Towards a European enforcement toolkit?
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Abstract of paper:

Since the 1990s, European law has increasingly influenced market supervision. European law provides substantive, institutional and procedural rules for supervising many sectors of industry. Member States are required to set up ‘regulatory agencies’, which play a key role in applying rules for the European market. This trend has been identified as the *Europeanisation* of market supervision.

There is however one missing link: the European enforcement of these rules (the *European enforcement deficit*). The autonomy principle dictates that the enforcement of Community law is largely up to the Member States and their authorities: European rules have to be enforced by national agencies. Member States have extensive freedom to select and shape the enforcement instruments. This dichotomy between the need for the uniform application of Community law and powers of the Member States has lead to different national enforcement regimes.

The European Court of Justice has only given some *minimum* and rather vague requirements the national enforcement must comply with. Although the national procedural autonomy of Member States leaves NRAs free to design their own enforcement regime, the European criteria seem to point towards a deterrence-based approach to supervision. Also in the liberalisation directives for certain sectors, such as the energy and telecommunication sectors, not much guidance is given on the enforcement requirements. This leads to the question whether the Member States’ autonomy should be further curtailed and whether more specific direction could be given to ensure the enforcement of European rules at national level.

In the recent regulations, establishing the new European Supervisory Authorities, new powers have been entrusted to the European authorities, in which case these new authorities can impose sanctions directly on undertakings, without the help of the national authorities. This development forms a major shift in the European enforcement landscape. The European legislator seems to prefer in those cases the instrument of sanctions/penalties in case of non-compliance.

This draft paper is a first study, which includes an agenda for further research.

**Keywords:** European enforcement deficit – harmonization of national enforcement by regulatory agencies – development of European conditions for enforcement
Chapter I - Setting the Scene - The principles of autonomy and effectiveness

Effective enforcement is vital for the success of any legal order. Of particular importance is effective enforcement for the European Union legal order. The European Union is primarily dependent on the Member States for the enforcement of EU law. Member States and their authorities are entrusted with ensuring compliance with Union law and sanctioning infringements.

In the field of market supervision national regulatory authorities (hereinafter: NRAs) are entrusted with the supervision and regulation of markets. Over the past two decades many different NRAs have been created by the Member States of the European Union in order to implement the relevant European sectoral market liberalisation directives. The main task of the NRAs is to supervise and regulate the relevant markets. Therefore, they are entrusted with various regulatory and supervisory powers. In this way the NRAs play a key role in implementing and enforcing European rules. Although the liberalisation directives for the various sectors make clear that the implementation and enforcement of the directives is primarily the responsibility of the national regulators, European Law has a growing impact on the activities of the NRAs.

1.1 National Procedural Autonomy

The work of NRAs is based on the principle of national procedural autonomy. National procedural autonomy refers to the power of Member States to determine what national procedures are used to enforce Union rights before national courts. This means that the enforcement of Union law is primarily dependent on Member States and their authorities. European rules are created at a European level, but implemented and enforced at a national level. Member States are free to determine what national procedures they use to secure EU rights at a national level. In most cases the EU relies on decentralised, indirect administration through the Member States for enforcement. The dependence on national regulatory authorities to enforce EU law can have major consequences. National procedural autonomy leads to different enforcement regimes throughout Europe and subsequently to regulatory competition. In order to prevent or reduce disparities between different enforcement regimes within the European Union, the ECJ has imposed limits on the national procedural autonomy of Member States. The ECJ has laid down some minimum requirements which

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5 ibid 40.
6 Acceto (n 1) 381.
national procedural rules should comply with. These requirements will be discussed in the next section.

1.2 The Principle of Effectiveness and Equivalence

Member States are free to determine how EU law is enforced before their national courts. However, the ECJ has imposed limits on the national procedural autonomy. The twin rulings in *Rewe*⁷ and *Comet*⁸ laid down the basic framework that has consistently served the ECJ ever since when addressing issues relating to the decentralised enforcement of Union law.⁹ In the case *Rewe* the Court laid down two minimum requirements national procedural rules should comply with:

*Accordingly, in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature. The position would be different only if the conditions made it impossible in practice to exercise the rights which the national courts are obliged to protect.*¹⁰

First, the ECJ made clear here that national procedural autonomy is the point of departure, when no harmonisation measures on the subject have been taken yet.¹¹ Next, the ECJ points out that in the absence of Union legislation, enforcement of Union rights and obligations will take place in accordance with national procedural rules, but that those rules are subject to two requirements: the principle of equivalence and the principle of effectiveness. The principle of equivalence entails that rules that govern a dispute with a Union dimension may not be treated less favourable than those governing similar domestic actions. This principle used to be known as the non-discrimination principle. More recently the term principle of equivalence came into use by the ECJ.¹²

The principle of effectiveness states that national procedural rules must not render enforcement virtually impossible, or at the very least, make it excessively difficult.

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⁸ Case C-45/76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 2043.
¹¹ L Flynn, ‘When National Procedural Autonomy Meets the Effectiveness of Community Law, can it survive the impact?’ (2008) 9 *ERA Forum* 246.
¹² Jans (n 2) 42.
The test set out in *Rewe* is beset by contradiction.\textsuperscript{13} On the one hand the ECJ called for national procedural autonomy, stating that enforcement of Union rights and obligations is left to the Member States, but subject to the principle of effectiveness and equivalence. On the other hand, the requirement that national enforcement of EU law should not make it virtually impossible to exercise EU rights, pushes for the development of a Union framework of enforcement. This contradiction contributed to a fairly complex case-law on this subject. This case-law will be discussed in section 1.5.

1.3 The obligation of loyal cooperation

The minimum requirements of national enforcement of EU law by NRAs are developed by the ECJ, based on the principle of loyal cooperation. When NRAs are enforcing EU law, they are likely to be torn between loyalty towards the Union and their own national interests.\textsuperscript{14} Therefore, the principle of loyal cooperation plays an important role in Union law. This principle carries a number of obligations for NRAs. First, NRAs are required to secure legal certainty for EU law. Secondly, NRAs must actively police EU law (e.g. *Spanish Strawberries*). Thirdly, NRAs must penalise infringements of EU law that are similar to those applicable to infringements of national law.

In *Ireland v. Commission*\textsuperscript{15} the Court has confirmed the importance of the principle of loyal cooperation with regard the effectiveness of Union law. In this case the Court stated that the principle of loyal cooperation entails an obligation on the Member States to take all the necessary measures to guarantee the application and effectiveness of Union law and imposes on Member States and the Union institutions mutual duties to cooperate in good faith.

