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Making European Policies Work

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October 2021

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European Institute of Public Administration
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The European Commission supports EIPA through the European Union budget

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Evolving Challenges and New Approaches in EU Law Enforcement

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Abstract

The EU is continuing to explore new approaches in the legal enforcement tools that it uses to ensure compliance with EU policies. The EU now combines mechanisms of public or centralised enforcement, on the one hand, with private or decentralised enforcement, on the other. It has also evolved in the last 20 years in order to find alternative and complementary enforcement tools. One key element is the principle of partnership between the EU and the Member States, involving ex ante enforcement mechanisms by which the Commission provides guidance and assistance to prevent non-compliance by Member States. Three case studies illustrate different trends and issues within this process. EU border control policy and the Schengen area show how the combination of horizontal and vertical mechanisms in a particular enforcement arrangement can evolve; horizontal cooperation and peer review continue to be valued even as the evaluation system has come to be Union-led. Competition policy is an example of the increasing importance of private enforcement through actions taken by firms, as a complement to public enforcement in ensuring effective deterrence. The EU response to the digitalised economy highlights the difficulties of using familiar enforcement tools given that new technologies challenge core concepts such as legal certainty; regulatory sandboxes are now being proposed as an innovative response.

[1] Within the team, the lead was respectively taken by Juan Diego Ramírez-Cárdenas for the overview of the EU's legal enforcement tools, Petra Jeney for EU border policy, Godefroy de Moncuit for competition policy, and Martina Anzini for regulatory sandboxes.

The EU's Legal Enforcement Tools: Sharpening and Broadening

The European Union is an autonomous legal system founded on the rule of law. The Court of Justice of the EU (CJEU) has established that the principles of primacy, by which EU law prevails over national law in the event of conflict, and of direct effect, by which EU law may create rights and duties directly for legal persons, are fundamental and essential features of the EU system. However, the legal and practical implementation, as well as the enforcement, of EU law are not exclusive prerogatives of the EU. EU policies are applied primarily by the Member States following the principle of sincere cooperation.[2] Although EU legislation increasingly provides for the European Commission to adopt binding norms that shape how policies are put into effect, implementation by Member States remains the general rule.[3]

Moreover, the EU possesses neither the administrative prerogatives nor the machinery to ensure application of EU law. By default, this application is carried out through the intermediary of national administrations. Indeed, Member States have the discretion to apply EU law according to their own administrative culture, being subject only to minimum EU organisational or procedural requirements.[4]

Effective enforcement mechanisms are essential in order to make EU policies work. These mechanisms should make it possible to detect, deter, reverse and punish breaches of EU law, which usually means that EU law is not transposed or applied effectively by Member States.[5] Yet the EU lacks a fully centralised power with which to coerce Member States into compliance. As Guardian of the Treaties, the Commission is responsible for making sure that all Member States properly apply EU law. However, the Commission's main enforcement tool - the infringement procedure or, technically, an action for 'failure to fulfil an obligation'[6] - does not permit it to directly interfere in the implementation and application of EU law by Member States, only to sanction violations of EU law once the state failures have occurred.

Due to this lack of coercive power, the policy of the EU has significatively evolved in the last 20 years in order to find alternative and complementary enforcement tools.[7]

One result of this evolution is that EU enforcement policy is now based upon the idea of partnership between the Commission and the Member States. By virtue of the principle of sincere cooperation the Commission not only sanctions wrong state policy outputs *(ex post enforcement control)* but also assists state authorities in ensuring compliance through a number of tools to help them to transpose, apply and implement EU law correctly and on time.

These can be regarded as *ex ante enforcement mechanisms*, based upon different patterns of administrative cooperation between the Commission and the relevant authorities of the Member States. Through these tools the Commission seeks to prevent non-compliance by monitoring how EU law is applied and implemented, clarifying the meaning of EU obligations to the Member States or by facilitating the exchange of necessary information between Member State enforcement authorities.

Moreover, Member States are also obliged to provide sufficient remedies to ensure effective legal protection in the fields covered by EU law. That is, if citizens' rights under EU law are affected at national level as result of instances of maladministration or incorrect state implementation, the public have to be granted access to rapid and effective national redress mechanisms. Hence, *private judicial enforcement mechanisms* (brought by private parties before the competent national courts) complements the *public judicial enforcement procedures* which can be initiated by the Commission.

The EU has thus developed a comprehensive and composite set of enforcement mechanisms combining both administrative and legal procedures, intended to promote effective implementation, as well as to monitor and sanction non-compliance.

Public or centralised enforcement

As explained above, Member States bear primary responsibility for the transposition, application and implementation of EU law. The European Commission oversees Member States in the exercise of these duties, under the control of the CJEU, through the infringement procedure.

This centralised procedure does not have a punitive purpose: it is not the goal to reach the stage of proceedings before the CJEU and to obtain a condemnatory ruling. Rather the opposite, the procedure aims at giving Member States every possibility to remedy the breach of EU law. This is why the procedure starts with an administrative/prelitigation phase of dialogue with the Commission, so that state authorities comply with their EU law obligations voluntarily[8] Only if the Commission is of the belief that state action has been unsuccessful to repair the breach, or the justifications presented are unsatisfactory, will it refer the case to the CJEU,[9] initiating the second phase of the procedure or litigation phase.

