include reliance on private and criminal laws and mechanisms of national jurisdictions, which has also gradually touched upon Europeanization trends and harmonization of national private and criminal laws, to ensure effectiveness of enforcement through the addition of more enforcement possibilities and deterrent effects to prevent non-compliance (see Chapters 2, 4, 28 and 32). Next to indirect enforcement, we have witnessed the proliferation of various cooperation mechanisms and the creation of direct enforcement, that is, enforcement vis-à-vis private actors directly by EU enforcement authorities (Scholten and Luchtman 2017; see Chapters 10, 11, 15, 16, 17, 24, 31 and 32), which sometimes originate from networks of national enforcers (Scholten and Ottow 2014; see Chapters 9 and 11).

Finally, there are still some more intergovernmental, yet also developing, rationales in enforcement, that are employed in some specific policy areas such as the Common Foreign and Security Policy (Chapter 13), Economic Monetary Union (Chapter 14) and the area of freedom, security and justice (Chapter 30), where, for instance, the Council and political pressures and mechanisms play a more prominent role in enforcement.

The evolution of enforcement of EU law has seen a number of processes and trends, as mentioned throughout the book (see also Craig and de Búrca 2021), which can be briefly summed up as follows:

- Principles-, rights- and safeguards-based approaches, meaning that enforcement of EU laws can be organized via ensuring and monitoring specific principles in attaining policy goals, rather than detailed regulations, and allowing reliance on rights and safeguards in ensuring the attainment of policy goals in a legitimate way.
- Europeanization of national laws and enforcement, meaning the influence and adjustments in various degrees of harmonization of national substantive and procedural laws and further from predominantly indirect to also networked and direct enforcement.

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- Centralization of the enforcement rule-making authority to determine how enforcement should be done and to exercise enforcement, proliferating coordination (via networks) and agencification.
- Politicization of regulatory enforcement via determining, debating and defining what issues need to be regulated and enforced and what do not, and where difficult compromises and difficulties in reaching an agreement may lead to the creation of overly complex governance and decision-making processes which could challenge enforcement.
- Consolidation and proceduralization of enforcement activities via EU hard, soft and case laws and rights and safeguards.
- Proliferation of soft or *ex ante* mechanisms to enhance compliance to ensure the preventing function of enforcement, rather than relying only on (at times expensive in terms of human, financial and emotional costs) responding function of enforcement.
- Criminalization of EU laws, meaning the proliferation of prescribing national criminal sanctions for EU law enforcement violations and harmonization of procedural criminal laws.

While these processes and trends discussed throughout the book may vary per sector and with institutional developments, what seems quite striking is the lack of realization or acknowledgement of these processes in a comprehensive 'strategy and theory-building' way. There is yet this process of the EU acquiring enforcement power, which is ongoing through specific hard, soft and case law. This indicates the need to rethink the integration process and this new power at the supranational level. The treaties and the most recent 'better regulation' publications from the Commission are not explicit about this type of power (see Scholten 2022, where I analysed nine 'better regulation' documents). The new institutional innovations, such as joint supervisory teams and EU agencies with enforcement powers, lead to novel forms of EU cooperation and enforcement, thus challenging the classic 'nation-State' public controls over such powers and the protection of fundamental rights and the rule of law due to, among others, shared ways of enforcement. This deserves closer political and academic attention. It comes hence as no surprise that prominent experts call for addressing this pertinent question and developing an EU enforcement theory and strategy, including when looking at least at the first part of this volume on relevant conceptual underpinnings and developments in EU law enforcement (see also Scholten 2022).

To be more specific concerning experts' call for common strategies, Cherednychenko argues the need for a 'coherent private enforcement strategy' (Chapter 2). Duijkersloot and Widdershoven urge 'systematizing the applicable administrative tools, in general and within composite procedures in particular, both in order to promote legal certainty, fairness and trust' (Chapter 3). Discussing the concept of criminal law enforcement of EU laws and relevant Europeanization, Meyer and Tsilikis point to 'an essential deficit in the theoretical structure of the enforcement system' (Chapter 4). Van der Heijden and Batura outline novel questions for investigation and future enforcement theory-building literature, such as 'to what extent there is convergence (or divergence) in the use of' the concepts they discuss (deterrent, compliance-based, responsive and smart regulation, insights from human, organizational and behavioural studies, and so on) between EU Member States (Chapter 5). This certainly has implications for the degree of uniform application and the question of the extent to which there may be a need for centralization and harmonization strategies (or not, and when), also given other possible factors which may influence enforcement – cultural differences, politics

