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Implementation of EU Enforcement Provisions: Between European Control and National Practice

A report on Dutch experience

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Abstract

For effective enforcement of its law the EU is to a large extent dependent on the enforcement efforts of the member states. The member states are responsible for the correct and timely application of EU treaties and secondary EU legislation. This dependence is an important reason for the European legislator and European courts to increasingly guide national enforcement. Interesting questions result from this guidance. What exactly is the relationship between EU legislation in the area of law enforcement and national policy and legislation in this respect? How is that legislation implemented, and can patterns be recognized in this? What problems are the national legislator and the national enforcement practice and organisation faced with in this respect? These questions have been dealt with in respect to the Netherlands in a research project carried out in 2006 and 2007 by researchers of Leiden University and Utrecht University. The project was commissioned by the Dutch Justice Ministry's Research and Documentation Centre. This article presents the main results of this research into the implementation of EU enforcement provisions in the Netherlands.

1 Greater Community Control of National Enforcement?

On the 13th of September 2005 the EC Court of Justice (ECJ) gave a ruling on the competence of the Community legislature, which has been the subject of much discussion. The Court arrived at the conclusion that it is possible to include in an EC directive provisions which prescribe measures that relate to the criminal law of the Member States for an effec-

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tive enforcement of EC environmental law.[2] The ruling of the Court is of course interesting for the consequences it – possibly – has for the autonomy of national criminal law. But the ruling is also interesting for other, less conspicuous reasons. The obligation to impose penal sanctions on breach of Community provisions fits into the new strategy of the EU legislator to take action on the effective enforcement of EU legislation. It would appear that the EU will become more involved in the enforcement of EU law in order to tackle in this way the growing enforcement deficit,[3] and that it will do so by further limiting the national autonomy.[4] But is that indeed the case?

In 2006 and 2007 research into that question, commissioned by the Research and Documentation Centre of the Dutch Ministry of Justice, was carried out by a large group of researchers from Utrecht University and Leiden University. In various domains and in various regulations it was examined whether there is more intensive EU control of enforcement as evidenced by the enforcement provisions. The Dutch reaction to these kind of provisions was also examined: how are these provisions received and implemented? In this article we will pay attention to the set-up and results of this research. After an introduction to the set-up, the supervision and enforcement of EU provisions in general will then be discussed. Subsequently, we will deal with the question of how the research was carried out, as well as detailing the results of a number of case studies in a few policy areas. The article ends with the general findings of the research, and the conclusions which may be attached to them. Given the general nature of this article, it should be noted that reference will often be made to the full report of our research for further details or more in-depth reasoning.[5]

2 Research into EU Enforcement Strategies and Enforcement Provisions

The aim of the research was essentially twofold. The research group was asked to explore in greater detail how Europe guides the national enforcement of EU law provisions and to analyse – on that basis – how enforcement provisions in EU law (in particular legislation from the first (EC law) pillar of the EU and from the third pillar in respect of police and judicial cooperation in criminal matters) are implemented in

[2] Case C-176/03 *Commission* v. *Council* [2005] ECR I-7875.

[3] W. Voermans, 'De communautarisering van toezicht en handhaving', in: T. Barkhuysen, W. den Ouden & J.E.M. Polak (eds.), *Recht realiseren; bijdragen rond het thema adequate naleving van rechtsregels* (Deventer 2005), p. 79-81 and p. 85 and 86.

[4] G.J.M. Corstens, 'Het einde van het nationale strafrecht' [2003] *NJB*, p. 1429-1430 and by the same author, his earlier 'Communautarisering van het strafrecht' [2003] *NJB*, p. 661.

[5] P.C. Adriaanse et al., *Implementatie van EU-handhavingsvoorschriften* (The Hague 2008).

the Netherlands. In this respect, it should also be examined in particular whether certain regularities or patterns can be observed in the way in which the Netherlands implements (via legal measures or actual action by policy makers or enforcing bodies) EU enforcement provisions (originating from legal acts and case-law), and whether this implementation involves problems and issues which might provide a basis for adjusting the current method of implementation.

