Jean Monnet Network on EU Law Enforcement

Working Paper Series

Conference:

Enforcement of European Union Law: New Horizons,

19-20 September 2024 at King's College London

Let us wait and see first how the law does not work?

'Better Regulation' can do it better!

Miroslava Scholten[*]

Abstract

EU law presents a paradox: we create EU law aiming at ensuring (legal) certainty and guide our behaviour but the enforcement of EU law creates instead (legal) uncertainty. This is because if the law is not complied with or is applied differently, you do not achieve (legal) certainty, do you? Given the rise of knowledge on reasons for non-compliance and suboptimal enforcement, the paper has challenged the somewhat traditional logic of (EU) democratic law-making – 'let us wait and see first how the law does not work'. It has argued that considering enforcement should become an obligatory part of (pre)legislative stages in the EU to pass effective laws. Based on multidisciplinary research, it has tentatively proposed five clusters of reasons behind non-compliance and sub-optimal enforcement: the extent of (dis)agreement at the law-making stage, complex (legal) context, multiplicity of decision-making actors and points, language ambiguity, and value pluralism. These clusters help establishing a list of questions that could help the existing 'better regulation' agenda and the legislative stage. This paper's academic ambition is to bring together landmark insights from three literature streams (EU law (enforcement), compliance and policy implementation studies) to show their common goals and to invite further coordination and collaboration.

Keywords:

Enforcement, compliance, implementation, better regulation, law-making, EU

[*] Associate professor of EU law enforcement at Utrecht University (UU), Faculty of Law, Economics and Governance, Department of International and EU law, Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE), Chair of the UU Open Science Intervision and Advisory Team, LLM Law & Economics Programme Leader, m.scholten@uu.nl.
I am grateful to Stefan Euijen for his comments on the first draft of this paper.

I. INTRODUCTION

EU law presents a paradox: we create EU law aiming at ensuring (legal) certainty to guide our behaviour/conduct, but the enforcement of EU law creates (legal) uncertainty instead. Research shows, for instance, that people do not comply with laws because they may not be aware that laws exist or they do not know how to comply with them (Baldwin 1990). Also, EU laws are essentially words, and words can be easily understood, implemented and followed differently in the multilingual, multi-jurisdictional, multi-level, and culturally diverse EU. In addition, emerging legal scholarship shows that the proliferation of EU law enforcement and enforcers has affected fundamental rights and has created legal limbos on such pertinent questions as what the content of rights and freedoms may mean and how private actors can benefit from their rights (Scholten and Luchtman 2017, Prechal and Widdershoven 2020, Karagianni 2022). These and other insights from recent studies suggest that our understanding of enforcement has grown and should take cognisance of the knowledge influencing enforcement at the ex-ante stages of EU law-making processes to design effective laws and policies. This paper therefore explores the questions of how enforcement is being considered and should be considered at the EU law-making stage.

Recent years have showed various interesting and important developments at the EU level and in academic research. It is prudent to explore the mentioned questions now. Firstly, following the 2016 Interinstitutional Agreement on better law-making, the Commission has been active in developing its 'better regulation' agenda. It has issued approximately ten documents (Scholten 2022), which have been united in 'Better Regulation Guidelines' (2021) and 'Better Regulation Toolbox' (2023). As the Commission states, "'*Better regulation' is about creating legislation that achieves its objectives while being targeted, effective, easy to comply with and with the least burden possible*" (p. 3, 2021). At the start of the development of this 'better regulation' agenda, it has acknowledged that, "*[o]ften, when issues come to the fore – think of car emission testing, water pollution or illegal landfills – the problem is not the lack of EU rules but rather the lack of their effective application by Member States. That is why we need a robust and efficient enforcement system <…>*"(Press release 2016).

Secondly, academic attention surrounding the relevant issues has grown tremendously, but seems to be dispersed. Enforcement of EU laws is becoming a new trend in EU law scholarship thanks to developments such as the proliferation of EU enforcement agencies and networks of national enforcement, and the increasing legislative say the EU legislator has on matters of national enforcement (Scholten (ed) 2023). Relevant studies in public policy implementation and compliance have been booming, with investigations into what happens after 'a bill becomes the law' (in the EU and elsewhere) and how people and organisations may react toward legal interventions (see the outstanding collections of recent handbooks on public policy implementation (Sager et al 2024) and on compliance (Van Rooij and Sokol 2021)).

The time is thus ripe to start bringing these developments and dispersed literature streams together to further explore questions surrounding better laws and policies for society in the EU. This paper achieves this as follows. It begins with an overview of relevant concepts, to ultimately define what is meant by 'enforcement of EU law' and to map sources of (academic) knowledge to enhance enforcement of EU law (section II). This section shows that there are a number of related concepts and studies that have been researched – enforcement, implementation, compliance – and invites future research on advancing our understanding of these concepts and their interrelationship, also to ease cross-fertilisation of knowledge between these relevant literature streams. In section III, the main argument of this paper will be presented: to promote enforcement and hence achieve policy goals, enforcement needs to be considered at the law-making stage. To do that, we need to first establish what needs to be considered exactly. I explore this by distinguishing five clusters of reasons behind non-compliance and suboptimal enforcement. By discussing these reasons in specific cases when making laws we will promote creating 'water proof' laws and procedures. I conclude there with a tentative list of questions that could be useful for scholars, policymakers and legislators to consider in their respective analysis. Section IV discusses the existing formal EU law-making procedures and the better regulation toolbox to analyse what has been already taken in discussion when the EU law is being made. This section shows that enforcement is not necessarily an obligatory part of the law-making procedure. It also shows that some issues from the list created in section III can be found in the 'better regulation' toolbox but not all. The reasons for this partial and non-obligatory discussion of enforcement issues at the law-making stage stems from the fact that there are no democratic and legal obligations as such to discuss enforcement and that enforcement of EU law has evolved to focus predominately on compliance by national administrations with EU law. Moreover, in addition to unclear and evolving competence of the EU in regulating enforcement of its laws, the prevailing argument in law-

making has been that the legislator cannot anticipate all possible effects of its laws, therefore, it cannot consider everything that may appear later, including at the enforcement stage. While this argument has merit, this paper challenges this argument to the extent that our knowledge has grown, making it possible to anticipate issues ex-ante, and in turn promote enforcement. Therefore, I suggest that discussions surrounding the reasons behind suboptimal enforcement, that we are able to anticipate thanks to the growing body of research, should be a standard part of the law-making stage. Section V concludes. All in all, this paper argues that 'better regulation' can do better than, roughly speaking, 'let us wait and see first how the law does not work'.

II. DEFINITION, CONCEPTUAL AND DISCIPLINARY CONUNDRUM: ENFORCEMENT, IMPLEMENTATION, COMPLIANCE…

Before we turn to the main argument of this paper, it is essential to discuss unclear concepts that may exist in academic literature and in practice, specifically around the concept of enforcement and related terms, such as implementation and compliance. This uncertainty exists, in part, due to different disciplinary and sectoral lenses and in part due to language ambiguity. The aim of this section is to bring attention to the issue of a 'conceptual conundrum' and to set a working definition for this article. Special attention is made not to make any judging claims as to whose definition may be better or worse. In fact, I believe that in order to enhance and ensure progress in understanding, having multiple definitions and studies seems an important step in knowledge development. Therefore, the mapping of this conceptual conundrum can also be seen as acknowledging the fact that these are pertinent questions for academics and society, that a number of prominent (research) endeavours have been undertaken by researchers and practitioners from different disciplines and areas and that we are hopefully arriving at the stage where we have a clearer and fuller understanding of the matter at hand. This, in turn, is an invitation for future multi-disciplinary (research) attempts in order to fine-tune all the relevant concepts and interconnected relationships between them to enhance cross-fertilisation of knowledge. From this perspective, this section can be seen as a first attempt.

EU official documents

Since this paper aims to discuss EU law enforcement, let me start with EU official documents: Treaties (Treaty on the European Union (TEU), the Treaty on the Functioning of the European Union (TFEU)) and the 'Better Regulation' documents . Using a simple function of 'CTRL+F', you can spot all three terms in the EU Treaties in English. Roughly speaking, the term enforcement (found 3 times in TEU and 13 times in TFEU) is used in a more legal, even more criminal law sense and relevant provisions on judicial and criminal law cooperation; it is used to mean such actions as 'enforcement of judgments' or decisions. The term compliance can be found 20 times in TEU and 35 times in TFEU and is mostly used to refer to compliance with another article in the treaty or a principle. The word implementation can be found 39 times in TEU and 69 times in TFEU and is referred to various processes, which can also be described as adoption and execution of law, especially if one takes the Treaties in other languages. Article 197 TFEU, which presumably sets out the boundary between EU and national executive powers such as enforcement, uses the words 'implementation' in English and 'uitvoering' in Dutch. The Dutch term can also be translated into English as execution.

