M. Luchtman, ‘Setting the scene: The rise of EU law enforcement authorities’ in M. Luchtman, K. Ligeti & J. Vervaele (Eds.), *EU enforcement authorities: Punitive law enforcement in a composite legal order*, Oxford: Hart Publishing 2023, p.. 7-31.

Chapter 1 - Setting the scene: the rise of EU law enforcement authorities

Michiel Luchtman

1. INTRODUCTION

Direct enforcement by EU authorities is one of the major developments in the European enforcement landscape.[1] June 2021 saw the start of operations of the European Public Prosecutor's Office, without a doubt one of the most ambitious projects in the area of criminal justice. New plans for an European anti-money laundering agency have recently been launched.[2] The trend, however, undoubtedly has its roots in administrative law. An increasing number of EU policy areas is now enforced by EU authorities. Unlike in previous decades, where the role of EU institutions was to monitor the enforcement activities of national authorities, EU authorities have now themselves become entrusted with the monitoring of compliance with EU rules and regulations by individuals and other private actors, with the investigations into alleged breaches of these norms and with the sanctioning of established breaches, including sanctioning through punitive (pecuniary) sanctions.[3] This inherently means that the EU's operational mandates and powers have entered further into the domain of national enforcement competences and the administration of criminal justice.

This development was not the result of an overarching 'grand design'. One can safely assume that these developments have been largely sector-specific or path-dependent.[4] Punitive enforcement is often put in the hands of EU authorities that were already entrusted with regulatory, supervisory and/or indirect enforcement tasks. Direct enforcement then presents a next, logical step in cases where law enforcement by national authorities proves inadequate. These largely sectoral developments also explain why there are significant differences in the institutional frameworks of the authorities involved. These differences relate to, for instance, whether or not the enforcement activities take place in an 'open environment', where no supervisory EU enforcement regimes exist (such as in competition law or the area of the protection of the EU's financial interests (PIF)), or whether they are preceded by highly harmonised supervisory regimes, such as in the financial sector. There are also significant differences in the persons that are the object of investigations. Banking supervision is mainly exercised over legal persons, often multinational financial institutions with significant economic weight. That is different in the PIF-area, where OLAF investigations also cover natural persons. All of these and other differences have an impact on the institutional choices that have been made, as well as on the threats and opportunities that the EU authorities and citizens and undertakings are confronted with.

However, the path-dependent logic of these developments does not mean that one should close the eyes for the general, cross-sectoral trend towards direct

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

[2] Commission, 'Proposal for a Regulation establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010' COM (2021) 421 final.

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

[4] Cf chapter 5 (Bovend'Eerdt and Karagianni) in this volume.

enforcement and the commonalities and questions that all of the involved EU authorities face. To the best of my knowledge, there has not been a broader debate on the institutional and constitutional implications of this shift towards direct enforcement for the legal protection in cases of EU enforcement action, for the protection of fundamental rights in this transnational and supranational setting, nor, more generally, for its relationships to the domain of national criminal justice. The logic and speed by which existing authorities with regulatory or supervisory tasks now become entrusted with operational enforcement tasks conceals an important doctrinal shift in legal thinking on law enforcement and its traditional focus on the nation-state context. One of the common features of all EU enforcement authorities is their European-wide operational mandate. These authorities are no longer dependent on traditional, international law rules for mutual administrative or legal assistance in cross-border cases. Instead, part of the efficiency gains that their institutional frameworks strive for is precisely the removal of these elements of international law from their legal frameworks for the benefit of shared operational goals, policies and informal types of enforcement cooperation. In and of itself, these are major legal innovations.[5]

In this chapter, I intend to connect the notion of law enforcement to the notion of the EU and its Member States as a composite institutional, or perhaps even: constitutional, entity. Within this composite legal order, the tasks and competences of the EU authorities are capable of, on the one hand, connecting and integrating the legal orders of the participating Member States and their authorities into an enforcement design that cannot build, on the other hand, on the narrative of the nation state with respect to arrangements for fundamental rights, legal protection or political accountability.[6] A new narrative is needed for that, yet it remains understudied, and this in an area of law where interferences with the legal position of individuals are particularly intrusive. Existing studies on EU regulatory governance provide valuable input,[7] yet do not take full account of the specifics of law enforcement as such. Vice versa, national debates on law enforcement still remain focused predominantly on the setting of the nation state. The role and position of national enforcement actors, including courts, as part of the larger European project remains understudied and does not appear to have a prominent place on the political and legislative agenda's in the EU Member States' capitals.

To study law enforcement as a composite affair does justice to empirical reality. It illustrates how the significance of national borders and, consequently, the principles and vocabulary of international law in cross-border cases have been deliberately mitigated or even removed from the institutional frameworks of the EU authorities and their national partners. The notion of composite enforcement consequently also has normative implications. It sheds light on a number of blind spots in the current enforcement designs of the competent authorities that need attention in light of the effective enforcement of EU law, as well as effective legal protection. Composite enforcement stresses that law enforcement by EU authorities is not a derivative of national enforcement, nor can it be regarded as an exclusively European affair.

[5] MJJP Luchtman, 'Transnational Law Enforcement Cooperation: Fundamental Rights in European Cooperation in Criminal Matters' (2020) 28 European Journal of Crime, Criminal Law and Criminal Justice 14.

[6] Though the latter concept is not a part of this volume, it certainly merits future studies, for instance with respect to the European Public Prosecutor's Office.

[7] See for instance M Busuioc, *The Accountability of European Agencies: Legal Provisions and Ongoing Practices* (Utrecht University 2010).

Composite enforcement includes and connects – and should connect – all three traditional branches of government, at the EU, as well as the national levels.

In the subsequent sections of this chapter, I will first briefly introduce three of the administrative actors of our previous studies (section 2) and will then elaborate further on the notion of the EU and its Member States as a composite legal order (section 3). As a more specific form of compositeness, section 4 will subsequently explain what is meant with composite administrative enforcement procedures, as well as why the relationship with national criminal justice is so important for it. I will conclude this introduction with the consequences of all this for the approach and subsequent chapters in this book (section 5).

Though the EPPO was never a part of our previous studies, we have included a separate chapter on this important new actor as well, in which we highlight the relevance of the main findings of our previous work to this new actor in the domain of criminal justice. That is also why some introductory remarks on the EPPO have been made in the next section of this chapter.

2. PUNITIVE ENFORCEMENT BY EU AUTHORITIES: FOUR CASE STUDIES

As said in the preface to this volume, this book's methodology builds upon a comparison of four EU authorities and their integration into a number of national legal orders. These authorities were OLAF, DG Comp, ESMA,[8] and the ECB in relation to the Single Supervisory Structure (SSM). As noted, another EU enforcement authority has meanwhile entered the scene. The European Public Prosecutor's Office will be responsible for the investigation, prosecution and bringing to judgment by national courts of criminal offences against the EU's financial interests. It goes without saying that all of these authorities operate in different areas of EU policy and have different mandates and powers. Before answering the question of why a comparison is nonetheless necessary and fruitful, it is good to introduce these actors shortly as the following chapters will also build upon this comparison.