1.4 Case-law

Since 1976 the ECJ has produced an enormous amount of jurisprudence within the framework of the cases *Rewe* and *Comet*.\textsuperscript{16} The ECJ has influenced the national enforcement of Union law by the NRAs in Member States in two ways.\textsuperscript{17} Firstly, it is settled case-law that national enforcement measures must fulfil the requirements of equivalence (also known as non-discrimination), effectiveness, dissuasiveness and proportionality. Secondly, the ECJ has ruled that while enforcing Union law, fundamental rights, the general principles of EU law and the Treaty freedoms must be observed.\textsuperscript{18}

In this section the case-law with regard to decentralised enforcement of EU law will be discussed in brief. As stated earlier, the first case in which the principles of effectiveness and equivalence were laid down were the rulings *Rewe*\textsuperscript{19} and the similar ruling *Comet*.\textsuperscript{20} In these cases the Court ruled that national law must deal with infringements of Union law in the same way as infringements of similar

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\textsuperscript{14} Acceto (n 1) 382.


\textsuperscript{16} Dougan (n 10) 411.

\textsuperscript{17} Jans (n 2) 206.

\textsuperscript{18} ibid.

\textsuperscript{19} *Rewe-Zentralfinanz* (n 8).

\textsuperscript{20} *Comet* (n 9).
domestic law (equivalence) and that national law should not render the enforcement of EU law virtually impossible (effectiveness).

Both cases concerned traders who had paid levies charged by their Member States which were contrary to Union law. The question arose whether time-limits with regard to commencing actions before national courts could be set aside in cases involving Union rights. The ECJ rejected these claims by stating that the combined doctrines of supremacy and direct effect did not guarantee absolute protection of Union rights, but only their protection in the context of a particular legal system. An interesting feature of the ruling was the explicit recognition of the ECJ that reliance on the enforcement by Member States and their authorities could lead to disparities between the Member States.

The Court stated:

Where necessary, Articles 100 to 102 and 235 of the Treaty enable appropriate measures to be taken to remedy differences between the provisions laid down by law, regulation or administrative action in Member States if they are likely to distort or harm the functioning of the Common Market.

Further requirements to limit the autonomy of national regulatory authorities were laid down in subsequent case-law. In Sagulo the Court ruled that Member States are entitled to impose reasonable penalties for infringement by persons subject to Union law of the obligation to obtain a valid identity card, such penalties should by no means be so severe as to cause an obstacle to the freedom of movement. In other words, in Sagulo the ECJ added the requirement of proportionality to the already existing Rewe/Comet principles.

In Van Colsen the Court had to rule on the question whether national sanctions to remedy breaches of the Equal Treatment Directive 76/207 were compatible with EU law. The Court ruled that the Directive leaves the Member States free to choose between different solutions to achieve its objective. However, the Court continued, stating, first, that a sanction must guarantee real and effective judicial protection. Secondly, a sanction must have a deterrent effect on the violator. Thirdly, the sanction must be adequate in relation to the damage sustained. Van Colson thus added the requirement of adequacy and effectiveness of national remedies to the requirement of proportionality and the principles of effectiveness and equivalence.

About four years later the ECJ ruled in Germany vs. Commission that the requirements of national enforcement of EU law also apply to NRAs. It stated that:

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22 R Craufurd Smith (n 22) 294.
27 Von Colson (n 25) 28.
28 Craig and De Búrca (n 26) 310.
it should be observed that it is for all the authorities of the Member States, whether it be the central authorities of the State or the authorities of a federated State, or other territorial authorities, to ensure observance of the rules of Community law within the sphere of their competence. However, it is not for the Commission to rule on the division of competences by the institutional rules proper to each Member State, or on the obligations which may be imposed on federal and Länder authorities respectively. It may only verify whether the supervisory and inspection procedures established according to the arrangements within the national legal system are in their entirety sufficiently effective to enable the Community requirements to be correctly applied.

Greek Maize is undoubtedly the leading case on the requirements of European law on national enforcement.  

Greek Maize was about the failure of the Greek state to fulfil those obligations to initiate all the criminal or disciplinary proceedings provided for by national law against the perpetrators of fraud. The Court ruled that Article 4(3) TEU (before 5 EEC) requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. Next, the EJC ruled:

24. For that purpose, whilst the choice of penalties remain within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements in national law of a similar nature and importance and in which in any event, make the penalty effective, proportionate and dissuasive.

25. Moreover, the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws.

In subsequent decisions the ECJ repeated the requirements of Greek Maize. Earlier case-law of the Court was about disputes on the enforcement of EU regulations and directives before national courts, also known as ‘positive’ integration mechanisms. In Spanish Strawberries the Court made clear that NRAs may be under an obligation to enforce rules with regard to ‘negative’ integration mechanisms as well. From Spanish Strawberries follows that Member States enjoy a margin of discretion in determining what measures are most appropriate to guarantee the full scope and effect of Union law. In this case the Court was asked to rule on the question whether France had taken ‘adequate measures’ to prevent obstacles to the free movement of goods that were created by actions of private individuals on its territory. The ECJ ruled that Member States enjoy a margin of discretion, but concluded that France had not adopted appropriate measures for ensuring the free movement of goods. Interestingly, the Court implied a positive obligation from Article 34 TFEU (before 28 EC), to ensure the free movement of goods. This new obligation of enforcement is subject to the requirements of being necessary and appropriate to prevent the obstruction of the free movement of goods.

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30 Case C-68/88 Commission v Greece (Greek Maize) [1989] ECR 2965.
31 ibid 22.
32 ibid 24.
33 Jans (n 2) 208.
movement. This means that the requirements of ‘negative’ integration (Spanish Strawberries) are similar to the requirements of ‘positive’ integration (Greek Maize).

In Berlusconi, Advocate General Kokott explained what the requirements of effectiveness, proportionality and dissuasiveness entail:

88. Rules laying down penalties are effective where they are framed in such a way that they do not make it practically impossible or excessively difficult to impose the penalty provided for and, therefore, to attain the objectives pursued by Community law.

89. A penalty is dissuasive where it prevents an individual from infringing the objectives pursued and rules laid down by Community law. What is decisive in this regard is not only the nature and level of the penalty but also the likelihood of its being imposed. Anyone who commits an infringement must fear that the penalty will in fact be imposed on him. There is an overlap here between the criterion of dissuasiveness and that of effectiveness.

90. A penalty is proportionate where it is (that is to say, in particular, effective and dissuasive) for attaining the legitimate objectives pursued by it, and also necessary. Where there is a choice between several (equally) appropriate penalties, recourse must be had to the least onerous. Moreover, the effects of the penalty on the person concerned must be proportionate to the aims pursued.

