Articles

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Towards a European Reassessment of Punitive Law Enforcement?

Abstract

This article is an expanded version of the author's valedictory lecture delivered on the occasion of his retirement as Professor of Economic and European Criminal Law at Utrecht University on 10 March 2023, supplemented with footnotes. Its lecture style has been largely retained.

Introduction

In this speech, I particularly want to reflect on the present and future of punitive administrative and criminal law, which I define as punitive law enforcement, in the European Union. But to kick-off, I want to return to my inaugural lecture, entitled *Handen en tanden van het (gemeenschaps)recht. Beschouwingen over publieke rechtshandhaving*.[1]When I delivered it in 1994, here at this very university, economic and financial criminal law, also referred to as special criminal law or white-collar crime, was a specialisation that was studied and researched in the Netherlands by only a few – albeit very talented – individuals.[2] The same phenomenon could be observed in the field of punitive administrative law.[3] In those days European criminal law was also dismissed as being irrelevant by many criminal lawyers (both at universities and in legal practice). And yet the Europeanisation of national punitive law enforcement

1 J.A.E. Vervaele, *Handen en tanden van het (gemeenschaps)recht. Beschouwingen over publieke rechtshandhaving*, Deventer, Kluwer, 1994, uitgebreide versie, p. 48.

2 Th.A. de Roos, *Strafbaarstelling van economische delicten*, Arnhem, Gouda Quint,1987; M. Wladimiroff, *Niets bijzonders. Een beschouwing over de dominantie van het bijzonder strafrecht bij de handhaving van sociaal-economische normen* (oratie), Deventer, Kluwer, 1989; M. Wladimiroff & C. H. Brants (eds.), *Facetten van economisch strafrecht*, Arnhem, Gouda Quint, 1990; Y. Buruma, *De strafrechtelijke handhaving van bestuurswetten*, Arnhem, Gouda Quint, 1993.

3 F.C.M.A. Michiels, *De boete in opmars* (oratie VU), Zwolle: WEJ Tjeenk Willink 1994.

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had been underway for some time. Van Binsbergen even devoted his inaugural lecture[4] to it as early as 1963 with the title *Integratie een revolutie*? In doing so, he was not accepting a chair in European law or public economic law at this university, but in criminal (procedural) law and criminology. Upon my appointment in 1996, as Mischa Wladimiroff's successor, to the chair in economic criminal law, a unique chair in the Netherlands established at the UU in 1986, I did not hesitate to give it an EU dimension as well, entirely in the Utrecht tradition of the impact of EU law on the national legal order[5] and not to limit it to special criminal law in the formal sense, but to extend it to public law enforcement, *i.e.* based on the integrated approach of punitive administrative law and special criminal law.

Expansion of EU harmonised policy areas

Some thirty years after my inaugural lecture, the panorama looks completely different. Despite all the anti-EU rhetoric in many Member States, there has been a further broadening and deepening of European integration and thus of EU regulation. In 2016, the European Union's new customs code, the UCC,[6] entered into force. This unified and fully digitalised customs rules and procedures. Following the 2008 financial crisis and the subsequent sovereign debt crisis, the European Banking Union was founded on a common rulebook with a common supervisory mechanism and the role of the European Central Bank (ECB) as a supervisor was greatly strengthened.[7]For the financial markets and the stock markets in particular, based on the 2009 De Larosière Report, the Committee of European Securities Regulators was transformed into the European Securities and Markets Authority (ESMA), which, like the ECB, operates on the basis of a common rulebook and a common supervisory mechanism. With the Digital Services Act[8] and the EU Digital Markets Act,[9] the has developed important regulations for all digital platforms operating in the single market. The 2021 proposal for an Artificial Intelligence (AI) Act[10] aims to create a harmonised market for access to and the use of AI systems and, depending on the level of risk, to regulate or ban such systems. Other major developments are directly related to the COVID19 pandemic and Russia's invasion of Ukraine. Much more than a recovery plan or

4 W.C. van Binsbergen, *Integratie een revolutie*? (oratie), Zwolle, Tjeenk Willink, 1963.
5 P.J.G. Kapteyn and P. Verloren van Themaat, *Inleiding tot* het *recht* van de *Europese Gemeenschappen*„ Deventer Kluwer, 1987; K. Hellingman and K.J.M. Mortelmans, *Economisch Publiekrecht: rechtswaarborgen en rechtsinstrumenten*, Deventer, Kluwer, 1989.
6 Regulation 952/2013 of 9 October 2013 laying down the Union Customs Code.
7 The ECB has elaborated a digital compilation of the comprehensive regulation: Legal Framework for Banking Supervision Volume I (europa.eu).
8 Regulation 2022/2065 of 19 October 2022 on a Single Market for Digital Services (Digital Services Act).
9 Regulation 2022/1925 of 14 September 2022 on Contestable and Fair Markets in the Digital Sector (Digital Markets Act).
10 COM(2021)206 final, Proposal for a Regulation laying down harmonized rules on artificial intelligence (Artificial Intelligence Act).

emergency funding, the NextGenerationEU[11] policy agenda is a deepening and broadening of European policies related to the environment, health, food, energy, financial institutions, etc. It includes the European Recovery and Resilience Facility[12] but also, for example, a new European health policy, investment in digital transition and in climate change. EU foreign and security policy increasingly uses restrictive measures[13] as sanctioning weapons.[14] With the Russian invasion, the use of such sanctions has skyrocketed. Many of these measures or sanctions have gone far beyond sectoral interventions, such as export restrictions, military, financial or economic embargoes, but are increasingly individual in nature, such as the freezing of assets belonging to natural or legal persons or travel and visa bans.[15] Moreover, they are also used on the basis of the European Magnitsky Act to defend human rights,[16] and the Commission also wants to extend these measures to anti-corruption policy.[17] Also in the pipeline are policy initiatives to tighten the screening of foreign direct investments in Europe and to extend this policy to outbound European investments. The new regulation should ensure that inbound and outbound investments comply with EU and security policies.[18]

This new policy and regulatory authority of the European Union did not come without a struggle. Negotiations to further integrate the banking union and financial markets were arduous, but the 2008 crisis had painfully exposed the drawbacks of a lack of integration and national fragmentation. New regulations are often born out of crises, but that certainly does not make them temporary crisis regulations. The need for further integration, also under pressure from global developments, makes them structural new policy[19] Member states are also increasingly aware of the need

11 Recovery plan for Europe | European Commission (europa.eu), funded up to 30 % by issuing NextGenerationEU green bonds.

12 First Commission Report on the implementation: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1198.

13 In EU legislation they are formally labelled as *restrictive measures*, but in the scholarly literature they are mostly referred to as *smart sanctions* or *targeted sanctions.* See, *e.g.*, I. Cameron, *International Sanctions*, Oxford Bibliographies, Oxford, OUP 2013. A. Hofer, 'The Efficacy of Targeted Sanctions in Enforcing Compliance with International Law', *American Journal of International Law*, Volume 113, 2019, p. 163–168.

14 They are based on Art. 29 TFEU and Art. 215 TFEU. At this point in time the EU has more than forty different restrictive measures/sanctions in place, see https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/overview-sanctions-and-related-tools_en.

15 C. Beaucillon, 'Restrictive Measures as Tools of EU Foreign and Security Policy: Promoting EU values, from Antiterrorism to Country Sanctions', *in* S. Montaldo, F. Costamagna & A. Miglio (eds.), *European Union Law Enforcement. The Evolution of Sanctioning Powers*, Oxon and New York, Routledge, 2021.

16 Regulation 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses.

17 COM(2022)548 final, Commission work programme 2023, A Union standing firm and united, under section 3.4. See in particular point 33 in the attachment referring to *Setting a sanctions framework targeting corruption.*

18 COM(2022)548 final, under section 3.3.

19 Clearly reflected in COM(2022)548 final.

for EU policies in strategic areas and are also willing to give the EU more leeway in formulating new policies and regulations.

Punitive law enforcement: new European tasks

There is certainly no shortage of policies and regulations. Meanwhile, a great deal of research has also been conducted on the Politics of Regulation.[20] This expansion of EU policy harmonisation and EU regulation naturally also places new demands on the existing enforcement instruments.[21] This has already become very clear during the pandemic crisis and the related purchasing of face masks and high-tech medical equipment, with or without financing from EU funds. Many Member States now have pending civil, administrative, as well as many criminal cases concerning fraudulent procurement, counterfeit goods, the misuse of intellectual property,[22] the circumvention of public procurement, corruption and organised crime on the Internet and in the social media, etc. Strikingly, many fraud cases exploit the advantages of the internal market to trade in goods or services or to invest illegal profits. Due to the transnational nature of trafficking in illegal products or in products that do not meet market conditions, their combating is also immediately a common interest in the area of freedom, security and justice (hereafter the Area), according to Article 3(2) TEU, especially when this involves organised crime, which does not shy away from subversion and money laundering. With the €800 billion investment from the NextGenerationEU pogramme, the risk of similar illegal acts is a reality. The same applies to compliance with restrictive measures/smart sanctions. Those on whom the measures/sanctions are imposed are often very inventive in circumventing them as many of their assets are held in legal entities based in off-shore paradises, thus managing to disguise their ownership. Apparently, they also know how to combine various nationalities and identities. There is also no shortage of operators who are willing to provide their services anyway or who, as gatekeepers, ignore their reporting obligations, despite the threat of measures or sanctions. In short, the enforcement of those sanctions, which are imposed via punitive administrative law or special criminal law depending on the Member State, is quite a challenge.

Special criminal law, together with punitive administrative law, awaits a new task, not only in the Member States individually, but also in the common territory (the internal market, the Area). This means that this task of punitive law enforcement is

20 See *e.g.* D. Levi-Faur (ed.), *Handbook on the Politics of Regulation*, Cheltenham, Edward Elgar, 2011.

21 J.H. Jans, S. Prechal and R.J.G.M. Widdershoven (eds.), *Europeanisation of Public Law*, Groningen, Europa Law Publishing, 2015, p. 287; A Klip, *European Criminal Law*, Cambridge-Antwerp-Chicago, Intersentia, 2021, p. 229; V. Mitsilegas, *EU Criminal Law after Lisbon*, Oxford Hart, 2018, p. 60.

22 See the Intellectual Property Crime Threat Assessment of 2022 by Europol and the EU Intellectual Property Office: https://www.europol.europa.eu/publications-events/publications/intellectual-property-crime-threat-assessment-2022.

thus not limited to the jurisdiction of each Member State but also has a transnational dimension in the EU[23] and even a global dimension as part of the EU's external policy dimension.[24]

Punitive law enforcement and European harmonisation

In recent decades, the European harmonisation of national punitive law enforcement has boomed. The initial laborious integration of criminal justice in the third pillar of the Maastricht Treaty has become an important dimension of the Area.[25] European punitive administrative law has also expanded from the classical area of competition to the financial markets, the banking union and digital markets.

Meanwhile, nobody can deny the impact of European integration on punitive enforcement, including criminal law, either. Integration continues in the fields of punitive instruments (the definitions of administrative and criminal offences, sanctions and penalties, cooperation instruments, powers for European enforcement bodies) and legal safeguards and protection (the harmonisation of legal safeguards, the EU Charter of Fundamental Rights and the related jurisprudence of the Court of Justice). The instrumental function of enforcement law must be combined with its safeguard function, in particular with the core values of the EU (the rule of law and fundamental rights). Law enforcement in the Union is obviously not limited to administrative and criminal offences, but forms a normative unit with law-making and legal protection.[26] It is no coincidence that the Latin word for a sanction (*sanctio*, *sancire*) has a dual meaning: to ordain and sanction the law and (under penalty) to prohibit. Effective enforcement and rule of law compliant enforcement are thus inextricably linked in the EU. That is precisely why those core values of Article 2 TEU, in particular respect for the rule of law and human rights, are also linked to Article 7 TEU on the procedure for the suspension of rights and to the conditionality mechanism included in Regulation

23 L.F.M. Besselink, *A Composite European Constitution*, Groningen: Europa Law Publishing 2007; O. Jansen & B. Schöndorf-Haubold (eds.), *European Composite Administration,* Antwerp, Intersentia, 2011.

24 I refer here especially to enforcement cooperation with third countries in the form of information exchange, liaison officers and bilateral treaties between the EU and third countries on extradition and the international gathering of evidence.

25 Klip, *European Criminal Law*, 2021; U. Sieber, H. Satzger & B. von Heintschel-Heinegg (eds.), *Europäisches Strafrecht*, Baden- Baden, Nomos 2014; V. Mitsilegas, *EU Criminal Law After Lisbon. Rights, Trust and the Transformation of Justice in Europe*,Oxford, Hart 2015; D. Flore, *Droit penal européen, Les enjeux d'une justice pénale européenne*, Brussels- Paris, Bruylant, 2022.

26 A.J. de Vries and R.J.G.M. Widdershoven, 'Constitutional Principles and Composite Punitive Enforcement in the EU', *in* M. Luchtman, K. Ligeti & J.A.E. Vervaele (eds.), *EU enforcement authorities: punitive law enforcement in a composite legal order*, Oxford, Hart, 2023 and M. Böse, M. Bröcker & A. Schneider (eds.), *Judicial Protection in Transnational Criminal Proceedings*,Springer, 2021.