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and human, financial and technological resources, as discussed by Zhelyazkova (Chapter 6). Other chapters similarly pinpoint the need to rethink existing enforcement mechanisms in light of new political, legal and conceptual developments (see, for example, Chapters 7–11 on the enforcement institutions), and to research and construct relevant overarching strategies and frameworks generally and more specifically for relevant policy fields. The nature of EU law is diverse in a number of ways – policies (an increased number of sectors since the outset); policy objectives, which often need to be balanced among each other and with different national interests; addressees (national governments and/or private actors), and so on. It has its own dynamics, including types of obligations for national administrations and the society. It seems essential to develop a enforcement strategy and discuss the theory behind enforcement in an integration process and a multi-jurisdictional setting, such as that which the EU represents.

3. TOWARDS A SUCCESSFUL ENFORCEMENT (STRATEGY)

How to start building the relevant foundations for an EU enforcement strategy and theory? In addition to bringing emerging research from relevant disciplines – EU integration theories, EU constitutional theories, EU laws and relevant institutional and sectoral developments, institutional theories, enforcement and compliance research (see Scholten 2022 for the first attempt) – one of the main goals of this volume has been to try and find out to what extent enforcement of EU laws has been successful, to identify factors that may contribute to or challenge its success. Offering comparative insights could hopefully also enhance enforcement generally, if one could reflect on the usage of mechanisms and ideas implemented elsewhere, across the sectors and institutions. Knowledge of the factors to contribute to enhancing enforcement could support further development of strategies and roadmaps indicating when which type of enforcement of EU law could be more suitable, both generally and more sector-specifically. For instance, should centralization – network and/or agency – compensate for the Member States' poor performance in enforcement matters? For which types of policy aims and sectors could it be more effective to invest in enforcement at the national or at the EU level? How could various legal acts and legal procedures be further developed in light of compliance-based, responsive regulation and other behavioural studies insights? To what extent can the EU be involved in the regulating, designing and operationalizing of enforcement at the law- and rule-making stage, and what has been argued to play a role in success of enforcement, given the national procedural autonomy principle and considerations of national sovereignty? Even though political compromises dictate the outcomes of legislative processes and policy-building, such robust theoretical and empirical knowledge could support better policy-making and enforcement via supporting relevant positions in the political discourse.

3.1 In Search of 'Successful Enforcement'

To start with, there has been no genuine consensus among the authors of this volume as to the rate of success in EU law enforcement. As Butler writes, 'there is no optimal form of the enforcement of EU law, regardless of policy sphere' (Chapter 13). This seems to be due to the fact that we are lacking relevant methodological, analytical and evaluative tools to determine what successful enforcement could constitute. As the authors of Chapter 4, Meyer and Tsilikis, put it succinctly: 'Nobody has so far convincingly defined what level of enforcement is

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required […] we do not even know whether enforcement is norm-, results- or effort-oriented, whether each case or all cases on aggregate counts and how much variation is acceptable both nationally and internationally'. They conclude that one needs the right tools, standards and reliable statistics to be able to evaluate and trace relevant enforcement processes. Similar ideas emerge in other chapters. For instance, while positively evaluating enforcement in the area of intellectual property rights, Blok and Kornelius conclude that the evaluation studies they reviewed do not draw any firm conclusions about the effectiveness of specific enforcement measures as the necessary research data is lacking. Duijkersloot and Widdershoven come to a similar observation when discussing the trend for the EU legislator to prescribe detailed and strict enforcement tools over the course of the years to achieve a more effective and equivalent level of enforcement of EU rules in all the Member States: 'different from what one would assume, this strategy is not based on empirical research from which it can be deduced that top down prescribing these tools EU wide indeed leads to a more effective and equivalent enforcement in the Member States' (Chapter 3). Thus, a clear legal picture of harmonized national laws in that area seems only one factor leading to success; it does not seem to account for the whole story of that success. The lack of data on enforcement practices and doubts as to how to interpret emerging data, for example on the number of inspections and sanctions (see, for example, Chapter 24 by Cacciatore, Eliantonio and McMahon in the fields of common fisheries and agricultural policies or Chapter 10 by myself) have been quite consistently reported throughout the book. Furthermore, for those who may assume that successful enforcement can be seen in court decisions, it would be advisable to investigate how far relevant policy goals have been reached after such procedures. As van Dijk and Sterk state, 'we need to know more about the implementation of court decisions, at national and at CJEU levels' (Chapter 8): to what extent have court decisions been implemented and actually contributed to promoting policy goals? Finally, it is important to be cautious about the risk of biased assessment resulting from too narrow perspectives (disciplinary or other). Interestingly, Rumpf and Banet note in Chapter 23 that 'it is a question of whether one considers the glass half empty or half full: the Commission has a tendency to proclaim the achievement of energy policy goals, whereas ACER [The European Union Agency for the Cooperation of Energy Regulators] generally points to progress as well as setbacks'.