In order to obtain a good, representative picture we have looked at EU enforcement provisions and related arrangements in various policy areas. While doing so we have worked according to a multi-stage programme. For selecting the policy areas, first a so-called quick scan in twelve policy areas has been carried out.[6] By subsequently analysing the results of the quick scans for each policy area and constructing a scale for this, it was possible to arrive at a score of the European influence on national enforcement. Subsequently this score has been combined with a score allocated to each policy area for the degree of Europeanization of the substantive rules. On the basis of these overall scores we obtained a picture of the presumed intensity of the Europeanization of the law enforcement in the various policy areas.[7] In this way we were able to eventually distinguish four categories of intensity, varying from a low to a high degree of presumed intensity of the Europeanization of the law enforcement. Subsequently, for each category we have selected two policy areas which have been dealt with in greater detail (more in-depth case studies). Increasing from light to high intensity of Europeanization, more detailed research has been carried out in the following areas: I) media policy and combating terrorism; II) air quality and financial supervision; III) European Social Fund (ESF) and European competition; and IV) fish quota policy and customs. In those more in-depth case studies we have also paid attention to the situation in practice. The research in these case studies has been carried out on the basis of analysing implementation files, case law and literature and by holding interviews with key persons at legislative, policy and execution level.[8]

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6 The twelve policy areas are: customs, fish quota policy, ESF (protection of the financial interests of the Community), financial supervision, European competition, food safety, combating terrorism (harmonisation of substantive criminal law), working conditions, air quality, waste transport, media policy (broadcasting corporations) and quality of medical services.

7 In this research Europeanization is understood to be a development within the integrated European legal system whereby the national enforcement, including also the general doctrines of the law, is determined sometimes to a greater extent and sometimes to a lesser extent by European law.

8 For more details about that research method see the final report P.C. Adriaanse et al., *op. cit.*, p. 7-28.

3 Enforcement of EU Provisions

How does the EU actually enforce its legislation? If we look at the rules contained in the treaties, the member states are primarily responsible for the observance of Community rules. The European Commission has a general task (Article 211 EC Treaty) to supervise that Community law is enforced by the member states. The Commission carries out this task, for instance, by initiating infringement proceedings or by carrying out conformity checks. The Commission itself has few first-line monitoring tasks in this respect (i.e. itself carrying out inspections and enforcement in the member states). An important part of the supervisory task of the Commission shows more resemblance with – what in the Netherlands is called – administrative supervision than with the (direct) supervision of the observance of Community law. In the field of competition law the Commission actually has independent enforcement powers. Sometimes the supervision of the Commission is carried out by special agencies.

In recent years it is becoming increasingly clear that an enforcement deficit arises in the compliance with EU provisions. This is dealt with in various ways.[9] For instance, more intensive checks are carried out, the implementation of the rules is better prepared and better coordinated, more strict enforcement systems are designed (with more severe punishments), new institutions are set up (e.g. agencies), and a better monitoring of the compliance is aimed at.[10]

Whatever the merits of the new strategies may be – we will discuss this in greater detail later –, our research shows that, apart from exceptions such as competition law (which is by now also already partly decentralised), EU law is still mainly indirectly enforced. That is to say it is enforced primarily by the member states. In an increasing number of policy areas the European institutions establish uniform or harmonising rules for such enforcement which are incorporated directly into the national legal systems or via member state intervention. For EU law to have any effect the member states must implement these European rules.[11] For an effective enforcement of its

[9] For the Commission approach in the years to come see the Communication from the European Commission from 2007 *A Europe of results – applying Community law* (COM(2007) 502 final). As regards its own role, the Commission puts its efforts in prevention by: a) more attention for implementation (in a broad sense) at the drafting of legislation; b) reacting efficiently and effectively to complaints from citizens and enterprises; c) improving working methods, e.g. by giving priority to infringement proceedings, and d) more dialogue and transparency, between member states and institutions, but also to the public.

[10] Even the European Parliament expressly wants a role in the supervision of the compliance. See the Frassoni report about the 23d annual report of the Commission on monitoring the application of Community law (2005), 23 November 2007, A6-0462/2007.

[11] In this research – as in the guide used by the Dutch national legislator '101 Praktijkvragen voor de implementatie van EG-besluiten' – implementation is understood to mean: the legal

law the European Union is to a large extent dependent on the enforcement efforts of the member states. This dependence is an important reason for the European legislator and European courts to guide national enforcement.