In Schmidberger and Roquette Frères the ECJ made clear that NRAs must observe fundamental rights when enforcing European law. Schmidberger was the first case in which a Member State invoked the necessity to protect fundamental rights to justify a restriction of one of the fundamental freedoms. Schmidberger can be considered as the fundamental rights sequel to the Spanish Strawberries case discussed above. The Court made clear in Schmidberger that the obligation to ensure the free movement of goods, may under certain circumstances, be restricted by fundamental rights.

In Roquette Frères the ECJ made clear that Article 8 ECHR can also place limits on the enforcement of European rules. This case was about whether the protection of the home as laid down in Article 8(1) ECHR should be extended to cover business premises as well. The ECJ held that searching business premises without prior authorisation by a national court would be ‘a disproportionate and intolerable interference.’

Both Schmidberger and Roquette Frères make clear that besides the requirements as laid down in Greek Maize, fundamental rights should also be observed when enforcing EU law before national courts.

34 ibid 209.
35 AG Kokott, Joined Cases C-387/02, C-391/02 and C-403/02 Berlusconi and Others [2005] ECR I-3565.
36 Case C-112/00 Schmidberger [2003] ECR I-5659.
37 Case C-94/00 Roquette Frères [2002] ECR I-9011.
38 Jans (n 2) 214.
39 Roquette Frères(n 38) 76.
1.5 Conclusion

In most cases the European Union relies on decentralised, indirect administration through the Member States for enforcement. The ECJ confirmed in Spanish Strawberries that Member States enjoy a margin of discretion in determining what measures are most appropriate to enforce Union law. However, the ECJ has imposed limits on the national procedural autonomy of Member States. Firstly the minimum requirements of effectiveness, equivalence, proportionality and dissuasiveness should be respected. Secondly, fundamental rights must be observed when Union law is enforced at a national level.

These limits on the procedural autonomy of Member States were developed by the Court in conjunction with the principle of loyal cooperation, as laid down in Article 4(3) TEU. AG Kokott has contributed to the understanding of these principles in Berlusconi by explaining what effectiveness, dissuasiveness and proportionality entail. However, the requirements given by the ECJ are minimum requirements and rather vague.

Chapter II- Top-down Analysis

The Europeanisation of market supervision is occurring in two ways: European Union law influences the enforcement of Union law by laying down general principles and minimum requirements or by harmonising sanctions (top-down) or, alternatively, national enforcement rules and practises influence the formulation of European principles (bottom-up). In this paper only a top-down analysis will be conducted by looking at the requirements of national enforcement as laid down in secondary European legislation in the field of energy, electronic communications and financial services (Chapter II). In the next Chapter III it will be investigated which enforcement tools are entrusted to the new European Financial Authorities (EFAs), especially to ESMA.

2.1 The Energy Directives

First, the secondary legislation with regard to energy will be discussed. European energy legislation includes amongst others directives and regulations on oil, gas and electricity. Before looking at the requirements of national enforcement in the energy secondary legislation, it is important to note that the procedural autonomy of Member States is recognised in the energy Directives. Provisions with regard to enforcement of Union law often start first with stating that it is up to the Member States to design their enforcement regime. A good example of the acknowledgment of procedural autonomy of Member States in secondary legislation with regard to energy is Article 27 of Regulation (EC) 715/2009:

\[^{40}\text{Acceto (n 1) 381.}\]
Member States shall lay down rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that those provisions are implemented.

After ensuring that Member States are free to determine how Union law will be enforced before their national courts, the energy Directives lay down minimum requirements with regard to the national enforcement of Union law. These requirements are often identical to the criteria laid down by the Court in *Greek Maize*.\(^\text{41}\) Penalties must be ‘effective, proportionate and dissuasive’.

A good example of these requirements can be found in Article 9 of Directive (EC) 2006/67/EC:

**Member States shall determine the penalties applicable to breaches of the national provisions adopted pursuant to this Directive and shall take any measure necessary to ensure the implementation of these provisions. The penalties shall be effective, proportionate and dissuasive.**

However, these requirements are rather vague and leave a wide discretion to the Member States. Occasionally does Energy legislation contain provisions with more specific guidance on the enforcement of Union law. Article 37 (4) (d) Directive 2009/72/EC is an example of a more detailed instruction:

(d) to impose effective, proportionate and dissuasive penalties on electricity undertakings not complying with their obligations under this Directive or any relevant legally binding decisions of the regulatory authority or of the Agency, or to propose that a competent court impose such penalties. This shall include the power to impose or propose the imposition of penalties of up to 10% of the annual turnover of the transmission system operator on the transmission system operator or of up to 10% of the annual turnover of the vertically integrated undertaking on the vertically integrated undertaking, as the case may be, for non-compliance with their respective obligations pursuant to this Directive;

This provision starts with reiterating that penalties must be effective, proportionate and dissuasive, and continues with specifying that a regulatory authority must have the power to impose penalties of up to 10% of the annual turnover of the supervisee. This provision gives better guidance for NRAs how to enforce Union law by indicating what tools the NRAs must have in their toolkit. Exactly the same provision is laid down in Article 41(4) of Directive 2009/73/EC. This provision also states that a NRA must have the power to impose penalties for up to 10%, but this provision is specifically aimed at transmission system operators, while the abovementioned provision focuses on vertically integrated undertakings.

Another example of a provision stating more specifically what measures should be taken when rules imposed by the Directive have not been respected, is Article 37 (14) Directive 2009/72/EC:

**Member States shall ensure that the appropriate measures are taken, including administrative action or criminal proceedings in conformity with their national law, against the natural or legal persons responsible where confidentiality rules imposed by this Directive have not been respected.**

\(^{41}\) *Case C-68/88 Commission v Greece (Greek Maize) [1989] ECR 2965*
In this provision the European legislator indicates that appropriate measures must be taken when rules imposed by the Directive have not been respected, including administrative action or criminal proceedings. Occasionally, the European legislator indicates what measures cannot be included in the toolkit of the regulatory authority. An example can be found in Article 27 (2) of Regulation (EC) 715/2009 which states that penalties as provided by that article shall not be of a criminal law nature.

It can be concluded that the requirements of national enforcement in secondary legislation with regard to the energy market are minimal and rather vague. Occasionally the European legislator states what powers NRAs must have in their toolkit, but proper guidance on how Union rules should be enforced is not rampant. The European legislator tends to emphasise the need of punitive sanctions in the energy legislation. In two of its directives the European legislator has laid down that a NRA must have the power to impose fines of up to 10\% of the annual turnover. Furthermore, secondary legislation talks about penalties, rather than measures, which implies punitive sanctions as well. Nevertheless, more clarity with regard to the requirements of national enforcement is desirable. This would enhance the uniform application of Union law across Member States and prevent regulatory competition.