The Commission thus follows two consecutive stages in this procedure. First, it deploys a problem-solving strategy towards the Member State considered to be in breach of its EU law obligations by issuing a letter of formal notice and then, potentially, a reasoned opinion. With these official documents the Commission intends to gather information, open dialogue, provide guidance and persuade to compliance. The Commission may then move to a coercive and punitive approach in a second stage, with referral of the case to the CJEU aiming at a declarative condemnatory ruling.

The cooperative stance inherent to the prelitigation phase of the procedure was heightened with the creation of the EU Pilot System in 2008. The EU Pilot is an online platform which Member States and Commission's services use to communicate legal and factual information on infringement cases so that the formal start of the procedure is avoided.[10] By fostering communication and cooperation, the EU Pilot undoubtedly strengthens the capacities of Member State authorities to execute EU law.

Despite the increasing number of files handled by the system and its high resolution rate,[11] the Commission in its 2017 Communication announced an end to the practice of systematically referring all alleged infringement cases to EU Pilot. Since then, the Commission launches infringement procedures without relying on EU Pilot, unless recourse to it is seen as useful in a given case. The intention is to make the procedure more agile, by removing a lengthy step prior to the formal process.

The Treaty of Lisbon incorporated modifications into the procedure as further measures to make the infringement procedure a more effective and deterrent enforcement tool. For instance, the formal condition is lifted of having to issue a reasoned opinion in the second litigation phase that may be initiated if a Member State fails to comply with a judgement of the CJEU,[12] making this second infringement shorter and more time-efficient.

More importantly, the Treaty of Lisbon tackled the persistent and widespread problem of late transposition of directives, by inserting a new paragraph 3 in Article 260 TFEU. This new procedural device allows the Court to impose a financial sanction on an EU Member State

already at the conclusion of the first infringement procedure in the event of failure to notify the transposition measures of a directive. In its much-awaited judgement in Case C-543/17, *Commission v Belgium*, the Court for the first time formulated an extensive interpretation of the notification obligation covering not only 'non-communication', but 'partial communication' of transposition measures as well. This ruling has had major practical implications for the work of state authorities responsible for EU law implementation. It also equips the EU with a new enforcement tool to put pressure on Member States to transpose directives in a timely way.

A final illustration of the effort to enhance the persuasiveness and effectiveness of EU public enforcement mechanisms, at a time when the infringement procedure is used to deal not only with technical breaches of EU law but with fundamental attacks against EU legality, is the new recourse to Articles 278 and 279 TFEU. On the basis of these articles, since infringement actions themselves have no suspensory effect, the Commission may request the Court to order the suspension of a contested act and/or the adoption of interim measures if it considers that the urgent circumstances of the case so require. The first example of the use of this proceeding in the context of an infringement action is the decision of 19 October 2018 of the Vice-President of the Court of Justice, ordering the Republic of Poland to suspend the effects of the Judiciary Reform Act.[13]

Nevertheless, public enforcement through centralised infringement is procedures on the resources of the Commission, which are limited. This is why, in order to ensure its swift implementation and application, EU law has provided for the progressive establishment of decentralised enforcement mechanisms.

Private or decentralised enforcement

Private or decentralised enforcement mechanisms play an essential role in the EU system and ensure a complementary function to public enforcement tools.

According to this decentralised model, although substantive legislation is created by EU institutions, national courts apply EU rules and protect individual rights in their respective legal systems. National courts are hence 'the common courts' for upholding EU law and contribute effectively to enforcing it in individual cases. Moreover, in contrast to fully centralised models, such as a federal system which provides for parallel application of state and federal law, national courts in the decentralised model use national remedies and procedures to apply EU law.[14]

Consequently, in the decentralised model, it primarily corresponds to national courts to protect the rights that private litigants derive from EU law. However, when performing this task, the courts may—and sometimes must—cooperate with the CJEU by resorting to the preliminary ruling procedure.[15] This is an incidental and non-contentious procedure through which national courts refer questions on the interpretation or, more sporadically, the validity of EU law provisions, whenever they consider that the response to those questions has a bearing on the adjudication of their pending cases.

Although the fundamental function of the preliminary ruling procedure is to ensure the uniform interpretation of EU law, the procedure also serves to facilitate the application of EU law by offering national courts assistance when the circumstance triggering the use of the procedure is the detection of a presumed incompatibility between EU and national law. Hence, the preliminary ruling procedure can also be regarded indirectly as an enforcement tool since it helps to resolve the problems that frequently accompany the application of EU law.

Decentralised enforcement tools are also being promoted in specific cases. Recognising the limitations of centralised enforcement, EU legislation in a number of EU policies is reinforcing the role of private legal proceedings and aiming to increase people's awareness of their role in the enforcement of EU law. This is notably the case with EU competition policy, as discussed in the following section of this paper.

Finally, in the decentralised enforcement of EU law, traditional judicial procedures coexist with alternative mechanisms of redress to which citizens may turn to seek remedies in individual cases. The list of such mechanisms that have progressively emerged includes SOLVIT, a service provided by national administrations to help citizens and businesses if their EU rights are breached in another EU country, and the European Consumer Centres Network. Moreover, alternative and online dispute resolution mechanisms are playing an increasingly important role in the solution of EU-related problems.[16]

Alternative mechanisms: administrative enforcement tools

Due to the limitations of both centralised and decentralised enforcement mechanisms, the Commission has promoted various types of 'alternative' methods to improve compliance with EU law. These mechanisms aim at reducing the risk of non-compliance by transferring resources (knowledge, human, material, etc.) to the Member States or clarifying the obligations with which they have to comply.

