# Chapter 1
# INTRODUCTION

In 1992, Advocate General Giuseppe Tesauro noted that the issue of sanctions in the EU (then Community) legal order raised some concern, as sanctioning powers were considered to be lacking.[1] These words highlighted the shortcomings deriving from the limited sanctioning powers conferred upon the then European Community. At the time, three main factors contributed to scaling down the EC's role in this domain. Firstly, the lack of legal bases in the Treaty and the Member States' unwillingness to strengthen the sanctioning powers of the EC institutions, with limited exceptions. Secondly, according to some commentators, the European institutions were themselves focused on developing the Community legal order and policies, rather than on securing the implementation of relevant legislation at domestic level. Thirdly, the exercise of *jus puniendi* was still perceived as a primary task of the national authorities, due to its close connection with the idea of sovereignty over a given territory and a group of people. Consequently, the EC sanctioning system was originally confined to those limited provisions of secondary legislation expressly conferring such a task to the Community institutions.

In less than thirty years, the scenario has steadily changed.

Following the *Amsterdam Bulb* and *Greek Maize* case law,[2] EU law may require the Member States to impose proportionate, appropriate and effective sanctions as a corollary to their general obligation to ensure the effectiveness of EU law. This duty stems from the principle of loyal cooperation and has been considered *a contrario* as evidence of the existence of a structured EU-driven repressive system. Indeed, it provides a legal basis for the imposition of a sanction even in the absence of specific provisions of EC law.[3] However, *Greek Maize* situations merely reflect the multi-layered structure of the European legal order and the general rule according to which the Member States are tasked with implementing and executing EU law. Although national authorities have the duty to punish certain conduct under Article 4(3) TEU, the Union's *jus puniendi* is blurred by the allocation of the choice regarding the type and extent of a sanctioning measure at domestic level. Certainly, recent practice indicates that the margin of discretion left to the Member States is gradual-

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[1] G. Tesauro, La sanction des infractions au droit communautaire, General Report, XV FIDE Congress, Lisbon, 1992, 425.

[2] Case 50/76, *Amsterdam Bulb*, ECLI:EU:C:1977:13; case C-68/88, *Commission v. Greece (Greek Maize)*, ECLI:EU:C:1989:339.

[3] This can be inferred from Advocate General Capotorti's opinion as expressed in *Amsterdam Bulb*, para. 4.

ly being eroded, as the European legislature increasingly sets out the nature of the sanctions to be enacted at domestic level and the basic criteria of their intensity.

Yet, this is just one of the developments affecting the EU's ability to exercise sanctioning powers. Indeed, EU institutions and bodies are increasingly endowed with direct sanctioning powers. The reach of the integration process has instigated a transformation process of the Union's law enforcement powers and responsibilities, prompting the centralisation of enforcement powers into the hands of EU institutions and bodies.

On one hand, ever since the first cases in which the Court of Justice acknowledged that the then Community was entitled to impose sanctions, European institutions have fully exploited broadly worded primary legal bases – such as provisions enabling them to take all necessary measures to ensure the functioning of a given mechanism or system – to strengthen their direct enforcement powers. The common agricultural policy is a case in point. Neither the original version of Article 40 EEC (subsequently re-numbered as Article 34) nor the current wording of Article 40 TFEU expressly codifies such a power. Nonetheless, the Union legislature has relied on this legal basis to enact a vast array of measures to enrich its sanctioning toolbox. The compatibility of these instruments with the Treaties has been confirmed *in abstracto* by the Court of Justice.[4] As a consequence, the recourse to sanctioning powers (and to the broad definition of the very notion of sanction) has expanded to other domains, such as the environment policy. Interestingly, the Court of Justice has resorted to a similar approach in relation to its own powers pursuant to Article 279 TFEU, which entitles the Court to prescribe "any necessary interim measures".[5]

On the other hand, over the last two decades, Treaty reforms and new legislation have led either to the formal attribution to EU institutions and bodies of the power to impose sanctions directly or to the strengthening of previously granted competences, for instance with regard to restrictive measures and country sanctions, in infringement proceedings, in the framework of the EMU and of the Banking Union.

