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A New Type of Functional Spillover?**

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## **From regulation to enforcement in the EU policy cycle: a new type of functional spillover?**

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### **Abstract**

The European Union has acquired enforcement competences in areas where it previously only had regulatory authority. This expansion of competences from one step in the policy cycle to another is a blind spot in the works on functional spillover. While the increasing enforcement powers of the EU are mentioned, it is in the context of more competences, not what type. This paper investigates the nature of this 'policy cycle type of functional spillover', argues that this is a new type of functional spillover and discusses the significance of this finding. The paper offers original data concerning the expansion of EU competences in direct enforcement.

**Key words: spillover, neo-functionalism, EU integration, regulation, enforcement, policy cycle.**

## Introduction

In recent years, the European Union (EU) has acquired enforcement competences in areas where it previously only had regulatory authority. The latest example concerns the European Central Bank (ECB). As of November 2014, it is exclusively competent (Article 4, Regulation 1024/2013) to supervise significant credit institutions, which includes making on-site inspections and imposing fines for non-compliance (Scholten and Ottow, 2014). The expansion of EU enforcement competences is in contrast to the traditional division of competences between the EU and its member states (MS), where regulation was part of the EU's competences and enforcement of EU law was left to MS. According to some, the step towards enforcement followed the need for a closer monitoring of compliance of individuals, companies and national governments with EU regulations, investigating suspicious cases and punishing for non-compliance with EU law as national governments failed, or were simply unwilling, to do so (de Moor-van Vugt and Widdershoven, 2015).

The addition of enforcement next to regulatory competences can be interpreted as a new type of functional spillover. Functional spillover is commonly associated with MS cooperation including new economic sectors or policy areas in order to attain the goals in another, i.e. a broadening, or an increase in competences of the supra-national body in a policy area, i.e. a deepening (Lelieveldt and Princen, 2015; Cini and Perez-Solorzano Borragan, 2013; George and Bache, 2001). The notion that competences at one stage in the policy cycle may necessitate the creation of capacity in another stage in order to ensure adequate policy implementation is novel. Neither classic nor recent works on functional spillover treat this concept as a unique type of functional spillover (Haas, 1958, 1961; Lindberg, 1963; Sandholtz and Stone Sweet, 2010; Niemann, 1998); where enforcement competences are mentioned, discussion is about *more* competences, not the *type*. No distinction is made between giving capacities within one policy cycle stage (regulation) leading to the addition of

competences in another stage (enforcement). We may hence consider the *furthering* of competences along the stages of the policy cycle as different from the more established broadening of policy areas and deepening of regulatory competences.

This paper investigates the nature of this ‘policy cycle type of functional spillover’ and addresses the question of in how far we are witnessing a new type of functional spillover. It debates the novelty of the concept and the question of whether or not the development is indeed a new type of functional spillover.<sup>1</sup> This revisiting of the concept of functional spillover has the academic value that a more precise classification can imply new insights and that criteria regarding what constitutes a spillover effect are sharpened. On a practical note, we believe that especially in times of increasing Euroscepticism in which ‘less Europe’ is a popular political credo the increasing enforcement competences stand in stark contrast to popular sentiments. As such, it represents an interesting case for the spillover concept.

We proceed as follows. First, we dive deeper into the concept of functional spillover and investigate a) the novelty of the concept - is there a lack of attention to a policy cycle type within functional spillover? - and b) the possible criteria to assess when a development can be considered a spillover effect. We continue by presenting the expansion of the EU’s competence in direct enforcement at the hand of the empowering of EU institutions and agencies with direct enforcement powers vis-à-vis private parties (not vis-à-vis MS as has been traditionally the case), regulation of national direct enforcement by EU law and the proliferation of enforcement networks of national supervisors at the EU level. Then, we investigate whether the proliferation of European Enforcement Authorities (EEAs), the most far-reaching of the three developments in terms of allocation of direct enforcement

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<sup>1</sup> We explicitly do not wish to enter the debate of neofunctionalism vs intergouvernementalism here. We merely believe to have come across a potentially new type of functional spillover that we wish to convey to the academic community.

powers at the EU level, is due to functional necessity or specific developments. Are we dealing with a new type of functional spillover? The subsequent section reflects upon the broader conceptual implications of our finding. In conclusion, we indicate further research directions.

### **Spillover: the original meaning**

The concept of spillover is the most prominent aspect of neofunctionalism. It represents the core dynamic of the theory to understand the European integration process. In general, spillover refers to “a situation in which a given action, related to a specific goal, creates a situation in which the original goal can be assured only by taking further actions, which in turn create a further condition and a need for more action, and so forth” (Lindberg, 1963, p. 10). In terms of EU integration, spillover describes the process whereby members of an integration scheme, who initially transferred competences to a supranational body in order to attain a common goal in a certain sector, realize that this goal can only be attained by extending supranational competences, either through expanding collaboration into related sectors or by intensifying commitment in the original sector (Stone Sweet, 2010; Strøby Jensen, 2003; Schmitter, 1969). The challenges that necessitate further integration are often unintended outcomes of past agreements between the members of the integration scheme, creating the setting for a potentially continuous process towards full integration.