2.2 Electronic Communications Directives

The Electronic Communications legislation has been developed to develop an internal market for electronic communications networks and services in Europe. To achieve this objective, it is of paramount importance that the electronic communications legislation is enforced adequately. Effective enforcement fosters regulatory certainty, which is an important driver for investment.\(^42\) The importance of effective enforcement is acknowledged in the legislation. Consideration 69 of Directive 2009/136/EC states:

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(69) \text{The need to ensure an adequate level of protection of privacy and personal data transmitted and processed in connection with the use of electronic communications networks in the Community calls for effective implementation and enforcement powers in order to provide adequate incentives for compliance. Competent national authorities and, where appropriate, other relevant national bodies should have sufficient powers and resources to investigate cases of non-compliance effectively, including powers to obtain any relevant information they might need, to decide on complaints and to impose sanctions in cases of non-compliance.}
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Regardless the importance of effective enforcement, the European legislator tries to strike the right balance between effective enforcement and the procedural autonomy of Member States. An example of the recognition of the procedural autonomy of Member States can be found in Article 21a of Directive 2009/140/EC:

Member States shall lay down rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and the Specific Directives and shall take all measures necessary to ensure that they are implemented.

The national procedural autonomy of Member States, however, finds its limits in the minimum requirements of national enforcement as laid down in the electronic communications directives and Greek Maize. Therefore, the abovementioned Article 21a continues stating that the penalties provided for must be ‘appropriate, effective, proportionate and dissuasive’. In this Article the European legislator has added the requirement ‘appropriate’ to the Greek Maize criteria. Another interesting feature of Directive 2009/140/EC is that in consideration 51 is stated that the power to fine has failed to provide an adequate incentive to comply with regulatory requirements:

Experience in the implementation of the EU regulatory framework indicates that existing provisions empowering national regulatory authorities to impose fines have failed to provide an adequate incentive to comply with regulatory requirements. Adequate enforcement powers can contribute to the timely implementation of the EU regulatory framework and therefore foster regulatory certainty, which is an important driver for investment. The lack of effective powers in the event of non-compliance applies across the regulatory framework. The introduction of a new provision in Directive 2002/21/EC (Framework Directive) to deal with breaches of obligations under the Framework Directive and Specific Directives should therefore ensure the application of consistent and coherent principles to enforcement and penalties for the whole EU regulatory framework.

In this consideration the European legislator has made clear that the power to impose fines cannot be considered as an adequate incentive to comply with regulatory requirements. Therefore, new powers have been included in Article 9(7) of Directive 2009/140/EC amending Directive 2002/21/EC.

(…) in particular by setting out strict deadlines for the effective exploitation of the rights of use by the holder of the rights and by applying penalties, including financial penalties or the withdrawal of the rights of use in case of non-compliance with the deadlines. These rules shall be established and applied in a proportionate, non-discriminatory and transparent manner.;

This provision specifies what measures can be taken to prevent spectrum hoarding: setting out strict deadlines, financial penalties or the withdrawal of the rights of use. It is striking that the European legislator first indicates that fines ‘have failed to provide an adequate incentive to comply’ but still encourages NRAs to lay down rules to impose those fines.

Because the electronic communications legislation is not always very clear on how Union law must be enforced before national courts, it could be useful to look at the toolkit the Directives require

43 Case C-68/88 Commission v Greece (Greek Maize) [1989] ECR 2965
from NRAs. Article 13b of Directive 2009/140/EC amending Directive 2002/21/EC sums up which powers a national regulatory authority must have at its disposal:

1. Member States shall ensure that in order to implement Article 13a, competent national regulatory authorities have the power to issue binding instructions, including those regarding time limits for implementation, to undertakings providing public communications networks or publicly available electronic communications services.

2. Member States shall ensure that competent national regulatory authorities have the power to require undertakings providing public communications networks or publicly available electronic communications services to: (a) provide information needed to assess the security and/or integrity of their services and networks, including documented security policies; and (b) submit to a security audit carried out by a qualified independent body or a competent national authority and make the results thereof available to the national regulatory authority. The cost of the audit shall be paid by the undertaking.

3. Member States shall ensure that national regulatory authorities have all the powers necessary to investigate cases of non-compliance and the effects thereof on the security and integrity of the networks.

4. These provisions shall be without prejudice to Article 3 of this Directive.

More guidance on what powers NRAs must have at its disposal can be found in Article 10 Directive 2002/20/EC as amended by Directive 2009/140/EC.

1.(...) 2.(...) 3. The relevant authority shall have the power to require the cessation of the breach referred to in paragraph 2 either immediately or within a reasonable time limit and shall take appropriate and proportionate measures aimed at ensuring compliance.

In this regard, Member States shall empower the relevant authorities to impose:

(a) dissuasive financial penalties where appropriate, which may include periodic penalties having retroactive effect; and
(b) orders to cease or delay provision of a service or bundle of services which, if continued, would result in significant harm to competition, pending compliance with access obligations imposed following a market analysis carried out in accordance with Article 16 of Directive 2002/21/EC (Framework Directive).

The measures and the reasons on which they are based shall be communicated to the undertaking concerned without delay and shall stipulate a reasonable period for the undertaking to comply with the measure.

4. Notwithstanding the provisions of paragraphs 2 and 3, Member States shall empower the relevant authority to impose financial penalties where appropriate on undertakings for failure to provide information in accordance with the obligations imposed under Article 11(1) (a) or (b) of this Directive and Article 9 of Directive 2002/19/EC (Access Directive) within a reasonable period stipulated by the national regulatory authority.”;

5. In cases of serious or repeated breaches of the conditions of the general authorisation or of the rights of use, or specific obligations referred to in Article 6(2), where measures aimed at ensuring
compliance as referred to in paragraph 3 of this Article have failed, national regulatory authorities may prevent an undertaking from continuing to provide electronic communications networks or services or suspend or withdraw rights of use. Sanctions and penalties which are effective, proportionate and dissuasive may be applied to cover the period of any breach, even if the breach has subsequently been rectified."

6. Irrespective of the provisions of paragraphs 2, 3 and 5, where the relevant authority has evidence of a breach of the conditions of the general authorisation rights of use or of the specific obligations referred to in Article 6(2) that represents an immediate and serious threat to public safety, public security or public health or will create serious economic or operational problems for other providers or users of electronic communications networks or services or other users of the radio spectrum, it may take urgent interim measures to remedy the situation in advance of reaching a final decision. The undertaking concerned shall thereafter be given a reasonable opportunity to state its views and propose any remedies. Where appropriate, the relevant authority may confirm the interim measures, which shall be valid for a maximum of 3 months, but which may, in circumstances where enforcement procedures have not been completed, be extended for a further period of up to three months.

