The European legal system, which the Netherlands as from 1957 belongs to, is a shared legal order within which by loyal cooperation the European Union and the member states must arrive at an effective implementation of European law into the legal systems of the member states. For a long time the enforcement of this European law received little attention. This is now unmistakably changing.

European Union (EU) law is mainly indirectly enforced, apart from exceptions such as by now also already partly decentralised competition law. That is to say it is enforced by the member states. In an increasing number of policy areas the European institutions establish uniform or harmonising rules for such enforcement which are directly effective in the national legal systems or have to be incorporated via member state intervention. For EU law to have an effect the member states must ‘implement’ these European rules. In this research this is understood to mean in a broad sense the legal conversion or incorporation, the execution and actual enforcement of those rules. Within the framework of this research ‘enforcement’ is likewise broadly interpreted and refers to control (supervision of the compliance as well as investigation of offences) and imposing sanctions in reaction to breaches of EU-law.

So the basic principle is that for an effective enforcement of its law the European Union is to a large extent dependent on the enforcement efforts of the member states. They are responsible for the correct and timely application of EU treaties and secondary EU legislation. This dependence is an important reason for the European legislator and European courts to guide the national enforcement.

This research intends to study the European influence on law enforcement in order to analyse how enforcement provisions in EU law (in particular in legal acts from both the first (EC) pillar of the EU and from the third pillar in respect of police and judicial cooperation in criminal matters) are implemented in the Netherlands and which experience is acquired with it. In this research it has in particular been attempted to examine whether certain regularities or patterns can be observed in the way in which the Netherlands implements (via legal measures or actual action by policy makers or enforcement bodies) EU enforcement provisions (originating from legal acts and case law),
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and whether the implementation involves problems and issues which might be a reason for adjusting the current method of implementation. Through this approach the results of the research may contribute to the development of (proactive) policies in respect of the drafting of EU enforcement provisions and their implementation in the Netherlands.

With a view to that objective the research focuses on the following three questions:
1. What is the relationship between EU legislation in the area of law enforcement and Dutch policy and legislation in this respect?
2. How is that legislation implemented and can patterns be recognised in this?
3. Which problems are the Dutch legislator and the Dutch enforcement practice and organisation faced with in this respect?

DEMARCA TION AND METHOD

Also based on received indications and the research proposal, an exploratory investigation into twelve policy areas has been carried out according to the quick scan method. It concerns customs, fish quota policy, European Social Fund (ESF) (protection of the financial interests of the Community), financial supervision, European competition, food safety, combating terrorism, working conditions, air quality, transport of waste disposal, media policy and quality of medical services. By analysing the results of these quick scans for each policy area and by constructing a scale, a score for Europeanization of the law enforcement in all twelve policy areas has been calculated. This score has been combined with a score for the Europeanization of the substantive rules in each policy area. Based on these overall scores a picture of the intensity of the Europeanization of the law enforcement in the various policy fields is given. As a result four categories have been divided, varying from light to high intensity of Europeanization of the law enforcement. With regard to duplication two policy areas in each category have been selected. These policy areas have been further investigated in more in-depth case studies, on the basis of implementation file analysis, case law and literature analysis and in total 37 semi-standardised interviews with key persons at legislative, policy and execution level in the selected policy areas. Increasing from light to high intensity of Europeanization it concerns the following clusters: I) media policy and combating terrorism; II) air quality and financial supervision; III) European Social Fund (ESF) and European competition; and IV) fish quota policy and customs. With this selection the researchers intend to give a representative picture of the Dutch implementation practice within the frameworks set for this research for the very broad range of EU (policy) areas. The research was carried out in the period between 1 December 2006 and 2 November 2007.
STRUCTURE OF THE REPORT

After an introductory first chapter a further substantiation of the set-up and justification of this research follows in chapter 2. Subsequently in chapter 3 a general analysis of the Europeanization of the national enforcement is made. This chapter is a prelude to and a framework for the case studies in the areas mentioned above, which have been laid down in chapters 4 to 11. The set-up of these casestudies is as much as possible identical. There always is a EU part in which relevant provisions of European law are analysed, followed by a national part in which both the implementation from a legal and policy point of view and the actual implementation (actual enforcement) are discussed. Chapter 12 gives a final conclusion in which the findings of the research are presented together. On that basis it is finally investigated in that chapter whether patterns can be observed in the implementation and which problems arise in that respect.