This brings me to the initial point of departure stated in Chapter 1: that the success of enforcement depends on a number of pre-existing and emerging factors, including one's 'disciplinary glasses'. Enforcement success is taken as the real fulfilment of enforcement objectives in a legitimate way, understood broadly – respecting relevant principles, such as proportionality, fair procedure, procedural guarantees, respect for fundamental rights, in its set up and operation, and preferably via preventing violations rather than sanctioning (see Chapter 1), which is cost-efficient in various ways. Enforcement can be thus better pictured as a dynamic process and not a static outcome, which needs permanent attention, even though a number of authors signal achievements – European Monetary Union (EMU), European Banking Union (EBU) and the Area of Freedom, Security and Justice (AFSJ) – in their respective policy areas. It is thus crucial to identify elements that can contribute to this dynamic process of enforcement running more or less smoothly, and elements that can hamper it. As I state elsewhere, the (assessment of) success of enforcement is highly dependent on the normative glasses worn vis-à-vis the EU, the evolving legal and political contours, and policy and practical enforcement issues (Scholten 2022). The rich discussion in the preceding 32 chapters offers a great basis for distilling such elements. Some chapters even offer specific lists and

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conditions for enforcement in specific areas (see, for example, Chapter 20 on environmental protection by Bertone, Blanc, Coletti and Gemmell and Chapter 9 by Ruffing on six factors that may affect enforcement). Let me offer food for thought, also for any future research and policy agenda, on such elements.

3.2 Snapshot of Common Challenges to Enforcement

Let me start with the challenges to enforcement. The elements that seem to stall progress and hamper success and the assessment of it seem to come down to the following: a lack of enforcement strategy, as mentioned already; the complexity of designed institutions, legal provisions and enforcement and relevant controlling procedures, which undermines legitimacy and rule of law standards; and politicization. One may at the same time wonder if the politicization factor is not behind the lack of strategy and complex procedures, too. I leave this to the reader's further consideration.

First, many contributors argue for the necessity of an overarching idea behind enforcement in order for it to be successful. This seems especially relevant if brought together with another observation from a number of studies, that enforcement is hampered when a number of competing policy goals are at stake (environmental protection also in light of competition law aims, energy 'trilemma', to name but a few). Also, the so-called rights-based perspective on enforcement, that is, creating the rights for private actors to claim in (court) procedures such as those related to consumer protection (Chapter 22), may not necessarily be a good strategy if not supported by relevant mechanisms to facilitate access to courts, access to relevant information, materials and actors (see also Chapters 26 and 27) and other support, including education in compliance (see also Chapter 5). In fact, what seems to have been happening is that the more policy goals there are and the vaguer the norms to enforce may become, including misalignment of the aims and relevant legislative provisions, the more difficult it is to enforce such policies, goals and norms. This further necessitates striking relevant balances among such aims without necessarily pointing to who should be taking such responsibility. While such hypothesis warrants further investigation in legal and other, empirical studies, it seems wise to legislate with clear enforcement mechanisms per relevant clauses, norms and policy goals, and as to how to balance different goals.