2.1. OLAF

In the area of the protection of the financial interests of the EU, OLAF and the EPPO are key players. OLAF is a Commission directorate with a dual task.[9] It has a policy function, but it is also an operational body, entrusted with carrying out external administrative investigations in the Member States or internal administrative investigations at the European institutions. It is independent when it comes to its investigative tasks. Its mandate covers both the expenditure side of the EU as the income side. VAT, though part of the EU's budget, is however not within its operational competences, or at the least, that is still disputed.[10]

[8] I will not discuss ESMA and its tasks in relation to credit rating agencies in this chapter.

[9] Decision 1999/352/EC of 28 April 1999 establishing the European Anti-fraud Office (OLAF) [1999] OJ L136/20.

[10] J Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF)* (Europa law Publishers 2011) 77-8; M Luchtman and M Wasmeier, 'The Political and Judicial Accountability of OLAF' in M Scholten and M Luchtman (eds), *Law Enforcement by EU Authorities: Implications for Political and Judicial Accountability* (Edward Elgar Publishing 2017) 221.

OLAF is an administrative office, with administrative powers, that combats fraud and related activities.[11] The Office operates at the brink of administrative law and criminal law. OLAF itself is an investigative body. It is not competent to commence procedures for fraud or recovery. Those procedures are the responsibility of other actors, at the EU level (including the EPPO) or at the national level. The follow-up may be of a punitive nature (including criminal procedures), but that is not necessarily the case. In fact, many OLAF cases end up in disciplinary or recovery procedures. This highlights the Office's complicated institutional position. It is highly dependent on partner-institutions at the national and the European level to realise an effective fight against EU-fraud. That means OLAF needs to cooperate with a wide variety of partners, as national legal orders are organized in very different ways. In some cases, it is not even clear which national authority precisely is OLAF's partner. This is why a network of Anti-Fraud Coordination Services (AFCOS) was introduced, to enable OLAF to do its work more effectively. Yet, as it has turned out, these AFCOS also show great differences in their design and powers.[12]

OLAF's legal position is complicated further by its fragmented legal framework and instruments. It can conduct external investigations autonomously or coordinate procedures between competent national authorities.[13] Under the former heading, it may conduct on the spot checks.[14] Though OLAF's framework has been strengthened recently to the extent that it will be less dependent on national law in cases of cooperation by the economic actor under investigation, it remains dependent on national law and its national partners in cases of non-cooperation by those actors.[15] OLAF is not allowed to use physical force or to impose fines in cases of non-cooperation. When it conducts its investigations, it moreover needs to take account of a number of safeguards that are reminiscent of criminal procedures, though OLAF itself has no powers to initiate criminal charges.

A particular problem for OLAF is, as said, the follow up of its work at the national level. The OLAF Regulation requires the competent authorities of the Member State concerned to take 'such action as the results of the external investigation warrant' and to report back to the Office.[16] Of course, the question is to which extent a provision like this is now capable of binding national authorities to specific further action. That finding is relevant for future actions for annulment which may be launched by persons that are affected by OLAF investigations. As is well-known, the Court of Justice has this far rejected most OLAF-cases under Article 263 TFEU.[17] Recent case-law seems to suggest, implicitly, that this will not change with the entry into force of the new Regulation.[18]

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[11] See Regulation No 883/2013 of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) [2013] OJ L248/1, as recently amended by Regulation 2020/2223 of 23 December 2020, as regards cooperation with the European Public Prosecutor's Office and the effectiveness of the European Anti-Fraud Office investigations [2020] OJ L437/49.

[12] See chapters 4 (Böse and Schneider), 5 (Bovend'Eerdt and Karagianni) and also, *in extenso*, Bovend'Eerdt in his forthcoming dissertation.

[13] See Article 12ter Regulation 2020/2223.

[14] Regulation No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities [1996] OJ L292/2.

[15] Article 3 Regulation 883/2013, as revised by Regulation 2020/2223.

[16] Article 11(3) Regulation 883/2013, as revised by Regulation 2020/2223.

[17] Chapter 3 (Ligeti and Robinson), with further references.

[18] Case C-591/19 P *De Esteban Alonso v Commission* [2021] ECLI:EU:C:2021:468, para 70.

Also the rules on the admissibility of evidence in national proceedings were recently changed.[19] OLAF reports shall constitute admissible evidence in judicial proceedings of a non-criminal nature before national courts and in administrative proceedings in the Member States. For criminal procedures, the rules remain complicated, also under the new Regulation.[20] Reports are admissible when their use proves necessary in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors and shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall have the same evidentiary value as such reports. In effect, this rule bridges two gaps at once, i.e. a transfer of the report from the EU jurisdiction to the national one and from an administrative to a criminal procedure.

2.2. DG COMPETITION

Another enforcement directorate of the European Commission is DG Competition.[21] Like OLAF, it operates in what one could call an open context. It is entrusted with market surveillance in light of Articles 101 and 102 TFEU. Consequently, like OLAF, it has no specific legal relationships with private undertakings when it commences its investigations. Its task is to seek and find, together with national competition authorities, infringements of said articles and to ensure that undertakings terminate those infringements. The Commission may also impose punitive fines for violations of Articles 101 and 102 TFEU.[22]

The operation of the system of enforcement of EU competition law is based on a decentralised model. Whereas competition law was previously enforced by the Commission itself, the large reforms of 2003 saw the introduction of a decentralised model in which the Commission and national competition authorities (NCAs) enforce EU competition rules in close cooperation.[23] Infringements of EU competition rules will therefore certainly not always be investigated by the Commission, though the Commission has the right to intervene in pending national procedures.[24] That explains the need for continuous mutual consultation and coordination via the European Competition Network in which DG Comp and NCAs participate. In those situations, NCAs apply EU competition rules, as well as the standards of the EU Charter of Fundamental Rights.[25] In addition to this, NCAs enforce national competition rules.

The relationship between national and European competition law is complicated. Though both types of competition law are considered to protect different legal values, there will be overlap and, hence, potential for conflict in specific cases. It was for this reason that the rules on the national enforcement of Articles 101 and 102 TFEU and those on the parallel application of national competition laws were recently harmonised by a Directive having both Article 103 TFEU, as well as Article 114 TFEU

[19] Article 11(2) Regulation 883/2013, as revised by Regulation 2020/2223.
[20] Chapter 6 (Giuffrida and Theodorakakou).
[21] Regulation 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 [2002] OJ L1/1.
[22] Article 23 Regulation 1/2003.
[23] Article 11 Regulation 1/2003, and Commission, 'Commission Notice on cooperation within the Network of Competition Authorities' [2004] OJ C101/43.
[24] Article 11(6) Regulation 1/2003.
[25] Cf Article 5 Regulation 1/2003.

as its legal basis.[26] The so-called ECN+ Directive aligns the institutional position of the NCAs and their powers to those of DG Competition.

DG Comp's investigative powers are laid down in Articles 17-22 Reg 1/2003. These powers involve the power to request (voluntary) statements and to obtain information, but also to conduct on-site inspections ('dawn raids'). The inspection powers not only cover business premises, but under certain extra conditions, also private homes.[27] DG Comp may as an alternative also request the national authorities to perform investigative the measures on its behalf.[28] DG Competition itself cannot exercise physical coercion in case of non-cooperation. For that, it needs the assistance of national authorities. It does have the power, however, to impose administrative sanctions, including punitive sanctions, for non-cooperation. Coercion, therefore, is not a Commission power, but compulsion is.

