Introduction

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The European Union (EU) is faced with the perpetual challenge of guaranteeing effective enforcement of its law and policies. Effective enforcement goes to the heart of all policy areas, and it is all the more important now at a time when the EU's credibility is at stake and it finds itself under pressure to justify its existence (in some Member States at least). When rule setting is accomplished on a transnational level, rule enforcement must be effective. Policies are just political rhetoric if they cannot be delivered. Consequently, the EU must take enforcement seriously. This challenge is not unique to the EU: national law and international law face similar pressures, but the *sui generis* nature of the EU, with its multi-level system of governance and the constitutionalization of its legal order, presents particular problems for achieving effective enforcement. That said, its distinctive characteristics also offer opportunities for developing innovative solutions. This volume explores new trends in the effective enforcement of EU law and policy and the extent to which they achieve their intended (regulatory) goals. In contrast to many studies on the enforcement of EU law, the focus is on developments at, or driven by, the EU level of governance, rather than the activities of the Member States who are chiefly responsible for implementation of EU law and are the typical focus of enquiry for scholarly discussions.

Traditionally, the enforcement of EU law has been perceived as encompassing the classic dual track approach: public (centralized) enforcement by the European Commission (Commission) and private (decentralized) enforcement through national courts by individual litigants via the legal doctrines of direct effect, indirect effect, and *Francovich*¹ damages. Today enforcement in the EU no longer matches this conventional picture with even these established methods undergoing a transformation, in combination with a wealth of new practices, strategies and actors emerging. Moreover, political science approaches to enforcement of EU policies have always been explored from a different perspective to lawyers. Compliance

¹ Cases C-6/90 and 9/90 *Francovich and Others v Italy* [1991] ECR I-5357.

studies, international relations, public administration, game theory, regulatory theory and so on deal with enforcement by asking completely different questions about the behaviour of actors and institutions, and although may touch on similar themes (accountability, transparency, legitimacy, efficiency) they do so from a completely different starting point. These normative divides can create obstructions to uncovering in-depth and innovative research agendas with parallel conversations taking place in law and political science, but without a meaningful dialogue between these two normative starting points being made possible.

I. PURPOSE OF THE COLLECTION

This collection aims to explore a number of key questions in relation to the effective enforcement of EU law and policy. First of all, the collection explores the gaps in understanding that emerge between lawyers, regulatory scholars and political scientists when debating effective enforcement in the EU. Second, the collection aims to draw out the connections between the different disciplinary approaches to the study of effective enforcement, and also highlight the outright contradictions that have emerged between these disciplinary discourses. The purpose here is to engage with, and provide the groundwork for, developing new approaches to the study of effective enforcement of EU law and policy. Third, the collection explores new developments in the effective enforcement of EU law and goes beyond the approaches traditionally found in legal scholarship. In order to do this, the collection brings together diverse areas of EU law and policy and embraces the application of regulatory scholarship as well as theories from political science and criminology to these different policy fields. In this sense, this collection makes an original and innovative contribution to the literature on enforcement of EU law and policy.

Within the confines of a modest edited collection, it is impossible to cover all the policy areas of the EU, or indeed, the many distinct enforcement strategies adopted across the EU in order to deliver effective enforcement of EU law and policy. Thus, the collection concentrates on some of what we perceive to be the most important aspects of enforcement across as broad a range of policy areas as could be accommodated in such a short volume. Accordingly, and especially because the failures of the public and private 'dual track' systems of enforcement appear to most scholars as the starting point in their analysis of various policy sectors, it was important to begin with exploring these areas of enforcement. In doing so, we aim to unpick some of the widely held assumptions about how and why these enforcement regimes operate, and examine the new developments taking

place within these fields. We then opted to engage with the concept of networked enforcement, from its roots in regulatory scholarship to its metamorphosis in EU governance as ‘network enforcement’, a mode of policy steering and enforcement. We deliberately follow this model of enforcement from the regulatory, political science and legal perspectives, and juxtapose two studies of SOLVIT, an emanation of network enforcement, from both a legal and political science viewpoint.

In terms of policy areas, those selected have very different enforcement challenges, from the diffuse rights associated with environmental law to the economic complexities of competition law. It was also important to draw out new and emerging methods of enforcement in more traditional policy areas, such as consumer law where alternative dispute resolution (ADR) and particularly online dispute resolution (ODR), buttressed by networks and backed up by hard law, are being explored. Finally we selected some new or expanding policy areas, in this case the area of freedom, security and justice and economic and monetary governance, in order to see if new or expanding areas of competence brought with them new ideas, or whether the same problems of enforcement were repeated time and time again.