Second, the complexity of the created institutional and decision-making processes is noted as another challenge to successful enforcement. This in turn questions the effectiveness of the relevant processes and undermines essential procedural guarantees and rule of law values, which then hampers success as enforcement aims at attaining policy objectives in a legitimate manner (Chapter 1). The complexity and concerns about upholding the rule of law have been noted by the studies on the composite procedures in the areas of the Single Supervisory Mechanism (SSM) and in administrative and criminal law enforcement in general (Chapters 3, 4 and 15), (upcoming) developments in the field of anti-money laundering (Chapter 16), energy law (Chapter 23), data protection (Chapter 29) and the protection of financial interests (Chapter 32). The institutional complexity results in the involvement and applicability of too many EU and national actors, laws, procedures and standards, which undermines legitimacy, legality, legal certainty, fairness and trust. This is also due to the fact that any guidance may be lacking as to how to solve relevant matters of (conflicting) jurisdictions, standards, questionable protection of fundamental rights, and so on. As Karagianni and Wissink state, mixed administration is generally considered to be overall beneficial for the effectiveness

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of enforcement of the relevant EU laws. At the same time, the EBU's enforcement design brings along challenges for the division of tasks, creates complex decision-making procedures and may result in gaps with respect to the accountability of supervisors and the protection of fundamental rights (Chapter 15). Foster (Chapter 17) shows in this respect how complex an analysis of a very short part of legislative text, and hence part of the enforcement procedure – determining the content and scope of negligence and intent in setting a fine – can be, also due to unclear legislation.

The system of controls is a crucial sub-element here. One of the most pronounced problems discussed throughout the volume is questionable controls, accountability and protection of fundamental rights and access to justice, especially for outsiders (see, among others, Nicolosi in Chapter 31 on this discussion for the asylum seekers). The restrictive access to the court for, for instance, recipients of the State aid seeking to access relevant procedures with the EU Commission (as Knook states in Chapter 27) can be seen as impeding enforcement in its reactive function. The same goes for the questionable controls over EU (enforcement) agencies, whose legitimacy and hence operation and controls remain debatable due to the lack of a treaty basis (Chapter 10). As Bernatt and Zoboli mention in this respect, 'the intensity of judicial review (the depth of the reviewing courts' scrutiny) is a key factor in finding a balance between effective enforcement by competition authorities and the external check of their actions' (Chapter 25). Against this background, depending on the norm to enforce that is at stake and the characteristics of the potential violators, the development of alternative, more efficient in terms of time, financial and emotional costs, systems of supplementary (online) dispute settlement and relevant procedures and actors – such as the Fundamental Rights officers, to name but a few – should be developed further and supported in practice with resources, especially as to enhancing their professional support. As Pennings puts it succinctly: 'Among the possible best practices, a low-threshold adjudication body with sufficient competences to enforce the rules is a serious candidate' (Chapter 19).

Finally, we come to the politicization of enforcement. A number of chapters, such as those on enforcement in the areas of labour law, energy and internal market and on institutions such as courts and the Commission, see this factor as a challenge to successful enforcement. For instance, Linden writes that the European Commission seems to prioritize its policymaking role over its supervisory role as the 'Guardian of the Treaties' and that the Member States have a 'natural aversion to controlling their own behaviour' (Chapter 18). Pennings concludes similarly that 'in some areas Member States have conflicting interests and may therefore oppose rules for better enforcement' (Chapter 19), which is detrimental for such an area where the enforcement is left to individual and national levels. He notes differences in national interests in enforcing social and labour policies. Nicolosi echoes this in Chapter 31 concerning the Common European Asylum System (CEAS). Rumpf and Banet conclude that 'despite considerable success in the past, political disagreement still hampers the successful enforcement of EU energy law' (Chapter 22). Jaremba (Chapter 7) and van Dijk and Sterk (Chapter 8) discuss the politicization of the EU enforcement institutions as such, the Commission and the courts, especially in light of the pressures on the priority setting in the infringement procedure and on the independence of national courts respectively, which in turn put pressure on their enforcement functions. While noting a number of challenges of institutional, political, legal and technology-related nature in the field of combating money laundering, Petit pinpoints challenges stemming from competent authorities' forbearance and regulatory capture and legal arrangements that do not seem to work in practice due to political considerations; among

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others, governance structures with relevant national supervisors seem to be problematic in fighting breaches of the Union law, and have never been used (Chapter 16). Bernatt and Zoboli express similar concerns as regards national competition authorities if they have links with the State/government (Chapter 25). Montaldo mentions the AFSJ as being in the spotlight of political quarrels (Chapter 30).