2020/2092.[27] That relationship between law enforcement and respect for constitutional principles and thus the core values of the EU legal order are therefore also rightly at the very heart of the research programmes of our law school, in particular those of RENFORCE and Montaigne.

However, the recognition of that impact, particularly in the field of European criminal law, also goes hand in hand with growing criticism about the lack of democratic decision-making, over-criminalisation, the functional use of criminal law for political European purposes, the dominance of a security discourse, the reduction of legal safeguards[28] and, consequently, the legitimacy of European criminal law.[29] It is therefore right to call for the introduction of criminalisation criteria at the EU level, in order to avoid security militarism or populism becoming the agenda-setters for criminalisation.[30]

Interestingly, this criticism focuses in particular on the harmonisation of common offences, also referred to as Euro-offences.[31] This harmonisation goes back to the third pillar of the Maastricht and Amsterdam Treaties and now has its legal basis in Article 83(1) of the TFEU. The catalogue of Euro-offences reads as follows: terrorism, trafficking in human beings and the sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

Any discussion on the legitimacy of European criminal law and policies cannot, in my view, be reduced to this specific aspect. The impact of Union law on national criminal (procedural) law and punitive law enforcement in general comprises several aspects to be considered, which can be referred to as the core dimensions of a European punitive law enforcement policy:[32]

27 Regulation 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the EU budget.

28 J. Oberg, *Limits to EU Powers*, Oxford – Portland – Oregon, Hart Publishing, 2017; P. Asp, *The Substantive Criminal Law Competence of the EU*, Stockholm, Jure, 2012; B. Banach-Gutierrez & C. Harding, *EU Criminal Law and Policy*, London – New York, Routledge, 2017); J.W. Ouwerkerk, *Herijking van Uniestrafrecht. Over de grondslagen voor strafrechtelijke regelgeving in de Europese Unie* (inaugural address Leiden), The Hague, Boom juridisch 2017; J.W. Ouwerkerk, 'Criminalisation as a last resort: a national principle under the pressure of Europeanisation?', *The New Journal of European Criminal Law*, Vol. 3, No. 3–4, 2012, p. 234235.

29 I. Wieczorek, *The Legitimacy of EU Criminal Law*, Oxford, Hart, 2020.

30 S.S. Buisman, 'The Future of EU Substantive Criminal Law. Towards a Uniform Set of Criminalisation Principles at the EU level', *European Journal of Crime, Criminal Law and Criminal Justice* Vol. 30, 2022, p. 161–187.

31 M.S. Groenhuijsen & J.W.E Ouwerkerk, 'Ultima ratio en criteria voor strafbaarstelling in Europees perspectief', *in Roosachtig strafrecht* (liber amicorum Theo de Roos), Deventer, Wolters Kluwer, 2013, p. 249–279.

32 The contrast with national criminal justice policies is, of course, that EU competence is limited to what is provided as a legal basis in the EU Treaties.

- harmonisation in the area of administrative and criminal offences and related sanctions and penalties;
- harmonisation in the area of procedural law (fine investigation and criminal investigation) and the harmonisation of related legal safeguards;
- the development of horizontal cooperation instruments in the area of punitive law enforcement (mutual administrative assistance, judicial cooperation in criminal matters);
- the development of European enforcement bodies (administrative enforcement and criminal judicial enforcement) and their interaction with national enforcement;
- the rule of law and respect for fundamental rights compliant policies (core constitutional values).

In particular, it is striking that the aforementioned criticism pays little or no attention to European enforcement in the area of special criminal law or punitive administrative law. For most European criminal lawyers, special criminal law and punitive administrative law remain unknown and unloved.

In line with my chair and with the specialisation developed in Utrecht in the field of punitive enforcement – both in criminal and administrative law and also within the RENFORCE research programme – I would therefore like to focus in this speech on the legitimacy of the EU in the field of special criminal law and also, linked to this, on punitive administrative law and, in doing so, to place on the agenda the question of whether a European reassessment of punitive law enforcement[33] in general and of special criminal law in particular is needed. To what extent do the EU and its Member States have a policy on punitive enforcement in the internal market and the Area? How does that policy translate into the various key dimensions: substantive administrative and criminal law, procedural law, judicial cooperation, European enforcement agencies and constitutional values? And is there a need for a reassessment in the area of these core dimensions in order to deliver on the objectives of EU policy and regulation in a shared and integrated legal order? These questions are also a combination of my research interests in recent years: criminal and administrative law, European and international law, human rights and comparative law. Moreover, they are also essential questions concerning the Politics of Enforcement[34] on which, unlike the Politics of Regulation, there has been much less academic research and particularly little in the field of punitive law enforcement[35].

33 V. Franssen & C. Harding (eds.), *Criminal and Quasi-criminal Enforcement Mechanisms in Europe*
Origins, Concepts, Future, Oxford, Hart, 2022.

34 Even classic publications such as the one by F. Cafaggi (ed.), *Enforcement of Transnational Regulation. Ensuring Compliance in a Global World*, Cheltenham, Edward Elgar, 2012, focus mainly on regulation and private enforcement.

35 For private enforcement, see M. De Cock Bunning & L. Senden (eds.), Private Regulation and Enforcement in the EU. Finding the Right Balance from a Citizen's Perspective, Ox-

Before turning to those core dimensions, one more comment on the embedding of punitive enforcement law in the current EU treaties is appropriate. The single market and the Area have their own history of development. Even during the negotiation of the Constitutional Treaty and the current Lisbon Treaties, little or no thought was given to the integration of criminal law enforcement (laid down in Arts. 82 to 89 TFEU, as part of the Area) and administrative punitive enforcement, linked to specific policy areas in the internal market. The result is that an alignment between this dual enforcement system requires the adoption of directives or regulations within the internal market and directives within the Area, with the Councils of competent ministers varying.[36]This institutional schism between the internal market and the Area leads, as we will see, and at the European and national level (when implementing/applying), to divergent problems when it comes to the realisation of an integrated approach to punitive law enforcement. Now back to our main question for which I propose to analyse, in a nutshell, the various core dimensions mentioned above. In doing so, I do not deal with constitutional core values separately, but as an intrinsic part of each core dimension.

Policy on the harmonisation of substantive law enforcement

The EU harmonisation of punitive administrative law[37] in the Member States has so far been characterised by a sectoral approach. Historically, such harmonisation was developed *sub rosa* in the common agricultural and fisheries policies,[38] and that competence was definitively enshrined in Union law after the landmark C-240/90 judgment[39] of the European Court of Justice. Later, this competence was also used to harmonise administrative offences and sanctions in relation to the protection of the EU's financial interests (customs duties, VAT and EU subsidies),[40] market abuse and insider dealing,[41]

ford, Hart, 2020. Fortunately we can read soon M. Scholten (ed.) Research Handbook on the Enforcement of EU Law, Cheltenham, Edward Elgar Publishing, forthcoming in 2023.

36 M. Luchtman & J.A.E. Vervaele, 'Enforcing the Market Abuse Regime: Towards an Integrated Model of Criminal and Administrative Law Enforcement in the European Union?', *New Journal of European Criminal Law,* Vol. 5, No. 2, 2014, p. 192–220.

37 See for a general analysis of the EU impact on administrative law: Jans, Prechal & Widdershoven 2015.

38 Regulation 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy.

39 C-240/90, *Germany v. Commission*, 27 October 1992.

40 Regulation 2988/95 of 18 December 1995 on the protection of the European Communities financial interests.

41 Regulation 596/2014 of 16 April 2014 on market abuse (market abuse regulation).

competition law[42] and market surveillance.[43] Recently, this competence has also been used in the general data protection regulation[44] and in the Commission's proposal to establish harmonised rules on artificial intelligence,[45], where fines of up to 20 and 30 million euros can respectively be imposed. A recent study[46] shows that there are now more than fifty post-Lisbon directives and regulations prescribing administrative sanctions. So we can really speak of a substantial increase in harmonised EU fines in the Member States, but there is certainly no integrated approach as yet. There are very striking differences in that harmonisation, ranging from the obligation to impose effective, proportionate and dissuasive sanctions, without any further harmonisation of the type or level of those sanctions, as in market surveillance,[47] to the far-reaching harmonisation of the type and level of sanctions in many other areas. A good example of very detailed harmonisation can be found in the common fisheries policy.[48] Especially for serious infringements, which are specified in the regulation, there is the harmonisation of minimum and maximum sanctions, which are proportionate to the value of illegally obtained fish products. It also provides for accompanying sanctions, such as licence withdrawals, the seizure and immobilisation of vessels, exclusion from fishing rights and subsidies, etc. The regulation also includes a regime governing the administrative or criminal liability of legal persons and a points system for serious infringements.

Moreover, there are also notable absentees in this increased harmonisation, in the form of policy areas where such harmonisation has not been proposed or where proposals have failed in the negotiations. The most glaring example of the latter is undoubtedly one in the area of exclusive EU competence: European customs law, unified in the Union Customs Code (UCC).[49] To date, the UCC does not contain any harmonisation of punitive administrative law (or of customs criminal law). Customs enforcement is important not only for the effective collection of customs and excise duties (the financial part) but also for tackling illegal trade in and with the EU, ranging from tobacco products, pesticides, waste materials to drugs and weapons. In 2013, the European Commission finally made an attempt with the proposal for a directive

42 Directive 2019/1 of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. Arts. 13–16 contain far-reaching harmonisation of punitive fines and periodic penalty payments. Arts. 17–23 also prescribe a comprehensive leniency programme when cooperating with enforcement authorities on secret cartels.

43 Regulation 2019/1020 of 20 June 2019 on market surveillance and compliance of products.

44 Regulation 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, Article 83(6).

45 COM(2021)206 final, Art. 71.

46 M. Kärner, 'Interplay between European Union criminal law and administrative sanctions: Constituent elements of transposing punitive administrative sanctions into national law', *New Journal of European Criminal Law*, Vol. 13, No. 1, 2022, p. 42–68.

47 Regulation 2019/1020 of 20 June 2019, Art. 41.

48 COM(2018)368 final 2018/0193 (COD), Proposal for a regulation as regards fisheries control.

49 Regulation 952/2013 laying down the Union Customs Code.

to develop a Union legal framework on customs offences and penalties[50] with the following aim:

> *'In order to tackle those problems, the proposal sets a common legal framework for the treatment of customs infringements and sanctions, bridging the gap between different legal regimes through a common platform of rules and thus contributing to an equal treatment between economic operators in the EU, as well as the effective protection of the Union's financial interests and law enforcement in the field of customs'.*[51]

In this proposal, the Commission distinguished between administrative offences for which no moral element is required (strict liability) and those for which negligence or intent is required. For each of these three categories, the proposal prescribed penalties consisting of a certain percentage of goods or, if not related to goods, a maximum fine. This enforcement system could be transposed by Member States into both administrative and criminal law. This proposed directive failed in the negotiations in the Council and was never adopted. In the 2020 Customs Action Plan,[52] the Commission referred to the need for the harmonisation of enforcement but, given the lack of consensus in the Council, it limited itself to the following:

> *'The Commission proposes with the support of Member States in a project group to draw up an updated comprehensive report on the individual systems of penalties in each Member State in accordance with Article 42 of the Union Customs Code. On the basis of that report, the Commission will establish guidelines for the application of the criteria set out in Article 42 (1) to such national systems, namely that the sanctions must be "effective, proportionate and dissuasive". This work may lead in due course to another legislative proposal in place of the 2013 proposal'.*[53]

The Commission's approach is frankly exploratory and does not even include a concrete timeline for a new legislative initiative[54].

Despite the far-reaching harmonisation of environmental policy, there is no trace of any harmonisation of punitive administrative law here either. The Commission has clearly chosen to prioritise the harmonisation of criminal law relating to the environment,[55] without previously worrying too much about an alignment with national administrative law. A proposal to harmonise punitive administrative law in the environmental field has never seen the light of day.

50 COM(2013)884.
51 COM(2013)884Explanatory Memorandum, 1.1.
52 COM(2020)581 final, Taking the Customs Union to the Next Level: a Plan for Action.
53 Under point 8, common system of customs sanctions.
54 See also T. Verellen, The Common Commercial Policy and customs union, in M. Scholten (ed.) Research Handbook on the Enforcement of EU Law, Cheltengham, Edward Elgar Publishing, forthcoming in 2023.
55 See footnote 74.

Thus, despite the surge in the harmonisation of punitive administrative law in many policy areas,[56] there are glaring gaps and neither the EU nor the Member States have shown any interest in a general policy approach. Remarkably, in the pioneering academic study on Model Rules for European Administrative Procedures,[57] the choice was made to still not address administrative offences and sanctions. This is incomprehensible, given the increasing use of such offences and sanctions, and for that reason I embrace the proposal by the Dutch Committee on Europeanisation of General Administrative Law,[58] chaired by my colleague Rob Widdershoven, to expand the Model Rules with a book on administrative sanctions.[59] There is no general explicit legal basis in the Lisbon Treaties either, which could stand comparison with Article 83 TFEU, part of the Area.