The EU competition rules do not pay much attention to procedural safeguards and the rights of the defence. These have been elaborated mainly by case-law and were, occasionally, subsequently implemented in the legislative framework. Nonetheless, Regulation 1/2003 does provide for rules on the admissibility of evidence in competition procedures. Article 12 stipulates, for the purposes of applying Articles 81 and 82 TFEU, a rule of mutual admissibility of evidence. Additional conditions apply, however, when information is used for the application of national competition law or when used against natural persons. In the latter case, the exchanged information can only be used in evidence to impose sanctions where 'the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of art 81 or art 82 of the Treaty or, in the absence thereof, the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.'[29] It goes without saying that this provision can have significant repercussions for criminal law enforcement of competition law and related offences.

2.3. ECB AND THE SSM-FRAMEWORK

In the wake of the financial crisis of 2007-2008, the enforcement tasks of ECB (and other EU authorities on the financial markets) have been widened considerably. Banking supervision, and the punitive enforcement thereof, is of a different nature than the open context in which OLAF and DG Comp operate. Banks and other financial institutions are subject to a largely harmonised set of EU rules that generally requires prior authorisation by financial supervisors, before those institutions are allowed to enter the markets and offer financial services to customers. Once allowed to be active, EU and national implementing rules provide for a detailed set of prudential and 'conduct-of-business' rules to be monitored by the supervisory authority (the so-called single rule book). This is a continuous process in which banks and their supervisor

[26] Directive 2019/1 of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2018] OJ L11/3 (the so-called ECN+ Directive).
[27] See Articles 20 and 21 Regulation 1/2003 respectively.
[28] Article 22 Regulation 1/2003. In those instances, national law – recently harmonised by the ECN+ Directive – is applied.
[29] Articles 12(3) Regulation 1/2003.

constantly exchange information. Most supervisors consequently emphasise a relationship of trust with the financial institutions as being essential for their effective operations. At times, this position may be at odds with the power of that same supervisor to impose punitive sanctions or refer cases for criminal investigation and prosecution. Nonetheless, these powers exist and have on occasion also been used.

As an essential pillar of the EU's banking union, the single supervisory mechanism (SSM) appoints the European Central Bank (ECB) as the central prudential supervisor of financial institutions in the euro area and in non-euro EU countries that chose to join the SSM.[30] Under this framework, the ECB directly supervises the largest banks (so-called significant entities), while the national supervisory authorities monitor the so-called less significant entities. In the execution of their tasks, the ECB and the national supervisors work closely together to ensure that banks comply with the EU banking rules.

The structure of the SSM-system is such that there are no parallel competences within the system, unlike in the competition network. The supervisory competences of ECB and national banks are, under the oversight of ECB, mutually exclusive. This structure, with ECB clearly in the lead, does not mean that the national authorities have been removed from ECB's operations. In practice, national banks and their officials still play a significant role as part of ECB's supervision and enforcement structures. For instance, national officials are part of ECB's joint supervisory teams, acting as functional agents of the ECB, applying the ECB's legal regime. A specific innovation of the SSM-regime is that ECB is also called to apply national implementing laws, ie the material banking laws of that state.[31]

The supervisory and investigatory powers of ECB have been laid down in SSM Regulation 1024/2013. These very much resemble the powers of DG competition and include the power to request information and to conduct investigations on-site. However, unlike DG Comp, ECB has no powers to enter private homes. Non-cooperation is often punishable with a fine or penalty payment. The powers are available to ECB during all stages of the procedures, from the stage of monitoring to the investigation of violations of EU law to the stage of punitive sanctioning. Moreover, ECB can call in the assistance of the national competent authorities and instruct them to use any additional investigatory powers they may have under national law.[32] National authorities may also be called upon to offer assistance in cases where physical coercion is needed.

The ECB has direct sanctioning powers on the basis of Article 18(1 and 7) of the SSM Regulation.[33] These powers entail the imposition of punitive sanctions (particularly fines), in cases where norm violations are based on directly applicable EU law, ie the CRR[34] and other technical standards. Moreover, ECB can require the national competent authorities to commence proceedings in other cases.[35] National

[30] Regulation No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63, and Regulation No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) [2014] OJ L141/1.

[31] Article 4(3) Regulation 1024/2013.

[32] Article 9(1) Regulation 1024/2013.

[33] Article 18(1 and 7) Regulation 1024/2013.

[34] Regulation No 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms [2013] OJ L176/1 ('CRR').

[35] See, specifically, Article 18(5) Regulation 1024/2013.

competent authorities are competent, at least under the prevailing opinion, for the sanctioning of violations of norms contained in the CRD IV,[36] that consequently must be implemented in national law. This indirect sanctioning power of the ECB does not mean, however, that ECB can also require NCAs to achieve a certain result in this respect.[37]

As is also the case for DG Comp, procedural safeguards and defence rights have only been dealt with in passing in the SSM framework.[38] The obvious conflict between ECB's powers of investigation and the rights of the defence in punitive procedures is for instance left untouched. The general assumption is that for banking supervision, where legal persons are the supervised entities, the Court's case-law in competition law procedures is to be applied mutatis mutandis. The ECB framework contains no rule on the admissibility of evidence gathered in one jurisdiction (including the EU's) and subsequently introduced in another.

The relationship with actors in the area of criminal justice is a particularly sensitive one in banking supervision. Criminal proceedings against banks, if possible at all, indeed may have very negative consequences for the reputation and operations of that particular bank. The fact remains, however, that criminal prosecution for violations of banking supervision rules or related offences, such as anti-money laundering offences, is possible in a number of member states. The coordination of procedures and mutual exchange of information with national criminal justice authorities is therefore an issue that cannot be overlooked in the punitive enforcement of banking regulations. The topic is dealt with in passing in ECB's legal framework[39] and in more detail in Decision 2016/1162 on the disclosure of confidential information for criminal investigations.[40] The latter decision reveals that information exchanges between ECB's national partners and criminal justice bodies are possible, subject to ECB's oversight over the national competent authorities. Yet clearly, this decision leaves open a great number of issues, such as the coordination of punitive procedures and the nature and degree of ECB's oversight. Moreover, the conflict that may occur between criminal powers of investigation and a supervisor's duty of secrecy and that is dealt with differently in the participating Member States, is not touched upon.[41]

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[36] Directive 2013/36/EU of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms [2013] OJ L176/338 ('CRD IV').

[37] See *in extenso* S Allegrezza, 'The Single Supervisory Mechanism', 21, G Lasagni, 'Investigatory, Supervisory and Sanctioning Powers within the SSM', 63, and O Voordeckers, 'Administrative and Judicial Review of Supervisory Acts and Decisions under the SSM System', 117 in S Allegrezza (ed), *The Enforcement Dimension of the Single Supervisory Mechanism* (CEDAM/Wolters Kluwer 2021); Argyro Karagianni, *The Protection of Fundamental Rights in Composite Banking Supervision Proceedings* (Europa Law Publishing forthcoming).

[38] For an overview of the defence rights that have been included in the framework, see Lasagni, ibid, 74, and the same author, *Banking Supervision and Criminal Investigation: Comparing the EU and US Experiences* (Springer 2019).

[39] Particularly Article 136 Regulation 468/2014.

[40] Commission Implementing Regulation (EU) 2016/1157 of 11 July 2016 amending Implementing Regulation (EU) No 964/2014 as regards standard terms and conditions for financial instruments for a co-investment facility and for an urban development fund [2016] OJ L192/7, discussed by Allegrezza *et al*. in chapter 8.