3.3 Elements to Enhance Enforcement

To recall, enforcement aims at promoting policy goals and values in a most effective and legitimate way via its three stages – monitoring, investigating and sanctioning (see Chapter 1; Vervaele 1999). Given the expanding knowledge of socio-legal research (see Chapters 1 and 5; Ayres and Braithwaite 1992; Blanc 2018; van Rooij and Fine 2021, to name but a few), the focus needs to be given to enforcement's preventive function and possible rewarding for compliance, not 'only' to reactive function via sanctions (the classic deterrent approach), though a deterrent effect of available ex post mechanisms should not be forgotten. Also, education, rewards and incentives to comply need to be investigated and preferably discussed ex ante before the adoption of the norm to enforce. The mentioned challenges confirm these theoretical underpinnings and serve further as good ground for formulating elements that could promote enforcement via:

- an overarching strategy and clarity on the enforcement power of the EU (justification of choices behind indirect, networked and direct enforcement, elaborating balances between preventive and reactive enforcement functions and mechanisms, developing general and sector-specific approaches, and so on);
- smart law- and rule-making with consideration of enforcement ex ante, at the law-/rule-making stage, including within impact assessment, which would include national enforcement mechanisms, tailoring enforcement with policy aims and nature of obligations and actors targeted to carry such obligations;
- studying the effect of existing enforcement policies continuously to build reliable statistics and knowledge on enforcement;
- developing principles of creating simple and clear institutions and procedures; and finally
- practices of dealing with political considerations via developing of the rule of reason in justifying the need for regulation (at the EU law) and its further elements and promoting that the government does not only control the governed but also itself (The Federalist No 51, see Madison 1788).

Furthermore, the chapters of this book show that the elements that can be attributed to success of enforcement are as follows.

As the need for enforcement comes from the fact that there is a norm of enforcement, the amount and nature of regulation matter for the success of enforcement. This builds further on a number of considerations. First is the existence of an agreement on the norm as such, also bearing in mind that the context may develop over time. The less disagreement on the existence of the norm there is, the easier enforcement seems to be expected to be. For instance, if there is (science-based) agreement on what an airworthy, safe plane is, it becomes clearer how to enforce such a norm. Even given the fact that the EU law system is built on the foundation of respecting national procedural autonomy and discretion, one could promote enforcement, especially in areas where one sees that such discretion may be abused, by specifying options

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to choose for the Member States thus balancing discretion with effective enforcement (see, for instance, Chapter 19).

Second is the clarity of formulation and interplay with other norms, procedures and aims. The clearer the formulation of the norm and the context for its enforcement, the easier it is to enforce it. As Hofmann and Mustert (Chapter 29) conclude, the challenges for the enforcement of the General Data Protection Regulation come from the involvement of multiple authorities and their different interpretations of relevant provisions which have not been formulated clearly, substantively and procedurally, where reaching consensus becomes difficult. Therefore, the EU regulation capacity should be balanced against the need to establish norms of relevant quality and with the enforcement ability and capacity of the Member States and the EU itself. The passage of an EU norm without such balance may not lead to successful policy but rather contribute to the growth of enforcement and further legitimacy deficit. Similarly, as Baldwin and the Organisation for Economic Cooperation and Development concluded in 1990 and 2021 respectively, enforcement should be considered at the norm/rule/law-making stage (see also Scholten 2022), which is normatively not necessarily a clear-cut issue for those who may look at the EU through a 'federation prism' and see the absolute character for such principles as national institutional and procedural autonomy. The risk of not having an agreement at the norm-setting stage is that the discussion of disagreement leading towards multiple policy goals and vague legislation moves further down the policy-making cycle and has to be dealt with at the enforcement stage. Their relevance for solving the disagreement can then be questioned, also in terms of legitimacy (think of the long-standing debates about the judges and the unelected in this respect). Whereas agreement and degree of disagreement may change, also after the norm is set, relevant enforcement procedures and clauses should be developed with the aim of seeking such agreement and again preventing non-compliance, rather than reacting immediately via sanctions, as the policy goal will not be achieved via sanctions. Such clauses could be periodical evaluation of policy goals, sunset clauses, mediation and coordination mechanisms and organs, also for instance, within EU agencies, to name but a few.