And so that brings us to the second part, namely the EU harmonisation of substantive criminal law,[60] especially in the area of special criminal law. With the aforementioned catalogue of Eurocrimes, in Article 83(1), it probably did not escape your notice that the choice was mainly motivated by serious transnational common crime.[61]Tax crimes, stock market crimes, fraudulent bankruptcies, fraudulent misuse of companies, banking crimes, serious environmental crimes, food fraud, illegal imports of pesticides or the misuse of intellectual property rights, etc., are not included in that catalogue, and this while the EU has carried out substantial integration with the Customs Union, the Banking Union, the Monetary Union and has also carried out far-reaching harmonisation in the field of environmental policy, transport policy, etc. In fleshing out EU competence in the criminal justice area, Member States have mainly created room in the treaties for the harmonisation of serious common crime, the handling of which was defined as a common interest of Member States. White-collar crime[62] and green crime[63] are thus apparently not perceived to be serious forms of transnational crime by

56 O. Jansen (ed.), *Administrative Sanctions in the European Union*, Cambridge, Intersentia, 2013.

57 P. Craig et al. (eds.), *ReNEUAL Model Rules on EU Administrative Procedure*, Oxford, OUP, 2017.

58 Commissie Europeanisering Algemeen Bestuursrecht, *Europa en het Algemeen Bestuursrecht. Burger en Bestuur in de gemeenschappelijke rechtsorde*, Den Haag, Boom juridisch, 2021.

59 In ReNEUAL 2.0 this has not been put on the agenda, however. See: http://www.reneual.eu/projects-and-publications/reneual-2-0.

60 Klip, *European Criminal Law*, 2021. L. Picotti, 'Sui "tre volti"del diritto penale comunitario passato e futuro',A. Bernardi & C. Grandi (eds.) *in I Volti attuali del diritto penale europeo*, Ferrara,Pacini, 2021, p. 103–125.

61 J.L. Diez Ripollés & E. Garcia España, 'An Instrument to Compare National Criminal Justice Policies From the Social Exclusion Dimension', *International E-journal of Criminal Sciences*, no. 13, 2019.

62 K. Ligeti & S. Tosza (eds.), *White Collar Crime. A Comparative Perspective*, Oxford, Hart, 2018; K. Ligeti & V. Franssen (eds.), Challenges in the Field of Economic and Financial Crime in Europe and the US,, Oxford, Hart, 2019.

63 L. Elliot & W.H. Schaedla (eds.), *Handbook of Transnational Environmental crime*, Cheltenham, Edward Elgar, 2016; T. Saipens, R. White & W. Huisman (eds.) *Environmental Crime in Transnational Context*, London, Routledge, 2016; D. van Uhm, 'Groene criminolo-

the Member States. With the introduction of the Area in the Treaty of Amsterdam, as one of the main goals of the Union, on a par with the internal market, enforcement in the area of special criminal law has remained an understudy. Only after a great deal of institutional wrangling between the EU and the Member States and within the EU and important case law from the Court of Justice[64] was a specific legal basis finally created in Article 83(2) of the TFEU in 2009:

> *'If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned'.*

Article 83(2) is a response to a great need for the functional harmonisation of serious transnational offences in the field of the aforementioned policy areas.[65] In 2011, the European Commission also further satisfied that need with a rather unique document on EU criminal policy in the area of special criminal law.[66] The opening sentence pulls no punches: 'This Communication aims to present a framework for the further development of an EU Criminal Policy under the Lisbon Treaty'. In this document, the Commission discussed in detail the added value of EU legislation to protect citizens and for the effective enforcement of special and financial criminal law in the field of transnational crime. As a prime example, and obviously in light of the 2007–2008 financial crisis, the Commission referred to serious offences committed by citizens or companies in the single financial markets, which could completely undermine confidence in the integrity of the financial markets. These offences may include fraudulent banking or stock market operations or operations involving pension funds, fraudulent financial products, companies operating without licences or deliberately ignoring licence conditions, whether or not linked to large-scale money laundering operations. The Commission devoted a fair amount of attention to the general principles of criminal law and proportionality and subsidiarity in relation to national legislative policy. Core principles such as the principle of legality and the principle of guilt in criminal law are embraced here. Here the Commission thus explicitly established a relationship between effective, functional enforcement and constitutional core values of the EU

gie en georganiseerde misdaad', *in* B. van der Vorm (ed.), *Strafrechtelijke criminologie*, Den Haag, Boom juridisch, 2022, p. 149–160.

64 See the analysis in J.A.E. Vervaele, 'The European Union and harmonization of the Criminal law enforcement of Union policies: in search of a criminal law policy?', *in* M. Ulväng & I. Cameron (eds.), *Essays on criminalization & sanctions*, Uppsala, Iustus förlag, 2014, p. 185–225.

65 A. Bernardi, 'La competenza penale accessoria dell'Unione europea: problemi e prospettive', *in* : C.E. Paliero & F. Vigano (eds.), *Europa e diritto penale*, Milan, Giuffre, 2013, p. 69–149.

66 Communications from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM(2011)573 final.

legal order, core values which, by the way, had already been recognised by the Court of Justice as general legal principles of that legal order. The second part focused on criminal law policy: what actually are the harmonised policy areas in need of criminal law protection? Being aware of the wide range of areas that emerge, ranging from the Customs Union and the internal market to environmental policy, the Commission made a policy choice between areas that require criminal law harmonisation in the short term and areas that require further reflection on how to achieve such criminal law harmonisation in the medium term. Under the fast-track option, the financial markets were put forward, but limited to market abuse and insider trading. Furthermore, the criminal law protection of the financial interests of the EU and of the euro was placed on the list. The second list is much more comprehensive and is an indicative list, which includes serious breaches of social and safety rules in, among others, the transport sector, in data protection, the Customs Union, environmental protection, illegal fishing and public procurement. That further reflection on the second list also explicitly refers to the relationship between criminal enforcement and punitive administrative law, but without any further elaboration.

In a 2012 resolution on an EU approach to criminal law,[67] the European Parliament expressed its delight at the Commission's document and its recognition of constitutional principles such as proportionality, subsidiarity and legality, but it remained silent -surprisingly – on the policy choices made by the Commission. The Commission's promising approach in 2011 did not provide a real breakthrough in this area. The fast-track system in the three areas mentioned above has worked.[68] The directives have entered into force, even though the Commission had to compromise considerably during the negotiations and its proposals for criminalising legal persons or minimum sanctions did not make it through these negotiations. For the issues mentioned in the second list, the Commission did not take any legislative initiative in the years 2011–2021 and the list of policy areas requiring criminal law protection remained a dead letter. This in itself is remarkable, as the Commission itself had referred to an enforcement deficit in the areas of the Customs Union, the banking union and the internal market and environmental policy. Even a 2019 Council joint position, under the Romanian presidency, on the future of EU substantive criminal law,[69] did not lead to legislative initiatives:

> *'The application of Article 83(2) provides more flexibility. Also, there are further areas of EU policy which have been subject to harmonisation measures and for which*

67 Resolution of 22 May 2012 on an EU approach to criminal law (2010/2310 (ini)), document P7_ta(2012)0208.

68 Directive 2014/57 of 16 April 2014 on criminal sanctions for market abuse (Market Abuse Directive) (OJ L 173, 12.6.2014, p. 179–189); Directive 2017/1371 of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (this directive is however based on Art. 83(1)); and Directive 2014/62 of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law.

69 Council of the European Union, 'The future of EU substantive criminal law – Draft report bythe Presidency', 28 May 2019, Council document 8619/19.

> *an approximation of criminal laws at EU level could be considered essential to ensure the effective implementation of a Union policy. One could think of areas such as fisheries, agriculture, customs, road transport, data protection, and various aspects of the internal market: intellectual property rights, cultural goods, dangerous goods or foodstuff, and trafficking in human organs'*[70],

Long before the entry into force of the TFEU and thus the new legal basis in Article 83(2), academic studies such as the *Corpus Juris* study on the protection of the EU's financial interests[71] or my late colleague Tiedemann's pioneering study on European economic criminal law[72] had already examined, in detail, the need for further harmonisation in the area of special criminal law. If one applies Sanne Buisman's criteria for criminalisation[73] to that, then I think there is little doubt about the legitimacy and necessity of EU intervention and thus further harmonisation. Neither the European Commission nor the Member States – both of which can take legislative action – have used the new Article 83(2) TFEU to further flesh out that enforcement. The European Parliament did set up a special committee on financial crimes, tax evasion and tax avoidance (TAX3).[74]However, a report dated 26 March 2019 focused almost exclusively on tax crime and money laundering, largely in response to the Panama Papers and the recent money laundering scandals among European banks. However, there was still not much in the way of a policy vision on financial crime in relation to EU policy and harmonisation in the report.

I thus conclude here that in the area of the EU harmonisation of special criminal law, there is rather a situation of under criminalisation as opposed to common crime. Moreover, the Member States continue to regard this area as largely national in nature and thus disregard the importance of a common approach in the Customs Union, the Single Market and the Area. You will well understand that I come to a different conclusion compared to my colleague Marc Groenhuijsen who, in his recent valedictory lecture,[75] labelled the punitive influence of the European Union as one of the greatest threats to Dutch criminal law.

Of course, when elaborating potential EU directives, careful consideration is needed as to which infringements should be enforced via punitive administrative law or via criminal law, which norm addressees are to be targeted in this respect and those directives must stand the test of constitutional key values. However, the targeted crim-

70 Council of the European Union, 2019, p. 6.
71 M. Delmas-Marty & J.A.E. Vervaele, *The Implementation of the Corpus Juris in the Member States*, Vol. 1. Antwerp-Groningen-Oxford, Intersentia, 2000, p. 394.
72 K. Tiedemann, *Wirtschaftsstrafrecht in der Europäischen Union*, Carl Heymans Verlag, Cologne, 2002.
73 Buisman, 2022, footnote 29.
74 Decision of 1 March 2018.
75 M. Groenhuijsen,*Strafrecht als spiegel van beschaving*, valedictory speech Tilburg, Tilburg University, 2022, p. 21.

inalisation of legal persons seems to me to be an absolute must in this respect.[76] No progress has been made on this issue either, mainly due to resistance from Germany.

Criminal protection of the environment: a turning point?

In 2021, the European Commission finally took an important step[77] by submitting a proposal for a directive on the criminal law protection of the environment[78] to replace Directive 2008/99 on the protection of the environment through criminal law. The 2008 directive was very limited in scope and did not harmonise the type or level of criminal sanctions. In 2019, the Commission had already reviewed the effectiveness of the enforcement of EU environmental regulations.[79] The Commission underlined important regulatory gaps in the field of substantive criminal law, such as its limited substantive scope, the lack of harmonisation of punitive sanctions (the type and level) and the lack of jurisdictional provisions. It is clear from the impact assessment study[80] that there is a serious enforcement deficit in the Member States, which is reflected in the limited use of criminal law for environmental enforcement, relatively low penalties, poor alignment with punitive administrative law and serious environmental crime with substantial ecological damage being unpunished. Moreover, Member States do not demonstrate a great willingness to eliminate that enforcement deficit and impunity. The interesting 1998 Council of Europe Convention on the Protection of the Environment through Criminal Law[81] has remained a dead letter. To date, there are insufficient ratifications to bring it into force.[82] However, a Draft Feasibility Study[83] was completed by the Council of Europe's European Committee on Crime Problems (CDPC) in 2022, which could pave the way for drafting a new Convention.

The Commission wants the new directive to ensure that environmental crimes are no longer considered as minor offences (regulatory offences), but serious crimes to which existing EU legislation on organised crime, corruption, money laundering and confiscation can also be applied. The Commission thus sees this new directive not only as enforcing the European Green Deal,[84] the EU biodiversity strategy,[85] the

76 In EU law, however, the criminal liability of managers is subject to a certain degree of regulation, see S. Tosza, *Criminal Liability of Managers in Europe. Punishing Excessive Risk*,Oxford, Hart, 2021.
77 V. Mitsilegas et al., *The Legal Regulation of Environmental Crime*, Leyden, Martinus Nijhoff, 2022.
78 COM(2021)851 final, Proposal for a directive on the protection of the environment through criminal law.
79 https://data.consilium.europa.eu/doc/document/ST-14065-2019-INIT/en/pdf.
80 Zie https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/environmental-crime_en.
81 CETS 172 – Convention on the Protection of the Environment through Criminal Law (coe.int).
82 Fourteen Member States have signed it, but only one (Estonia) has ratified it.
83 1680a5b770 (coe.int).
84 COM(2019)640 final.
85 COM(2020)380 final.

