14. Political and judicial accountability in shared enforcement in the EU

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1. INTRODUCTION

The shift of direct enforcement power from the national to the European Union (EU) level ('verticalization') and accountability in this new system of shared enforcement have been the central focus of the project undertaken and of this book. The preceding chapters have investigated these issues from two perspectives: Chapters 2–10 looked at the accountability of individual EU and national actors for enforcement in particular sectors of the economy, while Chapters 11–13 discussed specific cross-cutting topics relevant across all actors and sectors, namely an additional perspective on (studying) accountability ('meaningful accountability'), the accountability role of the European Court of Auditors (ECA) and pertinent questions of judicial protection. Based on a comparative examination of the insights drawn from all of the contributions, this concluding chapter revisits the central question introduced in Chapter 1. Has the shift of direct enforcement power been accompanied by the establishment of an appropriate accountability system? What have we learned about accountability for enforcement, including in a multi-level setting, and what further steps are necessary in research on and operation of the shared enforcement and accountability?

We follow the same structure and analytical framework for accountability as for the case studies. We begin by forming the concept of 'shared enforcement' (Section 2). What does 'shared enforcement' mean in the EU? What is shared exactly? How can we explain its development and proliferation? Can we identify patterns in relationships between EU and national actors? If so, such patterns can be useful to identify the (potential) need for accountability and the challenges related to it. We then take stock of the results of the case studies (Section 3). With that we aim to build a systematic overview which has not existed so far. The issues that we clarify

here are to what extent relevant accountability mechanisms have been established at the EU and at the national levels following the new development of shared enforcement and how accountability levels (EU/national) and types (political/judicial) interrelate in order to prevent accountability gaps and undesirable redundancies. Based on such a mapping exercise (i.e. what accountability mechanisms are established and to what extent are they interrelated?), we can tackle the more normative question of under what conditions what type of accountability (political or judicial) is necessary with respect to the holding to account for shared enforcement. Concluding remarks and an outline of future research directions follow in Section 4.

2. SHARED ENFORCEMENT IN THE EU – WHAT, HOW AND WHY

2.1 Enforcement in the EU: the 'Traditional' Division of Competences

Legislation that is not put into practice is mere words on paper. Any organization issuing rules needs to provide a system of enforcement. The EU in principle provides a clear outline of where (i.e. at what level) the task of enforcement should be arranged. With respect to the notion of subsidiarity, actions should normally be taken at the lowest level possible, and this implies that enforcement takes place at the national, or sometimes even regional, level. As is typical for international organizations, and in line with national sovereignty, enforcement of legislation remains in the hands of the Member States (MS).[1] Depending on the national political structure and respective policy field, MS can in addition decide to delegate the responsibility for enforcement to lower levels such as regions or municipalities. This happens particularly in decentralized countries such as Germany; in Germany in certain policy fields the '*Länder*' are responsible for enforcing EU law. This does not imply, however, that MS or their regions are free to do as they please in terms of enforcing the law or not. According to Article 17 (Treaty on the Functioning of the European Union (TFEU)), the Commission is responsible for overseeing 'the application of Union law under the control of the Court of Justice of the European Union'. This article makes the Commission the 'Guardian of the Treaties', and it thus has the competence to initiate the infringement

[1] J Joachim, B Reinalda and B Verbeek, *International Organizations and Implementation: Enforcers, Managers, Authorities?* (Routledge 2008).

procedure (articles 258–260, TFEU). While this division of competences – MS enforce, the Commission oversees – applies to most policy fields, there are certain exceptions. In specific cases, the Commission is responsible for directly overseeing the application of EU legislation. The number of cases in which this applies is limited, e.g. the administration of the EU's humanitarian aid programme, common fisheries policy, and competition policy. These fields have in common the fact that diverging interests between MS could lead to obstacles, and an 'objective' partner (i.e. the Commission) is needed to enforce legislation in such cases.[2]

What MS need to do to enforce EU law is by no means uniform in all situations. In some cases, EU rules provide specific obligations for the MS to adhere to, for example by specifying that MS need to set up a competent authority and/or need to arrange a given number of inspections in a given time period. While EU legislation is becoming increasingly didactic about how enforcement should be arranged (see further), this is still rather the exception. In many cases, particularly in the case of directives, EU law only provides the specific substantive rules and MS themselves are responsible for organizing the enforcement: i.e. what type of inspection bodies to appoint, whether to create specific inspection tools, and which sanctions to impose in case of infringements.[3] The fact that all MS are responsible for their own enforcement regime (the principle of institutional autonomy[4]) – and in federalized MS several regimes can be found within one country – leads to the situation in which enforcement in the EU is a patchwork.[5] The organizational structure of enforcement regimes varies considerably between regions and MS. Some are highly centralized using standard operating procedures, while others allow for more autonomy to individual inspectors; some are divided by territory (e.g. general environmental inspectors enforcing all environmental rules in a given territory), while others are divided by function (e.g. specialized environmental inspectors only enforcing hazardous substances rules in the entire country or region); some work with computerized inspection tools that prescribe when to hand out what sanction, while others leave leeway

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[2] E Verlsuis, M van Keulen and P Stephenson, *Analyzing the European Union Policy Process* (Palgrave Macmillan 2010).

[3] M Scholten, 'Mind the Trend! The Enforcement of EU Law is Moving to "Brussels"' (2017) *Journal of European Public Policy* (forthcoming).

[4] J Jans and others, *Europeanisation of Public Law* (Europa Law Publishing 2007).