Once enforcement is considered and designed at the policy-, law- and/or rule-making stage, it seems relevant to design it in light of policy goals typology and specifics of the sector to regulate. Van Kreij (Chapter 11) demonstrates via comparative research that there may be fruitful correlations sought between the institutional designs of enforcement institutions – EU agencies or networks – and regulated industries and the degree of concentration of such industries. Cacciatore, Eliantonio and McMahon (Chapter 24) mention different types of enforcement considerations and expectations between different types of policies, such as regulatory and distributive. Van den Brink and Collazzo (Chapter 14) discuss political discretion within the enforcement of EMU and state that such political and ex ante mechanisms in that area 'may actually fit the nature of these policies'. Blanc and Megale discuss the specifics of the food sector, which in turn explain its tailored enforcement regime (Chapter 21). Tailored enforcement requires further consideration of possible multiple policy goals, how to achieve them individually and together, and the need to measure these properly. As Reifa and Grochowski (Chapter 22) state, to 'provide consumers with easily accessible redress for damages caused by defective products or dissuade traders from misleading advertising […] should not overshadow, however, a deeper dimension of consumer protection effectiveness', which includes considering being able to measure the question of 'how economically efficient […] enforcement of the particular consumer rights is'. Simonato and Tashukov conclude, too, that 'according to the type of violation and the type of response needed, a broad variety of

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tools may be used to protect the EU budget or recover the damage. [Additionally, t]he "sincere cooperation" between all relevant actors is, therefore, critical for a coordinated and coherent approach' (Chapter 32).

This volume produces further illustration of a rich developing set of tools of ex ante mechanisms and clauses supporting development of enforcement pyramids and responsive regulation. This implies the importance of the preventive function of enforcement that needs to be supported for it to be successful. Many chapters show the inclusion of pre-emptive and ex ante correcting activities to enhance the preventive function of enforcement to make enforcement successful, leaving the ex post 'heavy' legal procedures and thus reactive function of enforcement as a method of last resort. Such ex ante tools include developing codes of conduct, compliance programmes, peer pressure, dialogue procedures, mediation and dispute-resolution clauses, including reliance on ex post effective systems such as SOLVIT, alternative dispute resolution and online dispute resolution, laying out ex ante conditions and notifications requirements, preventive remedies, self-reporting, collaborative enforcement, education and soft law guidance, developing specific principles such as 'polluter pays' and traceability of food or money origin, rapid alert systems, cooperation, exchange of information and disciplinary measures. Bertone, Blanc, Coletti and Gemmell (Chapter 20) stress the paramount importance of guidance: 'the provision of lots of guidance and support, to enable compliance and excellence, is fundamental.'

In fact, such ex ante and preventive mechanisms and tools could also serve a learning function of enforcement, as being part of the policy-making process preceding the evaluation stage which then feeds the norm-setting or re-setting step based on the built experience in regulating and enforcement in a specific law or sector. They can also assist when it comes to ambiguously formulated goals and laws by helping to finetune them via collaborative processes, seeking agreement and governing by the rule of reason, which could support the rule of law and especially the limits thereof, when the law is not clear enough and hence disputable. In this light, networks and agencies of national supervisors as well as other, novel compositions such as network of first instance public procurement review bodies (a forum of judges and public officials: Chapter 26) may play a crucial role in bringing relevant persons and expertise together, to come up, in turn, with effective enforcement solutions.

At the same time, it is important to consider also a proper balance of ex ante and ex post mechanisms of enforcement, and especially effective use of ex post mechanisms as a deterrent effect to enhance compliance. Linden mentions 'capacity-building, peer review exercises and the issuance of interpretive guidelines' as necessary support in this light (Chapter 18). However, he questions the extent to which this could be enough to guarantee compliance, especially by national administrations and in light of politicization. Reactive mechanisms, such as sanctioning procedures, are thus important too, though more research seems necessary to find out what balance between ex ante and ex post enforcement mechanisms could be effective in building relevant (sectoral) strategies, and upon which factors effective balances may depend.