In 2021 and 2023, the Commission issued two documents, comprising all relevant 'better regulation' documents of the past years. One of these, entitled 'Better Regulation toolbox' starts with the aim of the better regulation agenda and the understanding of the Commission of relevant terms:

"Through its 'better regulation' policy, the Commission has committed to design, deliver and support the implementation of high quality policies. 'Better regulation' covers the whole EU policy cycle – planning, design, adoption, implementation, evaluation and revision"(p. 8).

The second document – Better Regulation Guidelines 2021 – comprises all relevant documents in one, stating:

"'Better regulation' covers the whole policy cycle (…), from policy design and preparation, through adoption, implementation (transposition, complementary non-regulatory action) and application (including monitoring and enforcement) to evaluation and revision" (p. 8).

One cannot help but notice some inconsistencies between these two quotes. For instance, the word planning is not included in the second quote; the words implementation and adoption are not written in the same order; and the word implementation may have two different meanings in the first quote. This is simply to stress the point of the difficulty to distinguish relevant processes and terms and perhaps using them consistently.

Now, this brings us to the question of how many policy cycle stages there may be and which ones. This should help clarify the mentioned concepts (enforcement, implementation, compliance). One would hope that academic literature would be helpful in this respect. However, as you will see below, we are not there yet.

At least three blocks of relevant studies: (EU law) enforcement, compliance and implementation

I tentatively group relevant literature streams intro three blocks – (EU law) enforcement, compliance and implementation studies. Roughly speaking, (socio)-legal scholars focus on enforcement, political scientists and scholars of public administration study implementation, and criminologists and social science scholars investigate compliance. Again, as this paper focuses on the EU, let me start with EU law enforcement relevant definitions. The subsequent definitions and literature discussed do not provide a complete list of possible definitions, but can be seen as representative samples from respected sources and experts.

- *EU law (enforcement) research*

The focus of the Treaties and 'better regulation' as well as of EU law scholarship seems to lie mostly on the making of rules, which stems from the historical development of the EU as an international organisation with norm-setting competences (Scholten and Stähler 2023). Studies on the enforcement of EU law seem to have developed their own jargon and focus, for example relating to infringement procedures, preliminary reference rulings of the Court of Justice of the European Union and transposition of directives. These procedures are not new or unique, similar procedures can be found at the national levels such as in federal states and organisational levels. These procedures can be captured within the meanings of terms such as enforcement, implementation, and compliance and their studies. Anyways, the 'classic' focus in EU law (enforcement) research has been on the questions of legislative competences, member states' formal compliance with EU law obligations via transposition, national legal provisions transposing EU laws and the work of the CJEU and its judgments in developing certain concepts on the mentioned questions. In a way, the term 'enforcement of EU law' has almost become equal to the infringement procedure, except for the areas of competition law where the Commission has been given direct enforcement powers from the early stages of the EU integration. So, the focus in EU law enforcement studies has been mostly on the so-called 'indirect enforcement' because the Commission would be essentially checking upon the member states if they have complied with their obligations and not private actors, who may have gained rights and obligations from EU law. The latter has been left to national administrations, their enforcement and studies of national laws and seems to have been called as implementation of EU law. In this light, Prechal et al. distinguish four different phases in the process of "implementation of Union Law in the national legal systems" (2015, pp. 13-18). These are:

1. transposition of directives into national law (not for regulations);
2. operationalization of the regulation or directive, which includes designation of relevant national authorities responsible for specific EU laws and hence is more visible for regulations;
3. application, which includes establishing rights and obligations via granting permits, subsidies, etc.;
4. and enforcement, which requires monitoring observance of the law and possible sanctioning. EU criminal law experts like Vervaele distinguish three stages in enforcement: monitoring compliance with the law, investigating suspicious cases of non-compliance and sanctioning for violations of the law.

In recent years, the proliferation of EU agencies with enforcement powers vis-à-vis private actors and of the EU's say on matters of national enforcement, including centralising enforcement via networks of national enforcers, have been noticeable (Jens et al. 2015, Scholten 2017). Direct enforcement, i.e. enforcement by EU authorities (together with national enforcers) vis-à-vis private actors, have taken a new direction in EU law enforcement studies, especially with regard to questions on the protection of fundamental rights and accountability (see, e.g., Scholten and Luchtman 2017).

- *The development of compliance studies*

Since the 1960s, we see a steady growth of compliance studies. This comes from an evolving understanding of drivers behind human behaviour and crime, coming mostly from socio-legal research and criminology. The predominant idea before that time on sanctioning as the driver behind compliance has been contested. The so-called transition from purely deterrence-based approach to compliance-orientated and mixed approaches has occurred (van der Heijden and Batura 2023, van Rooij and Fine 2021). As van Rooij and Fine argue,

"To improve our laws and make them more effective, we need to understands the behavioral code. Here social science is key. Decades of research have unearthed the behavioral mechanisms that shape human responses to legal rules" (p. 9).

Indeed, in light of conclusions of seminal works such as Baldwin's article in 1991, that people do not comply with law, because they do not know that the law exists nor how to comply with it, it seems logical to suggest that the deterrence based approach has its limits in achieving the desired outcome of compliance. It may not be proportionate to punish people for their lack of knowledge; it may be more effective to correct their behaviour and to educate them on how to comply. How do we ensure there is a proportionate system of enforcement? Several ideas have started to be developed, including responsive regulation, smart regulation, risk-based approach, etc. (Ayers and Braithwaite 1992, Baldwin et al 2011, Blanc 2018, Blanc and Faure 2020). In fact, one can notice the influence of these studies on enforcement law practices; many procedures have been adjusted over the years in the EU, including the infringement procedure. The Commission has introduced informal dialogues and EU pilot procedures to correct non-compliance and prevent lengthy and expensive infringement disputes before the Court. Research shows a decreasing number of infringement procedures in the past 20 years (Kelemen and Pavone 2021), which could be explained at least in part by the development of such additional and more proportionate mechanisms and steps in enforcement.

These findings also imply, *inter alia*, that adding a rewarding stage or deregulation could be incorporated into the process of enforcement and implementation generally. For instance, when monitoring compliance exhibits positive results and may even show the declining need to observe a norm or law. Anyways, what is implementation then?

- *Public policy implementation research*

The most recent handbook on public policy implementation (Sager et al 2024) includes a good overview of relevant literature spanning recent decades. Sætren provides in this edited volume a useful synopsis of various stages in public policy implementation research and hence definitions adopted by this stream of research. He cites one of the first definitions, provided by Van Meter and Van Horn in 1975:

"… policy implementation encompasses those actions by public and private individuals (or groups) that are directed at the achievement of objectives set forth in prior policy decisions. This includes both one-time efforts to transform decisions into operational terms, as well as continuing efforts to achieve the large and small changes mandated by policy decisions"(p. 14).

Sætren states further,

"Many later authors would offer similar but slightly different definitions of implementation <…>, they all seem to boil down to "what happens between the establishment of a policy and its impact in the world of action" <…>. While most definitions are relatively clear about where implementation begins, some are less clear about where the process ends" (p. 14).

In any case, as Sager et al, states,

"Public policy implementation is a core element of the policy process. It is a highly political phase in which policies already decided upon undergo fundamental changes due to the discretion that policy programs provide to the implementing actors. Policy success and effectiveness depend on the implementation process as much as it depends on the policy design that stands at the beginning of the implementation process" (p. 1).

In relation to the EU, Zhelyazkova et al. argue that,

"The EU implementation literature distinguishes between legal (transposition) and practical implementation of EU law. Most EU implementation research focuses on the transposition of EU directives, partly because legal implementation (in particular the timeliness of transposition measures) is relatively easy to measure" (p. 443, 2024).

In both compliance and implementation studies, the focus has been given to actual workings of what they call 'street level' public officials to gain insights into how norms, laws, policies and values have been adhered to.