EU action plan against wildlife trafficking[86] but also as part of the EU strategy to tackle organised crime[87] and even the EU Security Agenda.[88] Environmental crime had already been earmarked by Europol as a key area of organised crime in its European Multidisciplinary Platform Against Criminal Threats (EMPACT)[89] and in its Serious and Organised Crime Threat Assessment (SOCTA).[90] It has also linked certain forms of serious environmental crime to organised and international crime.[91] In green criminology, this phenomenon has now also been scientifically substantiated[92] and fortunately, at our faculty, Daan van Uhm will delve further into this aspect over the next five years as part of his recently awarded ERC Starting Grant.[93]

The new proposal broadens the current criminal law harmonisation under the 2008 directive, such as illegal management and the transport of waste, as well as the illegal wildlife trade, to include other important environmental policies that require criminal law protection in view of serious infringements and poor national enforcement. Those so-called emerging crimes include serious breaches of EU chemicals legislation causing significant damage to the environment or human health,[94] the illegal trade in timber and wood products,[95] the illegal trade in invasive species,[96] illegal fishing,[97] illegal water harvesting, the illegal production, marketing, importing, exporting, using, emitting or releasing of fluorinated greenhouse gases, the illegal trade in pesticides and the fraudulent circumvention of emissions registration through the use of manipulated instruments (the so-called Dieselgate scandal). The Commission's approach is thus very clearly driven by the effective implementation and enforcement of existing EU environmental protection policies.

While mandatory criminal offences are limited to unlawful and intentional acts, many also have serious negligence as a moral element. Moreover, the constitutive element of unlawful acts may fall away if there is corruption, extortion or coercion on the part of administrative authorities. Thus, there is no longer blind faith in the decisions of the administration. Damage becomes an important criterion because the

86 European Commission, EU Action Plan against Wildlife Trafficking, 2016, The EU Approach to Combat Wildlife Trafficking – Environment – European Commission (europa.eu).
87 COM(2021)170 final.
88 The European Security Agenda, https://eur-lex.europa.eu/legal-content/NL/TXT/PDF/?uri=CELEX:52015DC0185&from=EN.
89 EU Policy Cycle – EMPACT | Europol (europa.eu); the new EMPACT cycle for the period 2022–2025 includes, among its priorities, also fraud and economic and financial criminality: New EMPACT Cycle Started – Impact by War in Ukraine (eucrim).
90 Environmental Crime | Europol (europa.eu).
91 Council conclusions on setting the EU priorities for the fight against organized and serious international crime between 2018 and 2021, pdf (europa.eu).
92 See footnote 59.
93 D. van Uhm, *ERC Starting Grant, Green Crimes and Joint Crime Ventures: Laundering Natural Resources*, 2022–2027.
94 Regulation 1907/2006 (REACH).
95 Regulation 995/2010.
96 Regulation 1143/2014.
97 Regulation 1224/2009 and Regulation1005/2008.

severity, extent and impact of the damage must be used to determine whether the infringement is sufficiently serious to qualify as a criminal offence. Damage is also important as an aggravating criminal circumstance. For example, Article 8(b) of the proposed directive[98] clearly refers to 'the offence has caused destruction or irreversible or long-lasting substantial damage to an ecosystem'. By doing so, the Commission[99] hopes to bring cases of ecocide within the scope of the directive, but without providing for autonomous criminalization.

The harmonisation of penalties for natural persons follows the classic approach in other areas, namely minimum thresholds for maximum prison sentences of up to ten years. Thus, the proposal does not harmonise minimum penalties. The proposal does include additional sanctions such as fines, the revocation of licences, professional prohibitions, exclusion from subsidies, exclusion from public procurement procedures, the publication of court decisions, and freezing and confiscation measures, but these are not harmonised in terms of their duration or other modalities. For sanctioning legal persons, the Commission continues to opt for criminal or administrative responsibility, but the proposal does introduce criteria for the imputation of responsibility to legal persons. It also requires Member States to introduce punitive liability for legal persons when a lack of supervision or control has led to the commission of environmental offences. It also harmonises the types of sanctions and does so in a way that effectively also harmonises minimum sanctions. Indeed, it requires Member States to provide for a whole range of sanctions, ranging from those that are reparatory to highly punitive. It introduces a new system of financial penalties of up to 5 % of the overall turnover. In addition, the proposal also provides for the additional sanctions mentioned above for natural persons, but also sanctions such as being placed under judicial supervision, temporary or permanent closure, the fulfilment of duties of care and compliance programmes. Thus, all of these sanctions for legal persons can feed through into administrative or criminal law, depending on the model of punitive responsibility adopted by Member States in national law. The proposal also includes new criteria for mandatory jurisdiction, based on territoriality, harm ubiquity and the nationality or residence of the offender. Extraterritorial jurisdiction is also possible, but not mandatory, if the criminal offence has been committed for the benefit of a legal person based in the territory, if a victim is a national or resident, or if there has been serious danger in the territory.

Before the summer of 2022, the Council had already organised nine 'working party meetings' exclusively on eight articles (definitions of offences and sanctions), leading to a partial agreement within the Council.[100] Negotiations have been particularly difficult on the proposed harmonisation of sanctions. Member States are not yet on the same page regarding the criminalisation of gross negligence, even when it may result in deaths or serious injury. Also the attribution of responsibility to legal persons and

98 COM(2021)851 final.
99 See recital 16 of the Proposal for a Directive. COM(2021)851 final.
100 https://data.consilium.europa.eu/doc/document/ST-9374-2022-INIT/en/pdf.

sanctioning based on a percentage of the overall turnover remains under discussion. From the first amendments by the various committees in the European Parliament,[101] the bar does not appear to be high enough for them. These clearly want to see harsher penalties, the autonomous criminalisation of ecocide and more extraterritorial jurisdiction for companies committing environmental crimes in third countries. Interestingly, the amendments explicitly toe the line from business accountability for economically illegal acts and human rights violations to criminal responsibility, including for the lack of monitoring and control in the supply chain. In concrete terms, this means that the amendments would also make legal persons criminally accountable for a lack of supervision and control (due diligence) in the supply chain if this potentially creates a risk of environmental crimes and related human rights violations being committed. However, the amendments do not address the relationship between parent companies and subsidiaries, which can greatly complicate this accountability. In doing so, the amendments flesh out the criminal enforcement of the UN's Guiding Principles for Business and Human Rights, the so-called Ruggy Principles of 2011,[102] as well as positive human rights obligations[103] for states and the EU and perhaps even for companies.[104] Both the EU and several Member States had already provided for the civil or administrative enforcement of those principles. In 2017, an EU regulation was adopted on establishing supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.[105] In 2022, the European Commission submitted a proposed directive to introduce a general corporate sustainability due diligence regime in global value chains.[106] At the same time, several Member States have provided for the far-reaching civil or administrative enforcement of those specific due diligence obligations. The most well-known are undoubtedly the 2017 French law on *Devoir de vigilance*[107] and the German *Lieferkettensorgfaltspflichtengesetz*,[108] which came into force on 1 January 2023. Also in the Netherlands, a proposal for a bill on responsible and sustainable in-

101 See the website of the European Parliament for the opinions and amendments that have been submitted by the following EP committees: ENVI, DEVE, PETI en LIBE.

102 Introduction to the UN Guiding Principles on Business & Human Rights (business-humanrights.org). For further analysis, see J.A.E. Vervaele, 'Corporate Compliance and Criminal Liability of Corporations in the Light of Corporate Social Responsibility and Human Rights Obligations', *in* P. Severino, J.A.E. Vervaele & A. Gullo (eds.), *Criminal Justice and Corporate Business*, *RIDP*, Vol. 91, No. 2, 2020, p. 415–434.

103 L. Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*, Ghent, Ghent University, 2016. V. Kahl, 'A human right to climate protection – Necessary protection or human rights proliferation?', *Netherlands Quarterly of Human Rights*, 2022, Vol. 40, No. 2.

104 D. Bilchitz, 'Do Corporations Have Positive Fundamental Rights Obligations?', *Theoria, A Journal of Social and Political Theory*, 2010, Vol. 57, No. 125, p. 1–35.

105 Regulation 2017/821 of 17 of May 2017.

106 COM(2022)71 final.

107 La loi du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

108 Bundesgesetzblatt (bgbl.de).

ternational business[109] has been submitted, which would be enforced through punitive administrative law under the Dutch General Administrative Law Act. It remains to be seen whether these amendments on criminal enforcement due to failed supervision in the areas of environmental crimes and human rights will enter into force, because the Member States that have developed enforcement mechanisms for this purpose have mainly limited themselves to civil and administrative law. In any case, a nice research topic presents itself here that builds bridges between the research programmes RENFORCE, UCALL and UCWOSL, and is of course in line with the research being conducted by my colleagues Ivo Giesen, Manuel Lokin, Cedric Ryngaert, Lucas Roorda, François Kristen and Anne-Jetske Schaap.[110]

In conclusion, we can say that the proposed directive on the criminal law protection of the environment is an important policy step by the European Commission that contains substantive innovations in the field of special criminal law. It is notable, however, that the proposal pays little attention to an alignment with administrative punitive enforcement. Of course, it also remains to be seen what the final content of the directive will be after negotiations within the Council and with the European Parliament. Do these proposals for the criminal environmental directive now mean that the European legislator has a policy vision for the functional harmonisation of special criminal law in relation to harmonised policy areas? I fear not. It is certainly a turning point in the silence of recent years, but one swallow does not make a summer and many areas where there is a need for criminal law harmonisation remain fallow for the time being. Member States have demonstrated far less evidence of policy visions in this area.

Harmonisation in the area of procedural law (penalty investigation and criminal investigation) and the harmonisation of related legal safeguards

The procedural law used for punitive administrative law and for special criminal law has been much less subject to harmonisation in the EU when compared to substantive law.[111] Of course, this is related to the doctrine of the procedural and enforcement autonomy of Member States, even if this autonomy has been subject to considerable

109 Voorstel van wet van de leden Van der Graaf, Jasper van Dijk, Thijssen en Van der Lee houdende regels voor gepaste zorgvuldigheid in productieketens om schending van mensenrechten, arbeidsrechten en het milieu tegen te gaan bij het bedrijven van buitenlandse handel (Wet verantwoord en duurzaam internationaal ondernemen), Tweede Kamer der Staten-Generaal.

110 L. Enneking et al., *Accountability, International Business Operations and the Law: Providing Justice for Corporate Human Rights Violations in Global Value Chains*, London, Routledge, 2019, p. 318.

111 J. Spencer & M. Delmas-Marty (eds.), *Comparative Criminal Procedures*, Cambridge, CUP, 2002; P.J.Hofmański, *Die Zukunft der Europäischen Strafverfolgung. Festschrift für Andrzej Szwarc*, Duncker & Humblot, Frankfurt/Oder, 2009; R.E. Kostoris, *Handbook of Comparative Criminal Procedure*,Springer, 2018.

erosion in recent decades.[112]In the area of punitive administrative law, the EU has, however, taken important steps in very specific sectors to prescribe investigative powers and to regulate related safeguards – in short, an elaborate harmonisation of punitive supervision. Historically, these have been developed in the common agricultural and fisheries policies.[113] In recent decades, there have been a number of high-profile examples of expansion. The 2014 market abuse regulation developed a far-reaching harmonisation of investigative powers.[114] Every competent national authority must have these powers, even though certain powers may require prior judicial authorisation in accordance with national law. In the area of the internal market and the decentralised enforcement of European competition, Directive 2019/1[115] provides for the far-reaching harmonisation of the investigative powers of national competition authorities (NCAs), which are also represented in the European Competition Network. Those powers include interrogation, information gathering, the imposition of provisional measures, inspections of business premises, but also of other premises, including homes, if there are indications of incriminating evidence. The directive also provides for necessary safeguards, such as mandatory prior judicial authorisation in the case of residential premises or optional authorisation if this is provided for by national law. The directive also contains specific rules on the independence of national inspection authorities and safeguards for the businesses concerned, including the right to be heard, the rights of defence and the right to have access to justice.[116] In the area of market surveillance of products in the internal market, Regulation 2019/1020[117] equally provides for far-reaching harmonisation of the investigative powers of national supervisors, which are also organised in a network format. Those powers also apply to artificial intelligence systems placed on the market.[118]The general Regulation 2016/679 on the processing of personal data also extensively harmonises supervisory powers.[119] In the area of preventing money laundering and terrorist financing, the information and investigative powers of financial intelligence units (FIUs) have been elaborated in

112 See S. Prechal, 'Europeanisation of National Administrative Law', *in* Jans, Prechal & Widdershoven, 2015, p. 39–71 and R.J.G.M. Widdershoven, 'National Procedural Autonomy and General EU Law Limits', *REALaw* 2019, Vol. 12, No. 2, p. 5–34.

113 See for instance for the enforcement of the common fisheries policy, Title VII (on Inspections and Procedures) of Regulation 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, and Title VI (Inspections) of its implementing Regulation 404/2011 of 8 April 2011 laying down detailed rules for implementation, as well as COM(2018)368 final 2018/0193 (COD), proposal for a regulation as regards fisheries control.