In many instances, breaches of EU law by Member States are unintentional. They are frequently the consequence of the sheer complexity of the EU law obligations placed upon the Member States. The imprecision of EU norms or their very broad objectives may lead to defective compliance if Member States err in their interpretation and application.

Consequently, the Commission has created a series of mechanisms for consultation, dialogue and negotiation to help Member States transpose, apply and implement EU law correctly and on time. These include guidance documents, implementation plans, expert groups, explanatory documents, providing training, organising workshops and holding package meetings. Some of these tools are used to avoid (or prevent) breaches of EU law, while others are intended to be used in parallel with infringement procedures to resolve (or correct) these breaches and to avoid having to refer the matter to the CJE. These mechanisms can be qualified as 'vertical', for they link the EU with state and sub-state levels, and have existed for some time.

The development of horizontal cooperation as a tool to remedy EU law enforcement problems is more recent. A good illustration of these horizontal patterns of administrative cooperation is the proliferation of EU networks. These networks interlink competent EU and Member State authorities together with often, non-state actors, with the EU acting in many instances as a simple facilitator. Their degree of formalisation and their purpose vary, ranging from pure information exchange, or the sharing of best practice to more institutionalised networks, ensuring the role of co-regulators, enforcement supervisors.

Technological progress and recent technical developments, such as Artificial Intelligence, facilitate both the creation and the functioning of these networks. For instance, in the area of the internal market for electronic communications networks and services, the Body of European Regulators for Electronic Communications (BEREC) assists and advises the Commission and the national regulatory authorities in implementing the EU regulatory framework for electronic communications. Similarly, the European Competition Network contributes to the effective

and coherent implementation of competition rules. The European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) plays an important role, in particular by facilitating the exchange of best practice in enforcing the environmental acquis and respect for the minimum requirements for inspections.

Vertical and horizontal dimensions in EU law enforcement: the case of EU border control policy

The free movement of persons is one of the fundamental principles, and goals, of the European Union. It is only within the 'Schengen area', however, that they can move without being subject to internal border checks. The existence of the Schengen area relies not only on the application by the participating countries of controls on their external borders (that is, with non-Schengen countries), but also on a wide array of so-called 'compensatory measures' related to visa policy, the Schengen Information System, data protection, police and judicial cooperation. Although membership of the Schengen area does not necessarily coincide with that of the EU,[17] this set of rules known as the 'Schengen acquis' has been integrated into EU law. EU border controls may thus now be considered as an EU policy which is subject to differentiation.

Ensuring compliance with border control instruments in the Schengen area has had a very distinct journey as compared to the core market integration policies of the EU, such as competition policy or the single market. The intergovernmental origins of the Schengen area have left a deep imprint, in particular when it comes to monitoring and ensuring compliance. Despite the high complexity and technicality of the compensatory measures, monitoring the enforcement of border control regulations on the external borders was effectively left to the Member States themselves for the first two decades of the Schengen area. Judicial enforcement of the Schengen acquis, in the meantime, focused on clarifying concepts and practices in relation to border control and, perhaps more importantly, on ensuring that border control measures comply with fundamental rights.

This case study reviews the ex ante and ex post enforcement modalities in which compliance with the Schengen acquis is ensured, in order to illustrate how vertical interaction between EU and national actors works in tandem with horizontal administrative cooperation between Member States' authorities to ensure compliance.

Administrative cooperation between EU Member States in monitoring the enforcement of EU border control

The intergovernmental origins of the Schengen area have had a clear impact on how compliance with EU border control measures is ensured. Regarding ex ante compliance, two very distinct periods of monitoring modalities can be distinguished since the area was established.

The intergovernmental period

The first period ran from 1998 to 2013. It can be characterised as the intergovernmental period of monitoring, where Member States' compliance was followed by the Standing Committee on the evaluation and implementation of Schengen, set up in 1998.[18] The Standing Committee was composed of representatives of the signatory states; the European Commission at the time merely had observer status. The Committee's mandate was twofold: to verify if a country applying to join the Schengen area had fulfilled the necessary conditions to do so (verification); and to ensure that the Schengen acquis was properly being applied by those countries that had already joined the free travel area (implementation). The second period of monitoring, lasting from

2013 to this day, deliberately put an end to this intergovernmental period. Since 2013 Schengen evaluation has become a Union-led exercise, based on EU law and overseen by the European Commission.

During the intergovernmental period Schengen evaluations were scheduled, managed, executed and reported on by the Member States themselves. The intergovernmental nature of the evaluation was maintained even after the communitarisation of the Schengen acquis by the Amsterdam Treaty (coming into force in 1999), and the Standing Committee was, in fact, transformed to a Council Working Party on Schengen Evaluation (SCHEVAL/Scheval). Hence, while the regulatory environment underwent a significant transformation, the ex ante enforcement regime did not follow the same course. Although the Schengen acquis on border control become Community law under the 'first pillar' of the EU,[19] compliance was still ensured in the framework of intergovernmental cooperation among the countries (Peers, 2016).