Furthermore, as 'perfect regulation is impossible and the impact of laws is never entirely predictable, with the possibility of failure of one of its rationales' (Blanc and Megale, Chapter 21), regular evaluation, sunset and other flexibility clauses need to be foreseen, also concerning enforcement. This is especially important in light of proliferating policy goals, which may need to be balanced with each other and with other developments on the rise, such as sustainability, digitalization and other normative debates on the role of criminal punishment

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(Chapter 4) or how to align 'social justice' and 'social welfare' (the 'dual purpose' of consumer protection law according to Riefa and Grochowski, Chapter 22). As Rumpf and Banet show (Chapter 23), the treaties' aim for the shared energy competences includes effective competition, security of supply, sustainable energy supply and further interconnection of the European energy networks – which is clearly not an easy exercise to regulate in further regulation, and certainly not for enforcement.

The latter brings us to a more meta-level question of discretion in the public policy and law- and rule-making domain and the issue of controls and responsibilities. Whereas any delegation involves some degree of discretion, the discretion needs to be delineated, also in terms of how much freedom is given to make choices, balance policy goals and be accounted for – via codes of procedures and conduct, principles of good administration, justification of decisions and transparency. In this light, future research is most welcome to discuss this and relevant issues. What should the role of the EU be in terms of enforcement? As Montaldo notes, the evolution of enforcement to include various networks and agencies in the AFSJ 'is questioning rooted assumptions on the role of the EU in areas of a particular sensitivity for the national sovereignty and is generating heated debates on the limits of EU powers and on the need to secure appropriate levels of protection of fundamental rights' (Chapter 30). Should the EU further develop its preventive, monitoring, educative and mediation functions, also thanks to mediation and coordination via agencies and networks? This could also live more peacefully with the questionable boundaries of the non-delegation doctrine (Chapter 10).

Furthermore, when does it make sense to give more direct enforcement powers, including sanctioning, to agencies, and how should the implications of such delegation in terms of the protection of fundamental rights and controls be regulated? As Nicolosi argues, 'direct enforcement by EU agencies can ensure greater convergence in the implementation of the CEAS [Common European Asylum System] and inject a considerable resources and expertise into national administrations', including addressing the solidarity gap and addressing the lack-of-political-will problem, to be balanced with relevant accountability and controls (Chapter 31).

Concerning controls over discretion, Simonato and Tashukov state further that 'the prevention and resolution of conflicts of jurisdiction is an unsolved problem in the AFSJ, even before and regardless of the EPPO [European Public Prosecutor's Office], since there is no binding instrument regulating the procedure and the criteria for the "choice of forum"' (Chapter 32). These issues further provoke more normative questions to be addressed as to how such discretion should be handled – by political and/or judicial reactions; to what extent a legislative response is a must, and of what sort; and to what extent existing and/emerging principles of law and reason (also discussed in Chapter 32) could be regarded as solutions. How can we ensure that individuals are aware of the rights given to them and offer evidence to effectuate those rights? Can we arrive at a template 'delegation and control clause', especially for mixed administrations? What procedures could be enhanced to promote the cooperation and cooperation-oriented procedures, tools and mechanisms so greatly needed, especially in relation to such politically sensitive areas and novel challenges in terms of supranational solution-building as the area of asylum system, data protection and protection of financial interest among EU and national counterparts as well as among different policy, administrative, judicial and criminal officials? To what extent could new tools such as standstill provisions (Chapter 26), conditionality clauses (Chapter 32) and the like be effective, from a theoretical perspective and empirically?