[5] M García Quesada, 'The EU as an "Enforcement Patchwork": The Impact of National Enforcement for Compliance with EU Water Law in Spain and Britain' (2014) 34 *Journal of Public Policy* 331.

for the inspectors to determine sanctions on a case-by-case basis.[6] In sum, in principle the enforcement of EU legislation has been arranged at the national, or sometimes even regional, level, and MS have considerable freedom in the arrangement of their enforcement regime as long as it respects the principles of equivalence and effectiveness. This has changed drastically in the recent years.[7]

2.2 'Verticalization' of Enforcement: The 'Why'

While nothing changed in the arrangements in the Treaties of the European Union – Article 4 still determines that MS are responsible for the enforcement of EU law – we have seen an incremental shift to more and more enforcement tasks being delegated to the EU level.[8] We have seen an increase in EU directives and regulations that specify precisely what MS need to do in order to enforce this legislation, sometimes even indicating the sanctioning approach.[9] We have also seen an increasingly formalized involvement of EU agencies and networks in domestic enforcement activities. This, which we call in this book 'verticalization of enforcement', was to a certain extent announced by the European Commission in its 2001 White Paper on European Governance. That paper states that one way to better tackle implementation problems is to have recourse to EU agencies, as such agencies would 'improve the way rules are applied and enforced across the Union'.[10] Indeed, we have seen a proliferation of EU agencies in all sorts of policy sectors since the 1990s. However, explicit references to implementation and enforcement to justify in one way or another why a new agency has been set up are more recent, dating only from the 2000s.

The chapters in this book reveal an increase in EU-level agency involvement in direct enforcement, i.e. enforcement by EU entities vis-à-vis private actors (not national competent authorities). In response to the financial

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[6] Verlsuis, Van Keulen and Stephenson (n 2).

[7] See also: H Hofmann and A Türk, 'The Development of Integrated Administration in the EU and its Consequences' (2007) 13 *European Law Journal* 253; H Hofmann and A Türk, *Legal Challenges in EU Administrative Law: Towards an Integrated Administration* (Edward Elgar Publishing 2006) 3.

[8] A Ottow, 'Europeanization of the Supervision of Competitive Markets' (2012) 18 *European Public Law* 191; M Scholten and A Ottow, 'Institutional Design of Enforcement in the EU: The Case of Financial Markets' (2014) 10 *Utrecht Law Review* 80.

[9] J Jans, S Prechal and R Widdershoven, *Europeanisation of Public Law* (2nd edn, Europa Law Publishing 2015).

[10] Commission, 'European Governance' (White Paper) COM (2001) 428 final.

crisis, ESMA (Chapter 3) was established to supervise domestic regulators and safeguard the stability of the European financial system. In addition, the already existing ECB (Chapter 2) gained far-reaching enforcement responsibilities in 2014. The chapter on the EFCA (Chapter 7) shows that an agency set up with the aim of coordinating slowly increased its competences to more and more direct inspection powers. The same trend can be seen in the aviation sector (Chapter 5), where the institutions are currently negotiating a new proposal that extends the possibility for MS to delegate enforcement responsibilities to EASA, and which would grant the EU agency the right to take over the national competent authority in an emergency. The emergency enforcement powers of an EU entity already exist in the food sector (Chapter 8). The development has also reached the pharmaceuticals sector (Chapter 6) and the field of EU competition law (Chapter 4) and is about to become reality in the field of investigation, prosecution and adjudication of crimes affecting the financial interests of the European Union (Chapter 10), in which OLAF has currently only limited powers (Chapter 9).

The idea appears to be gaining ground that enforcement will benefit from more direct EU-level involvement; and more explicitly, that EU agencies will induce better compliance with EU law at the Member-State level. The rationale underlying this expectation is a belief that agencies[11] – possessing (independent) expertise and an apolitical stance – will produce high-quality evaluations and better results.[12] Scholten and Scholten explain this trend via the logic of functional spillover: 'enforcement power follows the transfer of regulatory power to the EU level in cases where the set EU policy goals are expected not to be attained or have not been achieved due to the lack of uniform application of EU law (functional necessity)'.[13] By providing a comprehensive analysis of how enforcement tasks are exactly shared between the national and the EU authorities, we can gain a better

[11] Interestingly, the institutional type 'EU agency' has been used more frequently for an EEA: four out of nine analysed cases are agencies (EASA, EFCA, EMA, ESMA). In three cases, the EEA is an EU institution (Commission's DG Comp and Directorate-F and the ECB). Although part of the Commission, OLAF is an independent part of it. The EPPO is going to be a 'body'.

[12] E Versluis and J Polak, 'International Cooperation Via Networks and Agencies: A Tale of Perceptions, Informality and National Cultures' in M van der Steen and N Chin-A-Fat (eds), *Cross-border Cooperation Between National Inspectorates* (International Conference on Enforcement in a Europe without Borders, Amsterdam, February 2016).

[13] M Scholten and D Scholten, 'From Regulation to Enforcement in the EU Policy Cycle: A New Type of Functional Spillover?' (2016) *Journal of Common Market Studies*, doi: 10.1111/jcms.12508.

understanding of why enforcement tasks are increasingly delegated to the EU level, and what impact this has on accountability.

2.3 Shared Enforcement: The 'What' and 'How'

Based on the analysis of the case studies, we can conclude that there is no single formula for the organization of shared enforcement, that is, an enforcement process which relies on both EU and national enforcement authorities. In fact, we cannot help but notice the differences between *what* 'shared enforcement' can imply. To be more specific, based on the cases analysed in this book, we can spot three different nuances in the meaning of this concept. To begin with, in the area of competition law, both the Commission and national competent authorities (NCAs) enforce EU competition law, but this occurs mainly at two levels or within their own legal systems. What is shared is the *overall responsibility* to enforce EU law in a particular policy, not necessarily the process of enforcement (investigating an individual company) as such. A similar situation applies to the area of aviation safety. This is different from, for instance, the case of ECB and ESMA which have become the primary enforcement authorities in relevant areas. For instance, ESMA monitors, investigates and sanctions for violation of relevant EU law by itself. The only 'sharing' in enforcement here can be observed at the monitoring and investigative stage (which is at ESMA's discretion, when ESMA can ask the NCA to, for instance, inspect the premises of a credit rating agency or trade repository on its behalf. Here, we can talk about the sharing of a *specific power* (e.g. making an onsite inspection). This is different again from the 'sharing' of the enforcement *process* (the three stages), which can be observed in the cases of OLAF, EMA, EFCA, Directorate-F and perhaps the upcoming EPPO depending on its future founding act. For instance, in the EU's enforcement process in the area of pharmaceuticals, the monitoring and sanctioning stages can be exercised by both EU and national authorities, but the investigation stage is performed only by NCAs. The EU relevant actor has no investigative power in this respect; in its enforcement process, the EU enforcement authority (EEA) will depend on the national enforcement authority (NEA) for making the enforcement process work.