There are also other relevant streams of research and analytical frameworks, such as on 'enforcing regulation' by Baldwin et al (2011) and on 'optimal enforcement' by law & economics scholars such as Shavell (1993). Baldwin et el. introduce, for instance, the DREAM framework (detecting, responding, enforcing, assessing, modifying) when they discuss 'enforcement of regulation'. Shavell discusses the idea of an optimal level of legal intervention and sanction, aiming at achieving the most desirable outcomes. He elaborates on this idea in light of the time and type of harm as well as different legal regimes such as tort law, taxation and so on to design a most optimal law. Finally, Veerman (2021) offers a historical and systematic overview on theories of legislation, which shows our developing knowledge and thinking about law-making and its interrelationship with the processes after the passage of the law.

Synthesis

This section has aimed at showing a number of related concepts and studies that have been researched – enforcement, implementation, compliance – to establish a working definition of enforcement, for this paper at least. It invites future research on advancing our understanding of these concepts and their interrelationship, also to ease the cross-fertilisation of knowledge between relevant literature streams and practitioners. So, what can we observe?

First, we see great interest in advancing our understanding on how to pass good laws and policies and to make them effective. These questions have been approached via different yet interrelated concepts - enforcement, implementation and compliance – which includes the research results that have been produced in at least three of the relevant literature streams distinguished above. What these literature streams have in common is the aim of studying relevant processes and actors after the passage of a norm in order to finetune the content of the norm and/or the norm-setting process or undertake other activities to promote effectiveness of public policies and/or laws; laws can be clearly only part of policy initiatives.

Secondly, these concepts and individual studies may differ as to the policy cycle sub-stages they may distinguish and may use each other's terms to describe different stages and even define themselves. The scope of the study (which actors, documents, processes, etc) and methods to study may differ, too. 'Disciplinary preferences' may be distinguished in this respect, such as focusing on the court (rulings) and (legislative) language by legal enforcement scholars, on political actors, public officials and governance processes by political scientists, and on human beings and organizations and their behaviours by social scientists in compliance studies.

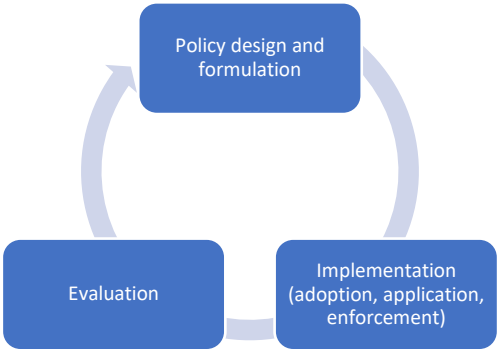
Thirdly, the concept of enforcement of EU law has been evolving to include more than, roughly speaking, infringement procedures, court judgements and transposition of directives in legal and implementation literature.

All this means that these studies can be seen as complementary, which in turn could boost progress in knowledge development and innovation. At the same time, different definitions and understandings of the mentioned key concepts should not be a hurdle to finding relevant studies and to harnessing the benefits brought by this complementarity. Therefore, we should seek out a common understanding and interrelatedness between these concepts.

For the purposes of this paper at least, I propose the following understanding and interplay between the three key concepts distinguished – enforcement, compliance, implementation. Enforcement is a process ensuring compliance with a norm, like EU law. It serves two goals: to prevent non-compliance and to react to possible violations via corrections and/or punishment. Enforcement knows three stages: monitoring

compliance, investigating possible violations, and sanctioning for violations. Enforcement is thus part of a policy cycle which is comprised of (Figure 1 below):

1. policy design and formulation:
    a. identifying a problem;
    b. designing a solution, which may include passing a norm (law) or not,
2. implementation:
    a. adopting (e.g. transposition of directives, designation of responsible authorities),
    b. application (which may be invisible, explained below),
    c. enforcement (monitoring compliance, rewarding for compliance or correcting behaviour, investigating possible violations, responding to violations via correction and sanctioning);
3. and evaluation, which then feeds policy design and formulation stage, what results in the cycle.



Application may be at times less visible, in the sense that there may be norms, such as the right to life, that do not necessarily have any authority to be responsible for its application in comparison to, for instance, a law which requires distribution of subsidies. In such cases, enforcement may come almost immediately after the adoption stage. In other words, "Law enforcement becomes necessary if compliance is not self-evident" (Veerman 2021, p. 208). Implementation of policy includes all the stages after the 'designing of a solution'. The solution may come without any legal norm, but this would still need other stages of the policy cycle to take place, albeit in different rather than purely legal forms. Enforcement is thus one of the steps of implementation and it aims at ensuring compliance. To ensure compliance, enforcement should be guided by knowledge on the causes of non-compliance and should have a palette of instruments to prevent, correct and respond proportionally if (seemingly) undesirable conduct occurs. Hence, compliance studies are an essential source of knowledge for research and practice on enforcement. To achieve successful implementation, and hence achievement of policy and legislative goals, enforcement is dependent on the successfulness of all three stages, processes and actors involved.

More specifically for the EU, direct enforcement of EU law implies enforcement by (EU) enforcer vis-à-vis private actors or addresses of the norms that require enforcement. Indirect enforcement implies the Commission overseeing compliance with EU law by EU member states. The EU pilots and dialogue procedures prior to possible infringement procedure are the tools of indirect enforcement which enhance proportionality in response to non-compliance to reveal the reasons for it. For direct enforcement, it is important to note that enforcement is an activity that can encroach on fundamental rights and freedoms. Therefore, enforcement requires proper legitimacy and legal bases for its implementation. At the national level, EU member states have developed relevant constitutional, administrative, criminal and private law norms, codes and institutions. However, enforcement authorities can enjoy discretion in setting, for instance, priorities on when they can enforce or not, given scarcity of resources and other considerations (see, for instance, the prioritisation criteria of the Dutch competition and consumer protection agency). The EU level has regulated enforcement in some areas at the Treaties' level and in secondary legislation; competition law and combating of financial fraud are the primary examples here. For many policy areas, the enforcement competence of the EU has, however, become less clear (Scholten 2017, 2023). This may be the reason why enforcement is not always discussed at the EU law-making stage and is left to national administrations. However, such practice may cause suboptimal enforcement.

III. FIVE CLUSTERS OF REASONS BEHIND NON-COMPLIANCE AND SUBOPTIMAL ENFORCEMENT

The main argument of this paper is that to promote enforcement, and hence achievement of policy goals, enforcement needs to be considered at the law-making stage. To do that, we first need to establish what needs to be considered - what this section is about. I do so by distinguishing clusters of reasons behind suboptimal enforcement, based on the three literature streams (enforcement, compliance and implementation studies). By taking this knowledge on board when making laws, we can enhance the chance to create 'waterproof' laws and procedures. I conclude with a list of questions that appear from this exploration and which could be useful for scholars, policy- makers and legislators to consider. The idea behind clustering reasons and questions is to make a framework that is feasible to use for research policy and law-making activities.

So, does EU law work? Does it bring the desired results? These are questions that we are increasingly facing, especially in a rule of law system with a growing body of legislation and in light of new challenges such as data protection, sustainability and technological innovations. Since recently, one of the leading views on addressing these questions is the realisation of inevitable interdependency of the working of a law with enforcement of it (Vervaele 1999, Van Rooij and Fine 2021, Scholten 2023, Sager et al. 2024). Enforcement is an action or act to enhance compliance with the law. Without it, the law seems to be only a 'piece of paper'. We are, however, lacking knowledge of how to assess the success of enforcement and hence of the law; "*we do not even know whether enforcement is norm-, results- or effort-oriented, whether each case or all cases on aggregate counts and how much variation is acceptable both nationally and internationally*" (Meyer and Tsilikis 2023 p. 69). What we do know is that the law is not always being followed: we know this thanks to enforcement activities and reports, news articles, especially on scandals, court cases, etc. So, the activities undertaken by various actors via the three main stages of enforcement (Vervaele 1999) – monitoring compliance, investigating of suspicious cases and sanctioning for violations, which can lead to court judgements – inform us about enforcement challenges. While we do not have tools to measure if enforcement has a 100% success rate or less, we do have growing research studying individual policy areas, case-studies, judgments, organisations, organisational and human behaviour and what can or has gone wrong. Thanks to this body of knowledge, we can distil a handful of reasons for non-compliance and suboptimal enforcement.