4 European Influence in the Area of Law Enforcement

The European influence in the area of law enforcement has two motives, and with it two sides. On the one hand, for an effective enforcement it is necessary to steer the enforcement in the member states in a vertical direction. That means that the EU legislator, EU courts (EC Court of First Instance and EC Court of Justice) and the European Commission make efforts to ensure the compliance with EU rules by influencing actors in an individual member state via enforcement provisions, case law and efforts of monitoring and imposing sanctions. On the other hand, there also exists horizontal steering, from the necessity for enforcement cooperation between the member states as well as for facilitating the coordination of enforcement efforts in the various member states. This type of steering occurs in particular in the combating of transnational infringements of European rules. After all, the infringement of EU rules does by no means always occur on the territory of a single member state. The European influence in the areas of enforcement is also intended, in particular, to prevent problems of a level playing field, which might rapidly arise without Europe influencing the enforcement cooperation and efforts. After all, (large) differences in the enforcement practice in different member states lead, just as differences in substantive rules, to unequal competition conditions for the parties involved. This problem has been observed in almost all policy areas examined. The most striking example was in the area of media policy, where a conflict arose between the Netherlands and Luxembourg in respect of the RTL group Netherlands, which has its registered office in Luxembourg and broadcasts in the Netherlands. Luxembourg satisfies the minimum requirements of the Television without Frontiers directive,[12] while the Netherlands has stricter regulations. The consequence of this is that the RTL group evades the strict

conversion or incorporation, the execution *and* actual enforcement of those rules. Within the framework of this research 'enforcement' is likewise broadly interpreted and refers to monitoring (supervision of the compliance as well as investigation of offences) and imposing sanctions.

[12] Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989, L 298/23), as amended by Directive 97/36/EC of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1997, L 202/60).

Dutch regulations which competing commercial broadcasters with registered office in the Netherlands actually have to comply with. [13]

The EU influences the enforcement of EU law in the first place by means of the legislative instruments from both the first (EC law) pillar of the EU and the third pillar in respect of police and judicial cooperation in criminal matters. In addition, there is influence in the form of case law. The EC Court of Justice establishes on the one hand instrumental requirements, such as the so-called principle of effectiveness,[14] to be used by member states for the enforcement of European law or national law grafted on it. On the other hand guarantee requirements are also established in case law.[15]

A third way of such influence by the EU is via soft law. It attempts to guide the process by formulating best practices, guidelines, benchmarks and standards, by holding peer evaluations and reviews, et cetera. This approach is strongly on the rise. All policy areas examined show that there exists a form of consultation between the member states themselves, or between the member states and the Commission. In most cases it has been specified in a directive, regulation or decision that a consultative body should be set up, such as the European Competition Network[16] in the field of competition, the Community Fisheries Control Agency[17] in the field of fish quota and the Committee of European Securities Regulators[18] in the field of financial supervision. In addition, our research shows that either by themselves or together with the Commission, member states set up an informal network if no formal consultative body has been set up, or when they want an additional consultative body, such as the European Platform of Regulatory Authorities[19] in the field of media and the European Competition Authorities[20] in the field of competition. From this it follows that in the past years the EU relies ever more heavily on information strategy (in the following: I-strategy) in combating the enforcement deficit in respect of European

[13] P.C. Adriaanse et al., *op. cit.*, p. 108.

[14] This principle has been formulated in the Greek maize case (Case 68/88 *Commission* v. *Greece* [1989] ECR 2965) on the basis of the requirements of equivalence, proportionality, effectiveness and deterrence.

[15] The guarantee requirements are on the one hand in line with the fundamental rights from the ECHR, and in addition the EU also has its own legal principles, such as the equality principle, the right to a fair hearing and the principle of proportionality.

[16] Article 14 Regulation (EC) no. 1/2003 of the Council of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003, L 1/1).

[17] Regulation (EC) 768/2005 of the Council of 26 April 2005 establishing a Community Fisheries Control Agency and amending Regulation (EEC) no. 2847/93 establishing a control system applicable to the common fisheries policy (OJ 2005, L 128/1).

[18] Decision 2001/527/EC of 6 June 2001 (OJ 2001, L 191/43).

[19] P.C. Adriaanse et al., *op. cit.*, p. 114.