Furthermore, careful reflection about these various existing practices indicates that we can identify three types of relationships of *how* the enforcement process can be shared between EEAs and NEAs: hierarchical; parallel; and supporting.

First of all, taking the tasks of the EEA in relation to the competences of the NEAs as a point of departure, the *hierarchical* type of relationship defines a situation where the EEA is 'in charge' and the NEAs play a sub-

ordinate role. This group depicts the most far-reaching transfer of competences and of responsibility. The two financial EEAs are currently in this group: the ECB and ESMA. ESMA has the power to monitor, investigate and sanction private parties (i.e. credit rating agencies and trade repositories). The agency can impose penalty payments and fines and can even revoke the registration of a trade repository or credit rating agency. A similar story applies to the ECB. This institution is directly responsible for the supervision of the significant credit institutions (currently about 130 banking groups). The ECB can carry out on-site inspections and can sanction (different types of penalty payments and fines) in cases of infringement. In the case of the ECB, NEAs are still partly responsible as they supervise the so-called less significant credit institutions. In the case of ESMA, NEAs are only involved at the request of ESMA to assist or when ESMA delegates relevant supervisory tasks. The structure of cooperation in the area of competition law and food safety can be mentioned here in part, namely the collaboration between the Commission and the NCAs within the European Competition Network (ECN) where the Commission acts as *primus inter pares* and the emergency powers of Directorate-F. When it comes to individual cases in the area of competition law, the relationship between the EU and national level authorities is better described as parallel.

Regulation 1/2003 sets out the criteria, in the area of competition law, for when an enforcement action needs to be taken by the Commission or an NEA. When they both share the responsibility to enforce EU competition law together, they have similar powers to enforce individual cases at the EU or national level. This bring us to the next type of relationship which depicts a more equal situation in which both EEAs and NEAs have similar enforcement powers and enforce EU *in parallel* to each other. Both EEAs and NEAs have the responsibility to enforce EU law and they both enjoy enforcement powers to do that. EASA clearly fits this category, as enforcement tasks are shared between the NEAs, EASA and the Commission. NEAs do the bulk of the enforcement work, but EASA has direct enforcement powers when it acts as the competent authority (e.g. in the case of enforcing airworthiness standards). NEAs have the possibility of voluntarily delegating enforcement tasks to EASA, and there are examples where MS make use of this option. EASA can conduct inspections (in accordance with the national law), technical investigations and monitoring activities. The agency does not have direct sanctioning power. There is the possibility of issuing fines and penalty payments, but these are decided upon by the Commission. EASA does have the competence, however, to suspend, amend and revoke certifications handed out by the agency itself.

Finally, the *supporting* type of relationship characterizes those instances

where the core of responsibilities lies with the NEAs, and the EEAs – in diverging degrees – play a supporting role. Here, the enforcement work is generally undertaken by the NEAs; in principle the NEAs are responsible for inspections and sanctioning. EMA cannot undertake inspections itself, it only coordinates inspections carried out by the NEAs on centrally authorized products. In addition, it organizes meetings between national inspectors. This is also the case in the EFCA example. Here again, NEAs carry out the inspections, based on guidelines determined at the EU level by the agency. The difference is, however, that EFCA can carry out inspections in specified situations: it is responsible for special programmes in international waters. The example of OLAF shows a situation in which the EEA is again dependent on NEAs to impose sanctions, with the difference that OLAF can carry out investigations itself.[14]

This divergence in the division of competences between EEAs and NEAs grew incrementally, and has been influenced by various factors. Looking into the types of EEAs that share enforcement responsibilities in the different types of relationships, we can observe the following trends. At present, the hierarchical type seems to prevail in the financial sector. This sector has been heavily influenced by the financial crisis, and many academics[15] have argued that the crisis is the core explanation of why a relatively quick transfer of competences to the EU level has been seen in a sector that was previously safeguarded at the national level by the MS. We thus see that the EEAs in this sector deal with very salient issues, and there are high stakes if anything goes wrong. This might have led to the agreement to transfer far-reaching enforcement powers – the right to sanction without interference at the national level – to the EU level. The empowering of ESMA with strong enforcement powers, something which has not been done before and which may be at odds with the *Meroni* doctrine, can perhaps also be seen from the perspective that the scope of its enforcement powers and discretion are quite limited (only credit rating agencies and trade repositories), including the exact sums of fines for different types of violations. In addition, this power did not exist at the national level before.[16] The sectors where the parallel and supporting types of relationships can be seen seem to have in common that interdependence influences

[14] Since the EPPO's design is still under discussion, we will wait and see which type of relationship it would fit best.

[15] A Boin, M Busuioc and M Groenleer, 'Building European Union Capacity to Manage Transboundary Crises: Network or Lead-Agency Model?' (2014) 8 *Regulation & Governance* 418.