EU law is being made at the EU level but it becomes part of 27 national legal orders (and can even have extraterritorial effects in other countries who may have to comply with it for a number of reasons, including trade interests and cooperation in fighting crimes).The EU multi-jurisdictional constellation, which may have its distinct shapes and flavours depending on the policy area, shows a complex legal regime operated like a web of interrelationships and processes among many institutional and individual entities. The EU is a multi-lingual, multi-jurisdictional, multi-level, and culturally diverse union, which has an even more complex task in enforcing rules than would be the case with one jurisdiction. This is because the 'classic' reasons for potential non-compliance with the law – unawareness of the existence of the law, unclarity on how to apply it, purposeful violation considering one's interest (e.g. financial gain) (see e.g. Baldwin 1990) – are only part of the list. Recent emerging research also shows what we may call 'EU specific' reasons such as problems stemming from language translations and misalignment of legal rules, procedures and institutions among national jurisdictions.

Because the list with potential reasons of non-compliance may be long, especially in specific cases or circumstances, I explore the possibility to distinguish five clusters of reasons behind non-compliance and suboptimal working of law via enforcement. This will assist establishing a workable framework for investigation, analysis, assessment and subsequent creation of enforceable EU law. The clusters are as follows: extent of (dis)agreement at the law-making stage, complex (legal) context, multiplicity of decision-making actors, language ambiguity, and value pluralism. I introduce these clusters, including referring to studies based on which I have distinguished individual clusters, here below. Then, I propose a list of questions that if considered, could promote creating enforceable EU laws. The list is tentative and may require further finetuning in light of the testing.

- Extent of (dis)agreement at the law-making stage

The decision-making process, where the law-making is taking place, is political. Laws are results of political, institutional, and stakeholder bargaining, where the level of (dis)agreement on the final product may differ at each and every stage and on all questions of that bargaining, also after the law has been

passed: is there a problem to regulate at all? How should it be addressed? By whom? At which level and how (public or private regulation and enforcement)? etc… Even if a final compromise is reached, there may be disagreement on the very fact that something needed to be regulated. Parties may have different ideas on the appropriate level (EU-national-reginal) and type (public-private) of regulation the law should follow. Furthermore, they may differ in their views on the scope of the law and/or the content and procedures it establishes. Remember, each law can affect the rights and freedoms of individuals, private and public organisations and states. This means that not all parties affected may agree on the necessity and scope of such restriction. Disagreements at the law-making stage will likely be moved to the enforcement stage, especially if there was a majority vote and a close one or if political majorities change at the member state's level. All these aspects will impact compliance with the law and relevant enforcement. Hence it makes sense to design laws with an ex-ante analysis of these factors. In turn, this may lead to creating additional appropriate enforcement mechanisms that address the reasons of non-compliance stemming from those disagreements or are sector or problem specific.

For instance, one may want to include mediation procedures, peer-reviews and other consensus driven approaches to enhance compliance and developing agreement (GDPR mediation procedures could be an example). Clearly, proper justification of the necessity of the law, of its form and of its scope will help too. This is because giving reasons enhances understanding and thus acceptance and legitimacy (Shapiro 1992). Proper justification could include finding emergent research as to when some enforcement mechanisms can be better to use (van Kreij 2023, Shavell 1993, Van Rooij and Fine 2021). Van Kreij (2023) shows how relevant it is to consider the features of the regulated industry when deciding on enforcement through an EU enforcement agency or a network of national enforcers. Based on his analysis of two policy sectors, he suggests that for industries which are more concentrated and have fewer actors to oversee, public enforcement via an EU agency may be more effective, whereas national enforcers are better suited to enforce if the regulated industry is dispersed and has a high number of actors to oversee. Shavell (1993) offers thought-provoking insights on the optimal enforcement as regards the type of enforcement and sanctioning (private or public, including administrative or criminal) and type of legal intervention (tort law, injunction, subsidies, tax) depending on the information position of individuals/potential victims and depending on the timing of the harm (before or after).

All in all, it seems helpful to sketch main arguments of parties involved in decision-making along the policy cycle sub-stages and to anticipate places, actors and reasons for future potential non-compliance to design proportionate means to address them in various and proportionate ways (not only via sanctions).

- Complex (legal) context

When a new law enters into force, the reality is that it operates alongside existing and evolving laws; it will likely interact with some of the existing laws, either through complementing them or perhaps clashing with them. This is in addition to the legislative and policy goals, which may be plenty and can at times be contradictory, which may lead to the clashes among laws (see, for instance, an example of the EU energy law (Rumpf and Banet 2023)). Furthermore, the complexity of the legal regime is ever increasing, also in light of continuously developing case-law, which is in part based on evolving legal precedent and a number of pertinent issues to consider; think about sustainability concerns and technological developments. Finally, misalignment between legal orders has been repeatedly reported: different (procedural) rules impeding effective judicial protection and access to remedies, divergent (court) interpretations leading to different degrees of legal protection and enforceability, missing links for accountability relationships leading to uncontrollable discretion by supervisors (Karagianni 2022, Scholten and Luchtman 2017). Scholars of national private, administrative and criminal laws point to the same misalignment with EU law – EU law does not work with such terms as private, administrative and criminal laws, which complicates implementation, especially in a uniform fashion across the Union (Cherednychenko 2023, Duijkersloot and Widdershoven 2023, Meyer and Tsilikis 2023). All in all, the complex (legal) context can lead to the 'classic' reasons such as not knowing about how to apply or comply with the law (Baldwin 1990). The interplay with relevant EU and national laws and standards has to be part of the law-making stage (e.g. via a preliminary (legal) assessment by national administrations).

- Multiplicity of decision-making actors and points

EU law operates in a layered structure: there are EU, national, regional and local levels that it may have to comply with. Furthermore, there are also web structures of actors that can be involved in enforcing EU law together. For instance, think about national enforcers requesting their national, EU, international

counterparts and/or private actors for assistance. This implies the involvement of a great number of different types of actors, organisations and individuals in compliance with law and in its enforcement. Landmark research (Pressman and Wildavsky 1973) has showed the difficulties with implementation in multi-layered, multi-jurisdictional entities (such as the US federal state). The title of the book speaks for itself: How great expectations in Washington are dashed in Oakland; Or, why it is amazing that federal programs work at all. On the one hand, difficulty in translating broad agreements in specific decisions, given a wide range of participants, has been noticed. On the other hand, there are also opportunities for blockage and delay that result from the multiplicity of decision-making points. The third lesson that the mentioned book derived from their study of failed implementation was misleading economic theory used in that case. As Pressman and Wildavsky (1973) concluded, successes in implementation lies in having good coordination, self-learning ability of programmes, and possibility to adapt during implementation. These lessons can clearly be applicable for the EU (see also studies on customisation in transposing directives (Thomann 2018)). Thus, actors and procedures as to how specific regulations should be adopted and enforced should also be discussed. Procedure seems one of the key decision-making points where implementation may go wrong or completely different in one jurisdiction in comparison to others, hence, it is important to discuss it and make guidance, especially for national administrations. Another issue is discretion that can bring flexibility, self-learning and adjustment in enforcement, but may clash with existing EU or national delegation doctrines.

Furthermore, decision-making actors may differ as to their (formal) competences and enforcement styles they can adopt or must follow. A study on the powers of 12 national courts of auditors showed that they have different powers as to the ability to oversee national central banks (Boers et al. 2012), which is an illustration of how it is important to discuss who is going to be involved in enforcement and what they need to have at the minimum to ensure coherence, if not uniformly. In addition, there may be, for instance, more strict and formal following of checklists or more informal dialogue and cooperative ways of enforcement. Therefore, enforcement can be affected by specific organisation's (limited) mission and powers and an individual enforcer may bring the difference about depending on his/her background and resources. Human, financial, and since recently technological resources are among the key elements of successful enforcement. These issues, including designating relevant authorities, imposing specific expert and leadership requirements, and in part requesting (re)determining missions, powers and resources, seem essential to consider at the law-making stage.

- Linguistic ambiguity

Laws are essentially words. Words can have different meanings and interpretations, which can be further interconnected with specific situations or context. Words can be language, policy or jurisdiction specific. For instance, the term accountability is difficult to translate into Dutch and they often use this English term in Dutch. The term enforcement can be best translated into Dutch as two words 'toezicht en handhaving', i.e. 'supervision and enforcement' where as supervision can be equal to monitoring and simply be part of enforcement in English (see the previous section, also on the specific enforcement procedures and their special terms in EU law proper).