Schengen evaluation in this first period meant that Scheval prepared programmes for and organised on-site visits to Schengen countries that were due for evaluation. Such visits were conducted by teams composed of experts from Schengen countries, accompanied by a representative of the General Secretariat of the Council and a Commission observer. While the evaluation mainly focused on compliance with the Schengen acquis as such, the evaluating teams also attempted to identify best/good practice that could help develop common standards within the various fields covered by Schengen cooperation. The evaluation process itself was wide-reaching, requiring extensive engagement from both the evaluation teams and the evaluated state in going through the process. This included a questionnaire that provided the factual basis of the inspection, the exchange of comments on the draft report of the evaluation, the on-the-spot inspections in the evaluated Schengen state and the follow-up exchanges between the inspectors and the representatives of the evaluated country. As a result, a strong culture of cooperation emerged among the various parts of Schengen states' administrations.

The Schengen evaluations went far beyond than merely exchanging information between competent authorities. Instead, they were based on full transparency, where denying access to data or sites was impossible, Despite the fact that the evaluation only resulted in a report that was submitted to the Justice and Home Affairs Council, and was accompanied by draft Council Conclusions containing recommendations offered to the evaluated country, there was great awareness among the parties to the process that they had a central role in ensuring compliance with the Schengen acquis. In fact, all participating competent authorities regarded the evaluation exercise as indispensable to the well-functioning of the Schengen area. Ex ante monitoring was considered to be fundamental to avoid security gaps in the free travel area. Given the wide scope of the evaluation, ranging from physical visits to external border crossing points to monitoring data protection authorities, to checking how visas are issued and how large-scale information databases were managed, a considerable segment of the national administrations was involved in the exercise.

The evolution of administrative cooperation

Even in its intergovernmental phase the Schengen evaluation triggered an in-depth ex ante administrative cooperation between the Schengen countries seeking to ensure compliance. Following the analytical framework suggested by Hartlapp and Heidbreder (2018), one can observe how procedural cooperation on a horizontal basis gradually led to organisational cooperation. Procedural cooperation solidified quickly, albeit mostly through the adoption of legally non-binding documents issued by the Schengen Executive Committee and later

by the Council (Schengen Manual,[20] Schengen Catalogues on Recommendations and Best Practices[21]). These instruments, while formally not binding, sought to develop best practices and common standards, and to clarify the Schengen acquis with a view to optimising compliance. The evaluation rounds were also very effective in developing organisational cooperation and established a network of professionals from the administrations of the various Schengen states who worked closely together in managing the evaluation rounds and channelling the outcome to the Council via the reporting process.

In this intergovernmental period the Schengen evaluation can be described as a bottom-up ex ante enforcement process that was launched in the general context of the Convention on the implementation on the Schengen Agreement, but without having a specific legal basis for the detailed modus operandi of the evaluation exercise. In this regard the participation of the Schengen states in the evaluation process was prompted by the general obligation stemming from being a member of the Schengen area, but very much depended on a voluntary commitment to the specific modalities of how the evaluation was organised (Pascau, 2012). Additionally, the administrative cooperation among Schengen states in this period can also be characterised as horizontal in nature, with Schengen states set on an equal basis both during the de facto evaluation visits and in the discussions taking place in the Council (Brady, 2012).

The second period of Schengen evaluation

A new stage started in 2013 with the entry into force of an EU Regulation establishing the new Schengen Evaluation and Monitoring Mechanism.[23] The end of the intergovernmental era was inevitable ever since the adoption of the Lisbon Treaty, which fully communitarised EU border policy through the new Article 70 TFEU. Nonetheless it still took the co-legislators many years to find a compromise on how the lead in the Schengen evaluation process would actually be handed over to the European Commission. By the time the new mechanism was proposed there were very clearly identified inadequacies in the evaluation process which called for more consistency and scrutiny. The vertical structure, which was put in place, effectively replacing the previous horizontal administrative cooperation between the Schengen countries, was designed to accentuate the institutional responsibility of the European Commission as Guardian of the Treaties. Besides reflecting the fact that the evaluation system was now Union-led, better programming, more efficient coordination and more rigorous monitoring were expected from the involvement of the Commission. This materialised in the introduction of a five-year evaluation cycle and an annual programme of inspections.

A further feature which underpinned the new vertical structure was the involvement of EU agencies. Frontex would provide risk analysis relating to the external borders with the support of Europol and Eurojust, and set up a specific selection procedure for the experts participating in the inspections. Under the new mechanisms, unannounced visits also become a possibility, exerting more pressure on Schengen states to constantly ensure full compliance. Placing the evaluation exercise under a vertical structure also meant that tasks related to reporting and follow-up also became a shared responsibility between the Schengen Member States and the European Commission. The Commission was not only responsible for coordinating the preparation of the report but now oversaw the implementation of the recommendations given to an evaluated country.

The continued importance of horizontal cooperation

Although the new Union-led Schengen evaluation process transferred the responsibility for the coordination and overall organisation of the mechanism to the European Commission, it also

retained elements of its peer-to-peer dimension. Schengen evaluations remained a shared responsibility between the EU and the Schengen States, with the Commission carrying out evaluations jointly with Member State experts and supported by EU agencies and bodies. This shared responsibility is very much reflected by the various arrangements of the evaluation; evaluation teams are composed by Commission and Member State experts, reports are co-drafted and must be discussed with the evaluated Member State, and it is the Council which adopts recommendations for remedial action upon a Commission proposal. The Commission itself noted that the Council's Scheval Working Party was kept precisely 'to maintain a high level of accountability, ownership of results and mutual trust among participating Member States'.[24] The peer-to-peer element was regarded as particularly important to ensure that Member States obtain direct knowledge of the situation in other Member States through the participation of their experts in the evaluation visits.