[41] See Allegrezza *et al*., chapter 8, in this volume and in 'The Single Supervisory Mechanism', 40, as well as Lasagni/Rodopoulos, 607 in S Allegrezza, 'The Single Supervisory Mechanism', 21, G Lasagni and I Rodopoulos, 'Comparative Overview', 607, in S Allegrezza (ed), *The Enforcement Dimension of the Single Supervisory Mechanism* (CEDAM/Wolters Kluwer 2021) and Argyro Karagianni, *The Protection of Fundamental Rights in Composite Banking Supervision Proceedings* (Europa Law Publishing forthcoming).

2.4. A BRIEF OUTLOOK: THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

Though the EPPO was not part of our previous studies, it does present a development that is too important to be left undiscussed. The position of the EPPO is unique to the extent that, as an EU organ, it is empowered to prosecute criminal cases before national criminal courts. Under the framework of the EPPO Regulation,[42] the EPPO shall be responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union which are provided for in the so-called PIF-Directive.[43] It undertakes acts of criminal prosecution and exercises the functions of prosecutor in the competent courts of the Member States. Within the scope of its mandate *ratione materiae*, the EPPO shares it competences with national prosecutors, though it has a certain priority competence within the limits of the Regulation.

The EPPO is an indivisible Union body, operating as a single office. However, the organisational structure of this EU organ is complicated. The EPPO is composed of two levels, ie a central level in Luxembourg and a decentralised level, consisting of the European delegated prosecutors within the 22 participating Member States. The central level consists of a European Chief Prosecutor, who is the head of the EPPO as a whole and the head of the College of European Prosecutors, the Permanent Chambers and the European Prosecutors. The general strategic and policy issues are for the central level, the operational work is done by the delegated prosecutors, whose operational competence is limited to the territory of their jurisdiction of origin. The European Delegated Prosecutors act on behalf of the EPPO in their respective Member States and have the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgment.[44] Their limited territorial mandate also means that for cross-border cases, cooperation with delegated prosecutors from other Member States remains a necessity.[45] In other words, there is no concept of European territoriality.

European delegated prosecutors wear a double hat; though they are functionally a part of the EPPO for their EPPO work, they are also national prosecutors and allowed to act in that capacity, as long as this does not interfere with their work for the EPPO.[46] They work under the supervision of so-called permanent chambers that supervise and coordinate the investigations. Once the decision has been taken to seize a criminal court, it is the delegated prosecutor who acts before the national court as prosecutor in the case.

As the work of the EPPO will usually involve multiple participating states,[47] the Regulation has designed a system of case allocation. A case shall as a rule be initiated and handled by a European Delegated Prosecutor from the Member State where the focus of the criminal activity is or, if several connected offences within the competences of the EPPO have been committed, the Member State where the bulk of the offences

[42] Regulation 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L283/1.
[43] Directive 2017/1371 of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [2017] OJ L198/29.
[44] Article 13(1) Regulation 2017/1939.
[45] See Articles 31-33 Regulation 2017/1939.
[46] Article 13(4) Regulation 2017/1939.
[47] Not to mention third states and non-participating EU-States; see N Franssen, 'The Future Judicial Cooperation Between the EPPO and Non-Participating Member States' [2018] New Journal of European Criminal Law 291, and the same author, 'Judicial Cooperation Between the EPPO and Third Countries: Chances and Challenges' [2019] Eucrim 198.

has been committed.[48] The applicable law is found in the EPPO Regulation itself. However, the national law of the handling delegated prosecutor applies to the extent that a matter is not regulated by this Regulation. Where a matter is governed by both national law and this Regulation, the latter shall prevail.[49]

Regarding the powers of the European delegated prosecutor handling a case, (s)he may either undertake the investigation measures and other measures on his/her own or instruct the competent authorities in his/her Member State. Those authorities shall, in accordance with national law, ensure that all instructions are followed and undertake the measures assigned to them. The EPPO Regulation does not define operational powers, nor does it define the applicable safeguards and defence rights. This is left to national law, including laws implementing the relevant EU Directives. The Regulation does however prescribe which investigative methods should be available for its work.[50] That means that, in cross border cases, there will be a number of (diverging) national legal systems relevant for the case work of the EPPO.

The system of legal protection in the EPPO Regulation is unique. Unlike any other area of law, the Regulation dictates that procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties shall be subject to review by the competent national courts (and not the EU judicature), in accordance with the requirements and procedures laid down by national law. The competences of the Court of Justice have been reconfirmed in the Regulation only for a limited number of specific situations.[51]

Article 37 of the Regulation is also a particularly relevant provision for legal protection. It deals with the admissibility of evidence in criminal procedures. This article stipulates that evidence presented by the prosecutors of the EPPO or the defendant shall not be denied admission on 'the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State.' This rule bridges the diverging national standards that will continue to exist in cases of cross-border evidence gathering. Arguably, it may also introduce a rule of non-inquiry, as the materials must be accepted without further investigations, even though this does not affect the freedom of judge to freely assess the evidence presented. It is unclear whether such a rule would also apply in cases where issues as regards to the lawfulness of the investigative work are raised.[52] Because of its indivisible structure, it is highly uncertain to what extent the existing national case-law on unlawfully obtained foreign evidence still holds in the specific, integrative setting of the EPPO. That case-law, after all, often builds upon the formal separations between the national legal orders involved. Materials that may have been unlawfully obtained in or transferred by another jurisdiction may as a rule be used as evidence, as long as this does not affect the fairness of the trial (the so-called *Trennungsprinzip*). Such an approach is not easily reconcilable with EPPO's status as an indivisible organ of EU law.

Finally, the EPPO clearly has a structure that is meant to promote the vertical and horizontal integration of national legal systems. These integrative effects will become visible in the horizontal (cross-border) investigations, but also in the vertical relationships between the EPPO and its national partners. As is the case for OLAF,

[48] Article 26(4) Regulation 2017/1939.
[49] Article 5(3) Regulation 2017/1939.
[50] Article 30 Regulation 2017/1939.
[51] Article 42 Regulation 2017/1939.
[52] See in more detail chapter 11 (Vervaele) in this book; see also M Luchtman, 'Het Europees Openbaar Ministerie in Nederland: Over Zijn Ondeelbaarheid en Verhouding tot de Nederlandse Strafrechter' [2021] Delikt en Delinkwent 63, 806.

those partners are very diverse and manifold. They include the national organs responsible for the expenditure side of the EU budget, but also the income side. That means that there will presumably arise similar issues for the EPPO as we have noticed for OLAF in our studies. The question is to which extent its national partners – who are not defined in the Regulation, but are referred to in general as the 'competent national authorities' – will be aware of the European dimension of their tasks and will be given sufficiently wide powers to cooperate and share information with the Office.[53]

3. LAW ENFORCEMENT IN A COMPOSITE LEGAL ORDER

The authorities that were discussed in the previous section are indicative of a trend in which EU authorities are made responsible for direct, punitive enforcement of violations of EU law by natural persons or other economic actors. It is also clear, however, that this trend is not the result of a top-down strategy or 'grand design'. Rather, one notices a strong sectoral focus for each of the authorities, where developments towards punitive enforcement by EU authorities have been largely path-dependent and responsive to the specifics of the policy area in play.