There is an insightful book by Beck analysing legal reasoning of the Court of Justice in this respect. He distinguishes the following sources for linguistic vagueness as a structural feature of (legal) language: the open-ended nature of many concepts, ambiguity, context-dependence, imprecision, incompleteness, essentially contestable or interpretive concepts, and 'dummy' standards such as 'substantial' and 'reasonable', and other instances of pragmatic vagueness (Beck 2013, p. 52-53). In addition, the EU is a Union of 24 official languages; this increases the chances for linguistic ambiguity due to the necessity of translation. As I co-wrote elsewhere,

"This European multilingualism however can be a source of legal miscommunication and divergence in meaning (Kjær and Adamo 2011), affecting the ability for effective law enforcement. Comparative law and its use in the translation process has been identified by Künnecke as a vital mechanism for ensuring consensus within the CJEU (Künnecke 2013). Outside the CJEU and into legislation, Šarčević highlights the increasing effect of multilingualism on legal certainty within the Union (Šarčević 2013). A response to these difficulties, as well as a potential solution, is the emergence and growing influence of EU legal English as lingua franca (Robertson 2012; Felicci 2011). This, in combination with the Europeanization of law Bajčić argues, is shaping a new EU legal culture (Bajčić 2018)"(Scholten and Staehler 2023).

Clearly, enforcement can be impacted by linguistic vagueness, including if enforcement is done by the Court. Beck sees linguistic vagueness as one of the three sources of legal uncertainty. Interestingly, he also distinguishes value pluralism and rule instability associated with precedent as the other two sources. I consider the role of precedent under the first cluster and this is one of the aspects which complicates the (legal) context for enforcement. Value pluralism is my next, fourth cluster.

All in all, explanatory guidance, educative activities such as workshops and online videos for public enforcers as well as the supervisees, seem necessary to provide with the passage of the law to reduce language ambiguity. When regulating a new field with evolving terminology one may consider including special procedures to seek agreement on the evolving terms and issues.

- Value pluralism

Value pluralism can affect the working of the law and its enforcement. As Beck explains, "norm or normative uncertainty in the law has its origin in value pluralism as a general theory of the impossibility of rational choice between incommensurable conflicting values" (Beck 2013, p. 53). In my earlier co-authored chapter, we have argued that "As the EU, as a political and moral system, adheres to the tents of liberalist philosophy there is no reason to reject value pluralism" (Gerbrandy and Scholten 2015, p. 11). Similarly, Pressman and Wildavsky (1973) mention the difficulty in translating broad agreements at the federal level in specific decisions down the chain to the local government given a wide range of perspectives as to what those broad agreements are. Generally, value pluralism exists because there are multiple fundamental values like peace and economic wealth and there is no clear hierarchy between them, especially if they originate at the same level, for instance, Article 2 of the Treaty on the Functioning of the EU (TEU). These values are also difficult to compare and there are different ways of resolving conflicts of values (Beck 2013, p. 78, Gerbrandy and Scholten 2015, p. 10-17). And value pluralism may be closely related to definition pluralism: we can define terms differently. Furthermore, value pluralism affects enforcement 'on the ground' where enforcement organisations may determine their values and individual enforcers may behave in different ways, consciously or subconsciously, due to their political, religious, cultural and other backgrounds, which influence their behaviour and how they see the law should be enforcement (see also de Witte 2013). As value, and in part definition pluralism, is inevitable, one may try to address it by inserting explanation-driven and mediation-like mechanisms to enhance enforcement and to prevent arbitrary and subjective factors in enforcement.

Synthesis: what to consider at the policy or law-making stage to enhance enforcement and hence effectiveness of laws and policies?

A list of questions that seem essential to explore at the law-making stage, structured along the five clusters discussed, is provided below. These questions can be used as guidance to analyse legislative proposals or to study legislative history of existing laws. These questions can be studied by using different and combined methods – desk top research on laws, preparatory documents, news articles, case-law, official documents and reports, academic literature, observations, interviews, etc.

- Why is there a problem and how can it be solved (in different jurisdictions)? To what extent is there agreement or disagreement on the existence of the problem and on solution(s) proposed? To what extent has there been agreement on the key questions: necessity of EU legislation, its type (regulation or directive), key concepts/definitions, regulation and enforcement ways? To what extent could mediation or other consensus-driven mechanisms help enhancing enforcement (especially when the extent of disagreement is high) and should such mechanisms be included in the law? How can a proportional system of enforcement (availability of different mechanisms to different reasons behind non-compliance) be developed for the specific legal act at stake? What could the dos and don'ts be for national enforcement types, styles and actors?
- To what extent is there (legal) complexity? How many laws can be affected and how? What the policy goals and how do they interrelate and can be balanced in case of contradiction? To what extent is there misalignment with national legal orders in terms of content (interpretation), procedure and protection of fundamental rights? To what extent is it feasible to include a legal clause/mechanism as to how to resolve issues related to legal complexity, especially due to differences among national legal regimes and the protection of fundamental rights? Could a solution be found in establishing a transnational legal mediation panel or alike to help enforcement?

- How many actors are involved in the adoption, compliance and enforcement of laws and who are they? To what extent have/can they be consulted on the upcoming law and how will they know of the existence of the law and how to comply with it? To what extent is there compliance support envisaged and supported via allocation of resources (financial, human, technological)? What is the envisaged impact on national administrations and budgets in terms of resources? To what extent are organisational and individual characteristics of enforcers (missions, powers, type, goals, working policies, enforcement styles, expertise, skills, experience, leadership) comparable among member states? Should there be additional requirements in EU law on national enforcers (mission, powers, education and expertise, skills, experience, leadership) and mutual assistance, such as for instance, the possibility to delegate implementation to EU or other national enforcers who are better equipped to enforce in that area? To what extent is there discretion and the ability to self-learn and adjust during implementation? To what extent is there coordination between relevant enforcers?
- To what extent is legislation coherent and clear? Where can there be instances of possible language unclarity, also in light of translations? Is there (national or sectoral) variety of definitions on the key concepts (this could be asked to enforcers and private actors)? To what extent are enforcement clauses (if any) clear and unambiguous? Are there explanatory, educative and other supportive materials and possibilities available to all relevant actors – enforcers and the supervisees concerning language ambiguity issues?
- What values may need to be balanced in enforcing the new law and how can these be balanced? To what extent is there definition pluralism and how can it be addressed? Are there explanatory, educative and other supportive materials and possibilities available to all relevant actors – enforcers and the supervisees concerning value and definition pluralism and possible bias in enforcement? Is there coordination possible between enforcers on this issue, including exchange of practices? Could including mediation or other mechanisms alike be helpful in dealing with this challenge?

IV. EU LAW- AND DECISION-MAKING PROCEDURES: NO OBLIGATION TO DISCUSS ENFORCEMENT

How is EU law made at this moment? What do they consider at the law-making stage and how far is enforcement considered? This section discusses the formal EU law-making procedures and the better regulation toolbox established by the Commission when they develop proposals. This section shows that discussing enforcement is not a formal obligation and is not necessarily part of the law, and relevant decision-making procedure. Notwithstanding this, some questions from the list created in section III can be found in the 'better regulation' toolbox. The reasons for this partial and non-obligatory discussion of enforcement issues at the law-making stage can be explained, at least in part, by the fact that there is no democratic obligation to pass laws of specific quality or with enforcement in mind. Also, as mentioned earlier, the enforcement of EU law has evolved to focus predominately on compliance by national administrations with EU law. As the Commission states,

"Member States have the primary responsibility for the complete and correct transposition, application and implementation of EU legislation. They also must give their citizens access to rapid and effective redress when the latters' rights under EU law are affected. <…> The Commission will continue helping Member States in their efforts in many different ways. For example, the Commission will set up high-level dialogues, networks and exchanges of best practice in partnership with national authorities and courts, and the European Network of Ombudsmen coordinated by the European Ombudsman. The Commission will also continue its focus on tackling potential breaches of EU law quickly and at an early stage" (Press release 2016).