This provision is relatively detailed on how Union law should be enforced in Member States. It sums up which various powers NRAs must have in their toolkit, including the power to require the cessation of a breach of Union law, the power to impose dissuasive financial penalties, the power to order to cease or delay provision of a service, the power to prevent an undertaking from continuing to provide services, the power to suspend or withdraw rights of use and the power to take urgent interim measures. These kinds of provisions are of great importance for NRAs, because they provide specific instructions on how EU law could be enforced.

It can be concluded that the European requirements of national enforcement in the field of electronic communications are more detailed than those in the field of energy, but are still rather vague. The requirements of national enforcement in the field of energy focus on the toolkit NRAs must have at their disposal, but do not elaborate on the way these tools must be used.

2.3 Financial Services Directives

In this section the European requirements with regard to national enforcement of financial services directives will be discussed. The financial crisis has made clear that the enforcement of Union law with regard to financial services is of paramount importance for the stability and functioning of the entire European Union. First, the Communication from the Commission with regard to the reinforcement of sanctioning regimes in the financial services sector will be discussed. Second, the European legislation within the field of financial services will be assessed.

2.3.1 Communication on the Reinforcing of the Sanctioning Regimes in the Financial Sector

In December 2010, the Commission published a Communication on reinforcing the sanctioning regimes in the financial services sector.\textsuperscript{46} In its Communication the Commission points out that it is

\textsuperscript{46} Commission, ‘Reinforcing sanctioning regimes in the financial services sector’ (Communication) COM (2010) 716 final
essential for the EU to ensure a ‘consistent and effective application of EU rules’. The Commission has been working on an extensive reform of the financial sector aiming at ‘ensuring the soundness and stability of the financial system’ It has recognised that a proper functioning supervisory system needs to have efficient and sufficiently convergent sanctioning regimes. A similar conclusion was drawn in the de Larosière report, which stated:

‘Supervision cannot be effective with weak, highly variant sanctioning regimes. It is essential that within the EU and elsewhere, all supervisors are able to deploy sanctioning regimes that are sufficiently convergent, strict, resulting in deterrence’.

The recent establishment of the European Supervisory Authorities (ESAs) is expected to contribute to a better coordination between regulatory authorities. This new development will be discussed in the next Chapter. However, what is even more important for proper enforcement of Union law is the fact that all NRAs should have the same sanctioning powers. This is not always the case, which is the conclusion of a review carried out by the Commission in cooperation with three Committees of Supervisors.

The Commission has carried out a review in cooperation with the three Committees of Supervisors (Committee of European Banking Supervisors, Committee of European Insurance and Occupational Pensions Supervisors and the Committee of European Securities Regulators) in order to examine sanctioning regimes across Member States. The review focused on the application of EU directives by Member States with regard to the banking, insurance and securities sector. Following this review, the Commission concluded that the sanctioning regimes in those sectors show considerable divergences across Member States. The Commission identifies in its Communication several divergences and weaknesses across Member States. Firstly, some NRAs do not have certain important types of sanctioning powers for certain violations at their disposal. Secondly, the levels of administrative fines vary widely across Member States and are too low in some Member States. Thirdly, some NRAs cannot address administrative sanctions to both natural and legal persons. Fourthly, NRAs do not take into account the same criteria in the application of sanctions. Fifthly, divergence exists in the nature (administrative or criminal) of sanctions provided for in national legislation. Finally, the level of application of sanctions varies across Member States. Thus, the Commission comes to the conclusion that sanctioning regimes across Member States diverge considerably. These divergences may lead to a situation in which sanctions are not applied in an ‘effective, proportionate and dissuasive’ manner.

2.3.2 Financial Services legislation

In this section the requirements of national enforcement as laid down in the financial services legislation will be assessed. How are the requirements of national enforcement of Union law formulated in the financial services legislation?

In principle, European legislation with regard to financial services recognises the procedural autonomy of Member States. A good example can be found in Article 99 Directive 2009/65:

1. **Member States shall lay down the rules on measures and penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that those rules are enforced.** Without prejudice to the procedures for the withdrawal of authorisation or to the right of Member States to impose criminal penalties, Member States shall, in particular, ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative penalties be imposed against the persons responsible where the provisions adopted in the implementation of this Directive have not been complied with. The measures and penalties provided for shall be effective, proportionate and dissuasive.

This provision makes clear that the European legislator leaves the Member States discretion to lay down rules with regard to the enforcement of Union law. However, the last sentence of paragraph 1 of Article 99 Directive 2009/65 also indicates that measures and penalties provided for must be effective, proportionate and dissuasive. How regulatory authorities can meet these rather vague requirements is not explained in the Directive. Nevertheless, in consideration 69 of Directive (EC) 2009/65 the European legislator emphasises the importance of a uniform toolkit of regulatory authorities:

(69) It is necessary to enhance convergence of powers at the disposal of competent authorities so as to bring about the equal enforcement of this Directive throughout the Member States. A common minimum set of powers, consistent with those conferred upon competent authorities by other Community financial services legislation should guarantee supervisory effectiveness. In addition, Member States should lay down rules on penalties, which may include criminal or administrative penalties, and administrative measures, applicable to infringements of this Directive. Member States should also take the measures necessary to ensure that those penalties are enforced.

Therefore, Article 98 of the same Directive lays down what supervisory and investigative powers regulatory authorities should have to exercise their tasks:

1. The competent authorities shall be given all supervisory and investigatory powers that are necessary for the exercise of their functions. Such powers shall be exercised:
   (a) directly;
   (b) in collaboration with other authorities;
   (c) under the responsibility of the competent authorities, by delegation to entities to which tasks have been delegated; or
   (d) by application to the competent judicial authorities.
2. Under paragraph 1, competent authorities shall have the power, at least, to:
(a) access any document in any form and receive a copy thereof;
(b) require any person to provide information and, if necessary, to summon and question a person
with a view to obtaining information;
(c) carry out on-site inspections;
(d) require existing telephone and existing data traffic records;
(e) require the cessation of any practice that is contrary to the provisions adopted in the
implementation of this Directive;
(f) request the freezing or the sequestration of assets;
(g) request the temporary prohibition of professional activity;
(h) require authorised investment companies, management companies or depositaries to provide
information;
(i) adopt any type of measure to ensure that investment companies, management companies or
depositaries continue to comply with the requirements of this Directive;
(j) require the suspension of the issue, repurchase or redemption of units in the interest of the unit-
holders or of the public;
(k) withdraw the authorisation granted to a UCITS, a management company or a depositary;
(l) refer matters for criminal prosecution; and
(m) allow auditors or experts to carry out verifications or investigations.