Yet, as said, that there are considerable differences between the EU authorities involved should not obfuscate what they have in common, in terms of common features, problems and challenges. In all of their legal frameworks, the relationships between the relevant EU authorities and their national partners are a decisive, institutional characteristic. A system of distinct, dual enforcement jurisdictions, like in the United States (federal level – state level), is non-existent in the European Union. The institutional design of the EU authorities is of such a nature that they function as vehicles that connect and integrate the different legal orders of the Member States involved. All of the authorities combine vertical (EU - Member State) and horizontal (interstate) dimensions in a single institutional framework that has EU-wide operational competence. EU authorities may be competent to perform acts of investigation themselves, but we have also seen many examples in which national authorities perform such acts on behalf of these authorities. Information that is transferred from national jurisdictions to the EU authorities may end up in their case files, or in case files before courts in another national jurisdiction, after having been transferred by the relevant EU authority. All of this illustrates that the legal frameworks of these authorities are designed for a bundling and pooling of information, staff and resources, with the aim of fulfilling that authority's mandate. In many cases, it will be impossible to clearly differentiate between the horizontal and vertical dimensions of an investigation.

The integrationist models fit well with the qualification of the European legal order as a composite one. That legal order is characterised, first of all, by the way in which it incorporates natural and legal persons in the transnational polity of the European Union.[54] Like the national enforcement authorities, individuals have acquired a dual capacity in this legal order. They are no longer only nationals of a certain state. Citizens and other actors that are economically active on the territory of the EU have been awarded, inter alia, enforceable rights vis-à-vis states in transnational affairs and,

[53] M Luchtman, 'Het Europees Openbaar Ministerie in Nederland: Over Zijn Prioritaire Bevoegdheid, Verhouding tot het OM en de Bestuursrechtelijke Handhavingskolom' [2021] Delikt en Delinkwent 54, 694.

[54] Cf H van Eijken, *European Citizenship and the Constitutionalisation of the European Union* (Utrecht University 2014).

for EU citizens, rights to participate in the political process at EU level or the local level of the state of residence. The European Union is, in the words of the Court of Justice 'a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals.'[55]

The notion of the European legal order of the EU and its Member States as a 'composite' one also emphasises the vertical and horizontal, transnational relationships between the branches of the trias politica. National state branches – whether they are part of the executive, judiciary or the legislative – also have EU-tasks to fulfil, such as to ensure that EU rules and polices are effectively enforced and that they cooperate loyally with EU authorities and partners in other states. Vice versa, those branches may expect that their partners in other jurisdictions (including the EU) do the same. These relationships were established for the purpose of achieving a series of common goals and policies, as defined in the Treaty on the European Union. To achieve these goals and policies, the European composite legal order deliberately pierces the veil of the participating nation-states and of the national enforcement structures, by regrouping those national structures under a single (yet often complicated) legal framework with EU wide competences. The same goes, in essence, for the judiciary which is encouraged to engage in dialogues with the Court of Justice and courts from other states. Their role as *juges de droit commun* has been emphasised many times in the internal market and is increasingly becoming clear in the Area of Freedom, Security and Justice.[56]

In this composite institutional setting, it is vital to stress and recognise the importance and relevance of the EU institutions themselves. Even in cases where autonomous investigative powers have been withheld from the EU level, as is the case for OLAF, the coordinative activities that take place within the confines of these EU authorities demonstrate their autonomous value. EU authorities are not derivates from national enforcement powers, but have an independent, autonomous role to fulfill. Though self-evident for many, there are still many authoritative sources that explicitly question this capacity, certainly in the area of enforcement integration and criminal justice. As has already been noted elsewhere,[57] the added value of the European Union in the enforcement landscape rests upon three distinct capacities:

1. the EU offers its Member States the opportunity to regain control over crime related problems which have become too big for individual states. Those problems require swift and effective cooperation, tackling both concerns of crime control as well as of due process;

2. the EU possesses the instruments to open up, if necessary, national legal systems, also in the area of criminal justice. Those who strive to regain control over crime can not only promote their own interests and perspectives. They need to be open to

[55] *Opinion of the Court of 18 December 2014 [on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms] pursuant to Article 218(11) TFEU* [2014] ECLI:EU:C:2014:2454, para 157.
[56] Cf Joined Cases C-562/21 PPU and C-563/21 PPU *X and Y* [2022] ECLI:EU:C:2022:100, paras 40-49.
[57] See MJJP Luchtman, 'Transnational Law Enforcement Cooperation: Fundamental Rights in European Cooperation in Criminal Matters' (2020) 28 European Journal of Crime, Criminal Law and Criminal Justice 14, referring to M Poiares Maduro, 'Three Claims of Constitutional Pluralism' in M Avbelj and J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 67, and, in reaction, J Komárek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles"' (2007) 44 CMLR 9. On the EU as a sovereign also N Walker, 'Late Sovereignty in the European Union' in N Walker (ed), *Sovereignty in Transition* (Hart 2003) 3.

the interests of other legal orders. Common goals, procedures, institutions and narratives are – or rather: should be – offered by the EU; and

3. a membership to the EU and the constitutional principles on which it is based also imposes what has been called 'external constitutional discipline' on the Member States, and one which is particularly important in law enforcement these days.

It matters a great deal how one views the institutional design of the EU authorities and their national partners. A perspective in which EU actors are presented as mere coordinative bodies, facilitating national authorities in the realisation of their tasks and duties will inevitably conceal a number of pertinent questions and issues of real concern to individuals and enforcement authorities. Yet, as said, this perspective is still omnipresent in the area of criminal law enforcement, where institutions such as the EPPO or OLAF have been qualified by some as bodies of enforcement *coordination*, ultimately supporting the national legal orders. Under that perspective, the main focus remains on what is needed – in terms of effective enforcement, as well as legal protection – in the legal orders of the individual Member States. Accordingly, there is less need to grant these bodies full operational autonomy or to revise national enforcement structures in light of their existence, nor is there a real need to rethink fundamental rights in light of their composite setting.

State sovereignty in the area of criminal justice can also be maintained via another technique. The limited punitive competences of a small number of distinct, highly specialised administrative EU-authorities, such as in banking law or competition law, bring along that the domain of national enforcement, and particularly that of criminal justice, remains largely unaffected. Also in this perspective, criminal enforcement remains a national affair, largely unaffected by the development of direct enforcement.

The empirical lens of a composite legal order, by contrast, leads to questions of a different evaluative and normative nature. Composite enforcement starts from the viewpoint that, though nation states remain distinct, autonomous entities, their interactions with the EU and other states are guided by a series of rules and principles that serve common goals and are inevitably geared towards further (enforcement) integration.[58] Enforcement by EU authorities is consequently not only the responsibility of those authorities, but also that of the Member States and the three branches of the trias. Not only do EU Member States need to open up, but also are they in need of a common narrative of what effective law enforcement is and what constitutes effective legal protection in a transnational setting. Yet before we delve further into the implications of our composite lens for the central questions of this book, it is necessary to clarify one more concept, ie that of EU enforcement authorities and their relationships to national criminal justice.