114 Regulation 596/2014, Art. 23.

115 Directive 2019/1, in Arts. 6–9.

116 Directive 2019/1, chapter II.

117 Regulation 2019/1020, Arts. 14–22.

118 COM(2021)206 final, Art. 63(1).

119 COM(2021)206 final, Article 58(1).

the Fourth[120] and Fifth[121] Anti-money Laundering Directives. These will soon also be able to be used *vis-à-vis* cryptocurrency providers that will become notifiable.[122] A 2019 directive[123] further extends these to many sources of financial information, including bank accounts, and they will also be useful for preventing, detecting and investigating or prosecuting certain crimes. Tax authorities can also make use of this directive.

In addition, in sub-sectoral regulations, particularly in the common agricultural and fisheries policies, regulations have been adopted that harmonise relevant national supervision almost entirely and in every detail. Good examples are Regulation 27/85 of 4 January 1985 laying down detailed rules for the application of Regulation 2262/84 laying down special measures in the olive oil sector and Regulation 882/2004 of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules.

Given these important developments, one would expect that the Model Rules for European Administrative Procedures[124] would specifically address this issue. However, this is only partly the case. The Model Rules do provide for procedural rules for the use of inspection powers granted in EU sectoral legislation, based on the principle of legality, and related safeguards such as the right to remain silent and legal professional privilege. However, those safeguards are not specifically tailored to punitive fining decisions. General rules on cautions, fine ceilings or cumulations of sanctions are still lacking in the Model Rules.

In the area of criminal procedural law, the need for harmonisation was only recognised by Member States following the lack of confidence in the application of the new cooperation instruments based on mutual recognition, and in particular the European Arrest Warrant. In the Tampere Programme (1999–2004) of the European Council,[125] the first policy programme for the Area, mutual recognition instruments in criminal matters were introduced without any harmonisation of criminal procedural law, neither in the area of investigative tools nor in the field of legal safeguards. The latter assumed that the accumulated acquis in the case law of the European Court of Human Rights provided a sufficient common standard to have confidence in the rule of law of each other's judicial decisions in criminal matters. Soon, that blind trust turned

120 Directive 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

121 Directive 2018/843 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, Art. 32(9). Financial institutions that have not signaled a suspicious transaction may also be subject to intelligence requests or investigative actions from now on.

122 This proposal is part of a package of legislative proposals by the Commission (dated 20 July 2021) to strengthen EU anti-money laundering and counter-terrorist financing (AML/CFT) rules.

123 Directive 2019/1153 of 20 June 2019 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences.

124 See footnote 53.

125 https://www.europarl.europa.eu/summits/tam_nl.htm.

into distrust, given the large differences in competent authorities, investigative powers, legal safeguards, detention conditions, the rule of law and the independence and impartiality of the judiciary, etc. The European Council's Hague Programme (2004–2009)[126] recognised for the first time that some minimum harmonisation of criminal procedural law was needed to make the system of the mutual recognition of judicial decisions actually work. This does not so much refer to the harmonisation of judicial investigative powers, but to procedural rights and legal safeguards, in particular those related to Article 6(2) ECHR. However, negotiations on a framework decision along these lines were very difficult and the final result did not meet the minimum protection under the ECHR, according to Council of Europe experts. Thanks to the Swedish Roadmap[127] and the new legal basis in Article 82 TFEU, six directives[128] with basic fair trial safeguards have been adopted, to be guaranteed in internal criminal cases and transnationally in mutual recognition cooperation. Those directives apply to all criminal offences, but not to administrative offences. However, a limited number of mutual recognition instruments, such as the European Investigation Order[129] and the Framework Decision on financial penalties,[130] can also be used by administrative enforcement authorities, provided that they have been recognised as competent authorities by the Member States and their decisions can be appealed to a court having jurisdiction in criminal matters in particular. The Court of Justice has ruled that such a court does not necessarily have to be a court that deals exclusively with criminal matters, but could also be an administrative court that applies similar safeguards.[131] In that scenario, the safeguards of the harmonisation directives also apply, of course, albeit that those directives often limit them to only the appeal procedure. Specifically, when first questioned by an administrative enforcement authority, the person concerned is then for example not entitled to the active assistance of counsel under the directive. However, not all directives are equally clear about this cross-cutting application in punitive

126 The Hague Programme – strengthening freedom, security and justice in the European Union, EUR-Lex – 52005XG0303(01) – EN – EUR-Lex (europa.eu).

127 Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.

128 Directive 2010/64 of 20 October 2010, on the right to interpretation and translation in criminal proceedings; Directive 2012/13 of 22 May 2012, on the right to information in criminal proceedings; Directive 2013/48 of 22 October 2013, on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty; Directive 2016/1919 of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings; Directive 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings; Directive 2016/800 of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings.

129 Directive 2014/41 regarding the European Investigation Order in criminal matters.

130 Framework Decision 2005/214 of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.

131 Case C-60/12 *Marián Baláž* and Case C-671/18, *Centraal Justitieel Incassobureau*.

enforcement. The Fourth Roadmap Directive on the presumption of innocence and the right to be present at the trial in criminal proceedings is somewhat indecisive:

> *'This Directive should apply only to criminal proceedings, as interpreted by the Court of Justice of the European Union (Court of Justice), without prejudice to the case-law of the European Court of Human Rights. This Directive should not apply to civil proceedings or administrative proceedings, including where administrative proceedings may result in penalties, such as proceedings relating to competition, trade, financial services, road traffic, taxation or additional taxation, and investigations by administrative authorities relating to such proceedings.'*[132]

Despite a new formal legal basis in Article 82(2) TFEU, which allows for the adoption of minimum rules on the admissibility of evidence and, on the basis of an unanimity decision, on other aspects of criminal procedure in order to promote mutual recognition, the EU, to date, has remained very reticent in the area of the harmonisation of judicial investigations. The Member States are also not actively promoting this, as the admissibility of evidence is obviously directly related to the legality of investigative acts and thus to their harmonisation. Neither the Member States nor the European Commission have used this new legal basis for a legislative proposal.[133] In the harmonisation of substantive criminal law under Article 83(1–2) TFEU, criminal procedure aspects are occasionally inserted, but they remain rather general. The recent proposal on the criminal law protection of the environment[134] contains extensive articles on policies, good practices and means, but Article 18 on investigative tools is particularly succinct:

> *'Member States shall take the necessary measures to ensure that effective investigative tools, such as those which are used in organized crime or other serious crime cases, are also available for investigating or prosecuting offences referred to in Articles 3 and 4'.*

In short, there is no trace of any harmonisation of special investigative powers as we know it in the Dutch Economic Offences Act (*WED*). This of course contrasts sharply with the functional harmonisation of supervisory powers and their networks in punitive administrative proceedings, which we have highlighted above.

Here again, the recent proposal for a directive on asset recovery and confiscation[135] is a breakthrough. Through its combined legal bases (Arts. 82(2), 83(1–2) and 87(2) TFEU), the proposal also includes harmonisation in the area of criminal procedure.

132 Directive 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, recital 11.

133 However, a study on the admissibility of evidence has been commissioned by DG Justice. However, there are no indications that this issue is now high on the legislative agenda.

134 COM (2021) 851 final.

135 COM(2022)245 final 2022/0167 (COD), on asset recovery and confiscation. See also A. Bernardi (ed.), *Improving Confiscation Procedures in the European Union*,Naples, Jovene Editore, 2019.

Chapter II provides for the harmonisation of detection and identification, in particular in the areas of access to information, the storage of information and the exchange of information by the recovery offices. Moreover, Chapter V also contains a series of safeguards, including the harmonisation of remedies in order to safeguard the rights of the defence and access to an impartial court.

In this section we can thus conclude that in punitive enforcement law we certainly do not have common EU rules on investigative powers and related safeguards. In the EU rules on supervision, we do see a clear pattern in terms of harmonizationof supervisory powers in sectoral regulations; in the EU rules on investigation, however, the harmonization honly really concerns the safeguards that are in place. Harmonisation in the EU is also proceeding in a dual setting, based on EU rules on supervision and related safeguards in the internal market and EU rules on judicial investigation in the Area, but this is limited to related safeguards only.

The development of horizontal cooperation instruments in the field of punitive enforcement (mutual administrative assistance, judicial cooperation in criminal matters)

In the EU, there is not yet a general regime for mutual administrative assistance between punitive supervisors. Nor is there an explicit legal basis in the Treaty for a general regime. However, Article 74 TFEU, which is part of the Area, states:

> *'The Council shall adopt measures to ensure administrative cooperation between the relevant departments of the Member States in the areas covered by this Title, as well as between those departments and the Commission. It shall act on a Commission proposal, subject to Article 76, and after consulting the European Parliament'.*

The problem is that this article does not refer to harmonised policies in the single market, but to policies that are part of the Area. Moreover, there is also no explicit reference to cooperation in the context of punitive enforcement. Thus, unlike in criminal procedural law, there is also no general arrangement whereby decisions can be mutually recognised.

This therefore means that we also have to fall back on sectoral arrangements for this dimension of enforcement.[136] Traditionally, EU rules on mutual administrative assistance have been developed in customs and tax law.[137] In recent decades, these have been further extended to other internal market policy areas, such as competition, market surveillance, agricultural and fisheries policies and the prevention of money laundering. Specialised network structures have also been created in many of these policy areas. The competition directive[138] contains a far-reaching arrangement rang-

136 P. Boswijk, O.J.D.M.L. Jansen & R.J.G.M. Widdershoven, *Transnationale samenwerking tussen toezichthouders in Europa*, Den Haag, WODC/Ministerie van justitie, 2008.

137 See for instance Regulation 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters.

138 Directive 2019/1, Chapter VII.

ing from participation in interrogations and inspections abroad to the transnational enforcement of periodic penalty payments and fines. The market surveillance regulation[139] contains a comprehensive regime ranging from operational support, information exchange, requests for investigative acts and even the transfer of enforcement proceedings. These arrangements apply *mutatis mutandis* to AI systems placed on the market.[140] The regulation also contains an elaborate arrangement for the EU network of national authorities and the European Commission. General Regulation 2016/679 on the processing of personal data[141] contains arrangements covering information exchange, operational and technical assistance, as well as the conducting of inspections and investigations. These include the possibility of setting up joint investigation teams to supervise data processors with establishments in several Member States. However, national (harmonised) law continues to apply in each jurisdiction. The Market Abuse Regulation[142] offers an interesting example. It contains not only a far-reaching harmonisation of information exchange obligations, but also with regard to investigative acts. In executing such an investigative act, the requested authority may carry out the request itself, carry it out jointly or even allow the competent authority making the request to carry out the on-site inspection or investigation itself. Interestingly, this regulation also constantly refers to ESMA,[143] which can also use this network of market supervisors itself (for requests) and provide operational support. The implementing Regulation 404/2011[144] on compliance with the rules of the common fisheries policy contains a comprehensive regime on information exchange and conducting inspections, all within the framework of a network of national authorities led by the European Commission. The Fourth Money Laundering Directive[145] contains a specific cooperation regime between FIUs, focusing on both information exchange and investigative actions. Indeed, FIUs must also use their national investigative powers at the request of an FIU from another Member State. The Fifth Money Laundering Directive[146] further extends such cooperation in the context of proactive investigations. All FIUs are part of an EU FIU platform, which use an FIU.net, a decentralised and secure computer network. Also in the 2019 directive[147] on the use of financial information,

139 Regulation 2019/1020, Chapter VI.
140 COM(2021)206 final, Chapter VIII, entitled coordinated enforcement and international cooperation.
141 Regulation 2016/679, Section I of chapter VII.
142 Regulation 596/2014, Art. 25.
143 Regulation 1095/2010 of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority).
144 Implementation regulation 404/2011, title X, chapter 1.
145 Directive 2015/849, Arts. 53–57.
146 Directive 2018/843, Art. 53(1): 'Member States shall ensure that FIUs exchange, spontaneously or upon request, any information that may be relevant for the processing or analysis of information by the FIU related to money laundering or terrorist financing and the natural or legal person involved, regardless of the type of associated predicate offences and even if the type of associated predicate offences is not identified at the time of the exchange'.
147 Directive 2019/1153, Chapter IV.

the transnational information exchange between FIUs and other enforcement authorities and with Europol is regulated.

We can conclude that there is a far-reaching harmonisation of mutual administrative assistance, but there are still differences among the policy sectors. What is certainly lacking in most policies is a regulation on cooperation in the transnational imposition and enforcement of administrative sanctions. Therefore, it is noteworthy that the RenEUAL Model Rules[148] contain neither a regulation on transnational assistance nor on the mutual recognition of administrative sanctions. For this reason, I endorse the proposal of the Committee on Europeanisation of General Administrative Law[149] to supplement the Model Rules with a general rule on the transnational imposition of administrative sanctions, in particular administrative fines, and the collection of administrative pecuniary debts. However, it would also seem obvious to work on common rules for mutual administrative assistance in the context of punitive supervision. In its 2023 work programme, the European Commission has announced[150] that it will work on a proposal to deepen and broaden administrative cooperation to make the implementation of EU policies more effective. Whether this will include mutual administrative assistance in punitive enforcement remains to be seen.