This division of competences may seem to suggest that EU laws should not be dealing with the issues of enforcement, which is a national prerogative, protected, among others, by the principle of national procedural autonomy. However, this logic and order of things are questionable as practice has learned and has shown that implementation problems could have been prevented if enforcement was part of the law-making. In case of persistent problems with EU policies and laws, there seems to be a trend of switching from directives to regulations and of enhancing harmonisation of national laws. One may however question these trends; regulations and harmonisation efforts would be prone to similar causes behind non-compliance and suboptimal enforcement.

Ordinary legislative procedure: no treaty obligation to discuss enforcement

"*Decision-making procedures are the means by which the Union exercises its competencies in a given case*" (Bradley 2020, p. 126). There are a number of different procedures: legislative and non-legislative, the latter includes passing 'regulatory acts'. The vast majority of acts are legislative acts adopted under the so-called ordinary legislative procedure (Article 294 TEFU) and delegated and implemented acts passed by the Commission pursuant to Articles 290-291 TFEU. Furthermore, the EU institutions can adopt additional guidance to support those procedures, such guidance can be rules of procedure for the institution, soft-law documents and other guidelines. Let us look at the ordinary legislative procedure for the purposes of this section.

Article 294 TFEU sets out the procedural steps and hence regulates potential influence of the main institutions – EU Commission, the Council of Ministers and the European Parliament – in this commonly used procedure to pass EU law. Clearly, the Treaties use somewhat general language and hence not all details are included. Still, it is important to note that no treaty obligation exists in this provision that discusses subsequent enforcement of a proposed legislative measure.

Article 294 TFEU procedure is used when other 'substantive' treaty provisions refer to it to be used. For example, Article 114 TFEU refers to the ordinary legislative procedure to be used to adopt measures which have as their object the establishment and functioning of the internal market. There are approximately 100 references to the ordinary legislative procedure in TFEU, but these 'substantive' treaty articles do not explicitly oblige discussing the questions of enforcing the measures to be adopted either. There are some interesting clauses, such as in Article 16 TFEU: "*Compliance with these rules shall be subject to the control of independent authorities*", which thus imposes certain conditions on subsequent enforcement. However, such a clause in the Treaties is rather an exception.

Looking at the guidelines of the European Parliament and the Council (Guide to the ordinary legislative procedure, 2024), one can also see that these are focusing more on the procedural steps, such as the possible first and second readings, negotiation and conciliation, during the law-making procedure. These guidelines prescribe no legal or political obligation to discuss the issues of subsequent enforcement of the proposed legislative act. Similarly, relevant treaty provisions, which establish these institutions and set up 'representative democracy' as the guiding law-making principle, impose no obligation on the substance of relevant deliberations. There is no requirement to discuss the enforceability of legislative proposals.

There are however guidelines such as Interinstitutional Agreement of 13 April 2016 on better law-making, where all three institutions have agreed to pursue better law-making by means of a series of initiatives and established procedures, most of which the Commission has developed under the umbrella of 'better regulation'.

Better regulation agenda development

Article 294 TFEU gives the right to submit a proposal to the Commission (Article 294 (2)). Following the Interinstitutional Agreement of 13 April 2016 on better law-making, the Commission has recently issued a number of guidelines aligned with its 'better regulation' agenda, which have been comprised in one guidelines document (2021) and an EU better regulation toolbox (Better regulation: guidelines and toolbox, 2023). While the first document contains 41 pages and may be seen as using somewhat broad language, the toolbox, a document of 614 pages, is much more detailed, which is helpful to try and understand the broad language of the guidelines. At the same time, while the toolbox is meant to help guiding the process of preparing policy and legislative proposals, one may wonder if this is really so when the document is 614 pages long. Empirical research is necessary to see if this 'better regulation' policy leads indeed to better results. I will sketch the key initiatives of the better regulation and give my observations regarding the extent to which relevant issues on enforcement have been included in it.

The Commission has proposed using various initiatives to improve law-making: evaluations and fitness checks, impact assessments (IAs), input from stakeholders, and compliance promotion tools. These initiatives seem to support the logic behind the main argument of this paper – to make better laws and policies, we need to have a good ex ante analysis of relevant issues. Indeed, the Commission promotes an 'evidence-based' approach, participation of stakeholders, promotion of key priorities such as sustainability and the protection of fundamental rights. The list of issues to consider is impressive and a number of questions that have been set out at the end of section III seem to be included in the better regulation. For

instance, an IA is about verifying the existence of a problem, identifying its underlying causes, assessing whether EU action is needed, and analyzing the advantages and disadvantages of available solutions (p. 30). Also, 'better regulation' seeks to take a coherent approach, which means checking the consistency with high-level and long-term policy objectives, digital transitions, and sustainability. These initiatives could be helpful in addressing the clusters of reasons on the extent of (dis)agreement at the law-making stage and at least in the complex (legal) context. 'Better regulation' also seeks to provide explanatory documents and activities, including passing implementation strategies, which could help address the clusters of language ambiguity and value pluralism. Finally, evaluations, which in part should include lessons learned from implementation, should be part of subsequent IAs and policy/law changes.

At the same time, one can observe that enforcement is not entirely considered. 'Better regulation' can be even better. Firstly, the guidelines are not legally binding on outside actors and are meant for the officials of the Commission, who have some derogation clauses and discretion regarding how to follow them. For instance, IAs are "*required for Commission initiatives that are likely to have significant economic, environmental and social impact or which entail significant spending, and where the Commission has a choice of policy outcome*" (p. 30). There may be political urgency which can imply having no IA, etc. All these decisions – to make an IA or not, which toolbox guidance to take into account and how exactly – are to be taken by the Commission's departments and have only political accountability, if at all.

In this respect, Harvey discusses the recent case-law by the CJEU where member states challenged the validity of legislation due to the absence or insufficiency of IAs carried out by the Commission and hence an infringement of the principles of sound legislative procedure by the EU institutions when preparing and adopting legislation. The Court has ruled that a failure to carry out an IA is not, in itself, a violation of EU law. It has, however, indicated that the proportionality principle should weigh heavier as a consideration in judicial review. "*Shortcomings in the legislative process may indicate the EU legislature failed to adequately consider all relevant facts and circumstances when legislating, particularly by failing to consider the economic and social impact that proposed EU legislation will have in certain Member States*" (Harvey 2024). According to Harvey,

"the most explosive example of this growing body of "process-oriented review" comes in a recent set of 15 annulment actions brought by 7 Member States against new EU road-transport legislation. The opinion of AG Pitruzzella represents a landmark development in the enforcement of "better regulation" standards against the EU institutions. For the first time ever, the AG has found that, by not carrying out an assessment of the economic, social and environmental impact of proposed legislation prior to its adoption, the EU legislature breached the principle of proportionality" (Harvey 2024).

Secondly, a number of important issues for enforcement are not necessarily covered in the pre-legislative phase. The language of 'Better regulation' seems to focus on indirect enforcement of EU law. It discusses such issues as enhancing compliance and implementation, but of the transposition phase and by national administrations. So, it is enforcement of the adoption stage – if following my definition from section II. In addition, while the Commission describes a number of activities, such as passing implementation plans by the Commission, organising educative workshops, holding compliance dialogues, that it could undertake in helping member states to comply and these initiatives could help addressing the reasons under cluster 'language ambiguity', they are not obligatory. These activities 'may' be organized. Data-driven research would be necessary to establish how often these compliance-oriented activities take place, their content, participants (type), and effect.

Enforcement may be part of subsidiarity and proportionality assessments in 'Better Regulation', but it is neither specifically mentioned for those procedures, nor is it always done comprehensively (see an example on ESMA's legislation where justifications have been very short in Zivic and Scholten 2024). Enforcement issues and enforcers are also not mentioned in the IA or among stakeholders to consult. This may not be surprising if the designation decisions on national enforcers at the national level seems to be done after the law has been passed. In such cases, national enforcers who would be assigned with enforcing a specific law, may be not informed or interested in being consulted at the ex ante stage when they do not know if they would be the ones to become responsible. However, their expertise and knowledge on their procedures and practice across the Union could be vital for the future success of legislation. Also, not knowing who is going to be responsible for future implementation makes it difficult to conduct fully-fledged IAs as one cannot know the costs of enforcement, the burden on national budgets, and one cannot compare relevant enforcers at the member state levels as to their missions, powers, etc. This is suggested to be important to address reasons under the 2-5 clusters.