4. COMPOSITE ENFORCEMENT PROCEDURES

Whereas the notion of the European legal order as 'a composite' refers to the European legal order of the EU and its Member States, the notion of composite enforcement is a species of it, presented in this volume as the conceptual lens for a study into punitive

[58] *Opinion of the Court of 18 December 2014 [on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms] pursuant to Article 218(11) TFEU* [2014] ECLI:EU:C:2014:2454, para 172.

law enforcement by EU authorities. Composite enforcement procedures reconcile the seemingly contradictory notions of EU-wide territorial competences on the one hand, and decentralisation and subsidiarity on the other. EU-wide competences are achieved by removing traditional mutual administrative assistance arrangements from the operational frameworks of the authorities. Decentralisation and subsidiarity bring to the fore that, one way or another, national legal orders remain a significant factor in the applicable legal instruments. EU authorities continue to rely on the input of national legal orders, either because national enforcement are part of and act under the responsibility of those EU authorities, and/or because national law must be applied during their enforcement activities, in addition to or implementing EU rules.

The consequence of this structure is that it is not always easy to differentiate between those elements of the tasks of national authorities that are part and parcel of the legal frameworks of the EU authorities and tasks that remain in the national domain. The European competition network, for instance, combines the composite procedures of the Commission itself and simultaneously coordinates the enforcement procedures by national competition authorities. A more precise conceptual delineation of composite enforcement procedures is therefore necessary, also because it may have normative implications for the applicable frameworks.

Respect for national procedural autonomy, subsidiarity and the consequent fragmentation of the applicable legal rules cannot do away with the fact that composite enforcement intends to establish a certain degree of coherence. There can be no 'composite' without it. There are two elements that distinguish composite procedures from being merely a set of related, yet distinct enforcement procedures. To start with, coherence shows itself by taking account of the connections between the different stages of the enforcement procedure, starting from the stage where investigations are initiated, to the stage where decisions on the follow-up are made, to the stage where punitive procedures are ultimately conducted and concluded, either at the EU or the national level. To be part of a composite enforcement procedure means that each of these different stages is without meaning in and of itself and that those stages are connected through legal arrangements. The procedures are capable of leading to punitive sanctions, although this need not necessarily be the goal from the start of the proceedings.

Secondly, for a procedure to be a composite within the scope of this project, the gathering of the relevant information or the subsequent imposition of the sanction must be either the responsibility of the EU authority itself, a national authority subsuming its place by legal arrangements or a national authority that operates under the auspices of that EU authority. The latter element – that of acting 'under the auspices of' – does not imply that there is a legal obligation of the national authority to achieve a specific, prescribed result.[59] Rather, for national authorities to be acting 'under the auspices of', they must be under the legal obligation to continue the procedures or execute specific measures if 'requested', 'instructed' or even 'ordered' to do so by the EU authority. Whether or not such an obligation exists, depends on the degree of discretion that is left to national authorities to formally decline such a request or instruction. For such discretion to be absent, the request, order or instruction should fall within the scope of the applicable legal instruments and leave the national authorities no formal possibilities (refusal grounds) to decline it. The required absence of discretion, therefore, relates to what is called in international criminal law the *granting decision* of

[59] That, in turn, also has consequences for the remedies available, see Ligeti and Robinson (chapter 3) in this volume.

the national authorities; ie to the decision to provide assistance to the EU authority.[60] The principle of loyal cooperation then takes precedence and such requests are to be executed, though it follows from that same principle that the EU authority, in turn, pays due attention to legitimate objections that may exist on the national side and seeks to accommodate those objections. That the subsequent *execution* of the request may remain within the hands of the national authority does not change its qualification as being part of a composite structure. National authorities are under a duty to deliver a reasonable degree of effort to achieve the result, in accordance with their national laws and obviously without interfering with such rights as the presumption of innocence.

To show the different ways in which procedures can be composite by nature, it is helpful to re-introduce the model that we used in our first Hercule-study on the stage of information gathering, yet with some slight adjustments.[61] Three factors are key in it:

1. the issue of which authority is the acting authority, ie the authority that ultimately performs the investigative acts. Is this the EU authority itself or its national partner (on behalf of the EU authority or in its own name)?;
2. the issue of whether the national partner functionally becomes a part of the EU organisation or whether assistance is provided to the EU authority by the national partner as a representative of its national administration; and
3. the issue of who instructs the national partners: are instructions provided by the EU authority or through the national chains of command?

On the basis of these factors, we have distinguished a number of models for composite enforcement:

1. **Autonomous investigative acts (*Vor-Ort-Kontrolle*)**:[62] in this model, EU authorities perform the investigative acts themselves. This means that the laws to be applied are mostly EU regulations and that the remedies are, in principle, to be found at the EU level. Although national authorities are usually allowed to be present, their assistance is not related to the performance of their own tasks. It is seen as administrative assistance, *Amtshilfe*,[63] and mostly comprises the use of coercive power in cases of non-cooperation or assistance of a practical nature. Physical force remains, after all, a power which is only available to the national authorities. National authorities are under the obligation to provide that assistance, and apply their own national laws in that process.
   We can find examples of acts of *Amtshilfe* in all legal frameworks, for instance in Regulation 2185/96 for OLAF (on-the-spot checks), Articles 20 and 21 Regulation 1/2003 (DG Comp), and on-site inspections within the framework of ECB and ESMA. Here, we can already notice major differences between the OLAF framework and those of other authorities. Whereas OLAF does have the power to

[60] On that concept, see M Böse, M Bröcker and A Schneider (eds), *Judicial Protection in Transnational Criminal Proceedings* (Springer 2021); A Eser, O Lagodny and L Blakesley (eds), *The Individual as Subject of International Cooperation in Criminal Matters: A Comparative Study* (Nomos 2002).
[61] The following models are derived from that report, M Luchtman and J Vervaele, 'Comparison of the Legal Frameworks' in MJJP Luchtman and others, *Investigatory Powers and Procedural Safeguards: Improving OLAF's Legislative Framework through a Comparison with Other EU Law Enforcement Authorities (ECN/ESMA/ECB)* (Utrecht University 2017) 248.
[62] See *in extenso* also A Althaus, *Amtshilfe und Vor-Ort-Kontrolle* (Stämpfli 2001); A David, *Inspektionen im Europäischen Verwaltungsrecht* (Dunckler & Humblot 2003).
[63] F Wettner, *Die Amtshilfe im Europäischen Verwaltungsrecht* (Mohr Siebeck 2005) 154; David ibid 309.

perform on-the-spot checks, it is highly dependent in law and practice on its national partners. The applicable Regulations do not provide for autonomous powers or means to deal with a lack of cooperation by economic actors. This is different for DG Comp and ECB.