The various powers a national regulatory authority must have at its disposal do not, however, give clear guidance on how these powers should be used. Secondary legislation with regard to financial services often states that ‘appropriate sanctions’ or ‘appropriate measures’ should be provided and occasionally gives an example of a sanction which should be included. A good example can be found in Article 8 of Directive 2002/92/EC:

1. Member States shall provide for appropriate sanctions in the event that a person exercising the activity of insurance or reinsurance mediation is not registered in a Member State and is not referred to in Article 1(2).
2. Member States shall provide for appropriate sanctions against insurance or reinsurance undertakings which use the insurance or reinsurance mediation services of persons who are not registered in a Member State and who are not referred to in Article 1(2).
3. Member States shall provide for appropriate sanctions in the event of an insurance or reinsurance intermediary's failure to comply with national provisions adopted pursuant to this Directive.
4. This Directive shall not affect the power of the host Member States to take appropriate measures to prevent or to penalise irregularities committed within their territories which are contrary to legal or regulatory provisions adopted in the interest of the general good. This shall include the possibility of preventing offending insurance or reinsurance intermediaries from initiating any further activities within their territories.
5. (..)

This provision states that ‘appropriate sanctions’ must be provided and includes only one example of an appropriate measure to prevent or penalise violations of regulatory provisions, which is the possibility of preventing of offending insurance or reinsurance intermediaries from initiating any further activities within their territories.
An interesting distinction between the financial services legislation and the energy and electronic communications legislation is the wording of the legislation. Energy and electronic communications directives often mention ‘penalties’ which must be ‘effective, proportionate and dissuasive’, while financial services legislation relatively often mentions ‘appropriate measures’ or ‘appropriate sanctions’. The distinction between ‘administrative sanctions’ and ‘administrative measures’ is not clear-cut. Some administrative actions are considered to be an administrative sanction in one Member State, while the same action is considered to be an administrative measure in another Member State. The fact that there is no clear definition of both actions does not contribute to a uniform application of Union law across Member States. In order to reduce disparities between the enforcement regimes across Member States, a clear-cut distinction between ‘measures’, ‘sanctions’ and ‘penalties’ should be formulated.

It can be concluded that the requirements of national enforcement of EU financial services legislation are rather minimal and vague. In the secondary legislation administrative sanctions and administrative measures are used interchangeably, there is no clear-cut distinction. Moreover, there is no adequate guidance on how these sanctions must be applied. The rather minimal instruction that administrative measures must be ‘appropriate’ does not contribute to a uniform application of EU law across Member States. Financial services legislation does include provisions stating what powers NRAs must have at its disposal. This is helpful, but not yet sufficient. More guidance on national enforcement is desirable.

2.4 Conclusion

In all three sectors (energy, electronic communications and financial services) the European requirements of national enforcement are rather vague and minimal. The requirement that penalties shall be ‘effective, proportionate and dissuasive’ does not provide clear guidance on how Union law should be enforced adequately. Occasionally, examples are given of sanctions that must be included if Union law is not complied with. However, in general, instruction with regard to national enforcement is restricted to a basic list of tools NRAs must have at its disposal. More guidance on the enforcement of Union law is required. More or better cooperation between NRAs across Member States will contribute to a more uniform application of the Union law as well. NRAs should be more aware of how other NRAs apply Union law within their jurisdiction. This follows from consideration 39 Directive 2003/6/EC, which states:

39) Member States should remain alert, in determining the administrative measures and sanctions, to the need to ensure a degree of uniformity of regulation from one Member State to another.

Chapter III- The new European Financial Authorities

3.1 The Financial Services Market

In October 2008, following the financial crisis, the Commission summoned Jacques De Larosière to propose recommendations on how to strengthen the European financial supervisory system. The financial crisis had exposed serious gaps in the cooperation, coordination, consistency and trust between NRAs and the Commission wanted to take steps to reform European financial supervision. 53 De Larosière concluded that effective, convergent sanctioning regimes are of paramount importance for a new supervisory system:

‘Supervision cannot be effective with weak, highly variant sanctioning regimes. It is essential that within the EU and elsewhere, all supervisors are able to deploy sanctioning regimes that are sufficiently convergent, strict, resulting in deterrence’ 54

In response to the De Larosière report the Commission took the steps needed to amend European financial supervision in its Communication of 27 May 2009. 55 The European Council President and the European Parliament reached provisional agreement on these proposals on 2 September 2010. 56 The three new authorities started operations on 1 January 2011. 57

In the new regulations it is opted not to set up a centralised European regulator, but instead to maintain supervision by national regulators at a national level, overseen by the European Supervisory authorities, the ESAs, i.e., the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA) replaced the three existing Committees of Supervisors, each having legal personality. 58 The new financial regulators have several substantive binding powers. An important new binding instrument is the so called ‘knight’s move. The ESA’s have direct powers to issue a binding decision on a financial undertaking, if a national regulator fails to take such action against such financial undertaking and thus infringes direct applicable EU law, thus overstepping the national regulatory authority. This represents an innovative and effective instrument, alongside the opportunity available to the Commission under Article 258 TFEU to initiate infringements procedures, in order to avoid an enforcement deficit at a national level. This is a significant development towards more centralisation.

55 Communication from the Commission, European financial supervision, Brussels, 27 May 2009, COM(2009) 252. For a discussion of these new regulations e.g.: E. Ferran, ‘Understanding the new institutional architecture of EU financial market supervision’, draft 20 November 2010, taken from SSRN.
56 Brussels, 6 September 2010, 13179/10, EF 92, ECOFIN 499, SURE 39, CODEC 772.
57 See footnote 44.
59 Article 17, paragraph 6 Regulation No 1093/2010. This power can only be executed in the case of relevant requirements which are “directly applicable to financial institutions”.

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3.2 Regulation (EU) 513/2011 amending Regulation (EC) 1060/2009 on credit rating agencies

But there is more. In June 2011 Regulation (EU) 513/2011 on credit rating agencies was adopted. Regulation (EU) 513/2011 makes the ESMA exclusively responsible for the registration and supervision of credit rating agencies in the European Union. In addition to the new instrument for individual cases (the ‘knight’s move), in the new European regulation for supervising credit rating agencies a real transfer of almost all supervisory powers is being transferred from the national supervisors to ESMA. The result of this transfer is a real centralisation in the case of the supervision on credit rating agencies. Until 1 July 2011, the supervision of these financial agencies was the responsibility of the national regulators (for example the AFM in the case of the Netherlands), but the new regulation assigns full supervisory responsibility to ESMA. ESMA will be given extensive powers, including the right to impose sanctions. A similar centralisation at a European level is expected to occur in other areas, such as in OTC derivatives, clearing and settlement. In other cases, however, the European financial supervisors have only an advisory role.