Ex post judicial enforcement of EU border control

The ex post judicial enforcement of the Schengen acquis on border control become a reality after the entry into force of the Treaty of Amsterdam in 1999. It was only from that point onwards that the Court of Justice of the European Union (hereinafter the Court) could exercise jurisdiction in the field of EU border policy, and it is from this moment that the Commission could launch infringement actions against non-complying EU Member States. As the Schengen acquis was made directly applicable by the Treaty of Amsterdam, national courts could also make references to the Court to interpret EU instruments related to the Schengen area.

For the purposes of the present analytical framework, the following general observations can be made regarding ex post judicial enforcement in the field of EU border policy.

First, when it comes to infringement measures launched by the European Commission, a relatively small number of cases have so far been opened, and only a very few have reached the judicial phase. Between 2012 and 2021 the Commission sent a letter of formal notice to a Member State on 26 occasions. In thirteen cases the Commission did not even reach the point of issuing a reasoned opinion and only three cases have reached the Court. The Court, however, did not have the occasion to rule on any of the three cases referred to it as all of them were withdrawn by the Commission in the course of the proceedings.

Regarding the procedures before national courts, the available data also shows a relatively low number of instances where national courts sought the interpretative guidance of the Court. The Court was called upon to interpret EU law in relation to the Schengen area on some 64 occasions since the entry into force of the Treaty of Amsterdam. Only 12 of these cases, however, directly relate to border checks. Nonetheless, even though the number of cases has been small, the Court has made very important contributions to the various more subtle issues in relation to the interpretation of the Schengen Borders Code, and these have a direct impact on Schengen states' compliance with EU border policy instruments. Among the central questions which has been revisited by the Court was the issue of the exercise of police powers by EU Member States' competent authorities as long as they are not effectively equivalent to 'border controls'. The Court stated that only such measures will be regarded as not having border control as an objective which are 'executed in a manner clearly distinct from systematic checks on persons at the external borders and are carried out on the basis of spot-checks'.[25]

According to the Court there was a need for a specific national framework to allow for the testing of the purposes when defining the intensity, frequency and selectivity of police identity checks

on the border. To this end the Court laid down a number of 'legal standards or benchmarks' for determining the lawfulness of such national frameworks. In this way the Court has effectively ensured that Member States comply with the cornerstone commitment of the Schengen area, namely the abolition of checks on the internal borders, and do not use regular police checks as guise for border control measures.

Compliance with the Schengen acquis is predominantly ensured though ex-ante administrative processes, chiefly the Schengen evaluation and monitoring mechanism. While judicial ex post enforcement is available, making recourse to judicial procedures in the area of the border checks remain seems to be the secondary option.

Private Enforcement of EU Competition Law and its Rapprochement with Public Enforcement

Competition policy represents one of the most significant examples of complementarity between private and public enforcement of EU law.

The rise of private enforcement in EU competition law is part of a broader movement towards the decentralisation of competition law enforcement that started in the late 1990s. It has come to be be widely recognised that private enforcement plays an essential, complementary function to public enforcement to achieve a sufficient degree of effective deterrence (Wils, 2003). The new role that both firms and consumers have come to play at national level is reflected in the conclusions of a recent study, which shows that there have been 239 court actions for cartel damages (of which 59 resulted in damages and 86 resulted in findings of liability) across 30 European countries since 1998 (Laborde, 2019). The surge in compliance programmes and rise in broader public attention toward competition law also reflects efforts to increase the awareness of European citizens as to the economic and social purpose of economic competition.

In this context new European legislation has been adopted with the aim of strengthening private legal proceedings. The 2014 Damages Directive,[26] for example, promotes private enforcement by clarifying the rules regarding access to evidence, standards for determining fault, and the setting of damages.

While the Damages Directive substantially improved the legal standing of victims of breaches of European competition law, crucial questions remain unresolved such as that regarding the determination of liability in civil lawsuits. Article 2 of the Damages Directive states that the infringer is the 'undertaking or association of undertakings which has committed an infringement of competition law'. Article 11(1) states that 'Member States shall ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law'. The Directive thus deals with the allocation of liability between entities composing an undertaking rather than the determination of entities bound to remedy the harm done in a civil lawsuit. The translation of this legislation into national law is currently the subject of debate. In private proceedings, the rules for determining the debtors of damages are different that the rules known for public proceedings. In other words, civil liability law is connected to the principle of liability for one's own acts. Accordingly, the notion of legal entity requires careful examination of every misconduct committed within a group of companies.

For this reason, the recent *Skanska* case[27] innovates and clarifies the applicable law by stating that the issue of determining who is liable in the context of a private action for damages following

a competition infringement falls within the scope of EU law and the concept of undertaking. The concept of undertaking is thus extended to civil litigation, which has a substantial practical impact: a national judge can apply the principle of economic continuity and impose civil liability on the operator who has taken over the activities of a defunct company that committed the infringement (Wurmnest, 2020).

This reasoning has long been used in public enforcement. By revolving around the notion of the 'undertaking', competition law can extend liability to the economic unit linking the parent company to its subsidiary. The economic entity allows for competition authorities to prosecute the parent company for the dealings of its subsidiaries by deeming them non-autonomous. Parent companies are often held liable for infringements by its subsidiaries even though the latter did not themselves commit the anticompetitive conduct. The probative task of competition authorities has been considerably lightened by the so-called 'Akzo' presumption.[28] This case has instilled a capitalistic presumption, whereby a subsidiary of which the capital is entirely owned by the parent company is presumed to follow the latter's instructions and is therefore non-autonomous. This presumption has since been expanded to cases of 'quasi' total[29] or indirect ownership,[30] cases where capital is held by a holding company even if it is not considered an undertaking,[31] cases with ownership of common subsidiaries,[32] and more recently cases where the parent company possesses all the voting rights.[33] In other words, the presumption of non-autonomy of subsidiaries is nearly irrefutable (Claudel, 2020), making prosecution easier for competition authorities in Europe by attributing misconduct of the subsidiary to the parent company.