II. CROSSING THE RUBICON: ENGAGING DIFFERENT DISCIPLINES IN THE STUDY OF EFFECTIVE ENFORCEMENT

In order to cross the disciplinary divide between lawyers, political scientists and regulatory scholars in the study of effective enforcement of EU law and policy, all of the authors were invited to address a common set of issues, namely, what does effective enforcement mean to their particular area of study? What theoretical or normative lens is used? For example, is ‘effective enforcement’ explored from the perspective of better regulation, efficient problem solving, improving decision-making, better governance, or upholding the rule of law? How is the effectiveness of the enforcement instruments measured or assessed? What are the new trends or approaches that have emerged or are emerging, and what are the implications of these changes for effective enforcement? Crossing the disciplinary divide proved to be no easy feat. Whilst it may be assumed that EU scholars speak one common language, what clearly emerged from collating these chapters is that the various disciplines attribute different meanings to the same terms and interpret the enforcement mechanisms in different ways. This collection marks an important step in addressing this ‘Babylonian’ confusion of tongues.

Despite the challenges faced in establishing a true interdisciplinary debate on the topic of effective enforcement of EU law and policy, common themes and cross-over concepts emerge from the chapters and play an important role in ensuring that future research agendas give a fuller picture of the EU's enforcement regime and that, in turn, policy development can be more effective. The starting point in this volume is the acceptance that in terms of regulatory implementation of EU policies, particularly the internal market and its flanking policies of competition, environment and consumer policy, there is an 'unknown universe of compliance'. This makes assessing the effectiveness of any enforcement regime particularly troublesome. The institutional structure of the EU requires that regulatory implementation takes place at national level, but in practice once transposition has occurred, it is at the state, regional and local administrative level that application of EU law takes place. So once the substantive rules have been enacted, a variety of actors besides the Member States are involved in implementation and application. The Commission cannot be aware of all breaches of EU law. Moreover, there are limits to what the law can achieve in terms of public or private enforcement. It is clear that reliance on deterrence alone with the fear of sanctions or remedies is insufficient to ensure full compliance with EU law, but that other forms of enforcement can be effective when they operate in this 'shadow of hierarchy'.

The question of what is considered to be 'effective enforcement' was something which each author was asked to focus upon, and this proved to be a difficult term to unpick across the disciplines. Political scientists² and regulatory scholars³ tend to perceive the enforcement of EU law as effective. Compliance levels of EU law compared with those of other international law regimes are relatively high and on a par with those attributed to national law.⁴ Legal scholars tend to fixate on notions of effectiveness of judicial enforcement found in the case law of the European Union's Court of Justice (CJEU). This collection makes an important contribution in seeking to unravel the assumptions made by the different disciplines in terms of what is being measured when we use this nebulous term of 'effective enforcement' and why, and attempts are made to make them more explicit. All of the authors in this collection start their analyses from

² For an account of the political science research on EU compliance, see Lisa Conant, 'Compliance and What the EU Member States Make of It' in Marise Cremona (ed.), *Compliance and the Enforcement of EU Law* (OUP, 2012), pp. 1–30.

³ Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (CUP 2007), p. 327.

⁴ Conant, noted at 2, p. 1.

different points on the spectrum of regulatory implementation, which spans from institutional design through to standard setting, monitoring and enforcement.⁵ Whilst legal scholars focus on enforcement in terms of the legal avenues open to individual litigants once the law has actually been infringed, political scientists and regulatory scholars adopt a much broader approach focusing on securing compliance at earlier stages of the regulatory cycle. Their research also focuses on a wider range of actors and considers the impact of different compliance techniques. It is important to recall that the standpoint chosen can determine what is understood by effective enforcement from the outset.

Looking at this question from an institutional perspective, the European Commission has characterized the notion of effectiveness as an element of output legitimacy, that is, effectiveness is defined with reference to policy outputs, meaning good policy management techniques which result in effective implementation and achieving the maximum results from each policy initiative.⁶ On the other hand, the Court has referred to the notion of effectiveness in its case law on private enforcement in a myriad of ways giving the term a fluid character whose meaning can vary according to the values the Court is seeking to promote in a particular context, taking into account the interests of the different, and often competing, actors.⁷ This gives rise to confusion at a doctrinal level and is arguably holding back the creation of a visible, accessible and coherent avenue for judicial enforcement.

The contributors to this collection adopt a variety of approaches to defining 'effective enforcement', which range from using proxies such as 'problem solving capacity and timeliness' (Martinsen and Hobolth),

⁵ Karen Yeung, *Securing Compliance: A Principled Approach* (Hart, 2011), p. 12. Regulatory implementation takes place once the overall regulatory goals of a particular course of action are determined.