[16] M van Rijsbergen and M Scholten, 'ESMA Inspecting: The Implications for Judicial Control under Shared Enforcement' (2016) 7 EJRR 569.

and stimulates cooperation.[17] Interdependence, i.e. the situation in which different institutions depend on each other and their behaviour influences each other, is particularly visible in policy fields that are, by definition, international. Topics such as aviation and fisheries are difficult to regulate in one country alone, without this impacting on other countries. This situation of interdependence increases the need to cooperate with inspectors in other countries, and is thus likely to increase the willingness of MS to delegate enforcement tasks to the EU level. By distinguishing these types of relationships between EU and national authorities, we are able to provide a better insight on how enforcement can actually be shared between the EU and the national levels. These different types of interrelationships could also necessitate different demands for accountability.

3. ACCOUNTABILITY IN THE SHARED ENFORCEMENT IN THE EU: COMPARATIVE RESULTS

The verticalization of enforcement has raised a question about accountability. Has the growth of EU enforcement power been accompanied by the establishment of relevant political and judicial accountability mechanisms at the EU and national levels? Following the analytical framework introduced in Chapter 1, this section presents the comparative results of all eight case studies and, where possible, the results concerning EPPO which is not yet in existence. It focuses first on political and judicial accountability individually and then brings these two types of accountability together.

3.1 Weak Political Accountability for Enforcement Policy

The architecture of political accountability regimes as it emerges from the case studies is overly complex. There is considerable variation as regards formal prescriptions for political accountability in the course of the key components of the process of account giving, that is, information, explanation and justification. What is more, it remains unclear whether and when the existing accountability mechanisms are actually activated

[17] K van Boetzelaer and S Princen, 'The Quest for Co-ordination in European Regulatory Networks' (2012) 50 *Journal of Common Market Studies* 819; J Polak and E Versluis, 'The Virtues of Interdependence and Informality: An Analysis of the Role of Transnational Networks in the Implementation of EU Directives' in S Drake and M Smith (eds), *New Directions in the Effective Enforcement of EU Law and Policy* (Edward Elgar Publishing 2016).

by accountability forums and what their practical consequences are. Nonetheless, an analysis of formal accountability provisions can provide crucial insights into the pre-conditions for accountability in practice, and reveal the priorities of the policy makers who designed the system.

The case studies have identified whether their EEAs and NEAs have the powers and tasks for which political accountability could be desirable. Whereas the powers and tasks of EEAs and NEAs differ greatly from one another, all case studies show the need for political accountability for such issues as establishing enforcement policy priorities and methods of work, and for EEAs' instructions to NEAs, to name but a few examples. The case studies indicate that an enforcement authority should render political account for the general policy side of enforcement, although with the reservation of inappropriateness for politicians to interfere with specific cases (ordering the start of an investigation, interfering with the ongoing investigation, or hindering the start of an investigation); see Chapters 9 and 10. While this type of accountability is thus of utmost importance our overall conclusion on political accountability at the EU and national levels is that it is quite weak. This is for three reasons.

First, accountability mechanisms, such as annual reporting obligations, are not usually designed specifically for holding to account for the enforcement part of the job of an EEA or NEA. Only in a few cases (in the shared enforcement systems where ESMA, ECB and OLAF operate) have the case studies shown specific reporting requirements to be demanded at EU level. In other situations, rendering account for enforcement takes place as part of the annual general report, implying reporting very briefly on the number of inspections or other managerial aspects. This could perhaps in part be interconnected with the question which this project has also been addressing, namely what role should political accountability play in the area of law enforcement? We will come back to this question later. In addition, a number of case studies note information and knowledge dissymmetry between enforcement authorities and parliamentarians at both EU and national levels. At the same time, the case studies as well as Chapter 12 acknowledge the considerable help arising from the scrutiny by such specialised support institutions as the ECA.

Second, this is not to say that the discussion stage of accountability is absent[18] but its 'quality' and benefit in terms of accountability are ques-

[18] Although it is worth mentioning that EMA and EFCA have no obligation to come and discuss their performance at hearings before the EP. Also, political accountability at the national level is conducted largely via relevant ministers who are often not responsible for independent agencies, which enforce EU law.

tionable. For instance, OLAF has been subject to intense hearings at the European Parliament (EP). However, OLAF is said to have been used as a 'bargaining chip' in deciding different questions between the Commission and the EP, rather than the checking of OLAF's performance being the sole focus. Also, many of the case studies have reported the significant role of annual financial procedures when it comes to intense discussions between the EEAs and the EP. The financial discussions are closely connected with the influence that the parliaments could exercise over the budgets and thus policy priorities of executive bodies. Therefore, this raises the question of whether the Parliament is using these procedures for the sake of accountability (a check upon performance), or for the sake of control and influence (by individual members) of ongoing investigations, for instance; the latter is not political accountability.

What is more, the available information at the information and discussion stages could be limited in three respects. In the first respect, it is the mandate of an EEA or NEA, which specifies (if at all) what the enforcement authority should report on in its reports (Chapter 11). As the authors of the EMA's study state, 'accountability is firstly frustrated by the open-ended nature of the agency's mandate, which focuses on process (stressing scientific excellence) rather than outcome (public health)'. In the second respect, it is the standard of review. The ECA has had, for instance, problems in defining how it should evaluate the work of the SSM as no grounds for ex post review have been established by the legislature.[19] In the third respect, the confidentiality clauses and thus a limited grasp by parliaments in such areas as financial supervision and competition law restrict the information flow towards the political 'principals'. While this could be justified by the effectiveness of enforcement, the question is whether the enforcement entities have appropriate internal controls to prevent the abuse of the power not to disclose.

So far as the sanctioning stage of accountability is concerned, while sanctions are available in theory in both respects – institutional (reduction of budget or functions) and personal (removal or no reappointment) – their usage is complicated by the involvement of numerous actors with possibly divergent interests. For instance, reducing the budget of an EEA or removing a director of an agency is an agreement by multiple institutions, i.e., the EP and the Council and/or the Commission. This makes such sanctions less feasible to be used for 'daily' misconduct and diminishes the need for and use of less formal sanctions, such as 'naming

[19] ECA, 'Single Supervisory Mechanism – Good start but further improvements needed' (Special Report No. 29/2016).

and shaming', for instance, in a negative or concerned tone of a report by the ECA or in discharge resolutions of the EP. The good news is that these soft sanctions can have a hard impact (Chapter 12 on the weight of ECA's reports), although this is not always the case – the Parliament has not always been successful (see Chapter 4 on competition law).