The *Skanska* case[34] is therefore not surprising from the public enforcement perspective. Nevertheless, this jurisprudence is highly innovative with regard to private enforcement by introducing into the realm of civil lawsuits a concept which was reserved to public enforcement (Bosco, 2019). According to the CJEU, the contamination of civil rules by competition rules is justified because 'actions for damages for infringement of EU competition rules are an integral part of the system for enforcement of those rules, which are intended to punish anticompetitive behaviour on the part of undertakings and to deter them from engaging in such conduct'.[35] The Court adds that the concept of 'undertaking', within the meaning of Article 101 TFEU, which constitutes an autonomous concept of EU law, cannot have a different scope with regard to the imposition of fines by the Commission under Article 23(2) of Regulation No 1/2003 as compared with actions for damages for infringement of EU competition rules'.[36]

This solution has two significant consequences. First, assigning civil liability to the undertaking has the potential to increase the effectiveness of private lawsuits aiming to redress competition law damages. The burden of proof on the victim is eased if, instead of having to prove the misconduct of the parent company, it can use the presumption of economic unity against the parent company for the misconduct of the subsidiary. Secondly, applying public enforcement goals to private enforcement highlights the fact that these private lawsuits also have the purpose competition law deterrence. The deterrence objective recalled in the *Skanska* case could open the door to an adaptation of the civil liability regime in the national law of the Member States. The deterrent purpose of private enforcement is often disregarded because the inherent nature of civil actions is to compensate the damage, not to deter the wrongdoer from reoffending. The objective of the full compensation principle is to put the injured party in the position in which it would have been had the act that gave rise to the damage not occurred. The rapprochement of the objectives of public enforcement to those of private enforcement could lead, in the future, to the establishment of a principle of restitutionary damages in civil claims for competition law breach (Moncuit, 2020).

Regulatory sandboxes: coping with legal uncertainty in a digitalised economy

The EU also has to deal with new challenges for policy implementation that reflect qualitative changes in the issues involved. This is particularly the case of the digitalised economy. In this field, the EU is preparing to engage in innovative policy responses that call into question some longstanding assumptions about the very bases of regulatory action.

Old rules for a new world: legal certainty under strains in the digitalised economy

The principle of legal certainty is one of the general principles of EU law. It requires rules to be clear, precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by EU law. Legal certainty is especially important in relation to rules that may entail financial consequences, in order that those concerned may know precisely the extent of the obligations which those rules impose on them. The core of this concept, as emerging from the case-law of the CJEU, thus lies in the foreseeability of the consequences stemming from carrying out a certain activity. Such foreseeability is put into question in the digital economy.

While the growing complexity of modern societies has already put legal certainty under stress, the advent of digital technologies has further eroded legal certainty. The reason lies in the increased rhythm of innovation cycles as well as in the disruptive nature of certain digital innovations. The significant implications of digitalisation for business models and market dynamics have raised doubts as to how to apply the existing regulatory framework and competition law rules to novel market phenomena such as online platforms.

While digital technologies are revolutionising markets as we know them, market players, regulators and competition authorities are trying to cope with legal uncertainty. It is in this context that regulatory sandboxes were conceived as a new enforcement model. This section of the paper is devoted to illustrating what regulatory sandboxes are, their growing importance within EU policy-making and the legal constraints that need to be kept in mind for their establishment and functioning.

Regulatory sandboxes as a new enforcement tool

The regulatory sandbox as an enforcement model was first developed in the ‘fintech’ domain. In this innovation-intensive and heavily regulated sector, digitalisation has quickly put supervisors in the uncomfortable position of having to try to ensure financial stability and consumer protection by applying traditional rules in a mutated context. As similar issues have arisen in all sectors and domains exposed to digitalisation, the regulatory sandbox model is now applied in many different contexts . However, there is no universally accepted definition of a regulatory sandbox.

According to the European Supervisory Authorities (the ESAs), regulatory sandboxes ‘provide a scheme to enable firms to test, pursuant to a specific testing plan agreed and monitored by a dedicated function of the competent authority, innovative financial products, financial services or business models’. Pursuant to this definition, the main features of a regulatory sandbox are:

- the existence of a testing plan agreed upon by the competent authority;
- the setting up of a ‘dedicated function’ by the competent authority (presumably intended to be a unit or a department), which needs to fix the conditions for access to the testing plan and supervise compliance with the latter; and
- the innovativeness of the product, service or business model as a requirement to access the sandbox and, more broadly, as a justification for its establishment in the first place.

The ESAs further define the concept of regulatory sandbox by contrasting it with the other main initiative undertaken by competent authorities around the world to handle financial innovation: the innovation hub. A regulatory sandbox entails an exchange between tailored guidance (from the side of the supervisor) and a great deal of information (from participating market players), whereas an innovation hub is merely a dedicated point of contact between the competent authority and the market, so that enquiries can be addressed to it and possibly prompt the adoption of guidelines .