Finally, there is an evaluation procedure to periodically review programs and their effectiveness. 'Better regulation' refers at times to the usefulness of learning from implementation when adjusting existing laws. However, enforcement may fall outside the scope of the evaluation, which is designed by the Commission officials and may not be scheduled if laws are not falling within an obligatory review term or political priority In any case, it may be too late, especially for new legislation, 'to wait and see how it does not work first'.

Should enforcement be discussed at the law-making stage?

Whereas 'Better Regulation' is a remarkable step towards better law-making, a legislative proposal from the Commission would be just a start. There are several documents that are produced when a legislative proposal is negotiated: legislative proposal, additional reports such as an IA, a report from the rapporteur from the relevant parliamentary committee, reports from advisory institutions such as the Committee of Regions, to name but a few. These documents may clearly have either specific provisions related to enforcement or information about it. However, what this paper aims to establish is the fact that there is no legal or democratic/political obligation to discuss consistently and comprehensively at the law-making stage how a legislative proposal, if adopted, will be enforced. This question is more or less moved to the adoption stage of the passed law and the reality of enforcement occurs afterwards.

The final question of this section is thus if enforcement *should* be part of the EU law-making procedure. This brings us to two issues – on 'essential' and 'non-essential' elements of legislation and on the issue of competence. One may opine that this is part of 'non-essential' elements of legislation and can be left to either the Commission (delegated to adopt implementing acts) or national administrations. Thus,

"the Union should only adopt implementing measures when 'uniform conditions for implementing legally binding Union acts are needed'. This restriction on the conferral of implementing powers is designed to safeguard the prerogatives of the Member States" (Bradley 2020, p. 136).

At the same time, one may want to question what elements of enforcement of EU law may be relevant to discuss at the EU legislative stage as they may form 'essential' elements for the adopted legislation to work. In Parliament v Council ('Frontex'), the Court has given some guidance in this respect. First, provisions whose adoption requires making political choices falling within the responsibilities of the European Union legislature cannot be delegated to the Commission, for instance (para 65). What questions of enforcement could involve making political choices? I suspect these may be plenty, if not all; the line is thin between political and 'other' choices (see also extensive debate in US constitutional law on this (Scholten 2014, pp 189-200). For example, would it be not a political choice to determine the type of enforcement (private or public law), which in turn has consequences for human, technological and financial resources of national administrations, which may fall under the public budget which is adopted by the parliaments in light of their strategic political priorities? I think it would. Enforcement is a resource-intensive activity and it is highly dependent on the availability of human, financial and technological resources. To enforce a law or not is tightly interconnected with the question of the budget available and political priorities.

Furthermore, and secondly, the Court has also said, that conferring enforcement powers, especially when such powers can impact fundamental rights, requires involvement of the EU legislator (para. 67). The interrelationship between enforcement and fundamental rights and freedoms of private actors is inevitable. Monitoring compliance requires gathering information and data. Investigating potential violations may require gathering more information and data, including involving more coercive measures, such as dawn raids and inspections. The protection of fundamental rights also has to be ensured at the stage of correction and sanctioning. Following this line of understanding, enforcement should always be discussed at the law-making stage. In fact, 'Better regulation' refers to the protection of fundamental rights as one of the priorities that must be taken into account in its initiatives. Recent research (Karagianni 2022, Scholten and Luchtman 2017) repeatedly shows that the protection of fundamental rights is not being well considered at the law-making stage, leading to legal gaps or limbos. If this potential reason for suboptimal enforcement is known, relevant discussions should be included at the law-making stage.

All in all, I cannot agree more with the following ambition (see here below) of the Commission, but in order to realise it, enforcement should become an obligatory part of pre- and legislative process and all relevant issues need to be considered, where the list of reasons behind suboptimal enforcement (see the end of section III) could be a helpful tool:

"Commission services should anticipate and address implementation and enforcement issues when analysing the impacts of proposed legislation, designing and drafting proposals, as set out in the Better Regulation guidelines and its toolbox (10). In the preparatory phase, services should give careful consideration to enforcement challenges, e.g. by mapping them before scoping the future proposal and looking at the existing national legal framework, constitutional specificities, administrative capacity for future enforcement etc. The IA could have a more prominent section on this aspect. It is important that services also continue to promote attention for implementation and enforcement aspects during the negotiations in Parliament and Council. Finally, they should spot challenges stemming from the adopted text as early as possible and try to address them in the ensuing implementation strategies. For this purpose, Services should make sure that, when appropriate, policy and enforcement services work in close cooperation and that knowledge about the debates during the negotiation process passes to staff preparing and monitoring the implementation of EU law. The stocktaking exercise revealed that where these principles are already put into practice, the relevant services benefit greatly from a sort of 'economies of scale' approach and the early and close collaboration between policy and implementation-responsible staff can greatly facilitate interactions and support back to the Member States on difficult implementation questions"(Commission 2023, p. 8).

V. CONCLUSION

This paper started with pointing a paradox in EU law. Why do we need EU law? We want to ensure (legal) certainty and guide our behavior. Implementation processes, including enforcement, are the key to achieving the goals of the law. However, if the law is not complied with or applied differently, you do not achieve (legal) certainty, do you? Given the increase in understanding on the reasons for non-compliance and suboptimal enforcement, the paper has challenged the somewhat traditional logic of (EU) democratic legislating, including 'Better Regulation'. In terms of which, we pass the law first, then we evaluate, and then we may adjust. This paper thus first blended the existing research on the reasons of non-compliance and suboptimal enforcement to identify what we know and thus what we should consider when making the law. Then, it investigated the question if enforcement is being discussed at the pre- and legislative stages to pass enforceable laws. Its main argument has been that to promote (legal) certainty and the goal we have behind passing the law, enforcement issues should be discussed at the pre-legislative and legislative stages.

The paper has showed that since recently, the EU institutions have been increasingly considering different issues at the pre- and legislative stages. 'Better Regulation' has promoted a number of relevant initiatives such as making IAs and taking lessons learned from the past to improve the law and policies. However, several shortcomings have been observed, too: the non-obligatory requirement of those initiatives and a somewhat limited attention to consider enforcement. Can you really make a good IA if you do not assess the impact on national enforcement and do not take national enforcers on board when legislating? The paper suggested a list of questions, structured in line with the five clusters of reasons behind non-compliance and suboptimal enforcement, that researchers and policymakers could use to improve the existing law-making. It has argued that enforcement should always be discussed and analysed when the law is being made to enhance compliance and prevent non-compliance. Enforcement is essential part of legislation requiring (subsequent) political choices to be made and it impacts fundamental rights.

What should be considered at the law-making stage exactly? Five clusters of reasons behind suboptimal enforcement that I have established could be a good start. They may be finetuned in further research and practice. These are: the extent of (dis)agreement at the law-making stage, complex (legal) context, multiplicity of decision-making actors and points, language ambiguity, and value pluralism. These reasons can be anticipated to cause problems in enforcement and hence require establishing a proportionate enforcement system, i.e. where non-compliance can be prevented, corrected and/or sanctioned with a mechanism depending on the reasons for non-compliance. Dialogue and consensus-based procedures, such as mediation clauses and boards, and coordination-driven initiatives (among enforcers and between enforcers and supervisees), seem to lie at the core of successful enforcement and should therefore be considered in law-making. Procedures on adoption of EU law and procedures used in national enforcement as well as envisaged enforcers should be brought together and discussed at the law-making stage too. Enforcers' expertise can be vital when the law is being made and formulated. National enforcers and relevant practices/traditions should also be compared ex ante to address possible problems stemming from negative effects of different national structures, resources, etc. Enforcement should be designed to have

flexibility and proportionate reactions to (possible) non-compliance in light of the reasons behind the non-compliance; a self-learning function and the possibility to adapt during the process, while respecting the non-delegation doctrine and legitimacy requirements.

Finally, this paper has brought together landmark research from three literature streams – EU law (enforcement), compliance and policy implementation. It invites future academic research on the points of disciplinary differences and overlaps as well as good coordination and collaboration of our efforts, which all aim to study and discover how we could create effective policies and laws.

VI. REFERENCES

Ayres I and Braithwaite J, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992)

Beck G, The Legal Reasoning of the Court of Justice of the EU (Oxford: Hart Publishing 2012).