At the EU level, the role of accountability forums other than the EP is quite limited. It is worth mentioning the Council, which has a role as an accountability forum with respect to OLAF, ECB, EFCA, and ESMA. For instance, the Council must meet the Director-General of OLAF for an exchange of views once a year, while in the case of ESMA there is a provision that enables the Council to invite the Chairperson to make a statement. However, the Council appears to be a weak forum, which sets out very limited accountability requirements and does not use its sanctioning capacity. The Commission seems to have more weight but at the same time it only has a selective influence, focusing especially on EMA and ESMA and, above all, on ECN. As regards the selectivity of focus in holding to account, it is a well-known fact that the salience of a policy area or executive institution influences the activation of checks by politicians. Thus, it is not surprising that some case studies (on OLAF, ECB, ESMA and EPPO) show a more active role being performed or envisaged for the EU and national political forums.

Nevertheless, a few interesting developments and to a certain extent good practice emerge. For instance, in a number of cases, including in the proposal to establish the EPPO, accountability of EEAs before national parliaments has been envisaged. It remains to be seen whether this questioning by national parliaments is again for the sake of accountability/check upon performance or simply for the purpose of 'calming down' the national parliament by providing some limited information, but it could be a useful possibility for avoiding some gaps such as those noted by the case study on the shared banking supervision system. 'The ECB instructs, the NCA acts and this action may have far-reaching consequences for natural or legal persons. However, the NCA can argue that it had no discretion in deciding differently, while the ECB can escape responsibility since it can argue that the NCA adopted the formal decision.' By having the possibility to question both the ECB and the NCA in one place, namely the national parliament, the 'pointing of fingers' and hence escaping from accountability could at least be mitigated.

A dilemma that exists primarily at the national level seems to be an indirect political accountability line between NEAs and parliaments. Ministers render account to the national parliament (in parliamentary systems), although they may not have the power to control NEAs and in some cases (see Chapter 6) may even be reluctant to check the reports or decisions of

the NEA. This is due to the parliamentary system structures, which the great majority of EU MS have. Here, the Dutch example in the area of competition law seems to provide an insightful practice into how not only this problem but also the question on what role might be appropriate for political accountability in the law enforcement area, could both be addressed. The Dutch ACM's analysis and the economic theory used in a particular case were questioned by the Dutch parliament. The ACM's chairman had the chance to explain the analysis in a round-table meeting organized by the responsible standing committee of the parliament. While the responsible Minister and Secretary of State spoke out publicly that they hoped that ACM would reconsider its analysis, ACM did not do so. The law prohibits the Minister from interfering with individual cases which forms an important safeguard to protect ACM's independence in individual cases. At the same time, this did not prevent a parliamentary check upon ACM's reasons and decision, even though a direct sanction was not envisaged

Interestingly, (political) accountability in some case studies seems to be less problematic than in others. Chapters 3 and 5 report no serious gaps in the shared enforcement where ESMA and EASA operate. As a possible explanation, we might suggest that there is a potential connection between the types of relationships between the EEAs and NEAs and the possibilities of organising accountability, although further, more careful investigation into this relationship is necessary. At this stage, we can observe that political accountability can be easier to organise in those cases where the enforcement process is not cut up into stages and even tasks between both EEA and NEAs, but is rather kept at one – EU or national – level. This characterises mostly hierarchical (ESMA) and parallel (DG Comp and EASA) types of relationships between EEAs and NEAs. When the enforcement process is truly shared at every stage of enforcement, political accountability for the enforcement policy as a whole seems much more challenging to organise.

3.2 Judicial Accountability: Strengths and Weaknesses

As Chapter 1 established, enforcement, whether arranged at the EU or national level, or as a shared activity, not only pursues a general interest, but also involves seriously intrusive interferences with the rights and liberties of individuals. This calls for a balanced system of accountability, capable of keeping track of the general priorities by the bodies that represent the general interest, as well as of protecting the interests of individuals or companies (as defendants, victims, or in whatever other capacity) in specific cases. That is why we are turning now to the issue of judicial accountability.

Generally, with respect to judicial accountability the situation appears to be much more clear-cut. The case studies have identified what types of decisions individual EEAs and NEAs can adopt, such as decisions allowing inspection of an office or a final sanctioning decision. All EEAs are, quite extensively but with some significant variations, accountable for individual, legally binding decisions in front of the Court of Justice of the European Union (CJEU), whilst NEAs are similarly so accountable in front of national courts. Moreover, internal and external auditors and boards of appeals are also relevant as judicial accountability forums, namely for the ECB, and, respectively, for EASA, EMA, ECB, and ESMA. However, looking more specifically, a number of concerns exist (see also Chapter 13). We will deal with them here shortly in accordance with the analytical framework of Chapter 1.

For judicial accountability to take place, a private party needs to be able to invoke it. Therefore, access to the court is an essential element to consider first. The system of judicial accountability is a two-level system, implying the possibility for judicial review at the level where the decision has been taken. A decision taken by an EEA against a private actor would thus be reviewed by an EU court, and in some cases first by a relevant board of appeal (e.g. for ESMA and ECB). A decision by an NEA against a private actor would be reviewed by a relevant national court. However, a few reservations must be made. First, it is the well-known, strict standard of *Plaumann* criteria of who can bring a claim, which is an obstacle to accessing the EU courts when the decision does not address the claimant directly. While the indirect way via the national court should then be possible, Chapters 7–9 and 13 show that this road has hardly (if ever) been used.