This does, however, not mean that NRAs have been made redundant. The NRAs remain responsible for the oversight of the users of credit ratings. Moreover, the ESMA is dependent upon an appropriate cooperation agreement with the NRAs. NRAs should provide information, assist the ESMA, or carry out investigations and on-site inspections on its behalf.

Regulation (EU) 513/2011 has two interesting aspects. First, it sets aside the responsibility of NRAs and gives an exclusive responsibility of registration and supervision of credit rating agencies to the ESMA. The second interesting aspect of the Regulation is the enforcement methodology of the ESMA in this Regulation. Recital 25 of the Regulation states that the ESMA should be empowered to take a range of supervisory measures:

“In the case of an infringement committed by a credit rating agency, ESMA should be empowered to take a range of supervisory measures, including, but not limited to, requiring the credit rating agency to bring the infringement to an end, suspending the use of credit ratings for regulatory purposes, temporarily prohibiting the credit rating agency from issuing credit ratings and, as a last resort, withdrawing the registration when the credit rating agency has seriously or repeatedly infringed Regulation (EC) No 1060/2009. The supervisory measures should be applied by ESMA taking into account the nature and seriousness of the infringement and should respect the principle of

The Responsive Regulation model of Ayres and Braithwaite is easily visible in this recital. At the bottom of the regulatory pyramid of ESMA you can find an apparently compliance-based measure: the ESMA will persuade the credit rating agency to stop the infringement. At the top of the regulatory pyramid you can find as a last resort the withdrawal of the registration of the credit rating agency. However, if you continue reading the Regulation, it becomes clear that the Council has adopted a very punitive version of the responsive regulation method. Recital 25 of Regulation (EU) 513/2011 implies that ESMA should start with requiring a credit rating agency to stop the infringement of the Directive. However, article 36b (1) (a) of the same Regulation explains that this is not done by persuasion, but by imposing periodic penalty payments.

Another feature which makes this enforcement method fairly punitive can be found in the articles concerning penalties. When the Board of Supervisors finds that a credit rating agency has, intentionally or negligently, committed an infringement related to conflicts of interest, organisational or operational requirements, it must impose a fine. The ESMA has no margin of discretion to choose what remedy is best fit. When the Board of Supervisors has found an infringement that is listed in Annex III of the Regulation it must impose a fine in accordance with the limits as laid down in the Regulation. The minimum and maximum amount of the fine are fixed, the ESMA cannot exceed these limits. This shows that the European legislator has chosen to adopt a very ‘deterrence-based’ approach to the responsive regulation model of Ayres and Braithwaite in this Regulation. Even the bottom of the regulatory pyramid of the ESMA, which is supposed to be compliance-based, has a very punitive character.

### 3.3 Conclusion

The establishment of the European Supervisory Authorities (ESAs) should be considered in the light of an increasing Europeanisation of market supervision. The networks of NRAs have been replaced by ESAs in the field of energy, electronic communications and financial services. The ESAs aim to develop administrative cooperation and do not have discretionary power. The European legislator has chosen for a sectoral approach to supervision. Each sector has been assigned its own supervisor.

The institutional landscape of financial supervision has changed dramatically. All European Supervisory Authorities can exert influence on the enforcement practices of NRAs. However, the level of influence strongly depends on the powers of the ESA. The powers of the ESA range from issuing recommendations and opinions to taking binding decisions and overstepping NRAs. The influence of ESAs on the application of Union law by NRAs should not be underestimated. By using their powers adequately, the ESAs contribute to a more consistent application of Union law across Member States. The final step towards total Europeanisation of market supervision has been taken in

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the new Regulation (EU) 513/2011 on credit rating agencies. This Regulation gives the exclusive responsibility of registration and supervision of credit rating agencies to the ESMA. In this field the NRAs have transferred almost all their powers to the ESMA. Cooperation between the ESMA and the various NRAs remains, however, remains needed.

Chapter IV – Analysis

This Chapter aims to analyse the developments as described in the previous Chapters. Various aspects of the Europeanisation of market supervision in the fields of energy, telecommunications and financial services will be assessed. First, the significance of the national procedural autonomy of Member States will be assessed, before turning to the dissuasiveness requirement. Finally, the influence of the European Supervisory Authorities on the enforcement practices of NRAs will be discussed.

4.1 National Procedural Autonomy

Member States enjoy a considerable autonomy in terms of how to enforce and apply Union law. However, this autonomy should be balanced with the need for effective and consistent application of Union law. In this section it will be argued that the national procedural autonomy of Member States should be preserved, but that more emphasis should be placed on the development of a European regulatory toolkit.

The work of NRAs is based on the principle of national procedural autonomy. National procedural autonomy refers to the power of Member States to determine what national procedures are used to enforce Union rights before national courts. This autonomy of the Member States is limited by the case-law of the ECJ in order to reduce the disparities between the different enforcement regimes. In its case-law, the ECJ has ruled that the enforcement of Union law must be effective, equivalent, proportionate and dissuasive. In addition, fundamental rights must be observed when enforcing Union law.

The national procedural autonomy of Member States remains of great importance today. In European secondary legislation, provisions with regard to the enforcement of Union law often start with emphasising the national procedural autonomy of Member States. These provisions generally start with stating that ‘member states shall lay down rules on penalties’. Furthermore, the limits placed on the national procedural autonomy of Member States are minimal and rather vague. The Greek Maize criteria still leave a wide discretion to the Member States to design their regulatory regime.

The question is whether the national procedural autonomy of Member States should be further limited or not. One the one hand, rather vague requirements with regard to the national enforcement of Union law can lead to disparities between regulatory regimes, and, subsequently regulatory competition. On the other, rather flexible requirements with regard to the enforcement of Union law can allow the NRAs to choose an enforcement method which is best fit for their jurisdiction.

The issue of divergent sanctioning regimes across Member States was also identified in the Communication from the Commission on reinforcing sanctioning regimes in the financial services sector. A review of the financial services sanctioning regimes carried out by the Commission shows considerable divergences across Member States. The NRAs do not always have certain important types of sanctioning powers at their disposal, the level of fines vary considerably across Member States and NRAs do not always take the same criteria into consideration in the application of sanctions. Therefore, the Commission also suggested that a `core set of administrative sanctions should be provided in all Member States`.

The procedural autonomy of Member States should be balanced with the need for effective and consistent application of Union law. To reduce the disparities between the regulatory regimes across Member States, further convergence is required. Convergence should be ensured by creating a uniform European regulatory toolkit. This toolkit should reflect all the levels of the regulatory pyramid of Ayres and Braithwaite: from compliance-based to deterrence-based measures. Within the current European legal framework, secondary legislation places too much emphasis on deterrence-based measures. The importance of placing more emphasis on compliance-based measures will be discussed in the next section.