Moreover, in the absence of a formal definition, the very notion of sanction has been construed broadly. The EU toolbox has been gradually equipped with an array of both punitive and restorative measures. The former are intended to place burdens on those who affect European interests or more generally infringe EU law, be they Member States, third countries, natural or legal persons. These include traditional monetary sanctions – e.g. competition fines, sanctions for breaches of data protection rules, fines issued in the framework of the banking supervision rules, and lump sums and penalties pursuant to Article 260 TFEU – but also much more diversified measures, such as the suspension from the enjoyment of certain rights, the prohibition

[4] See for instance 354/95, *National Farmers' Union*, ECLI:EU:C:1997:379.

[5] Case C-441/17 R, *Commission v. Poland*, paras 103 and 104, ECLI:EU:C:2017:877.

on receiving EU funding for a given period or on performing a given activity, seizure and confiscation. The latter are basically intended to restore the situation prior to a violation of EU law occurring and are mainly represented by restitutions of unduly obtained sums and revocations of decisions, awards and statuses. Even though both categories of measures contribute to shaping the EU system of repression, punitive sanctions pose particular challenges and call into question the scope and breadth of the Union's powers. Therefore, they represent the principal focus of this book.

Although the development of EU law enforcement schemes and methods has recently triggered insightful studies, the advances of the EU's direct sanctioning power are still largely under-examined among legal scholars. Against this background, the book aims to provide a comprehensive picture of this phenomenon and its evolution, including its systemic implications for the European legal order and the relationship between EU and national law. For this purpose, the book is structured as follows.

Firstly, the trend towards the expansion and strengthening of EU sanctioning powers is reflected in the growing complexity of the EU's institutional setting and a variety of agencies has been or is expected to be endowed with law enforcement responsibilities. When considered from a more general perspective, the emergence of an articulated repressive machinery at supranational level is a sign of the degree of complexity and maturity reached by the EU legal order. In the opening chapter, Miroslava Scholten assesses this intricacy and categorises the models of EU law enforcement, highlighting the role played by sanctions in this regard. Her analysis is complemented by the chapter written by Jacopo Alberti, which focuses on the growing diversification of entities endowed with sanctioning powers at EU level by concentrating on the role of EU agencies. The chapter argues that the vague legal status of these bodies and their diversified structures and tasks have contributed to the fragmentation of EU law enforcement models into as many bits and pieces as the relevant stakeholders that are involved.

In addition to mapping models and stakeholders, the book identifies the main triggers and rationales of the evolution of EU sanctioning power. As is generally recognised, *jus puniendi* pursues the well-established goals of fostering the effectiveness of Union policies and overseeing the proper implementation of EU law at domestic level. This is further confirmed by the fact that the strengthening of the EU's sanctioning capabilities is often a reaction to a perceived lack of effectiveness of the relevant legal framework. The economic and financial crisis and the rule of law backsliding taking place in certain Member States provide apt examples in this regard.

In this context, the book investigates the rationale behind the EU sanctioning power also with regard to traditional enforcement mechanisms. The chapter by Luca Prete does just this, focusing on the infringement procedure and discussing its most recent developments. The problem of effectiveness also lies at the core of the debate on the recourse to sanctions in order to protect the values of the Union.

Matteo Bonelli, in his chapter, focuses on the EU sanctioning toolbox and its suitability for protecting the rule of law, illustrating the interplay between preventive mechanisms and hard sanctions, and between political and judicial enforcement tools.