In the area of judicial cooperation in criminal matters, much progress has been made in recent decades[151] through operational structures such as joint investigation teams[152] and the adoption of specific instruments based on mutual recognition. For the transnational gathering and exchanging of evidence, the European Investigation Order[153] is of course a textbook example. Joint investigation teams have the great advantage that they can be multidisciplinary and cross-border, including even competent authorities from punitive administrative law, and that they can share autonomously – *i.e.* without request – all existing information. However, the initiative for this must

148 See footnote 51.

149 Commissie Europeanisering Algemeen Bestuursrecht, *Europa en het Algemeen Bestuursrecht*, 2021.

150 COM(2022)548 final, in section 3.3.

151 M. Luchtman, *Transnationale rechtshandhaving*, Den Haag, Boom juridisch, 2017,p. 19; M. Luchtman, 'Transnational Law Enforcement Cooperation – Fundamental Rights in European Cooperation in Criminal Matters', *European Journal of Crime, Criminal Law and Criminal Justice* 2020, p. 24; E. Sellier and A. Weyembergh (eds.), *Criminal procedures and cross-border cooperation in the EU area of criminal justice*, *Brussels,* Éditions de l'Université de Bruxelles, 2020.

152 Framework Decision of 13 June 2002 on joint investigation teams. See C. R.J.J. Rijken, 'Joint Investigation Teams: Principles, Practice, and Problems Lessons Learnt from the First Efforts to Establish a JIT', *Utrecht Law Review*, 2006, Vol. 2, No. 2, p. 99–118.

153 Directive 2014/41; L. Bachmaier Winter, 'European investigation order for obtaining evidence in the criminal proceedings. Study of the proposal for a European directive', *Zeitschrift für Internationale Strafrechtsdogmatik*, Issue 9, 2010, pp. 580–589; F. Zimmerman, S. Glaser & A. Motz,, 'Mutual Recognition and its implications for the gathering of evidence in criminal proceedings: a Critical Analysis of the Initiative for a European Investigation Order', *European Criminal Law Review*, volume 1, 2011, p. 56–80; L. Klimek, *Mutual Recognition of Judicial Decisions in European Criminal Law*, Springer 2017, p. 421–459.

be triggered by the Member States, which must set up such a team. In investigations, the leadership thereof is always in the hands of a competent judicial authority in the country of investigation, and national law also applies. Such investigations are widely used, but are largely limited to bilateral cooperation between two countries.[154] The European Investigation Order provides for a clear need for EU legal assistance based on mutual recognition. However, the investigative acts provided for mainly focus on serious transnational crime – just think of the special investigation methods – and much less on the enforcement of special criminal law. Thus, in the case of provisional measures, it is clear that their sole purpose is to obtain evidence.[155] Provisional measures, as elaborated in the harmonisation of punitive supervision, do not feature here. Furthermore, investigative powers and the conditions under which they may be used are not harmonised. The same applies to safeguards, remedies and rules of evidence. As we have seen above, the possibilities for punitive supervisors to use the European Investigation Order are limited and judges also have questions about that application.[156] The European Court of Justice will therefore have to provide more clarity in this respect.

Finally, neither in mutual administrative assistance nor in judicial cooperation has the legislator explicitly addressed the constitutional dimension. The presumptions appear to be that enforcement decisions in Member States are human rights-compliant, as authorities are bound by the ECHR and the EU Charter, and also that cross-border cooperation does not in itself create new problems with regard to the rule of law and respect for human rights. The fact that both presumptions are an illusion may be shown by the recent case law of the Court of Justice regarding the recognition of European arrest warrants. These cases have emanated from Member States that are structurally criticised for inhuman treatment in prisons or the lack of independence and impartiality among their judiciary. Mutual recognition is thwarted by (potential) violations of absolute human rights, flagrant denials of justice, and thus non-compliance with the essential core values of the Union itself.[157]Moreover, it is now also

154 See the second evaluation report: https://www.eurojust.europa.eu/sites/default/files/assets/eurojust_second_jit_evaluation_report_en.pdf.

155 Art. 32.

156 In the recent case C-16/22 of the 21 December 2021 the *Oberlandesgericht* Graz in Austria submitted the following relevant prejudicial question: 'Must the first sentence of Article 1(1) and Article 2(c)(i) of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters be interpreted as meaning that a German tax office for criminal tax matters and tax investigation which is empowered under national rules to exercise the rights and fulfil the obligations of the public prosecutor's office in relation to certain offences is to be regarded as a "judicial authority" and an "issuing authority" within the meaning of those provisions of EU law?' This case is still *sub iudice*.

157 V. Mitsilegas, 'Mutual Recognition, Mutual Trust and Fundamental Rights After Lisbon', *in* V. Mitsilegas et al, *Research Handbook on EU Criminal Law*, Cheltenham Elgar Publishing, 2016. Joined cases C-404/15 & C-659/15 PPU, *Aranyosi and Căldăraru*,; Case C-216/18 PPU,, *Minister for Justice and Equality v. LM*,; Case C-324/17, *Gavanozov*, and Case C-852/19, *Gavanozov II*.

abundantly clear that the transnational dimension itself raises new questions, especially linked to the lack of harmonisation of investigative powers, safeguards and standards of evidence. The silver platter transfer of evidence, forum shopping and gaps in legal protection, both in terms of safeguards and access to justice, are always lurking behind the scenes. Unequal legal protection in a common area should be a concern for the EU and the Member States, or does uniform application only apply to the effectiveness of enforcement?[158]

A look back at the harmonisation of national punitive law enforcement

The analysis clearly shows that the harmonisation of administrative enforcement has been systematically separated from the harmonisation of (special) criminal law. Only exceptionally, as in the case of the protection of the EU's financial interests[159] and market abuse,[160] has the relationship been considered and EU standards for administrative enforcement in the internal market and for criminal enforcement in the Area have been drawn up simultaneously. Instruments that integrate the dual enforcement regime do not exist, not least because separation in the EU treaties makes this difficult. Sporadic attempts have been made to build bridges, but these are often limited to information exchange and do not include investigative acts.[161] The transition from surveillance to investigation is thus not only a matter of national concern, but also a European one.[162]

Furthermore, there is a striking difference between the harmonisation of administrative enforcement and that of (special) criminal law. In administrative enforcement, we increasingly see directives and regulations that harmonise the entire enforcement chain, ranging from the definition of administrative offences to the definition of supervisory powers and guarantees and to the regulation of mutual administrative assistance, albeit for a specific policy area. In (special) criminal law, the chain approach is completely absent. Framework decisions and directives deal separately with the harmonisation of

158 Luchtman, 2020; A. Klip et al (eds.), *Improving the European Arrest Warrant*, Maastricht, Maastricht Law Series, 2022; A. de Vries, *Evidence and Transnational Punitive Enforcement Proceedings in the European Union*, 2022 (forthcoming).

159 For the EU's financial interests, criminal law protection was elaborated by a convention in 1995 in the third pillar of the Maastricht Treaty.

160 For market abuse see regulation 596/2014 and Directive2014/57.

161 Framework Decision 2006/960 of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union & COM(2021)782 final on information exchange between law enforcement authorities of Member States.

162 M. Böse, *Wirtschaftsaufsicht und Strafverfolgung*, Tübingen, Mohr Siebeck, 2005; J.A.E. Vervaele & A. Klip (eds.), *European Cooperation between Tax, Customs and Judicial Authorities*, *Alphen aan den Rijn- New York,* Kluwer, 2002, p. 35–36; M. Luchtman, 'Inter-state cooperation at the interface of administrative and criminal law', *in* F. Galli & A. Weyembergh (eds.), *Do labels still matter?*, Brussels, Editions de l'Université de Bruxelles, 2014, p. 202–203; L. Foffani, 'I mobili confini fra sanzione penale e amministrativa nel contesto della politica criminale europea', *in* A. Bondi et al. (eds.), *Studi in onore di Lucio Monaco, Urbino, UUP,* 2020, p. 541–552.

substantive criminal law, criminal law guarantees or mutual recognition. Very recently, however, a proposal has been submitted that attempts to break this compartmentalised approach. The tightening of restrictive measures/sanctions in response to the Russian invasion of Ukraine and the problems with their enforcement appear to have led to new insights at the European Commission and the European Parliament. It had long been known that such enforcement suffers from considerable deficiencies, as around half of the Member States limit it to punitive administrative law with sometimes quite lenient sanctions, and that in criminal enforcement only a small minority provide for the criminal responsibility of legal persons for these violations. In May 2022 the Commission therefore decided to tackle this problem with a double package. First, there are concrete plans to develop a proposal for a directive on criminal sanctions for violations of the EU's restrictive measures.[163] The Commission's communication outlines the content of the directive, which follows the same pattern of the proposal for the criminal law protection of the environment. Interestingly, the Commission wants to add this matter to Article 83(1) TFEU and has requested an extension decision from the Council and the European Parliament to do so. A second part of the package consists of a proposal for a directive on asset recovery and confiscation.[164] This directive aims to improve the existing legal framework in order to make asset recovery and confiscation easier and more effective across the Union. To this end, the directive should establish minimum rules on tracing and identification, freezing, confiscation and the management of property in criminal proceedings. This directive would also apply to offences in the area of restrictive measures/sanctions under the EU's foreign and security policy.

Interestingly, this proposal on asset recovery and confiscation has a combined, integrated legal basis: Articles 82(2), 83(1) and (2) and 87(2) TFEU. Article 83(1), as the legal basis for dealing with organised and serious crime of a transnational nature, is combined with the criminal enforcement of harmonised policies in Article 83(2). This includes the harmonisation of freezing and confiscation, including extended confiscation, confiscation without a criminal conviction and unlawful enrichment. The harmonisation of criminal procedural aspects and the protection of victims is based on Article 82(2). Article 87(2) provides the legal basis for horizontal police cooperation in the Area. This approach offers potential prospects for an integrated chain approach to criminal law enforcement of EU-relevant interests, integrating aspects of substantive criminal law, criminal procedural law, safeguards, victim protection and cooperation in a single instrument. Of course, this does not yet bridge the gap to administrative enforcement.

163 COM(2022)249 final. See W. Van Ballegooi, 'Ending Impunity for the Violation of Sanctions through Criminal Law', *Eucrim*, No. 2, 2022, p. 146–151.
164 COM(2022)245 final 2022/0167 (COD).

The development of European enforcement agencies (administrative enforcement and criminal judicial enforcement) and their interaction with national enforcement

The days when the European Competition Authority[165] was the sole European enforcer, and thus an exception to the rule of indirect enforcement by Member States, are long gone. In recent decades, numerous European enforcement agencies have been established, some limited to European supervision,[166] but many also with European punitive administrative sanctioning powers. Following the European banking crisis in 2008 and the achievement of the banking union and the further integration of the financial markets, both the ECB and ESMA have been equipped with investigative and sanctioning powers largely inspired by the model of the European Competition Authority. The latter has a long tradition and is now also embedded in national law through decentralisation.[167] It is to be expected that this will eventually happen for the ECB and ESMA as well, as European policies and regulations are also implemented through their enforcement networks with competent national authorities. For instance, the ECB is responsible for the supervision and sanctioning of systemic banks, while lesser players remain subject to national enforcement. However, the ECB can intervene and take on the investigations if the national approach leaves something to be desired.[168] Nevertheless, it is notable that the new design of the ECB[169] and ESMA as an enforcement agency has not given sufficient thought to the applicable safeguards and this while the European Court of Justice has built up a rich case law in the area of European competition. There are also areas where the EU has limited EU enforcement powers to monitor without providing for punitive sanctioning powers. The textbook example is the European Commission's Anti-Fraud Office, OLAF. OLAF has extensive investigative powers in Member States and European institutions, but it cannot impose either penalty payments or administrative sanctions.[170] It is also notable in OLAF's case that many of its investigative powers are not detailed in OLAF's regula-

165 Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts. 81 and 82. G. Dannecker & O. Jansen, *Competition law sanctioning in the European Union: the EU-law influence on the national law system of sanctions in the European area*, The Hague, Kluwer, 2004.S. Montaldo, F. Costamagna & A. Miglio (eds.), *EU Law Enforcement. The Evolution of Sanctioning Powers*, Oxon and New York, Routledge, 2021.

166 A. Ottow, 'Het Europese Toezicht op de financiële markten', *RegelMaat* 2011, No. 4, p. 203–205.

167 O. Jansen, *Administrative Sanctions in the European Union*, Cambridge-Antwerp-Chicago,Intersentia, 2013.

168 S. Allegrezza (ed.), *The Enforcement Dimension of the Single Supervisory Mechanism*, Padua, Cedam, 2020.

169 A. Karagiani, *The Protection of Fundamental Rights in Composite Banking Supervision Procedures*, Zutphen, European Law Publishing, 2022.