Second, are the strict criteria of what constitutes a reviewable act ('an act that is capable of affecting an individual's legal sphere can be challenged'). According to the authors of Chapter 9, 'the existing case law seems to suggest that these requirements may be an unsurmountable hurdle in most, if not all, OLAF cases'. This can make it difficult to challenge a preliminary decision (not the final decision imposing a fine, but a decision to inspect premises), a soft law guideline or an inspection report. Furthermore, inaction may be also difficult to challenge. According to Chapter 7, as the applicable provisions 'do not seem to ground any obligation for Union inspectors to carry out inspections or for EFCA to draft JDPs, it seems very unlikely that an action for failure to act, brought for example by a vessel's master who has been subject to an inspection (and who claims that its competitor should equally be inspected), would be successful. This is because of the discretion granted to the Union inspectors as to how to enforce the CFP'. According to the same study, 'failures to act

by an EU institution or body cannot be the subject matter of a preliminary question of validity'.

Third, the access to the court could be restricted in some jurisdictions in which an enforcement decision to make an on-site inspection, for instance, can only be challenged when an appeal is made against a received fine (e.g. in the Netherlands). However, if the fine is imposed by an EEA (like the ECB), then the challenge to the fine goes to the EU court, which may not check the arbitrariness of the prior decision which allowed the inspection, the task assigned by the legislature to the national level.[20] What is more, the private actor will have different levels of judicial protection in different MS.

The different levels of judicial protection are also worrying with respect to the standard of review discussed in detail in Chapter 13 between the EU and national courts and among national courts; the standard of review is directly connected with the information and discussion stages of accountability (what information is to be submitted and discussed in the court and according to which standard will that information be judged?). The principle of procedural autonomy allows for these national differences. However, the negative consequences are (potential) divergent outcomes (for example, see the case on Indian medical products in Chapter 5), which could negatively affect legal certainty, and could facilitate forum shopping by enforcement authorities as well as by private actors (see Chapters 9, 10 and 13).

The revocation of a certificate is one of the sanctioning measures that EEAs and NEAs could impose on private actors for violating the law. Public authorities could also impose fines and issue public notices. However, what if the enforcement authorities were wrong or their enforcement actions – from an investigation to sanctioning – have been disproportionate? What remedies are available for private actors against unjust fines or against a lack of respect for procedural safeguards during enforcement actions? The annulment of sanctioning decisions is normally possible in the EU or national courts, depending on the level at which the decision has been issued. Also, as the authors of Chapter 13 state that in the area of COM, ECB, ESMA and EASA, judicial protection against EEA investigations seems not to be very problematic. The challenges in contesting an action of an EEA may arise in the area of investigations by OLAF, EMA, EFCA, Directorate-F and EPPO insofar as appeal is excluded. These investigations cannot be contested directly before the EU courts, when these acts do not intend to produce legal effects vis-à-vis the

[20] Jans, Prechal and Widdershoven (n 9).

individual, as required by Article 263(4) TFEU. Furthermore, 'protection offered at EU level against investigative acts by OLAF currently focuses on damages' (Chapter 9). A similar picture seems to be painted by other case studies like the study on EFCA: 'while therefore an applicant fulfilling the liability requirements provided by EU law could bring an action for the damages incurred as a consequence of an inspection report by EFCA, this avenue is not open in the case of a lack of investigation, as actions for failure to act can only be brought where an institution has infringed a legal obligation to act'.

Based on the above, three main observations emerge. First, political accountability is overall quite weak for EEAs and NEAs. This weakness stems especially from the absence of a link between an accountability obligation and enforcement tasks and from difficulty in using sanctioning powers. Second, the overall degree of accountability of EEAs is not very high, though in some types of relationships it is higher than in others. The parallel and to a certain extent hierarchical (ESMA) types of relationships seem to face fewer accountability problems at both EU and national levels, which could be due to the lesser degree of sharing of the enforcement process as such; this suggestion should be further explored in any future studies. Third, we observe that powerful EEAs are formally more accountable, although they are so mostly by judicial means.

3.3 Bringing Political and Judicial Accountability Types Together in Shared Enforcement

Generally, what we see from the case studies is that while political accountability for enforcement policy choices is weak, judicial accountability for legally binding decisions in individual cases has been established, although also with some weaknesses (see Chapter 13). However, as judicial accountability is unlikely to cover such areas as enforcement policy choices, weak political accountability becomes a concern. Likewise, the basic fundamental standards for judicial accountability should apply irrespective of the level of political accountability. Or, in other words, violations of these standards cannot be compensated by a higher level of political accountability (Chapter 13). This leads us to conclude that political and judicial types of accountability cannot compensate for (the absence of) each other in relation to enforcement actions.

More specifically, Chapter 1 specified the types of actions in the area of law enforcement where political and/or judicial accountability could be necessary: determining (parts of) enforcement policies, including forum choices and settlement; opening investigations; passing specific investigative acts; and imposing sanctions in a wide sense, including supervisory

measures like a public notice as well as monetary fines. Do we have now any clarity on which type of action requires which type of accountability? We think that we do to a certain extent.

We agree with the suggestions made in several studies, but succinctly put by the author of Chapter 10, that 'policy choices by EU agencies at a general level (not in concrete cases) do need political oversight. The oversight is about the type of choices, the quality of the choices and the criteria of prioritization'. Thus, political accountability may be more appropriate for checking and sanctioning for the rationale behind discretionary decisions, such as policies behind 'non-decisions' – upon which general considerations are these choices made? – because political accountability involves an open process of information and justification that could expose the complex reasons behind these shortcomings. Judicial accountability, whose focus is by nature narrower (limited to the circumstances and questions of a particular case) and formalized, seems more appropriate for keeping actors accountable for legally binding decisions affecting specific actors. This would mean that the appropriateness of the selection of jurisdiction by an enforcement authority, as to where to investigate a particular company, would need to be checked by the court when a case is brought before it by the company. This system runs a risk of divergent national judgments and hence forum shopping by enforcement authorities and private actors, which therefore would require the setting out of common standards and a connection between EU and national courts and among national courts (see also Chapter 13).