The development of a European regulatory toolkit could contribute to the solution of this problem. The European legislator should place more emphasis on the development of a European regulatory toolkit in order to reduce disparities between the regulatory regimes across Member States. By creating a uniform regulatory toolkit for all NRAs across Member States, divergences will be minimal, while at the same time the national procedural autonomy of Member States will be preserved. The European legislator should prescribe all the enforcement measures of the regulatory pyramid, but leave the particular enforcement strategies up to the NRAs. In this way disparities between regulatory regimes will be reduced, while at the same time NRAs remain free to choose the enforcement strategy which is best fit for their jurisdiction.

The development of this European toolkit should also be based on the analysis of the national enforcement practices. Further studies should make a comparative analysis of these practices for different sectors, to establish a common practice. This practise can serve as an important database for the establishment of European standards. The effectiveness criteria developed by the Court of Justice in its case law, should take these practices into account.

71 Commission Communication Reinforcing Sanctioning Regimes (n 238).
72 Ibid 6-9.
73 Ibid 11.
74 Ibid 3.
4.2 The dissuasiveness requirement

Although the national procedural autonomy of Member States leaves NRAs free to design their own enforcement regime, the Greek Maize criteria seem to point towards a deterrence-based approach to supervision. In this section it will be argued that the European legislator should place more emphasis on a compliance-based approach to supervision in its legislation.

In its case-law, the ECJ has laid down that the national enforcement of Union law must comply with four requirements: effectiveness, equivalence, proportionality and dissuasiveness. These requirements are often reiterated in European secondary legislation. Effective are those rules which are framed in such a way that they do not make it virtually impossible or very difficult to impose an enforcement measure. Rules are equivalent when rules governing a dispute with a Union dimension are not treated less favourable than those governing similar domestic actions. Rules are proportional when they are necessary for the legitimate objective pursued. Finally, rules are dissuasive when they prevent individuals or corporations from infringing the law. This last requirement, dissuasiveness, will be discussed in more detail.

The dissuasiveness criterion requires that Union law is enforced in such a way, that corporations or persons will be deterred from non-compliance in the future. Generally, two types of deterrence can be distinguished: general and specific deterrence. The general deterrence theory is based upon the notion that punishing one corporation will discourage others from non-compliance. Alternatively, the specific deterrence theory is based upon the idea that corporations which have been previously punished for non-compliance will make an effort to comply with the law in the future. However, deterrence-based approaches to supervision are not necessarily the best way to make corporations comply with the law. From social studies follows that a purely deterrence-based approach can be very ineffective. It is widely recognised that a judicious mix of different enforcement styles is the best enforcement strategy.

This raises the question which enforcement strategy the European legislator advocates. It can be argued that the Greek Maize criteria, the dissuasiveness principle in particular, point towards a deterrence-based enforcement strategy. Provisions in European secondary legislation with regard to national enforcement of Union law often mention ‘penalties’ rather than ‘measures’. The common definition of a penalty is a ‘punishment imposed for breaking a law, rule or contract.’ Therefore, the use of the word ‘penalty’ implies that national enforcement measures must have a punitive character. This conclusion is supported by various provisions in European secondary legislation. Two examples will be provided in this place. First, Article 37 (4) (d) Directive 2009/72 states that NRAs must have the power to impose penalties of up to 10% of the annual turnover of the supervisee. This provision clearly shows that the European legislator advocates a deterrence-based approach to supervision. The second example is Regulation (EU) 513/2001 on credit rating agencies. This Regulation requires the ESMA to impose fines when infringements of the Regulation have been found. The ESMA is not allowed to opt for another enforcement strategy; it ‘shall’ impose a fine in accordance with the

regulation. This Regulation shows that the European legislator tends to favour a deterrence-based approach to a compliance-based approach to supervision.

However, it could also be argued that the European legislator is not favouring one enforcement strategy over another. It could be stated that the European legislator simply indicates the top of the regulatory pyramid, by summing up which punitive enforcement measures a NRA must have at its disposal. Within this theory, NRAs are still free to use compliance-based measures, as long as the NRAs have a deterrent, punitive sanction as a last resort. Nevertheless, this theory cannot be upheld when looking at the recently published Regulation (EU) 513/2011 on credit rating agencies. This Regulation clearly illustrates the fact that the European legislator favours a deterrence-based to a compliance-based approach to supervision.

It is widely recognised that tough deterrence-based measures are necessary to make an enforcement regime effective. Without deterrence, compliance-based measures would not be effective. Nevertheless, the right balance should be struck between deterrence and compliance-based measures. Further research is needed to see what the national practices are of the NRAs and what there influence is on the development of the European enforcement practice (bottom up approach). This gap between the European legal framework and the enforcement practices of NRAs must be filled. This can be done, as argued in the previous section, by developing a uniform European regulatory framework, which explicitly qualifies the use of compliance-based enforcement measures as ‘effective, equivalent, proportionate and dissuasive’ measures.

4.3 The influence of European Supervisory Authorities (ESAs)

The establishment of the European Supervisory Authorities (ESAs) will contribute to greater convergence across Member States.

The influence of the establishment of the European Supervisory Authorities (ESAs) on the enforcement practices of NRAs can easily be underestimated. Criticism on the power of the ESAs focuses on two aspects of the ESAs: the governance structure and the toolkit. First, critics state that ESAs only have been assigned technical and advisory powers. Only in exceptional cases, the ESAs have the right to issue binding decisions. Second, the criticism focuses on the governance structure of the ESAs. Critics state that the ESAs do not have a real European dimension because the NRAs can still exert considerable influence on the ESAs at a board level.76

However, the influence of the European Supervisory Authorities on the enforcement practices of NRAs should be seen from a different perspective. Not all the ESAs have been assigned the same powers. Nevertheless, they all have one tool in common: the right to issue opinions and recommendations. The right to issue opinions and recommendations is often underestimated. Although these tools are not legally binding, they can still have a large impact on the enforcement practices of NRAs. If the European Supervisory Authorities will consistently issue high-quality recommendations and opinions, the influence of this tool can be significant. Although these tools are not legally binding, high-quality recommendations and opinions cannot simply be ignored by NRAs. If

76 AT Ottow, European Public Law 2012.
these recommendations are also based on the common practices and experiences of the NRA’s, this might have a significant convergence effect of the enforcement practices.

But also the new instrument of the ESAs regarding the ‘knight’s move will have a convergence effect: the treat of such an intervention will force the NRA to take the appropriate measures. Also the new to be developed practice of ESMA regarding the credit rating agencies will serve as an example for the enforcement practice. It is to be hoped that ESMA will not only focus on sanctions/penalties, but will also take into account the other instruments available regarding enforcement.
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