EUROPEAN INFLUENCE IN THE AREA OF LAW ENFORCEMENT

The European influence in the area of law enforcement has two motives and – with it – two sides. On the one hand, for an effective enforcement it is necessary to steer the enforcement in the member states in a vertical direction. That means that the EU legislator, EU courts (EC Court of First Instance and EC Court of Justice (ECJ)) and the European Commission make efforts to ensure the compliance with EU rules by influencing actors in an individual member state such as the Netherlands via enforcement provisions, case law and efforts of monitoring and imposing sanctions. On the other hand, there is also a question of horizontal steering, from the necessity for enforcement cooperation between the member states as well as for facilitating the coordination of enforcement efforts in the various member states. This type of steering occurs in particular in combating transnational infringements of European rules. After all, the infringement of EU rules does by no means always occur on the territory of a single member state.

The European influence in the areas of enforcement is also especially intended to prevent problems of a level playing field, which might rapidly arise without Europe influencing the enforcement cooperation and efforts. After all, (large) differences in the enforcement practice in different member states lead, just as differences in substantive rules, to unequal competition conditions for the parties involved. This problem has been observed in almost all policy areas investigated.

The EU influences the law enforcement by means of the legislative instruments from both the first (EC law) pillar of the EU and from the third pillar in respect of police and judicial cooperation in criminal matters. In addition, there is
influence in the form of case law. Within the framework of the so-called principle of effectiveness the ECJ establishes on the one hand requirements for the instruments used by member states for the enforcement of European law or national law based on it. On the other hand requirements for safeguards are also established in case law. A third way of influencing is via soft law. It is attempted to guide the process by means of best practices, guidelines, benchmarks and standards, by holding peer evaluations and reviews, et cetera.

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

The EU influence relates to various methods of law enforcement, varying from forms which in the Netherlands we would call public law enforcement by means of administrative and criminal law to forms of – measured according to Dutch standards – private law or private enforcement (in the following: private enforcement). As regards the used jargon the Dutch and the European doctrine are not fully in line. In respect of – what we would call in the Netherlands – public law enforcement, EU enforcement provisions concern both the control stage of the administrative supervision of compliance and the criminal investigation, as well as the imposition of sanctions after observed rights. As regards the private enforcement, EU enforcement provisions concern actions which in particular citizens may institute in order to enforce their entitlements protected by the EU. They may do this before the national courts in relation to other citizens or the government. In this way disputes under EU law may also be submitted to a competent European court, via a procedure which makes a uniform application of EU law possible. This private way of influencing the compliance with EU rules has not been exhaustively dealt with in this research.
However it actually plays an important role for instance in the field of European competition law and fish quota policy.

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

The research shows in the first place that traditionally in (policy or discussions about) EU enforcement provisions dogmatic distinctions, as used in Dutch law, between criminal law and administrative law are not taken into account. That applies in particular for the EC. This has partly to do with the fact that EC law often leaves it to the member states whether they want to enforce certain matters by criminal law, civil law or administrative law. For another – possibly much more important – part the cause of this lies in the fact that the EC, as was assumed for a long time, had no power, or at its best a controversial power, in the field of criminal (procedural) law. For that reason one actually comes across provisions which concern the relation with criminal (procedural) law, but without a direct obligation to enforcement under criminal law. An example of this is the financial supervision, where it is provided that within that framework there must be powers of seizure, which usually have a criminal law character in the Netherlands. The case study of the fish quota policy also provides examples of this. However recent developments in case law to be discussed hereinafter shed a different light on this power issue.

In line with the above it attracts in the second place attention that European enforcement provisions, at any rate in the policy areas investigated, mostly emphasize the instrumental side of the law enforcement, directed at the way in which member state authorities and enforcement bodies must carry out enforcement. The safeguard side (including the legal protection) gets much less attention and often only in case law. Therefore, when choosing between various enforcement methods, as well as in their implementation, more than is now the case, structural attention is asked for the associated legal safeguards and legal protection as well as for the implications for transparency, monitoring and democracy in the law enforcement.