⁶ European Commission, *European Governance: A White Paper COM* (2001) 428, pp. 10, 13, 18.

⁷ See further Michael Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart, 2004), p. 27 who identifies four different manifestations of the notion of effectiveness in the Court's case law: In terms of ensuring the realization of a substantive policy or concept in a practical way before the national courts, the Court refers to (i) the effectiveness of subjective rights when enforced against Member States or private parties and (ii) the effectiveness of provisions safeguarding the general interest as enforced against national authorities and individuals. With regard to the judicial architecture, the Court has referred to (iii) the effectiveness of the preliminary ruling procedure and (iv) the effectiveness of the ability of individuals to challenge the legality of EU acts indirectly before the national courts as an alternative to Article 263(4) TFEU (a claim which is widely disputed).

to those which considered objective and non-political mechanisms to be essential to the meaning of effectiveness (Murphy). Certainly many questions arose as to the choice between conceptualizing effective enforcement in terms of quantity (eg, achieving legal transposition) and/or quality, for example, implementation and application of EU law and the realization of EU law rights by citizens, either individually or collectively. Indeed for some legal scholars (Eliantonio and Cortés) ‘effective enforcement’ ranges from the availability and accessibility for individuals and non-governmental organizations (NGOs) to invoke and secure the benefits of EU rights in a timely fashion before courts, to exploring ‘softer’ means of realizing EU rights through ADR or networked enforcement.

Another common approach across the collection is the acknowledgement that there ought to be a careful balance between the quest for more effective enforcement (however defined) and the realization, promotion and protection of overarching constitutional values: not everything should be sacrificed on the altar of effectiveness.⁸ Both Murphy and Smith acknowledge that there might be tensions between achieving effectiveness within a regime, and enabling transparent and accountable systems of enforcement. Similarly, Drake’s model comprising regulatory goals and constitutional values demonstrates the inherent tensions in constructing and operating a multi-level enforcement regime. How should the conflict be resolved between the principle of legal certainty and the need for regulatory flexibility? Should legal certainty, effective judicial protection and equality be prioritized over legality and legitimacy in the name of ‘effective enforcement’? For some, the need for legitimacy emerges as fundamental in the establishment of an effective enforcement regime. In a Union based on the rule of law, compliance will only be secured if it is accepted by the actors whose behaviour EU norms are seeking to change. This has been a source of strife at different levels where the Court has been seeking to create a private enforcement regime through its case law (Drake) and through EU hard law measures (Petrucchi). The contribution by Baker which draws on compliance theory in the field of criminology provides important theoretical insights into how compliance could be achieved in a multi-level enforcement regime. Any disconnect between the top-down approach based on hard law and the ‘street level’ actors required to comply with the law jeopardizes effectiveness.

⁸ This term is taken from Mariolina Eliantonio, ‘Judicial Review and the New Modes of Governance: The Case of Standardization – Sacrificing the Rule of Law on the Altar of Effectiveness’, paper presented at the 22nd International Conference of Europeanists, Sciences Po, Paris, 10th July 2015.

Viewed holistically, this collection draws out common themes and problems that may be identified across the wide variety of enforcement approaches, and at times, also demonstrates some clear contradictions. Broadly speaking, the majority of chapters essentially accept that there is no 'one size fits all' approach to achieving effective enforcement, and that whilst hard law has its limits, total disregard of hard instruments is not recommended either. One discernible trend from the contributions is that a 'mix and match' approach to enforcement is considered the best way to achieve effectiveness, so that both soft and hard forms of governance need to work in harmony in order to achieve the optimum level of enforcement. The first task of course is to be able to identify the relative strengths and weakness of each type of enforcement technique before going on to plug any enforcement gaps that emerge, and this task in and of itself proves difficult due to existing and contradicting gaps in the literature and the lack of empirical data.

The majority of contributions include some element of hard law as the basis of the enforcement regime, although that overarching legal framework may or may not provide the means by which the policy area is enforced. Chapter 2 (Smith) on centralized enforcement of EU law has little to say about the governing legal regime since most of the enforcement work takes place behind the veil of diplomacy. The same can be said of the chapters by Cortés, Petrucci, and Murphy whose particular areas of study begin with legal frameworks that ultimately rely on much softer forms of enforcement, from online dispute resolution in consumer law, to soft law principles in competition law, and largely political will in the area of economic and monetary governance despite the plethora of legal instruments.