2. **Mandated investigations, or even *Organleihe*:** in this constellation, too, EU authorities lead the investigations, but national authorities also have a clear role, which certainly exceeds the mere 'opening of doors'. Both models (mandates and *Organleihe*) have in common that the investigative acts of the national partners are ascribed to the EU authorities; national authorities perform tasks on behalf of the EU authorities (not in their own name).[64] The law to be applied is usually (directly applicable) EU law. Where EU authorities give such orders and retain the power of oversight and to act themselves, we speak of mandated delegations.[65] The (gradual) difference between a mandate and *Organleihe* is that, in the latter case, the (national) authority also becomes a part of the EU structure in legal terms; participating states lose control over their authorities, which act as a functional part of the EU authority. They operate within the framework of EU laws.[66]
   We submit that the two models can be found in the ESMA (delegation) and ECB frameworks (JSTs, possibly also OSITs). Article 30 CRAR deals with delegation.[67] That article holds that ESMA may also require competent authorities to carry out specific investigatory tasks and on-site inspections as provided for in the Regulation. National partners then have the same powers as ESMA.[68]
   Organleihe appears to be the most accurate form to qualify the cooperation between ECB and NCAs for significant entities in the framework of Joint Supervisory Teams (responsible for the monitoring of significant entities), as defined in the SMM Framework Regulation. Also the position of European (Delegated) Prosecutors in the EPPO-framework resembles the features of an *Organleihe*.[69]

3. **Assistance (*Amtshilfe*), including instructions:** This is the oldest and most well-known form of interaction. Administrative assistance means that, upon the request of the EU authorities, national authorities perform specific acts of investigation in their own name, but for the fulfilment of the tasks of the EU authorities (not for their own tasks, therefore). In principle, they apply national laws (which may have been harmonised). *Amtshilfe* as such creates no changes in the legislative framework of the requested party (in terms of its powers, for instance).[70] Hierarchically, the assisting national authorities do not take instructions from their EU partners, but via their national chains of command in the execution of such acts. However, though

[64] Wettner ibid 147.
[65] Wettner ibid 148-149.
[66] Wettner ibid 152-153; AAH van Hoek and MJJP Luchtman, 'Transnational Cooperation in Criminal Matters and the Safeguarding of Human Rights' (2005) 1 Utrecht Law Review 28.
[67] Regulation 1060/2009 of 16 September 2009 on credit rating agencies ('CRAR') [2009] OJ L302/1, as revised.
[68] The question, incidentally, is to which extent Articles 30 truly concerns a delegation, ie a transfer, of powers. The legal construction of the provision rather resembles a mandated power. The construction, after all, does not affect the responsibility of ESMA and does not limit ESMA's ability to conduct and oversee the delegated activity (Article 30(4) CRAR). A different opinion can be found in Böse and Schneider (chapter 4) in this volume.
[69] M Luchtman, 'Het Europees Openbaar Ministerie in Nederland: Over Zijn Ondeelbaarheid en Verhouding tot de Nederlandse Strafrechter' [2021] Delikt en Delinkwent 63, 806.
[70] Of course, those powers and safeguards may have been harmonised by EU law (case-law and legislation).

Amthshilfe-constructions originate from international law,[71] the legal regimes of the EU authorities that we have studied often no longer show a degree of discretion for national authorities to kindly refuse such 'requests' for assistance. Though such 'requests' may not (and often cannot) entail a duty to achieve a specific result, they do contain an obligation of effort. That is why I consider them as a part of composite procedures.

Examples of *Amtshilfe* are found in the legal frameworks of ESMA and ECB, where they mostly refer to providing assistance to the relevant authorities in cases of opposition. A similar provision is found in Article 4 of OLAF Regulation 2185/96. Within the setting of competition law, DG Comp has the power to 'ask' national partners to collect evidence on its behalf, applying their own law (Article 22(2) Regulation 1/2003). The latter power is somewhat different from the other types of mutual assistance within the framework of EU authorities, as the national competition authority then performs acts of investigation individually, but on behalf of DG Comp and applying EU law.[72] This provision appears to be rarely used.[73]

A category related to 'mutual assistance' are the *instructions*, available in the SSM framework.[74] Instructions allow the ECB to oblige the national partner/NCA to use powers or take further procedural steps that are not available to the ECB itself. The applicable legal regime is the regime of the agent, not the principal EU authority. Likewise, the consequences of the acts are, in principle, not imputed to the EU authority.[75]

	Autonomous	*Organleihe*	Mandate	Assistance
Acting authority is …	EU authority	national	national	national
Act is part of …	EU organisation	EU	national	national
Instructions via …	EU hierarchy	EU	EU	national

Figure 1- Different models for interaction between EU authorities and national partners; the role of national partners.

The models illustrate the different modalities of how national authorities can assist their EU partners in composite procedures and how their actions are imputed to the

[71] The term 'mutual administrative assistance' is used in the setting of international law, the proverb 'mutual' illustrating the element of reciprocity. That element is usually absent in the top-down types of assistance in composite procedures.

[72] This is why one may doubt whether this is really mutual assistance or rather a different type of assistance. Most academic writings qualify it as mutual administrative assistance; see M Böse, 'The System of Vertical and Horizontal Cooperation in Administrative Investigations in EU Competition Cases' in K Ligeti (ed), *Toward a Prosecutor for the European Union, Volume 1, A Comparative Analysis* (Hart 2012) 840.

[73] Böse and Schneider (chapter 4) in this volume.

[74] Arguably, instructions may also be regarded as a separate category, particularly where they are so specific that national partners are left without discretion. In that situation, national lines of hierarchy are less relevant. The difference between instructions and mandated investigations is that, under the latter regime, one cannot transfer more powers than one has oneself. In that respect, instructions come closer to mutual administrative assistance. In fact, some mutual assistance regimes are so specific in their terms and conditions that the differences between the two forms have become small. That is why we have placed the two forms in a single category.

[75] See L Wissink and others, 'Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection' (2014) 10 Utrecht Law Review 110. This may be different where discretion for national authorities is fully absent; see A Witte, 'The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law?' [2014] Maastricht Journal of European and Comparative Law 89.

respective national or EU legal orders. As a rule of thumb, the differences between the specific legal regimes will have consequences, for instance for the applicable law (on powers, safeguards, evidence,[76] et cetera), the legal remedies available and for questions of political accountability.[77] Yet these differences are not decisive for their qualification as being a part of administrative composite procedures.

Composite administrative procedures not only cover the vertical or 'multilevel' relationships between the authority and its partners in a specific legal order, they also relate to the more horizontal relationships between the many national legal orders in the context of composite procedures. It is certainly thinkable, for instance, that materials collected in the Netherlands end up in punitive enforcement procedure in, say, Greece. The legal arrangements that aim to achieve the necessary degree of 'horizontal' coherence often remain implicit in the legal frameworks. That does not mean that they are not there. The dominant model within the scope of this project is the hierarchical (or 'star pattern') model, in which the interactions between legal orders essentially run via de the EU-authority (cf. OLAF, DG Comp, ECB). The resulting focus of these models on the vertical axis of coherence conceals that important decisions on case allocation, the applicable law, et cetera, are made within the confines of the EU authorities, but often without a clear framework.[78]

There are also collegial (or 'web pattern') models, based on joint decision making structures, such as within the EPPO. It is not without coincidence that the latter type of models usually include rules for case-allocation or forum choices. It is also not without reason that in the EPPO structure its 'indivisibility' has been explicitly confirmed in its founding Regulation.[79] There is no reason to do this in star pattern models. For web patterns, however, it is absolutely vital.

5. THE LENS OF COMPOSITENESS: IMPLICATIONS AND RESEARCH QUESTIONS

As composite procedures intend to achieve a certain degree of coherence, legal questions follow from it, relating to the (foreseeability of the) applicable law, judicial protection, the scope of fundamental rights. The lens of punitive enforcement by EU authorities as composite processes certainly has analytical and normative implications. Before introducing our research questions at the end of this section, I will highlight two of those in the remainder of this introductory chapter. Using such a lens implies, first of all, that, even though decentralisation and diversity are an intrinsic part of their legal design, these procedures also require coherence in terms of the foreseeability of the applicable legal rules. It makes a difference for questions of legal protection or the foreseeability of legal rules whether or not individuals and legal persons are confronted with these questions in the framework of enforcement procedures that are conducted in parallel by different authorities or within a composite framework, under the responsibility of an EU authority. The latter framework should offer those individuals,

[76] See also Vervaele (chapter 9, section 5), in this volume.