[20] P.C. Adriaanse et al., *op. cit.*, p. 207.

rules. The emphasis is on obtaining (as accurately as possible) information with respect to the compliance situation. The control methods identified for this, in which the Commission also participates, can be seen as parts of that I-strategy in promoting the compliance with EU provisions. In the way in which cooperation is effected at EU level (at regulatory level) and at national level (as noted above the member states are responsible for the execution of EU rules) information concerning the compliance in the member states is essential. That applies among other things, but not exclusively, for second-line supervision.[21] Without information there is no insight into the enforcement deficit with respect to European rules, and neither is it possible to react. In view of this, member states will as a rule profit from embracing the I-strategy of the EU in the enforcement of and compliance with EU rules. This provides good chances for benchmarking and thus for arriving at a more effective and more efficient enforcement of EU rules. It may further prevent that the European level playing field will be undermined, and in this way it may also strengthen the transparency and dialogue with citizens and organisations involved.

The EU influence is exercised by steering various methods of law enforcement, varying from public law enforcement by means of administrative and criminal law to forms of private law or private enforcement.[22] As regards the private enforcement, EU enforcement provisions concern actions which citizens in particular may institute in order to enforce their entitlements protected by the EU. They may do this before the national courts in relation to other citizens or the government. This private way of influencing the compliance with EU rules has not been exhaustively dealt with in our research. However, it actually plays an important role in the field of the European fish quota policy by the Biesheuvel groups[23] and in the field of competition law.[24]

Examining in greater detail the interaction between the European requirements and the national public law enforcement, three matters in a general sense attract attention.

Our research shows in the first place that in (policy or discussions about) EU enforcement provisions dogmatic distinctions, as often used in national

[21] Second-line supervision is understood to mean the monitoring of the monitoring activities of the member states by the Commission. This as distinguished from first-line supervision whereby the Commission acts directly in the member states in order to monitor the market participants.

[22] As regards the jargon used, the Dutch and the European doctrine are not fully in line. In respect of – what in the Netherlands is called – public law enforcement of EU enforcement provisions concern both the (monitoring) stage of the administrative supervision of compliance and the criminal investigation, as well as the imposition of sanctions after observed infringements.

[23] P.C. Adriaanse et al., *op. cit.*, p. 279.

[24] P.C. Adriaanse et al., *op. cit.*, p. 212.

law between criminal law and administrative law, are traditionally not taken into account. That applies in particular for the European Community (EC). This has partly to do with the fact that EC law often leaves it to the member states themselves whether they want to enforce certain matters by criminal law, civil law or administrative law. For another – possibly much more important – part the cause of this lies in the fact that the EC, as was assumed for a long time, had no power, or at its best a controversial power in the field of criminal (procedural) law. For that reason one actually comes across provisions which concern the relation with criminal (procedural) law, but without prescribing enforcement under criminal law. The case study on financial supervision provides an example of this, where it is provided that within that framework powers of seizure must actually be available, which in the Netherlands have generally been regulated through criminal law.[25] In line with the above, it attracts in the second place attention that European enforcement provisions, at any rate in the policy areas examined, mostly emphasize the instrumental side of the law enforcement, directed at the way in which member state authorities and enforcement bodies must carry out enforcement. That is for instance apparent from provisions regarding fish quota and air quality which indicate how the monitoring must be carried out.[26] The safeguard side (including the legal protection) gets much less attention. Reference to this side is often only made in case law.[27] Therefore, when choosing between various enforcement methods, as well as in their implementation, more structural attention is asked for the associated legal safeguards and legal protection as well as for the implications for transparency, monitoring and democracy in the law enforcement.

In the third place it is striking that in various areas the legislator on the European stage is over and again reinventing the (same) wheel as regards enforcement provisions, without this seeming to lead directly to mutual learning effects between the various European policy-fields. So, in other words, at the European level one operates in a policy-field dependent way. A more integrated, horizontal approach of the enforcement problem at EU level seems appropriate. At European level this has only very recently been started.[28] The outcome of this development cannot be predicted.

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[25] P.C. Adriaanse et al., *op. cit.*, p. 151.