At the same time, the question remains as to which type of accountability is more suitable for such actions as omission or inaction, case or jurisdiction selection, namely the sorts of decisions that are taken within such structures as the ECN. This brings us to the more general question of accountability for discretion in the area of law enforcement – which type of accountability is more suitable here?

We must report that the case studies did not show the presence, in reality, of one or other type of accountability for discretionary decisions. What is worrying is cases such as those noted by the authors of Chapter 7, 'A gap of judicial accountability is present with regard to EFCA's omissions (to draft a JDP or to carry out an inspection), as in such cases neither a direct action for failure to act nor a preliminary question of validity is open to the applicant, due to the lack of an obligation on the part of EFCA to carry out those very activities.' The authors suggest the relevance of political accountability to close this gap.

Furthermore, no accountability seems to have been arranged for decisions characterizing shared enforcement, such as giving instructions. It is unclear what kind of document an instruction given by, for instance, an

EEA to NEA is; the answer to this question will dictate the necessity for one or other (or both) types of accountability. At the moment, while the ECB gives instructions to NCAs which they are obliged to follow, the ECB does not seem to be made to render political or judicial accountability for such instructions. The ECB is 'exclusively competent' for the supervision of big banks, but not exclusively responsible for the supervisory mechanism (Chapter 2). NCAs render account for their actions at the national level, even though they 'are obliged to follow' ECB's instructions. This raises the question of whether national parliaments are able to hold their NEAs to account if NEAs could simply point the finger at the ECB and vice versa. The absence of one venue where all these actors can meet implies a possibility to point fingers at each other (for the enforcement authorities as well as accountability forums). Furthermore, it matters not only for the relationship between EEAs and NEAs, but also between the EEA-NEA, on the one hand, and a private actor, on the other hand. Is it a judicially reviewable act, which an affected private actor can bring before the court? Will the private actor know about its existence in the first place?

As a final remark, we want to stress the difficulty in determining the meaning and scope of policy discretion in the law enforcement area. Within the limits of *Meroni* and in part the recent *ESMA-short selling* case,[21] an EEA, which is an EU agency, should not be given discretionary powers, although one could question the relevance of the '*Meroni+*' delegation doctrine in relation to enforcement (not regulatory) powers. ESMA's tightly defined tasks and sanctions that it must impose for violation of relevant laws could be a good example of limiting discretion, at least at first glance. Yet, some discretion remains for ESMA. For instance, ESMA must investigate when 'serious indications' exist as regards potential violation. How should ESMA determine when an indication is serious? More importantly for the perspective of our inquiry, which type of accountability should apply to ESMA's method, form and judgment on that? The same question applies to other agencies, including EFCA, which 'sets up the common criteria and priorities for controls and inspections under the CFP' (Chapter 7). Is this policy-making discretion? If so, then the question is, first of all, whether an agency can be lawfully given this power. The question as to which type of accountability would be the next concern. This brings us to putting forward a few suggestions for address-

[21] Case C-270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union (ESMA short selling)* [2014] ECLI:EU:C:2014:18.

ing accountability inconsistencies in the system of shared enforcement in practice and for further research endeavours.

4. CONCLUSION

In July 2016, when the major bulk of our project's work was behind us, we received the news that the EU legislature had passed another legislative act creating the European Border and Coast Guard. This agency will replace the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) and will have a strengthened mandate, including enforcement powers, to support migration policy.[22] The list of EEAs is thus about to become longer. The new and the existing EEAs operate in different policy areas, which could be the reason why they have not yet been looked at as a whole. Bringing all of them together for examination, however, is important. First, this clearly reveals that we are dealing with a new development ('verticalization of enforcement') in EU law and governance, as well as a trend of rapid proliferation of EEAs. Second, this implies an ongoing shift of direct enforcement power from the national to EU levels, a shift that does not seem to have been reflected by the Treaties, although this would seem to be necessary for the sake of legitimacy and ensuring the appropriate systems of accountability. Finally, bringing all the EEAs together is also important for understanding what shared enforcement means, which forms and types it may take, why it has appeared and has been proliferating, and what implications it brings. This edited book has taken the first step in understanding this development. It has delved into the meaning of 'shared' in this new system of direct enforcement and the types of relationships between EEAs and NEAs. It has highlighted the implications that shared enforcement may and does have in terms of political and judicial accountability. A number of issues remain, however, either (purposely) unaddressed or requiring further investigation.

Let us first return to the main question of our project: to what extent has the shift of direct enforcement power been accompanied by establishing relevant accountability systems? All the case studies of individual EEAs and their counterparts have identified the presence of political and judicial accountability mechanisms and in some cases even the adjustment of the existing accountability mechanisms to the specifics of new enforcement

[22] European Commission, 'A European Border and Coast Guard to protect Europe's External Borders' (Press release) IP/15/6327.

tasks (ESMA). So, the overall picture may be satisfactory. Yet, as the devil is always in the detail, a number of challenges do arise and they need to be addressed. We cluster these challenges in three groups: those which limit/restrict the scope of (political) accountability; those which hinder/weaken its execution; and those which undermine the very existence of accountability. It is in the case of the last-named that we think that we can speak of there being an accountability gap or problem, caused by the system of shared enforcement.