In those chapters not primarily concerned with law, other concerns emerge. The proliferation of network enforcement, not as a way of ensuring accountability through interdependence as originally envisaged and encapsulated in Chapter 3 on networked enforcement, but as a way of implementing policy without any apparent concerns of accountability, (input) legitimacy or transparency is in evidence. Where network enforcement is considered, it is clear we have travelled far from any pretence of relying solely on command and control approaches. Such regimes are set up under soft governance mechanisms (SOLVIT) and even those that have some legal architecture (Polak and Versluis), it is the perception of that network as a forum for cooperation and problem solving that remains paramount to its effectiveness rather than the overarching regime from which it flows. It is what happens outside of the law, in practice by those who participate in such regimes as well as the 'end user', that is of interest in considering the notion of effective enforcement.

By presenting a variety of approaches which analyse effective

enforcement through different lenses, gaps and challenges in the current enforcement framework are exposed and this illustrates how important it is for actors to be more explicit about the choices that they are making between different (competing) goals and values when enforcing EU law at multiple levels and in multiple arenas. Adopting a specific perspective clearly shapes our research questions and answers. It is only by being up front and more transparent about these matters, that new innovations, whether legal or policy based, can effectively achieve their intended goals.

III. ORGANIZATION OF THE COLLECTION

The collection is divided loosely into three sections. The first two chapters of the collection explore the EU's 'dual vigilance' framework of centralized and decentralized enforcement, but seek to go beyond the traditional legal (doctrinal) accounts which rarely assess effectiveness in the operational sense and adopt a more holistic, schematic account. Both draw on regulatory scholarship in order to conceptualize the enforcement regimes as more than a set of legal rules, but as regulatory schemes in themselves which reflect policy choices on how EU regulation is to be enforced. In Chapter 1, Drake assesses the effectiveness of key doctrinal and institutional features of the EU's private enforcement regime including new constitutional provisions introduced by the Treaty of Lisbon and the EU's Charter of Fundamental Rights. By viewing the private enforcement system as a regulatory scheme aimed at achieving the collective regulatory goal of effective compliance of EU law, and mapping the scheme (legal doctrine and institutional design) against carefully chosen regulatory goals and constitutional values, Drake is able to identify where and how the system can align regulatory goals and constitutional values to improve the effectiveness of the private enforcement regime. In Chapter 2, Smith addresses the effectiveness of the classic, public enforcement system set out in Article 258 TFEU in which the European Commission is the chief enforcer of EU law and policy. Smith presents us with a new, layered model of centralized enforcement and laments the inability of scholars across the disciplinary divide to fully assess the effectiveness of the infringement mechanism due to misplaced assumptions created by a lack of transparency at the very core of the infringement process. A more complex, fragmented process of enforcement is revealed, populated by a multitude of actors that are not subject to public scrutiny. What is apparent from these first two chapters is that the simplistic way in which the 'dual track' of enforcement is often portrayed in the literature is far from accurate. These 'gaps' in understanding provide the basis for new research agendas.

The second part of the collection explores the shift in regulatory enforcement from deterrence-based (command and control) strategies to more management focused compliance strategies. There is a particular focus on network(ed) enforcement, with both political scientists, regulatory scholars and lawyers contributing theoretical and empirical chapters. In Chapter 3, van der Heijden, makes a fundamental contribution to the collection which serves as an important platform for future dialogue between the different disciplines and between EU scholars and regulatory scholars in general. The chapter charts the evolution of the regulatory theory of enforcement since the 1980s and evaluates its expansion from relying solely on the traditional deterrence-based strategies to compliance-based strategies. This chapter provides the theoretical framework against which the subsequent empirical chapters on network enforcement can be juxtaposed. It also plays an important role in reminding legal scholars that a full assessment of the effective enforcement of EU law and policy can only be achieved by looking beyond the traditional command and control model from a singular perspective, namely that of the individual litigant. Moreover, it provides a useful reference point against which developments in EU regulatory strategies and, in particular, the proliferation of EU networks can be compared with classic regulatory models.