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

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

This research shows that in the past fifteen years within the first pillar the influencing by legislation and policy has clearly expanded. Along that way Europe influences in the first place various parts of the national monitoring activities (in the Netherlands mainly consisting of compliance supervision and investigative activities). The precise influence on these parts differs for each policy area, but with the necessary provisos it may be stated that more European guidance in respect of the monitoring can be observed in policy areas in which substantive rules have been more strongly Europeanised. This concerns areas such as European competition and to an increasing degree also ESF, fish quota policy and customs.

In addition to the monitoring activities the influence by legislation and policy in the first pillar also concerns the (administrative and criminal) imposition of sanctions in the member states. The European legislator is however considerably more reticent in influencing what must happen after an infringement has been discovered. Member states usually have a relatively large freedom in choosing for a criminal, or administrative or private law system of imposing sanctions. Some developments seem to point in the direction of a decrease of this European restraint. In various areas – so it appears from the research (cf. customs and fish quota policy) – an increasing influence is expected as regards rules which set requirements for both the administrative and criminal imposition of sanctions. Prescribing criminal sanctions in the first pillar is expected to be the next step. The ECJ ruling on environmental criminal law and the Commission’s reaction to it form an indication of this, at any rate in the field of the environment where the EC Court of Justice coupled the Community legislator’s power to prescribe measures connected with criminal law to the effective functioning of Community law. The Commission is of the opinion that it must also be possible to use this power outside the field of the environment, such as intellectual property, hiring illegal workers and discharge at sea. For the latter field this has by now been confirmed by the ECJ in the ruling on discharges at sea. Whether this also applies for the other areas mentioned cannot yet be said with certainty. However, for the period and policy areas investigated in this research it applies that on these grounds no actual shift to or strengthening of criminal enforcement has been observed.
In the third pillar too the law enforcement is influenced by Europe. For instance, in recent years all kinds of initiatives have been developed which – e.g. as in the field of combating terrorism – intend to harmonise the criminal law of the member states as well as to bring both its substantive and procedural law in line. Here too the earlier mentioned I-strategy is clearly present.

Nevertheless in the third pillar there is more room for the member states to shape their own enforcement practice than in the first pillar. Moreover the European institutions have precisely less room to ensure compliance with framework decisions, in particular because there is no possibility to institute treaty infringement proceedings. In the Pupino ruling the ECJ has however opened the possibility for first-pillar elements to be introduced into the third pillar. In the light of this the ECJ will in all probability use the loyalty to the Union more often in the future in order to impose obligations on the member states in respect of the implementation and application of third-pillar law. The instrumental requirements and safeguards developed in case law within the framework of the first pillar may start to play an important role in that respect.

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

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

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

At the entry into force of the Reform Treaty the separation between the first and the third pillar will disappear for that matter. This implies that the Community method including the instrumental and safeguard requirements from case law might also start to be applicable in respect of the cooperation in criminal cases. This will make possible a further, integrated approach to cross-border cooperation in respect of enforcement.

DUTCH INFLUENCE ON EU ENFORCEMENT PROVISIONS

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

This research shows that the attitude of the Netherlands in respect of the various policy areas investigated varies. That has obviously to do with the policy-field dependence still to be discussed hereinafter. There are nevertheless some remarkable developments which deserve to be pointed out. Sometimes active Dutch attempts are made to influence European rules, for instance in the fields of combating terrorism, fish quota policy and customs. In other fields that precisely does not happen and the Netherlands adopts in particular a passive attitude. In some fields the European agenda is used as a vehicle for the execution of national policy, e.g. in the field of media policy, in other fields one is especially busy defending one’s own freedom (cf. combating terrorism, to a lesser extent also financial supervision, and customs). In this respect the Netherlands seems to be fairly adept in defending its own position in the negotiations, whereby it applies however that the margins are often large enough in order not to get into problems in the implementation stage. Clear differences are perceptible as regards the contribution of the Netherlands in the European legislative process and the role of the enforcement bodies in this respect. That role is sometimes large (cf. financial supervision), sometimes also almost absent (cf. combating terrorism). So in respect of the Dutch influence on the drafting of EU enforcement provisions no clear line can be recognised.