The teleological approach to sanctioning powers unveils an inherent tension between the quest for the effectiveness of EU law and policies with the general principles of the EU legal order. The further the EU sanctioning authority expands, the greater the need becomes to establish appropriate limits on the use of punitive powers by EU institutions and bodies. From this perspective, Nicole Lazzerini addresses the relevance of the Charter of Fundamental Rights, while Stefano Montaldo looks at EU sanctions through the lens of the principle of proportionality, which underpins the whole sanctioning cycle, from the abstract pre-determination of the form and amount of a sanction to its actual imposition in an individual case.

Beyond this general institutional layer, the evolution of EU sanctioning powers follows diversified paths depending on the specific policy domain involved. Here, the blurring of enforcement models reaches its peak, in parallel with the scope and breadth of the EU's competence to impose sanctions. The book depicts this complex and diversified scenario by providing insights into key areas where the Union is entitled to issue repressive measures to safeguard compliance with its interests and policies.

Alberto Miglio and Francesco Costamagna look at the enforcement machinery in the EMU economic pillar and observe that, despite the prominence of sanctioning mechanisms and the emphasis on fiscal discipline, recourse to formal sanctions has been negligible due to the presence of alternative enforcement tools. This chapter is complemented by Frédéric Allemand's analysis of the new sanctioning toolbox given to the European Central Bank in the framework of prudential supervision on the banking system.

Two chapters focus on EU restrictive measures in the context of the CFSP. Charlotte Beaucillon discusses the normative power of the Union to use these sanctions as tools of value exportation. She outlines the possible future developments of the EU's practice and critically addresses the political conditionality of partnership agreements, illustrated by human rights clauses, which have led some third countries to prioritise the establishment of commercial relationships with other areas of the world. Andrea Spagnolo provides a complementary perspective on CFSP sanctions by looking at the topic through the lens of international law, discussing the legality of EU autonomous CFSP sanctions in light of recent complaints raised before the International Court of Justice and the WTO against similar sanctions imposed by the United States.

The concluding set of chapters covers EU policies where the Union's repressive powers are either particularly deeply rooted and developed or stand out due to their peculiar features. Luca Calzolari looks at competition law fines pursuant to Articles 101 and 102 TFEU and the respective secondary legislation, examining the legal nature of sanctions, their rationale, and the calculation methods. Francesco Munari

outlines the main features of EU environmental law enforcement, affecting not only Member States with infringement procedures and interim measures, but also individuals under the Environmental Liability Directive and the Environmental Crime Directive. Lastly, Paul de Hert's chapter provides a detailed analysis of law enforcement tools in the context of EU data protection law, mapping the sweeping changes brought about by the GDPR.

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Chapter 2

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

**Miroslava Scholten** [*-**]

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

KEYWORDS: *enforcement – models – sanctions – EU*



## 2.1. Introduction

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

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[**] This chapter is a part of the ongoing research project of the author 'Shared tasks, but separated controls in the EU – how to make it work for democracy and the rule of law', funded by the Dutch Research Council (NWO) under the 'veni' scheme of M. Scholten. I would like to thank Tom Huisjes, Maurits Munck, Giancarlo Pistelli and Leander Stähler for their assistance. A first draft was presented before the scholars and students at the conference 'European Union Law Enforcement: The Evolution of Sanctioning Powers', Turin, 28-29 March 2019, for which I am grateful to the organisors-editors of this volume.

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

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

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

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

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

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

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

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

## 2.2. Defining EU law enforcement and its types

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

Enforcement of EU law can be understood broadly and narrowly.

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

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

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

[8] Vervaele (fn 3) 131.

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

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

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

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

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

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

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

[12] Rowe (fn. 11).

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

[14] Scholten (fn 4).

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

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

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

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

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

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

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

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

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

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

### *Scenario 1*

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

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

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

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

[23] See chapter by Munari in this volume.

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

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

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

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

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

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

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

[29] *Ibidem.*

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

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

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

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

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

### *Scenario 2*

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

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

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

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

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

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

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

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

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

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

[39] Scholten (fn 4).