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Finally, with the focus on EU enforcement strategy- and theory-building, research should be devoted to the question of how ex ante procedures of the Better Regulation agenda of the Commission could include enforcement considerations – not only enforcement in the indirect sense, but actual enforcement at the EU and/or national levels and its forms, styles, preventive and responsive functions, and so on. This is especially important to consider in light of the possible multiple and competing goals of a policy and different types of obligations – vis-à-vis national public authorities and/or private actors. This then puts a certain pressure on the legislators and policy-makers to decide on such balancing acts as well as enforcement options, also given the new technological developments and industry, nationally and culturally specific effects. In fact, it becomes more and more evident that the burden of educating and explaining the norm to be enforced can be expected to be attributed to the level and actors passing and enforcing the norm. It seems unfair to punish for non-compliance if how to comply was not first explained. This is especially true in relation to EU law obligations vis-à-vis private parties. But this may also be relevant for public enforcers. National public administrations comprise many civil servants, with, at times, flexible contracts, and it is not always the case that the civil servants negotiating EU legal texts are the ones who need to enforce them afterwards. At the same time, one should not forget the inclusion of (new) actors to prevent non-compliance, such as intermediaries, online platforms, self-regulation incentives, and the like. As Caranta and Fricova suggest (Chapter 26), in achieving 'smart, sustainable and inclusive growth', 'arguably, standing should be extended to other "vigilant" actors', such as environmental and social non-governmental organizations. Finally, the preventive effect of reactive mechanisms of enforcement needs to be further explored, especially in statistical and data-driven research. To what extent do reactive mechanisms, such as the infringement procedure and other possible sanctions, including naming and shaming, have a deterrent effect and ensure compliance with EU law? To what extent may there be a difference if an EU law obligation targets national administrations or private actors? And so on.

4. CONCLUSION

The more we know, the more we realize the extent of our ignorance. Thanks to the multi-dimensional and comparative approaches in this book, what was previously highly dispersed knowledge has been gathered together to shed light on relevant trends, developments, concepts, institutions and sectors in the field of EU law enforcement. This offers a possibility to reflect and to learn from each other to promote enforcement in individual domains and in general. The 32 chapters, featuring conceptual, institutional and sectoral investigations, offer the status quo in law, practice and research from different disciplines and sectors of law to the greatest extent possible, and indicate the directions for future research and policy and relevant officials and stakeholders' attention.

The EU is a *sui generis* polity, which is an achievement in itself. Furthermore, it has developed a number of novel and great regimes to ensure safety, security, prosperity and the rule of law. It is not for nothing that a number of contributors use the word 'achievement' when they discuss relevant developments, institutions and sectors. However, as was also shown, these achievements need constant care and attention as the world does not stand still. In fact, the world, and hence the EU, seems to be living in a continuous state of crisis, or crises – financial, migration, environmental, health, rule of law, energy, trust. Addressing these crises,

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and other matters, effectively is highly dependent on the enforcement process and building knowledge on when an enforcement mechanism may work and when it may not, especially in a multi-jurisdictional setting such as the EU.

Enforcement is a complex process with preventive and reactive mechanisms, both of which contribute to preventing non-compliance, which, in my view, should be the focus of any successful enforcement strategy. Preventing non-compliance enhances the chances of ensuring the policy goal or a value at the least cost, financial or otherwise. Furthermore, preventive and reactive functions need to be well designed and balanced to ensure enforcement success. Policy fields may differ in terms of the competence of the EU and types of policies and policy goals. This in turn will translate into the need for different enforcement mechanisms and approaches. In any case, understanding (potential) reasons behind non-compliance could help offer an effective toolbox of enforcement instruments tailored for such reasons – tools to seek agreement on the norm, educate, discuss, warn, explain, investigate and give various responses to various violations in a legitimate and proportionate manner. Here, a more comprehensive approach thanks to multi-disciplinarity is key, also as enforcement problems can have diverse sources such as disagreement with regulation, the level of it, its substance and/or form, the method of regulation and enforcement and legal problems, such as differences in application and protection standards across Member States to ensure the rule of law, especially in a proliferating shared legal order of the EU.

Furthermore, as we have seen throughout this volume, addressing legal problems in enforcement practices and procedures is only a step towards successful enforcement, as this is not necessarily ensuring enforcement of the policy goal (see also Blanc 2018). Moreover, as many experts have noted in this volume, we lack data and methodology on, for instance, the extent to which court judgments have been implemented or not; to what extent the judgments stop violations and if they do not rather promote creativity in establishing other practices to avoid the regulation; if we should perhaps try to assess performance rather than compliance, and so on. Therefore, in addition to plentiful, valid questions from all the chapters that deserve further attention, assessing the presence, level, forms and substance of regulation could be perhaps one of the key elements to prevent non-compliance and ensure successful enforcement. Future attention to this and other points is clearly welcome, from various – doctrinal, normative, conceptual, analytical, comparative, empirical – perspectives.

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