In this connection it must be noted that, given the European influencing of the law enforcement as described before, presently there still seems to be a reasonably large national freedom in organising law enforcement in the
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Netherlands. In many cases that goes hand in hand with the wish to keep it that way. With a view to this it is advisable to be alert and if needed action must be taken. The foundations of the Dutch enforcement system are at present apparently such that the current European rules can be complied with without large adaptations of national law. However this may change now that in view of the ECJ rulings on environmental criminal law and discharges at sea the Community legislator can also prescribe measures connected with criminal law, albeit that the nature and scope in this respect cannot be established. The parties concerned should be aware of this possibility and where needed adopt a (pro)active attitude based among other things on experience with the enforcement practice in the Netherlands. Instead of examining which threat is posed by a concrete European instrument for national policy or law, the question should be in which areas the member states and so also the Netherlands need European guidance when realising a common area of freedom, security and justice and, if this is the case, with which instruments. This applies in particular in order to avoid level playing field problems.

IMPLEMENTATION PRACTICE IN THE NETHERLANDS: PATTERNS AND PROBLEMS

In this research the starting point has been the hypothesis that a high degree of Europeanization of the law enforcement plays a role in the implementation in a legal and actual sense (the execution of enforcement) in a policy area. Europeanization is then understood as a development within the integrated European legal system whereby the national enforcement, including also the general doctrines of the law, is determined sometimes to a greater extent and sometimes to a lesser extent by European law. If the European Union sets strict and extensive requirements it may also be expected that those requirements in one way or another play a role in the actual execution of enforcement. Vice versa, if hardly any requirements have been formulated, this also implies that in the execution hardly any influence of the EU can be observed. In short, the research has been carried out from the initial idea that when the degree of Europeanization of the enforcement increases, the probability will also increase that European requirements start to play a role in the practice of execution and that deviations may also start to occur. It makes little sense to look for reactions to European requirements in respect of the enforcement where those requirements hardly exist.

On the basis of the general investigation and the research in the eight case studies it has been observed that in areas with a low degree of Europeanization of the substantive rules there is hardly any influence on the Dutch enforcement policy and enforcement practice. The enforcement in these cases follows common, Dutch methods of organising the enforcement. Special about this is that also in areas in which the degree of Europeanization of the substantive
rules increases, and also where – still apart from that degree of Europeanization – more and more directive European enforcement provisions occur, the national policy field and its characteristics are mostly the determining factor for explaining why the EU enforcement provisions have precisely been implemented in the way chosen. Within the framework of this research this is indicated as **policy-field dependence**. A strong policy-field dependence of the execution of EU enforcement provisions for instance applies to the cases of media policy, combating terrorism, financial supervision and air quality.

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

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

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

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

As regards the question of possible problems in the implementation practice only some points for improvement – at European and/or national level – have been identified at the level of some of the policy areas investigated. For instance in the implementation stage lack of clarity may arise due to the fact that Brussels sometimes leaves two regulations in existence next to each other, without bringing them properly in line (cf. fish quota policy). It also occurs that the consultations and information exchange about implementation of European rules in transnational forums are arranged in an ad hoc way. That sometimes leads to problems. While those executing the rules organise themselves to an increasing degree in networks, national legislators turn out to have hardly any idea of the implementation choices which are made in Europe. Nevertheless the practice has a strong need for information about the application of the European monitoring and sanction rules in other member states (cf. financial supervision). It also occurs that in the implementation stage there is little or no question of transnational consultations or information exchange (cf. air quality), while such consultations as a rule in many areas are in fact experienced as very positive. The coordination within the Dutch implementation chain does neither always run very smoothly (cf. media policy and ESF). Sometimes there is even (virtually) no coordination (combating terrorism and air quality). The information exchange and the coordination in the enforcement chain also sometimes appear to be a problem (financial supervision and fish quota policy). Another point of attention concerns the enforcement priorities to be set. When the enforcement of European rules prevails, it may put pressure on the enforcement of pure national rules (e.g. customs). Furthermore, in many areas the risk of the problem of a level playing field has been observed.
However in the areas investigated no structural problems in the practice of the implementation of European enforcement provisions appear to exist in the Netherlands.