[26] Fisheries: Article 3 and 25 of Council Regulation (EC) no. 2846/98 of 17 December 1998 amending Regulation (EEC) no. 2847/93 establishing a control system applicable to the common fisheries policy (OJ L 358/5). Air quality: Articles 4-6 of Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (OJ L 296/1).

[27] For the equality principle and the principle of proportionality see for instance Case C-29/95 *Pastoors and Trans-Cap* [1997] ECR I-285.

[28] In the Netherlands that has been included as of 2007 via the amendment to the Competition Act. See Amendment to the Competition Act as a result of the evaluation of that Act. *Parliamentary Papers II* 2004/05, no. 30 071.

5 EU Enforcement Provisions Viewed From the Pillar Structure

In areas which are considered to belong to the first (EC law) pillar of the European Union law enforcement in the member states is mainly influenced through case law, legislation and policy. In our research we have also observed some forms of spontaneous or voluntary adjustment, harmonisation and coordination of enforcement efforts of member states. The recent introduction of the search powers of the Netherlands Competition Authority is a good example of this.[29]

Our research shows that in the past fifteen years the influence within the first pillar by legislation and policy has clearly expanded. In this way Europe influences various parts of the national monitoring activities (in the Netherlands mainly consisting of compliance supervision and investigative activities). The precise influence on these parts differs for each policy area, but with the necessary provisos it may be stated that more European guidance in respect of the monitoring can be observed in policy areas in which substantive rules have been more strongly Europeanised. This concerns areas such as European competition, on which provisions have been included in Regulation (EC) 1/2003[30] which give the Commission the right to be informed and react when national competition authorities decide to initiate an investigation under Article 81 or 82 EC Treaty.[31] In addition, this influence can also be noticed to an increasing degree in the field of the ESF, because the new Regulation (EC) 1828/2006[32] contains much more detailed monitoring provisions than its predecessor.[33] Other examples are the case studies concerning fish quota policy[34] and customs.[35]

In addition to the monitoring activities, the influence by legislation and policy in the first pillar also concerns the (administrative and criminal) imposition of sanctions in the member states. The European legislator is however considerably more reticent in influencing what must happen after an infringement has been discovered. Member states usually have a relatively large freedom in choosing for a criminal, administrative or private law system of imposing sanctions. Some developments seem to point in the direction of a decrease of this European restraint. In various areas an

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[29] *Parliamentary Papers II* 2004/05, 30 071, no. 3

[30] Council Regulation (EC) no. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003, L 1/1).

[31] Articles 11, 12, 13 and 15 of Regulation (EC) 1/2003 and P.C. Adriaanse et al., *op. cit.*, p. 195.

[32] Council Regulation (EC) 1083/2006 of 11 June 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) no. 1260/1999 (OJ 2006, L 2006/25).

[33] P.C. Adriaanse et al., *op. cit.*, p. 226.

[34] P.C. Adriaanse et al., *op. cit.*, p. 264.

[35] P.C. Adriaanse et al., *op. cit.*, p. 300.

increasing influence is expected as regards rules which set requirements for both the administrative and criminal imposition of sanctions. Section 5 of the Modernised Customs Code, for instance, concerns punitive sanctions.[36] Prescribing criminal sanctions in the first pillar is expected to be the next step. The ECJ ruling in case C-176/03 on environmental criminal law of the EC Court of Justice and the Commission's reaction to it forms an indication of this, at least in the field of the environment where the EC Court of Justice linked the Community legislator's power to prescribe measures connected with criminal law to the effective functioning of Community law.[37] The Commission is of the opinion that it must also be possible to use this power outside the field of the environment, such as intellectual property, hiring illegal workers and discharge at sea. For the latter field this has by now been confirmed by the EC Court of Justice in the ruling on discharges at sea.[38] Whether this also applies for the other areas mentioned cannot yet be said with certainty. However, for the period and policy areas examined in our research it applies that on these grounds no actual shift to, or strengthening of criminal enforcement has been observed.

In the third pillar the law enforcement is also influenced by Europe. In recent years all kinds of initiatives have been developed which – e.g. in the field of combating terrorism – intend to harmonise the criminal law of the member states as well as to bring both its substantive and procedural law into line. Here too the earlier mentioned I-strategy is clearly present.