[77] There are some tricky areas, particularly when national authorities are left with no discretion by the EU authorities, but their actions do affect the position of individuals and undertakings; cf A Witte ibid 97-103; P Schammo, 'EU Day-to-Day Supervision or Intervention-based Supervision: Which Way Forward for the European System of Financial Supervision' (2012) 32 Oxford J Legal Studies 771, 785-86. This particularly holds true for mandated investigations and instructions.

[78] See further chapter 7 (Robinson) and chapter 10 (Luchtman) in this volume.

[79] Article 8(1) Regulation 1939/2017.

and also the involved authorities, sufficient clarity on the applicable legal rules, at the relevant stages in the procedure.[80]

The second implication touches upon the relationships with national criminal justice. Composite enforcement procedures allocate the responsibilities between and within the different enforcement stages to actors from different legal orders. They are characterised by a high degree of organisational or decisional interdependence and coherence. It is clear that criminal justice as such is not, save for the EPPO, a part of the composite enforcement structures that we have studied. There are good reasons, however, not to exclude criminal justice from this book's scope. By their very definition, the ties between administrative enforcement and criminal enforcement are tight. First of all, punitive administrative enforcement regimes serve as alternatives to criminal justice, for various reasons. Administrative enforcement regimes may for instance have been introduced to decriminalise certain behavior or, and that is more relevant to this book, because of the advantages that administrative enforcement structures bring, including the presence of highly specialised administrative agencies. Moreover, administrative and criminal investigations often run in parallel and have complementary functions. This shows itself in the complementary goals that both types of enforcement may have and in the temporal connections between them, as socio-economic crime often will remain undisclosed – and criminal justice mechanisms therefore ineffective – without administrative enforcement.

In a composite setting, the interactions between the many legal orders that are involved add to the legal challenges. For instance, one of the most pressing issues in the area of EU-fraud is why the composite enforcement procedures by OLAF still do not connect to the final stages of those procedures, ie the stage where administrative investigations lead to punitive or non-punitive follow up, particularly at national level.[81] Composite enforcement procedures by OLAF have been confined to the stages of investigation and do not regulate the stages of prosecution and sanctioning at national level. Yet, with OLAF procedures being regarded as distinct, separate procedures, the connection to national follow up, criminal or administrative, remains loose. Follow-up is still a predominantly national affair, even after the recent revision of the OLAF framework. Clearly, this can have implications, both for the effective enforcement of EU law, for the legal protection of persons concerned, as well as for the overall legitimacy of OLAF's – and the EU's – operations. This issue also has a flip-side. OLAF investigations of course do influence the work of national authorities – administrative and criminal alike – in a way that is not always in line with their own priorities, policies or standards. Though the OLAF-framework remains puzzling and rather loose, it does require national authorities to respond.[82] Under the recently revised framework, the EU-legislator focused mainly on the relationships between OLAF and the EPPO and left this part of the puzzle largely untouched.

Also in other areas of EU law and policy, the relationships between composite administrative enforcement and criminal justice are underregulated or even deliberately disconnected. Authorities such as ECB and DG Comp have the power to impose

[80] See further chapter 7 (Robinson) and chapter 10 (Luchtman) in this volume.

[81] As will be analysed in detail by Bovend'Eerdt in his forthcoming dissertation.

[82] Article 11(3) of the revised OLAF regulation reads, inter alia, '[t]he competent authorities of the Member State concerned (…) shall take such action as the results of the external investigation warrant and shall report thereon to the Office within a timelimit laid down in the recommendations (…) and, in addition, at the request of the Office.' See however also Recital 30 of Regulation 2020/2223: 'In accordance with the settled case-law of the CJEU, the Office recommendations included in its reports have no binding legal effects on such authorities of Member States or on institutions, bodies, offices and agencies.'

administrative sanctions themselves or can entrust their national partners to do so, yet their institutional frameworks do not regulate the relationships with criminal justice actors. In fact, in competition law, the provision of information for other purposes than originally obtained for is said to be at odds with the rights of the defence.[83] However, because such information may be taken into account to justify the initiation of a national procedure, the overlap in scope of composite administrative and national criminal investigations cannot be disregarded and causes many other complications, both in terms of the effective enforcement of EU laws and policies, as well as the protection of the individual.[84]

Therefore, as is the case in purely national cases of enforcement, composite enforcement procedures under the auspices of EU-authorities inevitably will have links with criminal justice. There are temporal links, in which criminal justice is the necessary follow-up to administrative investigations or in which both set of procedures run in parallel. There are also substantive and personal links, because the facts and persons under investigation in administrative and criminal procedures will be the same or be closely related to another. In a great deal of these cases, national judicial authorities are also in the process of implementing EU law and, hence, acting within the scope of EU law. This also goes in cases where ordinary criminal offences, such as forgery, are used as the basis for prosecution for violations of substantive norms of EU law.[85] That, in turn, means that the provisions of the EU Charter of Fundamental Rights are applicable and that the mechanisms for cooperation and cooperation between EU authorities and national criminal justice authorities should be an integral scope of his study, both from the perspective of the effective enforcement of EU law, as well as the legal protection of individuals. Criminal justice is not a distinct, separate domain, but is part and parcel of the same policy that EU administrative authorities serve to implement. Consequently, both sets of procedures should be aligned to prevent problems with, for instance, the ne bis in idem-principle or the privilege against self-incrimination.

The lens of composite punitive enforcement thus pushes to the fore two different perspectives and related questions. There is an internal perspective, focusing on the legal architecture of the relevant models and on the legal position of the many involved authorities therein, as well as the position of the individuals concerned. Furthermore, there is the external perspective in which the relationships of composite punitive enforcement with national criminal justice are taken aboard. As indicated in the preface, our research questions are: What models for composite enforcement do currently exist? What constitutional parameters define and guide the interactions between the many authorities from the involved legal orders? What powers do these authorities need for the effective fulfilment of their punitive tasks, during the consecutive stages of the enforcement process? And what may individuals expect from these authorities in turn; are their rights, safeguards and remedies guaranteed? How does EU administrative enforcement relate to (national) criminal justice? All of these questions are linked to both the EU, as well as to the national levels. They relate not only to the executive

[83] MJJP Luchtman, AM Karagianni and KHP Bovend'Eerdt, 'EU Administrative Investigations and the Use of Their Results as Evidence in National Punitive Proceedings' in F Giuffrida and K Ligeti (eds), *Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings* (Luxembourg University 2019) 7, 17 and 33, with further references.

[84] See also Argyro Karagianni, *The Protection of Fundamental Rights in Composite Banking Supervision Proceedings* (Europa Law Publishing forthcoming).

[85] As was the situation in Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105.

branches, but also to the other two branches of government. Moreover, they involve cross-policy considerations in relation to the domain of criminal justice and vice versa.

In the following chapters of this book, organised in four parts, we focus on the main constitutional parameters for composite enforcement (chapters 2 and 3), on the exemplary models for composite enforcement (chapters 4-6), on a number of topical issues regarding EU enforcement authorities and their relations to the national legal orders (chapters 7-9). We conclude in the fourth part with a series of overarching observations and an outlook towards the EPPO (chapters 10 and 11).