Interestingly, the definition provided by the ESAs does not include one of the most striking characteristics of the regulatory sandboxes (and its main difference vis-à-vis the innovation hub), which is the possibility for supervisors to waive applicable regulations for the purpose of testing the innovative financial products, financial services or business models . On the contrary, the ESAs specify that 'sandboxes do not entail the disapplication of regulatory requirements that must be applied as a result of EU law'.

To further highlight the varied and multifaceted identity of the regulatory sandbox model, it should be clarified that sandboxes entail to a certain extent an overlap between enforcement and regulation. This is due to the fact that the establishment of a sandbox can be seen as a more 'market friendly' alternative to the adoption of potentially premature or inadequate regulation of new phenomena . Also, within the sandbox the supervisor acquires a quasi-regulatory role vis-à-vis innovators, either by making large use of its discretion or by granting participants waivers of applicable provisions.

Regulatory sandboxes: pros and cons
The establishment of a regulatory sandbox can provide the competent authority with a better understanding of the new concerns that digitalisation brings about in the relevant sector. Also, the tailored guidance offered to market players within the sandboxes improves legal certainty and encourages innovation as a consequence.

It has been noted that the very establishment of a sandbox flags to market operators worldwide that the national legal system is market friendly and attracts innovators.

At the same time, regulatory sandboxes can give rise to regulatory arbitrage risks. and produce divergent supervisory practices, thus endangering the integrity of the internal market .

The growing success of regulatory sandboxes in EU policy-making
In its conclusions of November 2020, the Council has expressed support for regulatory sandboxes while noting that they often require the enshrinement of experimentation clauses in the regulatory framework. Experimentation clauses are defined as 'legal provisions which enable the authorities tasked with implementing and enforcing the legislation to exercise on a case-by-case basis a degree of flexibility in relation to testing innovative technologies, products, services or approaches'.

Notably, the Council has encouraged the Commission to consider the use of experimentation clauses while drafting or reviewing legislation and to facilitate the exchange of good practices concerning regulatory sandboxes between Member States, thus effectively promoting the dissemination of sandboxes as an enforcement model.

This call has so far produced the inclusion within the Artificial Intelligence Act proposal of a regulatory framework for national and multinational regulatory sandboxes in the area of AI.

Legal constraints affecting the establishment and operation of regulatory sandboxes

EU law-related legal constraints

Regulatory sandboxes are all the more effective as environments for experimentation when the competent authority can grant to participants waivers from applicable regulatory requirements. However, this feature of sandboxes can be highly problematic when the regulatory requirement, which the national authority intends to grant a waiver from, is established by EU law. In those cases, the competent authority risks acting in breach of EU law. This is why, as advocated by the Council, experimentation clauses could turn out to be essential for the sandboxes to gain terrain as an enforcement model: they would grant the competent authority an express legal basis to exercise this kind of discretion.

Also, competent authorities willing to establish a regulatory sandbox need to ensure compliance with personal data protection law and, therefore, with the General Data Protection Regulation.

National law-related legal constraints

The regulatory sandbox as an enforcement model could arguably be extraneous to the constitutional tradition of many Member States. This is because, according to such model, the competent authority is empowered to adapt the legal framework to the specific case in front of it, while the principle of legality requires such authority to merely apply the law, as large as its discretion in this respect might be. Also, in some cases the legal framework that the authority is called to apply/modify might encompass areas that are reserved to the legislature by the national constitution.

Another national law-related limit that needs to be checked in the process to establish a sandbox has to do with the mandate of the competent authority. As explained before, regulatory sandboxes can improve legal certainty, but they are mostly used to openly support innovation – the criteria governing access to the sandbox could be extremely telling as to what is the real objective of the sandbox. In this regard, it is worth considering whether the mandate of the competent authority encompasses the promotion of innovation.

Also, it must be considered that tailored guidance offered to market players within the sandboxes is a scarce resource. Sandboxes require authorities to set up an ad hoc unit to run the monitoring exercise. At the very least, the use of this enforcement model entails the mobilisation of a significant number of civil servants and possibly the recruitment of experts (such as experts in the relevant digital technology). This bears an important implication: not every market operator can take part in a sandboxing exercise. While potential participants cannot obtain to be all admitted to the sandbox environment, they are likely to be entitled to be treated equally. This means that access to the sandbox must be subject to an open tender procedure.

Finally, depending on the interaction concretely taking place within the sandbox between the authority and the market operator, a liability of the authority for damage suffered by third parties could arise due to the activity carried out under the supervision of that very authority. The legal risks stemming from that need to be properly addressed.

Regulatory sandboxes can be effective tools to improve legal certainty, especially in those sectors that are most exposed to digitalisation. However, they could be used either to improve legal certainty per se or to ultimately promote innovation by improving legal certainty. While the Council and the Commission seem to uphold the latter view, this could be problematic for those national

authorities, whose competences do not encompass the promotion of innovation. More broadly, there are a number of legal constraints that national authorities will need to face, some of which depend from EU law while some others strictly depend upon national law (as it is the case of the legality principle).

Irrespectively of the legal issues listed above, the Council and the Commission seem deeply committed to promote this model and it is to be expected that there will be more and more regulatory sandboxes in the future.

Conclusions

In order to ensure the effective application of EU law, the EU has developed a set of complementary enforcement tools, both centralised (run mostly by the Commission) and decentralised, operated at the level of the Member States. These tools involve both administrative cooperation, aiming at preventing breaches of EU law, and judicial measures, aiming at sanctioning these breaches.