Nevertheless in the third pillar there is more room for the member states to shape their own enforcement practice than in the first pillar. Moreover the European institutions have actually less room to ensure compliance with framework decisions, in particular because there is no possibility to institute treaty infringement proceedings. In the *Pupino* ruling[39] the EC Court of Justice has however opened the possibility for first-pillar elements to be introduced into the third pillar, in particular by making a comparison between the framework decision and the directive and by arriving at the opinion that by virtue of this comparison interpretation must be in conformity with a framework decision which member states have to deal with. In light of this the EC Court of Justice will in all probability use the loyalty to the Union more often in the future in order to impose obligations on the member states in respect of the implementation and application of third pillar law. The instrumental requirements and safeguards developed in case law within the framework of the first pillar may start to play an important role in that respect.

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[36] Regulation (EC) no. 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code) (OJ 2008, L 145/1).

[37] Case C-176/03 *Commission* v. *Council* [2005] ECR I-7875.

[38] Case C-440/05 *Commission* v. *Council* [2007] ECR I-9097.

[39] Case C-105/03 *Pupino* [2005] ECR I-5285.

But it must be noted here that the influencing of the national law enforcement within the framework of the third pillar runs along other lines to those in the first pillar. In the first place, it is not primarily directed at supporting EC law, but at combating serious crime (organised crime, terrorism, human trafficking et cetera) in the common area for freedom, security and justice. The support of the EC law by for instance the harmonisation of substantive criminal law was and still is limited. In the second place, in the third pillar a more horizontal strategy is applied. Many initiatives are directed at cross-border criminal cooperation. It is striking for that matter that criminal procedural law hardly gets any attention in this connection. However, international cooperation is on the other hand strongly developed in the third pillar. Far-reaching cooperation exists by the exchange of information based on the principle of availability and the organisation of joint investigation teams in criminal investigations.[40]

So, if we view the influencing of the law enforcement from the pillar structure, it may be stated that there is an influence both via the first pillar and via the third pillar, but that the ways of influencing in these pillars differ from each other. Moreover, it is striking that similar subjects – for instance cross-border cooperation – are dealt with in different ways in the two pillars.

Nevertheless some converging trends are perceptible between the first and the third pillar. Within the first pillar the case law of the EC Court of Justice now already relates to the criminal law of a member state when it has chosen for criminal law enforcement. Moreover, since the ruling on environmental criminal law in case C-176/03 and the ruling on discharges at sea in case C-440/05 the door seems to be open for prescribing criminal enforcement in the first pillar, albeit that the scope of this power has been limited in the latter ruling. On the other hand, in some cases third-pillar legislation does not only concern criminal law, but also administrative law. This makes it clear that the two pillars grow towards each other and can influence each other. The consequences of this convergence between the first and the third pillar for the national law enforcement are noticeable. A substantial part of the law is now under European influence that is sometimes relatively far-reaching. That influence will in due course also become noticeable to an increasing degree at the level of criminal enforcement, in the same way as this has happened in respect of administrative enforcement.

6 Dutch Influence on EU Enforcement Provisions

For a proper perspective on the relation between EU legislation in the field of the law enforcement and national policy and legislation, in this respect it is also important to look at the possible influence which the member states exercise on the drafting of the European provisions.

[40] P.C. Adriaanse et al., *op. cit.*, p. 122.