Chapters 4, 5 and 6 go on to examine instances of networked enforcement within the EU. In Chapter 4, Polak and Versluis provide an empirical study of network cooperation in the EU context. Their qualitative study of the implementation of EU directives on product safety, air safety, and pollution prevention draws out the factors that promote effective cooperation within the networks and identifies the importance of informality and mutual trust and learning. In Chapter 5, Lottini explores a specific example of network enforcement, namely the SOLVIT network, which is a network based in the Member States (but managed by the Commission) whose original design was premised as a 'dispute resolution service' which has morphed into a network that allows citizens and businesses to benefit from EU rights 'on the ground'. Lottini examines this network from a lawyer's perspective and considers the possibilities for effective enforcement at three distinct levels: the individual, the administrative and the regulatory level of governance. Chapter 6 by Martinsen and Hobolth focuses on the same network but this time from a political science perspective, examining SOLVIT as an example of a trans-governmental network enforcement. This qualitative study focuses on assessing the effectiveness of the SOLVIT network itself in managing the practical application of EU law. It uses the network's problem-solving capacity and resolution speed as proxies for assessing its effectiveness. The study makes an important contribution to the effective enforcement of EU law since it aims to identify whether the

claims in the literature on network enforcement (that it is indeed an effective method of enforcement) can be empirically proven with an empirical study of the network in operation, in particular, whether such networks work to 'plug the gap' between top-down centralized enforcement which focuses predominantly on transposition problems by the Member States, and the misapplication of EU law in practice by national agencies, which obstruct the enjoyment of EU rights by EU citizens.

The third and final part of the collection analyses new innovations in enforcement in traditional policy sectors such as environmental policy, consumer policy, competition law, and in newly expanded fields, policy sectors such the area of freedom, security and justice and economic and monetary governance. By analysing the different enforcement mechanisms in a specific policy context, we are presented with a much starker picture of the limitations of the traditional 'dual' enforcement mechanisms and how new innovations are being developed to address its inadequacies. Chapter 7 by Eliantonio demonstrates unequivocally how the nature of environmental law presents real challenges for the EU's enforcement regime. Where the law is designed to protect the public interest and does not create individual rights, a private enforcement system predicated on individuals litigating to protect their rights presents severe shortcomings. Moreover, environmental damage cannot always be undone. For this reason, there is an important focus on compliance strategies in this policy area. Yet, Eliantonio argues that the lack of empirical research on whether the use of soft law does achieve greater levels of compliance needs to be addressed. Furthermore, the use of network enforcement can play an important role and should be promoted further. In Chapter 8, Cortés explores the three pillars of enforcement adopted by the EU in the context of consumer policy. This chapter first considers the emergence of network(ed) enforcement in this field before exploring the limitations of private enforcement for obtaining redress where the cost of litigation is likely to outweigh the value of the claim. The author then turns to explore the potential offered by innovations in extra-judicial redress through consumer ADR and ODR mechanisms. For Cortés, only a holistic approach where all three pillars work in conjunction with each other will optimal enforcement in this sector be achieved. Chapter 9 turns to the field of EU competition law. Traditionally, an area where centralized enforcement by the Commission has dominated, and private enforcement has been underused, Petrucci explores EU attempts to change the legal regime to promote collective redress. Petrucci evaluates the effectiveness of this strategy by assessing the Commission's policy process through the lens of input and output legitimacy derived from political theory. This interdisciplinary analysis reveals clear tensions between the 'top down' quest for a

more effective private enforcement regime and legitimacy at ‘street level’ from the actors ultimately responsible for ensuring that the regime works. Petrucci advances the debate on input/output legitimacy by providing new insights into the relationship between legitimacy and effectiveness.

The final two chapters of the book explore two contemporary EU policy areas, the establishment of an area of freedom, security and justice and economic and monetary governance. Both reveal new paradigms in the quest for compliance and enforcement. In Chapter 10, Baker makes an original and groundbreaking cross-disciplinary contribution drawing on compliance literature within the field of criminology and applying it within the context of the new Article 83(2) TFEU which codifies EU competence to introduce criminal sanctions in order to achieve ‘effective implementation’ of existing EU harmonizing policies. She predicts the emergence of a multi-levelled approach to enforcement embracing a range of actors within a staged process which she terms ‘nested enforcement’. The chapter unpacks the challenge to EU policy-makers in using this new legal base to adopt not only new criminal measures but as another step in the construct of the EU’s constitutional framework. Baker warns against adopting a top-down technocratic approach which fails to take into account the moral realm. The chapter also presents an important typology of compliance which may have applicability in other policy sectors. In Chapter 11, Murphy critically assesses the effectiveness of the new and revised system of enforcement of the rules on economic and financial governance in the EU post-economic crisis. This chapter reveals the complexity and range of the new mechanisms and instruments being swiftly adopted in the aftermath of the financial meltdown. The tensions and contradictions examined in previous chapters are highlighted here in sharp relief as Murphy explores the problématique between seeking effective enforcement of EU law and the limitations imposed on an enforcement regime as a result of *realpolitik*.

The collection marks an important step in expanding the boundaries on current legal approaches to enforcement and lays down bridges for future scholarly engagement with neighbouring disciplines in this fundamental area of EU law and policy.