The case of EU border controls and the Schengen area illustrates the evolving balance between vertical and horizontal coordination mechanisms in a sensitive policy area that has been shaped by its intergovernmental origins. Although the horizontal cooperation model has largely been replaced by a vertical structure, the peer-to-peer elements in the evaluation mechanism were kept and are still regarded as a way to exert further pressure on non-complying EU Member States. In 2021, in proposing the third overhaul of the monitoring the Schengen regime, the Commission continues to maintain that the Schengen evaluation should be based on close cooperation between the Member States and the Commission, with a balanced distribution of shared responsibilities and the maintenance of the peer review nature of the system. In justifying the continued system of shared responsibility the Commission still argues that the mutual trust on which the functioning of the entire Schengen area is built is directly reinforced by the peer-to-peer element, through which Member States' experts check what their counterparts are doing, acquire direct knowledge of the situation in the other Member States, recommend solutions and urge action if needed.[38]

Competition policy offers an example of how private and public enforcement mechanisms have come to be combined in order to assure compliance with EU law. This has taken place in the context of an important decentralisation of the enforcement regime initiated in the early 2000s, and new EU rules have been adopted to promote private enforcement, although questions remain to be resolved.

The cases of regulatory sandboxes, finally, highlights some of the broader challenges facing enforcement of EU law – and law in general – in the new digital age.

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Notes

[1] Commission Communication 'EU law: Better results through better application' (2017/C 18/02).
[2] Article 4(3) Treaty on European Union (TEU).
[3] Article 291(1) Treaty on the Functioning of the European Union (TFEU): 'Member States shall adopt all measures of national law necessary to implement legally binding Union acts'.
[4] This administrative application by Member States must be also carried out within the parameters marked by certain fundamental EU principles, such as the principle of effectiveness, or equivalence.
[5] Individuals or economic operators can also breach their obligations under EU law. Nevertheless, the ultimate responsibility would correspond to Member States if they did not sanction these violations.
[6] Articles 258 to 260 TFEU.
[7] The evolution toward a framework of complementary and composite infringement tools is reflected in Commission Communications 'Better monitoring of the application of Community law', COM(2002) 725/final/4, 'A Europe of Results — Applying Community Law', COM(2007) 502 final and the already cited 2017 Communication.
[8] Article 258 (1) TFEU.
[9] Article 258(2) TFEU.
[10] The infringement procedure formally starts when the Commission decides to issue the Letter of Formal Notice, thereby opening the prelitigation phase.
[11] A total of 969 files were handled in 2015, and 875 in 2016, with a resolution rate of 75% and 72% for each of these years respectively.
[12] Article 260(2) TFEU.
[13] Order of the Vice-President of the Court of 19 October 2018 in Case C-619/18 R, Commission v. Republic of Poland.
[14] By virtue of the principle of effective judicial protection (Article 19 TEU & Article 47 of the Charter of Fundamental Rights of the EU) Member States have to provide the individuals with sufficient remedies to ensure effective legal protection in the fields covered by EU law.
[15] Article 267 TFEU.
[16] In the area of financial services, for example, the Commission has established the Financial Dispute Resolution Network to facilitate the resolution of cross-border problems.
[17] As of 2021 the Schengen area was made up of all EU countries except Bulgaria, Croatia, Cyprus, Ireland and Romania, as well as non-EU countries Iceland, Norway, Switzerland and Liechtenstein.
[18] Decision of the Executive Committee of 16 September 1998 (SCH/Com-ex (98) 26 def).
[19] Protocol integrating the Schengen acquis into the framework of the European Union.
[20] Common Manual on Checks at the External Borders) was adopted by the Schengen Executive Committee on 28 April 1999, and endorsed by Council Decision 1999/436/EC of 20 May 1999.
[21] Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen – SCH/Com-ex (98) 26 rev def. on External border control, Removal and Readmission 2002; the Schengen Information System, SIRENE 2002; Police Cooperation 2003; Issuing of visas 2003.
[22] Schengen evaluation – an educational experience. The example of Norway 2020, https://phs.brage.unit.no/phs-xmlui/bitstream/handle/11250/2650172/schengen_evaluation.pdf?sequence=1&isAllowed=y.
[23] Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen.

[24] Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Council Regulation on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing Regulation (EU) No 1053/2013 SWD/2021/119 final.
[25] See, for example, the Judgment of the Court of 19 July 2012 in Case C-278/12 PPU.
[26] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.
[27] CJEU, 14 March 2019C-724/17.*Vantaan kaupunki v Skanska Industrial Solutions* EU:C:2019:204.
[28] Case C-97/08 P Akzo Nobel EU:C:2009:536.
[29] CJEU, 29 Sept. 2011, C-520/09 P, Arkema : ECLI :EU :C :2011 :619.
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[33] Trib. EU 12 July 2018,. T-419/14, The Goldman Sachs Group, Inc. c/ Comm. UE : ECLI :EU :T :2018 :445.
[34] CJEU, 14 March 2019, C-724/17.*Vantaan kaupunki v Skanska Industrial Solutions* EU:C:2019:204.
[35] Ibid. pt. 45.
[36] Ibid. pt. 47.
[37] ESMA/EBA/EIOPA, Report FinTech: Regulatory sandboxes and innovation hubs. 2018.
[38] Proposal for a Council Regulation on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing Regulation (EU) No 1053/2013 COM/2021/278 final.