As far as the Netherlands is concerned, our research shows that the attitude of the Dutch government in respect of the various policy areas examined varies. That has obviously to do with the policy-field dependence previously mentioned and still to be discussed further hereinafter. There are nevertheless some remarkable developments which deserve to be pointed out. Sometimes, active Dutch attempts are made to influence European rules, for instance in the fields of combating terrorism,[41] fish quota policy,[42] and customs.[43] On the contrary, in other fields that does not happen. In those fields the Netherlands adopts a particularly passive attitude. In some fields the European agenda is used as a vehicle for the execution of national policy, e.g. in the field of media policy,[44] in other fields one is especially busy defending one's own freedom, as is apparent in the case studies concerning combating terrorism,[45] to a lesser extent also financial supervision,[46] and customs.[47] In this respect the Netherlands seems to be fairly adept in defending its own position in the negotiations, whereby it applies, however, that the margins are often large enough in order to avoid problems in the implementation stage. Clear differences are perceptible as regards the contribution of the Netherlands in the European legislative process and the role of the enforcement bodies in this respect. The role of the enforcement bodies is sometimes large, as in the field of financial supervision where consultations took place between the Ministry of Finance, the Authority for the Financial Markets, the Fiscal Intelligence and Investigation Service/Economic Investigation Service, the Ministry of Justice and the Public Prosecution Service.[48] Sometimes the role of the enforcement body is also almost absent. In the case of combating terrorism there has, in view of the time pressure, not been any contact with the Public Prosecution Service, the police and the bar.[49] So in respect of the Dutch influence on the drafting of EU enforcement provisions no clear line can be recognised. In this connection it must be noted that presently there still seems to be a reasonably large national freedom in organising law enforcement in the Netherlands. In many cases that goes hand in hand with the wish to keep it that way. With a view to this it is advisable to be alert, and if needed action must be taken. The foundations of the Dutch enforcement system are at present apparently such that the current European rules can be complied with without large adaptations of national law. However, this may change, now that in view of the ECJ rulings on

41 P.C. Adriaanse et al., *op. cit.*, p. 129.
42 P.C. Adriaanse et al., *op. cit.*, p. 274.
43 P.C. Adriaanse et al., *op. cit.*, p. 306.
44 P.C. Adriaanse et al., *op. cit.*, p. 107.
45 P.C. Adriaanse et al., *op. cit.*, p. 128.
46 P.C. Adriaanse et al., *op. cit.*, p. 150.
47 P.C. Adriaanse et al., *op. cit.*, p. 308.
48 P.C. Adriaanse et al., *op. cit.*, p. 149.
49 P.C. Adriaanse et al., *op. cit.*, p. 125.

environmental criminal law and discharges at sea the Community legislator can also prescribe measures connected with criminal law, albeit that in this respect the nature and scope of the sanction to be imposed cannot be determined by the Community legislator. The parties concerned should be aware of this possibility and where needed adopt a (pro)active attitude, based among other things on experience with the enforcement practice in the Netherlands. Instead of examining which threat to national policy or law is posed by a concrete European instrument, the question should be in which areas the member states, and so also the Netherlands, need European guidance when realising a common area of freedom, security and justice and, if this is the case, with which instruments. In particular this applies in order to avoid level playing field problems.

7 Implementation Practice in the Netherlands: Patterns and Problems

Our research has been carried out from the initial notion that, when the degree of Europeanization of the enforcement increases, the probability will also increase that European requirements will start to play a role in the implementation in a legal and actual sense (the execution of enforcement) in a policy area and that also deviations may start to arise. On the basis of a general analysis and research in eight case studies it has been observed that in areas with a low degree of Europeanization of the substantive rules there is hardly any influence on Dutch enforcement policy and enforcement practice. The enforcement in these files follows common, Dutch methods of organising enforcement. What is special about this is that in areas in which the degree of Europeanization of the substantive rules increases, and also where – still apart from that degree of Europeanization – more and more directive European enforcement provisions occur, the national policy field and its characteristics are mostly the determining factor for explaining why the EU enforcement provisions have precisely been implemented in the way chosen. Within the framework of this research this is indicated as policy-field dependence. We see for instance a strong policy-field dependence on the execution of EU enforcement provisions in the files of media policy, combating terrorism and air quality. As regards media policy it was notable that the existing more strict Dutch legislation resulted in a level playing field problem. In the case of combating terrorism we are faced with another objective other than the enforcement of European provisions, namely national security. As regards air quality many decisions could not go ahead because of the coupling which has been made in the Dutch regulations between proper spatial planning and air quality requirements.[50]

[50] This is also apparent from the article by P. Houweling & H. Luyendijk, 'Implementatie zonder slot' [2008/1] *RegelMaat*, p. 15-20.

In areas with a low degree of Europeanization we further observe that from the EU often only a number of general requirements for enforcement are set, which often also merge with the requirements which in the Netherlands are set for enforcement. This applies in particular for those files in which it is prescribed that fitting sanctions are taken, as long as they are effective, proportionate and deterrent, according to settled case law. It is then hardly possible to establish for these areas a further, deviating Dutch influence on the execution of these general European enforcement provisions, since to only a very limited extent the European enforcement provisions in question set a framework for, or give guidance to the Dutch enforcement practice. That makes it almost impossible to find differences.