170 M. Luchtman & J.A.E. Vervaele (eds.), *Investigatory powers and procedural safeguards: Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB)*, 2017; F. Giuffrida & K. Ligeti (eds.), *Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings*, 2019.

tions and often refer back to the applicable national law. Recent case law shows that in the event of non-cooperation by the (legal) person concerned, national authorities must provide police assistance and that OLAF exercises investigative powers on the basis of European law.[171] However, these are not all clearly regulated in the OLAF regulations.[172]

Recently, there have been quite a few new initiatives pointing to a further expansion of European punitive enforcement. The AI proposal[173] provides that the European Data Protection Supervisor may impose administrative fines on Union institutions, agencies and bodies that fall within the scope of this regulation. These fines may be up to €500,000. That this is not a theoretical exercise may be demonstrated by the conflict between the European supervisor and Europol regarding the massive storage of personal data with no clear link to criminal activity.[174] In the regulation on digital markets,[175] the Commission is also given far-reaching powers of investigation and sanctioning *vis-à-vis* very large online platforms and can impose fines of up to 10 % of their total worldwide turnover. In the regulation on setting CO_2 emission standards for new passenger cars and new light commercial vehicles,[176] a response to the Dieselgate scandal, the Commission can impose excess emission contributions[177] on manufacturers.

Here, too, there are notable absentees. In the harmonised area of the common agricultural and fisheries policies, a 1990 proposal to harmonise the administrative investigation powers of the European Commission and related legal safeguards failed in the Council negotiations.[178] The proposal was interesting because it was a first attempt to harmonise legal safeguards. To date, no new attempt at harmonisation has been made. While there has been the European Fisheries Control Agency since 2002, its mission is mainly to coordinate and cooperate with national inspectorates. Despite the inspection powers of the European Food Safety Authority, indirect enforcement

171 Case T-48/16,*Sigma Orionis v. Commission*.

172 See the PhD dissertation by Koen Bovend'Eerdt, *The Protection of fundamental Rights in OLAF Composite Enforcement Procedures*, that will be defended in June 2023 (forthcoming).

173 COM(2021)206 final, Art. 72.

174 The Supervisor requested the ECJ to cancel the legal basis for the storage of such data in the Europol regulation. It is quite likely that Europol has applied y AI applications when processing and using this data. See https://edps.europa.eu/press-publications/press-news/press-releases/2022/edps-takes-legal-action-new-europol-regulation-puts-rule-law-and-edps-independence-under-threat_en.

175 Regulation 2022/1925, Arts. 65–83.

176 Regulation 2019/631 of 17 April 2019 setting CO_2-emission performance standards for new passenger cars and for new light commercial vehicles, Art. 30.

177 The contribution is automatically calculated using the following formula: excess emissions × EUR 95 × the number of vehicles registered for the first time.

178 COM(90)126 final, Proposal for a Council Regulation on the checks and penalties applicable under the common agricultural and fisheries policies. See J.A.E. Vervaele, 'Compétences en matière de sanctions administratives de et dans l'Union européenne. Vers un système de sanctions administratives européennes?' *Revue de Droit Pénal et de Criminologie*, 1994, No. 9–10. pp. 933–974.

by Member States has primacy. On the customs front, there has never been an attempt to establish a European Customs Enforcement Agency.

The AMLA: a new European Anti-Money Laundering and Terrorist Financing Authority

In the wake of major money laundering scandals in the European Union, involving European and, in particular, Dutch banks, and the European Banking Authority's finding[179] that national supervision, based on the horizontal cooperation of FIUs, is inconsistent and fails when it comes to cross-border operations, the Commission drew up an action plan[180] for a comprehensive EU policy to prevent money laundering and terrorist financing. Part of this action plan is the proposed regulation to establish the Anti-Money Laundering and Terrorist Financing Authority (hereafter AMLA).[181]

At first sight, it seems that the AMLA will play a kind of coordinating and guiding role in an integrated AML/CFT supervisory system, consisting of the authority itself and national authorities with an AML/CFT supervisory mandate. The new authority should play an essential role in improving information sharing and cooperation among FIUs. The new authority will also play an important role in joint analysis by FIUs, *i.e.* in identifying relevant cases and developing appropriate methods for the joint analysis of cross-border cases. However, further analysis reveals that the AMLA will also have competence concerning the direct supervision of a limited number of the most risky and selected cross-border notifiable financial sector entities.[182]For other entities, national supervisors will remain competent. In addition, there is a procedure whereby the authority will take over the supervision of notifiable financial sector entities from national supervisory authorities if there are indications of breaches of AML/CFT laws that are not efficiently and adequately addressed at the national level. The European supervision of selected notifiable entities is carried out by joint supervisory teams led by the AMLA, but including staff from national supervisory authorities. Supervisory powers are set out in the regulation and range from interviews to on-site inspections. The AMLA will have the power to impose administrative sanctions on legal entities up to a maximum of 10 % of the total turnover or 10 million euro, whichever is higher. As part of the supervisory powers, the authority can impose, among other things, periodic penalty payments – with a maximum of 3 % of the daily turnover – for non-coopera-

179 EBA/Rep/2020/06, https://eba.europa.eu/file/744071/download?token=Tf9XDqWX.

180 C/2020/2800: https://eur-lex.europa.eu/legal-content/NL/TXT/?uri=CELEX%3A52020XC0513%2803%29.

181 COM(2021)421 final,. See D.D. Schlarb, 'Rethinking anti-money laundering supervision: The Single Supervisory Mechanism – a model for a European anti-money laundering supervisor?', *New Journal of European Criminal Law* 2022, Vol. 13, No. 1, p. 69–90 & F.A. Siena, 'The European anti-money laundering framework – At a turning point? The role of financial intelligence units', *New Journal of European Criminal Law*, 2022, Vol. 13, No. 2, p. 216–246.

182 COM(2021)421 final, Arts. 12 to 27.

tion and for up to a maximum period of six months; it can also enforce compliance programmes, require changes in the governance structure and propose that the licensing authority should revoke the licence of the legal entity in question. The proposal also includes a mutual administrative assistance regime between FIUs and the AMLA. Finally, better cross-links are also being worked on at the European level. For instance, the three financial regulators ESMA, the European Banking Authority and the European Insurance and Pensions Supervisor (EIPOA) will develop joint guidelines and set up joint AML/CFT teams for companies operating in more than three Member States. There is also a provision for cooperation between AMLA and the European Public Prosecutor's Office (EPPO), so that the AMLA can report suspicious operations that fall within the jurisdiction of the EPPO. In short, here the Commission has thus clearly taken the ECB-ESMA as a model for the establishment of the AMLA.

European administrative law and in particular EU administrative enforcement has undergone substantial developments since Auby & Dutheil de la Rochière's standard work in 2007.[183] A standard model[184] has been developed based on verticalisation – the European enforcement authority – combined with an EU-driven network model of national enforcement authorities that mostly apply European law and operate as mixed teams in an integrated legal space. This model is thus partly based on the common standardisation of administrative offences, sanctions, investigative powers and, albeit to a lesser extent, procedural guarantees.

European judicial enforcement bodies

Innovative steps have been taken in the judicial field since the Maastricht Treaty, with the establishment of Europol[185] and Eurojust,[186] but for both the mission is still limited to information exchange, coordination and support. Europol has an important role to play in the area of strategic and intelligence analysis of serious forms of transnational and organised crime. Eurojust coordinates and supports ongoing judicial investigations in Member States in the area of serious transnational crime. Both also play an important role in setting up joint investigation teams. However important they may be, neither Europol nor Eurojust is currently an operational enforcement body, in the sense that either of these organisations can independently take police or judicial

183 J. -B. Auby & J. Dutheil de la Rochère (eds.), *Droit administratif européen*, Brussels, Bruylant, 2007.

184 See M. Scholten & M. Luchtman, *Law Enforcement by EU Authorities. Implications for Political en Judicial Accountability*, Cheltenham UK, Northampton MA, USA, Edward Elgar Publishing, 2017. M. Scholten & A. Brenninkmeijer (eds.), *Controlling EU Agencies, The Rule of Law in a Multi-jurisdictional Legal Order*, Cheltenham (UK), Northampton MA, USA: Edward Elgar Publishing 2020.

185 Regulation 2016/794 of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol).

186 Regulation 2018/1727 of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust).

investigative actions in the Area. These are still strictly reserved for national competent authorities.

With the entry into force of the TFEU, after decades of discussions in politics and within academia,[187] Article 86 TFEU created a legal basis for the creation of the EPPO. The text leaves no doubt that the EPPO is a body that can investigate and prosecute criminal offences, to date still limited[188] to the criminal protection of the Union's financial interests.[189] Moreover, for that task, an EU regulation should determine:

> *'The general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural acts performed by it in the performance of its functions'.*

To this end, the European Commission's proposed regulation[190] had elaborated a European system of investigative powers and related safeguards that could be applied by the EPPO in a fairly uniform manner in the common judicial area of the Member States.[191] This system obviously has the advantage that those powers and related safeguards do not vary significantly from one jurisdiction to another, but also that no judicial cooperation instruments need to be used for the exercise of transnational investigation and, above all, that problems relating to the admissibility of evidence before national criminal courts are largely reduced. However, the 2017 regulation,[192] adopted by 22 Member States,[193] shows a very different picture. In the negotiations, Member States traded the model of European investigation for a model of national investigation in each Member State. This means that the EPPO, through the European

187 In the Corpus Juris study of 1997 and in the implementation study of 2000 the concept of the EPPO was elaborated. See Delmas-Marty & Vervaele, *The Implementation of the Corpus Juris in the Member States* 2000, p. 394.

188 Based on Art. 86(4) TFEU, this substantive jurisdiction can be extended to other serious crimes with a cross-border dimension if the European Council and the European Parliament unanimously decide thereon.

189 The European Commission has chosen not to include criminal offences in the EOM regulation, but to refer to Directive 2017/1371 on the fight against fraud affecting the financial interests of the Union, for this purpose. As this directive, in accordance with Art. 89 TFEU, only lays down minimum rules, there are therefore significant differences from one Member State to another, especially in the area of criminal sanctions.

190 COM(2013)0534 final on the establishment of the European Public Prosecutor's Office.

191 Generally through the European delegated prosecutors, who belong to the EPPO as an indivisible body and apply European law. National law comes into play when certain aspects of criminal procedure during the investigation are not regulated in the regulation. This choice follows the Corpus Juris study and the Luxembourg Model Rules of 2013; K. Ligeti (ed.), European model rules of investigation and prosecution for the future European Public Prosecutor's Office, Luxemburg, 2013.

192 Regulation 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO').

193 Art. 86 TFEU provides for the possibility of setting up the EPPO under enhanced cooperation in the case of a lack of unanimity. The non-participating Member States of the EU are: Denmark, Ireland, Sweden, Poland and Hungary.

delegated prosecutors who are part of the indivisible EPPO, will use national investigative powers in each Member State. In this model, there is no longer a common judicial area and there is again a need for judicial cooperation between the EPPO delegated prosecutors. As national investigative powers are not harmonised, except for a few directives with legal safeguards,[194]there are therefore major differences between jurisdictions and thus problems relating to the admissibility of evidence may arise. In short, the EPPO is clearly more nationally based than European administrative enforcers in terms of investigative powers, safeguards and remedies.

The need for a European reassessment of punitive law enforcement

After this bird's-eye view analysis, it is time to take stock. To what extent have the EU and the Member States developed policies in the field of punitive law enforcement, and is the lack thereof, in part, a problem for the objectives of European integration, to which both the Union and the Member States have subscribed? European integration is broadening and deepening. The European Union and the Member States have committed themselves to an ambitious policy agenda in the single market and the Area. So there is no shortage of regulation. Enforcement, and especially punitive law enforcement, does not yet seem to have been fully embraced by policymakers in Brussels and in the capitals. Integrated European law enforcement in the EU, as envisioned by Van Binsbergen in 1963, is still far from being a reality today.[195]

The risk of *Vollzugsdefizit*, an enforcement gap or an enforcement deficit is not at all imaginary. Despite this Europeanisation of many policy areas, Member States continue to operate largely on the basis of national enforcement systems for punitive law enforcement, linked to national territoriality. Moreover, essential aspects of that enforcement, both in terms of instruments and safeguards, have not been harmonised. The result, of course, is a panoply of legal systems, the lack of common standards for such enforcement and the risk of failing to deliver effective and rule of law-based enforcement in the single market and the Area. This enforcement deficit is a direct result of the lack of a policy vision at the EU and in the Member States and this can be clearly seen in the negotiation of the EU treaties (primary Union law), in the negotiation of secondary Union law and in the implementation and/or execution of that secondary Union law in national legal orders. The treaties have major flaws, which we could refer to as failure by design. First, the administrative and criminal law components are split between the internal market and the Area and are thus condemned to a schism. Moreover, the legal basis for the criminal enforcement of harmonised policies was only included in the Lisbon Treaty, as part of the Area, with little to no alignment with the administrative enforcement dimension in the single market. These misalignments hinder the overall alignment between supervision and