A number of case studies have noted the presence of confidentiality clauses, which limit the disclosure of information including during the rendering of account process. This certainly restricts the scope of accountability by, e.g. a political forum which would then have only partial information on a specific matter. Such confidentiality clauses and in fact elements of independence of enforcement authorities, however, are essential for enforcement of law. They have to be there to ensure effective enforcement and to protect such values as privacy of those who are under investigation, especially from undesirable political interference. We believe that these clauses do not necessarily create gaps in accountability. If supported with appropriate internal (but impartial/independent) checks on, e.g. what files should be labelled as confidential and under what circumstances, the restriction on 'external' accountability by politicians could be mitigated. Such internal checks have not been found across the case studies and hence could be put forward as a suggestion to be considered when drafting relevant legislative or internal rules.

What hinders accountability (in shared enforcement) is weak political accountability, including the lack of enforcement activities or selective attention and knowledge in checking them, poor quality and 'meaningless' accountability reporting; differences in rules and procedures (e.g. scope of review) at the EU and national courts and among national courts, and obstacles to sanctioning or obtaining an effective remedy. The solutions to these problems already partly exist but also need to be created or developed further. For instance, the ECA is acknowledged to be of great help in holding EEAs to account thanks to its knowledge and specific focus and powers in checking the budgetary spending and in its cross-sector and institutions' overview. The EU and national ombudsmen could facilitate getting a remedy when this is not possible in court, although such remedy would differ from judicial redress. To improve the quality and 'meaningfulness' of accountability processes, relevant legislative (accountability) obligations need to be adjusted to be more specific as to what issues should be taken into consideration when rendering account. Poor quality reporting can be explained (at least in part) by the fact that reporting obligations do not require reporting on enforcement; at the end

of the day, 'you get what you ask for'. At the same time, the lack of and selectivity of attention in holding to account are much more difficult to address, as this requires the accountability holders to check on themselves, which is a challenge.[23]

What undermines accountability in shared enforcement are the instances of disconnection between the levels (EU-national) and types of accountability (in our book, political-judicial). While we could draw a line between when political and when judicial accountability is needed for law enforcement, certain grey areas, such as (purposeful) inaction or the choice of jurisdiction where to investigate, seem to be left outside both types of accountability. The disconnection between the levels is clear not only from the classic *Tillack* case but also from the difference in the scope of review. As the authors of the study on OLAF succinctly say, 'Whereas the Court of Justice of the EU will not usually hear cases for annulment, Dutch courts, for instance, seem to be of the opinion that testing OLAF's investigations is something to be done only in exceptional cases.' Roughly speaking, OLAF's work is generally treated as reliable without a proper check being made on reliability. In this light, we suggest that the sharing of tasks also requires connecting the accountability forums in one way or another, for instance via facilitating mutual recognition schemes and ad hoc or regular meetings between political accountability forums. Here, the recent development in the case of Europol, i.e. the creation of a joint parliamentary scrutiny committee of representatives of the EU and national parliaments, is worth mentioning and is interesting to consider in future research.[24]

This brings us to some concluding remarks outlining possible directions for further research. Here, we see at least three directions. First, with respect to accountability in shared enforcement, the sharing of enforcement tasks calls for exploring the possibilities of connecting EU and national accountability forums and different types of accountability. The separated systems of accountability for shared tasks run the risk of blame avoidance. Ironically, for the issue of judicial accountability, for instance,

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[23] M Scholten, *The Political Accountability of EU and US Independent Regulatory Agencies* (Brill 2014).

[24] Council Regulation (EU) 2016/794 of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA [2016] OJ L 135/53; M Scholten, '(R)evolution in the EU System of Political Accountability: Joint Parliamentary Scrutiny Mechanism' (*RENFORCE Blog*, 30 May 2016) < http://blog.renforce.eu/index.php/nl/2016/05/30/ > accessed 16 January 2017.

the traditional question on checks on *national compliance with EU law* is sent into reverse. In light of the discussed example with the ECB, the question that warrants further investigation is: how can *EEAs' compliance with national laws* be checked and at what level? The conundrum is that national courts cannot annul decisions of EU entities whereas the CJEU is not empowered to apply and annul national law. Second, we have identified three possible types of relationships between EEAs and NEAs with respect to how enforcement can be shared between them. These types could be useful in analysing and designing accountability regimes in shared enforcement, a topic that we leave for future studies to explore. Third, the analytical framework used in this book to analyse accountability has been built on connecting the accountability concept developed largely by public administration scholars with the legal scholarship on the principle of effective judicial protection. The latter has added structure and content to the broad accountability concept when used for analysing judicial accountability. This allows us to study (judicial) accountability in a more accurate way. In this light, we invite future conceptual research on accountability to test this connection in other settings and thus to develop it further.

As a final remark, in addition to the issues of accountability, the development of shared enforcement also raises other important concerns, such as those of legitimacy and organization of shared enforcement.[25] The enforcement powers of EEAs imply the growth of EU power at the cost (at least in part) of national power. However, is this growth legitimate in the absence of a specific legal basis and framework? The Treaties establish the rules and procedures for predominantly a 'rule-making' EU, not an EU that can 'search and seize'. Another important question is how to organize shared enforcement institutionally, procedurally, and substantively. Shared enforcement touches upon such requirements as accessibility and foreseeability, and nationally divergent rules concerning the use of evidence in a fair trial differ greatly among the MS.[26] For instance, engaging in investigation and prosecution by an EU entity will invoke the need to gather evidence in different countries. Can a written statement taken by a judge in France be accepted in England where, according to the hearsay rule, the witness needs to give evidence orally? Shared enforcement has appeared and has been proliferating for a reason, the reason being the

[25] Scholten (n 3).

[26] M Luchtman and J Vervaele, 'European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor's Office)' (2014) 10 ULR 132.

enhancement of the effectiveness of the enforcement of EU law, which has hitherto faced obstacles. In light of the concerns that this development brings (accountability, but also legitimacy and operation), future research should consider whether the benefits of the solution of 'shared enforcement' outweigh the disadvantages and how the right balance can be struck between, on the one hand, effective enforcement and, on the other hand, our core values of democracy and the rule of law.