Where a strong influence of the national policy field on the manner of execution of EU enforcement provisions is at issue, we establish that the European influence is asymmetric. Where it would be expected that more Europeanization of the policy field and more European enforcement provisions would also lead to a more perceptible European influence on the implementation, we arrive in our research at the conclusion that such a scheme is too simple. For instance, in areas with a greater degree of Europeanization of the enforcement there are more possibilities for deviations from the regime desired by the European Union. In our research we find this for instance in the case study on fish quota policy, where deviations are sometimes the consequence of the way in which the Netherlands has organised or interpreted the monitoring (for instance the Biesheuvel groups). In other cases a higher degree of Europeanization of the enforcement leads to an actual execution in which those EU rules are very expressly taken into account – sometimes more than strictly required. In such a case the Netherlands settles itself, so to speak, at the top of the band width. This is for instance at issue in the field of European competition, as already appeared from the aforementioned search powers of the Netherlands Competition Authority.

When considering possible patterns in the Dutch practice of implementation of EU enforcement provisions, both the practice of implementation from a legal and policy point of view and the actual implementation (the actual enforcement practice) have been examined. On the basis of leads in literature this research has focused on the following themes as regards the implementation from a legal and policy point of view: the necessity of implementation, the manner of legal implementation, the choice of the form of enforcement, transnational consultation and exchange of information and coordination in the implementation chain. In respect of the actual implementation (the actual enforcement practice) these themes are the following: awareness of the authorities involved about the European origin of the rules to be enforced, possible enforcement priorities, the enforceability of European enforcement provisions and national provisions based on them, coordination in the enforcement chain, international consultations and information exchange, cooperation with European or foreign regulators, the enforcement capacity and second-line supervision.

In view of the asymmetry of European influence and the strong policy-field dependence – in spite of the existence of some points of resemblance – for none of these themes examined is it actually possible to speak of a single particular Dutch practice, or demonstrable usual patterns of executing EU enforcement provisions.

With regard to possible problems in the implementation practice only some points for improvement – at European and/or national level – have been identified in some of the policy areas examined. For instance in the implementation stage lack of clarity may arise due to the fact that Brussels sometimes leaves two regulations in existence next to each other, without bringing them properly into line. An example of this is in the area of fish quota policy where a basic regulation and a monitoring regulation are left in existence next to each other.[51] It also occurs that the consultations and information exchange about implementation of European rules in transnational forums are arranged in an ad hoc way, this sometimes leads to problems. While those executing the rules organise themselves to an increasing degree in networks, national legislators turn out to have hardly any idea of the implementation choices that are made in Europe. Nevertheless practice has a strong need for information about the application of the European monitoring and sanction rules in other member states, as the case study on financial supervision shows.[52] It also occurs that in the implementation stage there is little or no question of transnational consultations or information exchange, such as in the field of air quality, while as a rule such consultations are in fact experienced as being very positive in many areas. The coordination within the Dutch implementation chain does not always run very smoothly, as shows the case study on ESF.[53] Sometimes there is even (virtually) no coordination, like in the fields of combating terrorism[54] and air quality.[55] It has also been established that the information exchange and the coordination in the enforcement chain sometimes appear to be a problem, as shows the case study on financial supervision.[56] Another point of attention concerns the enforcement priorities to be set. When the enforcement of European rules prevails, it may put pressure on the enforcement of pure national rules, as is the case with customs.[57] Furthermore, in many areas the risk of a level playing field problem has been observed.

Apart from these points for improvement, however, in the areas examined no structural problems in the practice of the implementation of European enforcement provisions appear to exist in the Netherlands, which is actually a gratifying final conclusion.

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[51] P.C. Adriaanse et al., *op. cit.*, p. 257.

[52] P.C. Adriaanse et al., *op. cit.*, p. 158.

[53] P.C. Adriaanse et al., *op. cit.*, p. 245.

[54] P.C. Adriaanse et al., *op. cit.*, p. 125.

[55] P.C. Adriaanse et al., *op. cit.*, p. 182.

[56] P.C. Adriaanse et al., *op. cit.*, p. 154.

[57] P.C. Adriaanse et al., *op. cit.*, p. 316.