194 See footnote 118.

195 A. De Vries, *Evidence and Transnational Punitive Enforcement Proceedings in the European Union*, 2024(forthcoming).

investigation as well as between administrative and criminal sanctioning. Moreover, they also affect horizontal enforcement cooperation. Mutual administrative assistance and judicial cooperation in criminal matters are also separate worlds under treaty law, with far-reaching mutual recognition provided for the latter, whereas this is not the case for administrative law enforcement. Joint Investigation Teams (JITs) could in principle bridge the gap, but the initiative to set them up is in the hands of the Member States and it is and will remain a judicial cooperation tool. Formally, therefore, the supervisors, insofar as they are invited, are certainly not in a guiding or leading position. And European enforcement bodies are also scarred by these lapses. The European administrative enforcement bodies, now on the rise, are part of the single market. Their relationship with the judicial European enforcement bodies seems to be limited to the reporting of suspected offences.[196] We know from the experience with OLAF that this is obviously far too minimalist an approach. Finally, the external dimension of European enforcement policy is also subject to this schism. Based on Articles 216–219 TFEU, the European Union can conclude international agreements with third countries or international organisations to the extent that they are functional for EU policy and not reserved to Member States. This means that those agreements are not limited to the internal market or the Area, but could also combine them. We can see in reality that the internal schism is working its way through here too. For administrative punitive enforcement, there are only limited sectoral cooperation agreements, which vary considerably according to the policy area. In contrast, in the judicial area a fair amount has been developed. There are partnerships in the field of information exchange and liaison officers with Europol and Eurojust. The US has recognised the EPPO as a competent authority for letters rogatory. Treaties have been concluded with third countries on extradition and the collection of evidence. However, even in this judicial development, the links to the external dimension of punitive administrative enforcement are underdeveloped. In the transnational enforcement of, for example, administrative offences and criminal offences in environmental law, such as the illegal trade in waste, pesticides, native flora and fauna, this leads to poor cooperation in enforcement and often impunity.[197]

The analysis of the key dimensions identified has clearly shown that, despite all efforts in the single market and the Area, the European Union and the Member States have not developed a sufficient policy vision to break that schism. In the period 1999–2014, important common policy programmes[198] for the Area were adopted by the

196 G. Lasagni, *Banking Supervision and Criminal Investigation. Comparing the EU and US Experiences*,Springer, 2019.

197 J.A.E. Vervaele, 'International cooperation in the investigation and prosecution of environmental crime. Problems and Challenges for the Legislative and Judicial Authorities', *Revue International de Droit Pénal*, 2016, Vol. VI, No. 2, p. 126–143. A. Nieto, *Global Criminal Law: Post national Criminal Justice in the Twenty-First Century*, Londen -Camden, Palgrave Macmillan, 2022.

198 I refer here to the Tampere (1999–2004), The Hague (2005–2009) and Stockholm (2010–2014) Programmes.

Council, the Commission and the European Parliament. Since 2014, we only have limited strategic guidelines[199] from the European Council in the area of justice and home affairs, which have provided the necessary framework for the implementation of the Strategic Agenda 2019–2024,[200] that was adopted by the European Council in 2019. Of course, within that framework the EU has developed important policy initiatives on EU security, EU anti-terrorism, EU anti-money laundering, etc. but these are fragmented and mainly limited to Eurocrimes within the Area. In short, interest in an overall policy approach seems to be declining rather than increasing and there has never been a policy approach that broke the said schism.

The European Commission, for its part, has also not stepped into the breach. In its October 2022 communication on Enforcing EU law for a Europe that delivers[201] a panoply of topics idly pass by and it is stated that 'The enforcement of EU law is and will remain one of the Commission's core priorities',[202] but punitive law enforcement, whether in relation to European enforcement bodies or not, is conspicuously absent. At the European Parliament, things are not much better. Its proposal to draft a regulation on the Administrative Procedures of the European Union's institutions bodies, offices and agencies[203] pays no attention at all to European enforcement bodies. It seems very much as if the *Jean Monnet Network on EU Law Enforcement* (EULEN)[204], led by Mira Scholten and Michiel Luchtman, could continue to research European enforcement bodies for quite some time to come[205].

Moreover, Member States cherish their sovereignty and still regard their *ius puniendi* as an essence of their *pouvoir régalien*. Each Member State continues to think that its legal system is the best, which does not favour the development of common norms and standards. To the extent that national policies exist at all, they are mainly based on the interests in the jurisdiction of each Member State individually and do not focus on the common interest in the single market and the Area. This carries the danger of competing normativity and competing enforcement. In the absence of a common policy, there is a risk of positive conflicts of jurisdiction between Member states, which may also lead to a violation of the *ne bis in idem* guarantees. However, negative conflicts of jurisdiction are also prominent, as Member States are not always interested in difficult enforcement cases that have many ramifications with other jurisdictions. In more transnational cases, evidence is gathered in various jurisdictions by different authorities (administration, police, judiciary). Due to divergent investigative powers and evidence systems, the admissibility of that evidence is very dependent on the law

199 https://www.consilium.europa.eu/nl/policies/strategic-guidelines-jha/.
200 EU Strategic Agenda for 2019–2024 (europa.eu).
201 COM(2022)518 final.
202 Under VIII, Conclusions.
203 European Parliament Resolution of 9 June 2016 for an open, efficient and independent European Union administration (2016/2610(RSP)).
204 https://www.uu.nl/en/news/establishment-of-the-jean-monnet-network-on-eu-law-enforcement-eulen.
205 See also M. Scholten (ed.) Research Handbook on the Enforcement of EU Law, Cheltenham, Edward Elgar Publishing, 2023.

of the forum state. For both conflicts of jurisdiction and the admissibility of evidence, a legal basis for the elaboration of common standards has been created in Article 82 TFEU. However, neither the European Commission nor the Member States have developed legislative initiatives.

Moreover, Member States have firmly put the brakes on the possible granting of operational enforcement powers to Europol and Eurojust and have also managed to replace the EPPO's European investigative powers in a single legal area, as formulated in the European Commission's proposal, with national investigative powers. Of course, it also speaks volumes that non-participating Member States, like Poland, or third European countries, like Switzerland, are actually unwilling to recognise the EPPO as a competent authority in international cooperation in criminal matters, whereas, in contrast, the US has signed a cooperation agreement with the EPPO at the federal level whereby it does recognise it.

This fragmented and piecemeal approach obviously leads to gaps on the one hand, and to new problems and questions on the other. Here I limit myself to a few telling examples, like for instance For tackling organised crime, access to digital information is of paramount value. Criminal networks use encrypted and protected digital communication channels and the deep web. In recent years, enforcement authorities have been increasingly successful in cracking cryptophones like EncroChat and Sky ECC[206] through so-called cryptophone operations. However, a panoply of tools, ranging from police to investigative and special investigative powers, are deployed for this purpose on a Member State by Member State basis, and there is also cooperation under the banner of Europol and within joint investigation teams (JITs). But it is far from clear when and which powers can/may be used and which legal safeguards and effective judicial control will apply.

In 2017, the European Central Bank's Single Resolution Board determined the imminent bankruptcy of Spain's Banco Popular and approved the sale to Spain's Bank Santander. Several criminal investigations are ongoing in Spain in relation to Banco Popular and its business managers on suspicion of fraudulent operations. However, the flow of information from the ECB to the Spanish judicial authorities does not take place smoothly because the ECB invokes confidentiality obligations.

The delegated European prosecutor can deploy special investigative powers in the Netherlands if this is requested by the EPPO's permanent chamber, but does it, as a European authority, need the permission of the Dutch Board of Procurators General to do so? The EPPO can take over cases in exceptional circumstances (evocation). If the EPPO deploys mutual recognition instruments like the European Arrest Warrant, is it bound by implemented absolute grounds for refusal in the Member States or do they lapse if they were optional in the European directive?

206 See jjoerlemans.com, Overzicht cryptophone-operaties;M. Hirsch Ballin & M. Galič, 'Digital investigation powers and privacy: Recent ECtHR case law and implications for the modernization of the Code of Criminal Procedure', *Boom Strafblad*, 2021, No. 4, p. 148–159; B.W. Schermer & J.J. Oerlemans, 'De EncroChat-jurisprudentie: teleurstelling voor advocaten, overwinning voor justitie?', *TBS& H* 2022, Vol. 2, No. 2.

What is the status of evidence obtained transnationally in the forum state when that evidence has been successfully challenged in the state where it was obtained? What is the transnational validity of a ruling on the inadmissibility of evidence in another Member State? And what if that evidence was obtained in the context of punitive enforcement investigations, but is used in a criminal case?

These telling examples suggest that enforcement cannot lag behind policy integration and that there is a need for a European reassessment of punitive law enforcement.

A European model for punitive law enforcement

This cannot be the place to elaborate a complete solution. I am happy to leave that chore to the future generation. However, some comments are in order here.

I opt for a functional policy approach, in which the EU and the Member States define which priority policy areas require an EU approach to punitive law enforcement, based on a chain approach from administrative to criminal enforcement and thus integrating the dual enforcement regime.[207] These are by definition harmonised policy areas in the internal market that need both administrative and criminal law enforcement and a common body of enforcement standards. Within that policy choice, European regulations can then determine what falls under the category of administrative offences and what under the category of criminal offences, and what sanctions are appropriate for them. For the procedural dimension, by which I mean investigative powers and safeguards,[208] I advocate an approach that regulates European administrative supervision for European supervisors and investigative powers for the EPPO. In a number of areas, there is little work to be done on the part of the European administrative supervision side, for instance in the area of financial market integration, as these already exist. In other areas, such as European supervision for the purpose of environmental enforcement, there is, as yet, no European regulator, so a European Environment Agency with administrative enforcement powers would have to be provided. On the EPPO side, my proposal entails an extension of substantive powers to other economic and financial offences on the basis of Article 86(4) TFEU and the inclusion of investigative powers in the regulation. I call for both substantive and procedural law to be laid down in European regulations and not in harmonisation directives, in order to promote uniform application in the single legal area. European networks of national enforcement authorities could be established at the supervisory authorities and the EPPO. These networks could be used to develop enforcement policies, to identify good practices, to develop practice manuals, to establish mixed enforcement teams, and to coordinate administrative and judicial policies in relation

207 M. Hirsch Ballin, 'Handhaving van het levensmiddelenrecht en de invloed van Unierechtelijke handhavingsbeginselen: De fipronil-crisis als aanleiding voor een meer geïntegreerd sanctiestelsel', *NJB* 2020, No. 6, p. 380–388.

208 Luchtman, Ligeti & Vervaele, *EU enforcement authorities: punitive law enforcement in a composite legal order*, Oxford, Hart, 2023

to sanctioning approaches (out of court settlements, choice between enforcement avenue, etc..). By mixed enforcement teams, I mean that European supervisors and the EPPO will use teams that are also composed of national supervisors or national investigating authorities, but which apply European law. Possibly, European joint investigation teams (EU JITs) could also be set up, within which supervisors could also be integrated. These networks have the advantage of bridging national organisations and practices and thus guarantee an embedding procedure, but without subjecting enforcement to national policy and law. European competition enforcement has also learnt that, in time, some of that enforcement can be decentralised on the basis of common standards and practices and thus be embedded into national enforcement. In short, the Europeanisation of enforcement in that policy area is not synonymous with transferring powers to Europe and scrapping national enforcement authorities, indeed quite the contrary. It is about building those national enforcement authorities into a European network model, which combines vertical and horizontal elements[209] and has the potential to create an integrated enforcement chain between the administrative and criminal law dimension in the field of EU punitive law enforcement. This approach also has the advantage of strengthening and fine-tuning the external dimension of that European enforcement, both on the supervisory and judicial side.

Finally, new models need their time to develop and mature. The single market and the development of European supervisors is another telling example of this.

Prospect for legal research and education

So what does all this mean for Utrecht University and the Department of Law? Some will probably think that I have strayed considerably from the law of the land. The choice of the theme of my valedictory lecture was partly prompted by the fact that, despite nationalistic tendencies in many Member States, it is quite plausible that the Europeanisation and internationalisation of the legal playing field will continue. This means that Utrecht's integrated approach to international, European and national law will gain further importance and traction in the future. The interaction between the knock-on effects of international and European law in national law and national law as an anchor of European integration, both instrumentally and in terms of guarantees, are a UU hallmark. The protection of the rule of law and human rights is obviously a core value of that interaction and thus of the hallmark of UU.

This development obviously has consequences for both research and education and I do not see it as a threat, but rather as an opportunity. In terms of research, it is essential that legal research can develop further at the UU with its own research

209 D. Levi-Faur, 'Regulatory networks and regulatory agencification: Towards a single European regulatory space', *Journal of European Public Policy*, 2011, Vol. 18, No. 6, p. 810–829.D. Martinsen, E. Mastenbroek & R. Schrama. 'The power of "weak" institutions: assessing the EU's emerging institutional architecture for improving the implementation and enforcement of joint policies', *Journal of European Public Policy*, 2022, Vol. 29, p. 10.

programmes, just like everywhere else at European universities, based on doctrinal and empirical legal research. Of course, these will have to further internationalise and Europeanise, and comparative law will also have to play an important role. From that strength, those legal programmes will then be able to and should build bridges to university themes. In terms of education, the Netherlands is already a magnet for international students, including in law. Instead of calling on them to stay at home, it is of course high time for all policy layers to really invest in this opportunity to set up international study programmes here that train sound and critical lawyers for that future.