Baldwin R, 'Why Rules Don't Work' (2011) 53 The Modern Law Review 321

Baldwin R, Cave M and Lodge M, 'Enforcing Regulation', Understanding Regulation: Theory, Strategy, and Practice (2nd edn, Oxford Academic 2011)

Bengoetxea J, 'Text and Telos in the European Court of Justice - Gunnar Beck, The Legal Reasoning of the Court of Justice of the EU (Hart Publishing2012) 486 p., ISBN 9781849463232

Blanc F, 'Tools for Effective Regulation: Is "More" Always "Better"?' (2018) 9 European Journal of Risk Regulation 465

Blanc F and Faure M, 'Smart Enforcement in the EU' (2020) 23 Journal of Risk Research 1405

Bradley K, '5. 'Legislating in the European Union' in Barnard C and Peers S (eds), European Union Law (3rd edn, OUP 2020)

Cherednychenko OO, 'Private Enforcement of EU Law' in Scholten M (ed.), Research Handbook on the Enforcement of EU Law (Cheltenham: Edward Elgar, 2023)

De Witte F, 'Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law' (2013) 50 Common Market Law Review 1545

Duijkersloot T and Widdershoven R, 'Administrative law enforcement of EU law' in Scholten M (ed.), Research Handbook on the Enforcement of EU Law (Cheltenham: Edward Elgar, 2023)

Gerbrandy A and Scholten M, 'Core Values: Tensions and Balances in the EU Shared Legal Order' In van den Brink T, Luchtman M, & Scholten M (Eds.), Sovereignty in the shared legal order of the EU : Core values of regulation and enforcement (Intersentia 2015) <https://dspace.library.uu.nl/handle/1874/323286> accessed 30 August 2024

Harvey D, 'Process-Oriented Federalism in the EU: A (Partial) Response to Critiques of Process Review Advocacy in the EU' (2021) 46 European Law Review 460

Harvey D, 'The Role of Impact Assessments in the Judicial Enforcement of EU Law', EULEN Jean Monnet Working paper, 2024, forthcoming

Pressman J and Wildavsky, Implementation: How Great Expectations in Washington Are Dashed in Oakland; Or, Why It's Amazing That Federal Programs Work at All, This Being a Saga of the Economic Development Administration as Told by Two Sympathetic Observers Who Seek to Build Morals on a Foundation of Ruined Hopes (University of California Press 1973)

Jans JH and others (eds), Europeanisation of Public Law (2nd edn, Europa Law Publishing 2015)

Karagianni A, 'The Protection of Fundamental Rights in Composite Banking Supervision Procedures' (Dissertation, Utrecht University 2022)

Kelemen D and Pavone T, 'Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union' (27 December 2021) <https://papers.ssrn.com/abstract=3994918> last accessed 9 December 2022

Meyer F and Tsilikis D, 'Criminal law enforcement of EU law and the impact of Europeanization' in Scholten M (ed.), Research Handbook on the Enforcement of EU Law (Cheltenham: Edward Elgar, 2023)

Prechal S, 'Europeanisation of National Administration Law' in Jans JH and others (eds) Europeanisation of Public Law (2nd edn, Europa Law Publishing 2015) 39-72.

Prechal S and Widdershoven R, 'Principle of effective judicial protection' in Scholten M and Brenninkmeijer A (eds), Controlling EU Agencies: The Rule of Law in a Multi-jurisdictional Legal Order (Edward Elgar Publishing 2020)

Rumpf J and Banet C, 'Energy Law' in Scholten M (ed.), Research Handbook on the Enforcement of EU Law (Cheltenham: Edward Elgar, 2023)

Saetren H, 'An intellectual history and state-of-the-art assessment of policy implementation research and theory' in Sager, F., Mavrot, C., & Keiser, L. R. (eds.). (2024). Handbook of Public Policy Implementation (Edward Elgar Publishing 2024)

Sager, F., Mavrot, C., & Keiser, L. R. (eds.). (2024). Handbook of Public Policy Implementation (Edward Elgar Publishing 2024)

Sager F, Mavrot C and Keiser L.R, 'Introduction: the notion of policy implementation and why it is important' in Sager, F., Mavrot, C., & Keiser, L. R. (eds.). (2024). Handbook of Public Policy Implementation (Edward Elgar Publishing 2024)

Scholten M (ed.), Research Handbook on the Enforcement of EU Law (Cheltenham: Edward Elgar, 2023)

Scholten M, 'Challenges and Successes of Enforcement of EU Law' in Scholten M (ed.), Research Handbook on the Enforcement of EU Law (Cheltenham: Edward Elgar, 2023)

Scholten M and Stähler L, 'Introduction to Research Handbook on the Enforcement of EU Law' in Scholten M (ed.), Research Handbook on the Enforcement of EU Law (Cheltenham: Edward Elgar, 2023)

Scholten M, 'Mind the Trend! Enforcement of EU Law Has Been Moving to "Brussels"' (2017) 24 JEPP 1348

Scholten M, 'Better regulation' door 'better enforcement': de noodzaak van een EU rechts handhavingstheorie en strategie voor de EU van 70+' (2022) 11 SEW 482

Scholten M, The Political Accountability of EU Agencies: Learning from the US Experience (Datawyse: Universitaire Pers Maastricht, 2014)

Scholten M and Brenninkmeijer A (eds), Controlling EU Agencies: The Rule of Law in a Multi-jurisdictional Legal Order (Edward Elgar Publishing 2020)

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

Shapiro M, 'The Giving Reasons Requirement' [1992] UCLF 179

Shavell S, 'The Optimal Structure of Law Enforcement' (1993) 36 JLE 255

Thomann E, Customized Implementation of European Union Food Safety Policy: United in Diversity? (Palgrave Macmillan 2018)

Van der Heijden J and Tsilikis D, 'Enforcement concepts and strategies in the EU' in Scholten M (ed.), Research Handbook on the Enforcement of EU Law (Cheltenham: Edward Elgar, 2023)

Van Kreij L, 'The choice of EU agencies or networks of national authorities: exploring the relevance of regulated industry characteristics' in Scholten M (ed.), Research Handbook on the Enforcement of EU Law (Cheltenham: Edward Elgar, 2023)

Van Rooij B van and Fine A, The Behavioral Code: The Hidden Ways the Law Makes Us Better or Worse (Beacon Press 2021)

Van Rooij B and Sokol DD (eds), The Cambridge Handbook of Compliance (Cambridge University Press 2021) <https://www.cambridge.org/core/books/cambridge-handbook-of-compliance/A7A803D987C9C001C6569395BEE5051C> accessed 3 September 2024

Veerman GJ, Thoughts and Theories about Legislation. A Historical and Systematic overview (Wolf Legal Publishers: Oisterwijk 2021)

Vervaele JAE (ed.), Compliance and Enforcement of European Community Law (Kluwer Law International 1999)

Zhelyazkova A and others, 'Differentiated Policy Implementation in the European Union' (2023) 47 West European Politics 1

Zivic A and Scholten M, 'How to ensure legitimacy when (re)designing enforcement on the EU level: the 'Enforcement Competence Test Roadmap'', EULEN Jean Monnet network working paper, 2024, forthcoming

Official Sources

Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (2016) OJ L123/1

Commission, 'Better Regulation Toolbox' (Europa, 20 July 2023) https://commission.europa.eu/law/law-making-process/planning-and-proposing-law/better-regulation/better-regulation-guidelines-and-toolbox_en, accessed 30 August 2024

Commission Staff Working Document, 'Better regulation Guidelines' SWD (2021) 305 final

Commission Staff Working Document, 'Stocktaking report on the Commission working methods for monitoring the application of EU law' SWD (2023) 254 final

Council of the European Union, Guide to the ordinary legislative procedure (EU Publications Office 2016)

Commission Press Release, 'EU law: Commission steps up enforcement of EU law for the benefit of citizens, consumers and businesses' (Europa, 13 December 2016) https://ec.europa.eu/commission/presscorner/detail/en/IP_16_3963 accessed 20 August 2024

Cases

Case C 482/17, Czech Republic v Parliament and Council [2019]

Case C-151/17, Swedish Match AB v Secretary of State for Health [2018]

Case C-355/10, European Parliament v Council of the European Union ('Frontex') [2012]

Joined Cases C- 541/20 to C - 555/20, Lithuania et al v European Parliament and Council of the European Union (Judgment Pending).

Treaties

Consolidated version of the Treaty on European Union (TEU) [2016] OJ C202/1

Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47