Generally, three types of spillover are distinguished: functional, political and cultivated (Lelieveldt and Princen, 2015; Strøby Jensen, 2013; George and Bache, 2001).<sup>23</sup> *Functional* spillover refers to

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<sup>2</sup> There three types follow closely the three mechanisms that Haas (1958) theorized would drive integration processes: positive spillover, the transfer of domestic allegiances and technocratic automaticity.

<sup>3</sup> Some mention also a fourth type, i.e. *induced* spillover. It implies the development of common external positions in a regional bloc influenced by unexpected results of the integration, external pressures and inspired outsiders by the successes of the integration (Niemann, 1998).

the notion that successful cooperation in one sector requires and creates pressures for cooperation, both technically as well as policy-wise, in functionally related sectors or an intensification of cooperation in the original sector (Strøby Jensen, 2013). Further integration is a functional necessity to achieve earlier set goals. *Political* spillover “involves the build-up of political pressures [by national interest groups] in favour of further integration within the states involved” (George and Bache, 2001). Successful integration in a sector shifts the allegiance or strategy of existing lobby groups from national to supranational institutions once decision making takes place there and creates new lobby groups on the supranational level that exert pressure on supranational institutions. Political spillover is also linked to deliberate integration for political or ideological reasons, not functional necessity, and the formation of package deals to this end. *Cultivated* spillover, finally, relates to supranational institutions acting as the agents furthering integration, not only as mediators of national or group interests. In this case, supranational institutions pursue a supranational agenda even where member states are reluctant to integrate further.

The growing EU’s competence in direct enforcement in addition to its regulatory repertoire can be interpreted as *a new type of functional spillover*.<sup>4</sup> Within the functionalist notion of spillover,

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<sup>4</sup> We intentionally consider the increasing direct enforcement competence of the EU as part of the functional spillover concept and not political or cultivated spillover. Two reasons account for this. First, the step from regulation to enforcement competences seems more in line with considerations of deepening and broadening of cooperation rather than the question who acts as the agent of integration. Second, a careful reading of the definition of spillover reveals that the spillover effect does not necessarily relate to who is the (primary) agent of integration beyond the members of an integration scheme, instead focusing solely on functional necessity as the driving force for integration. Hence, so should we. While it might be insightful for the neofunctionalist-intergovernmentalist debate to see who pushes for integration, the spillover effect as such need not be concerned with this. As long as the effect is present, anybody picking it up is sufficient.

emphasis is largely on a broadening across policy areas, i.e. the ‘expansive logic’ that integration in one policy-area spills over into adjacent areas, and also on a deepening of cooperation within policy areas, i.e. gaining more competences in a policy area (Rosamond, 2000). The classic example of broadening of competences is that the integration in economic sectors would promote integration in social policy areas. An illustration of the deepening within one sector would be a customs union built on an agreed exchange rate parity mechanism would increase incentives for wider monetary cooperation, such as a currency union. The notion that competences at one stage in the policy cycle may necessitate the creation of capacity in another in order to ensure adequate policy implementation is neither stated explicitly in the classic works on spillover (Haas 1958, 1961; Lindberg, 1963) nor leading lecture books (Lelieveldt and Princen, 2015; Cini and Perez-Solorzano Borragan, 2013; George and Bache, 2001). This policy cycle type of functional spillover, i.e. the process of expansion of competences from one step in the policy cycle to another (such as between regulation and enforcement), simply does not feature there.

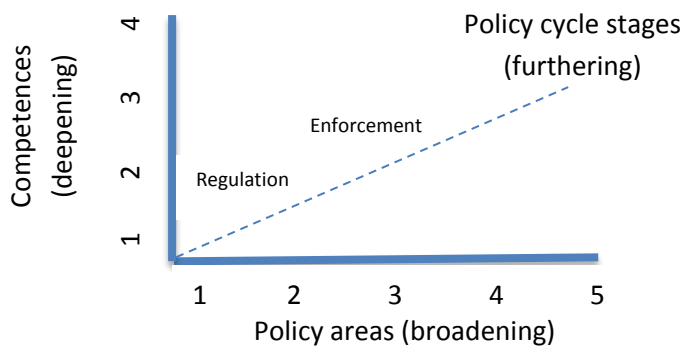
Some recent works on neofunctionalism (Niemann, 1998; Sandholtz and Stone Sweet, 2010) mention enforcement when they write about the EU’s ‘task expansion’ or what supranational governance is and how EU competences have deepened within policy areas and broadened among policy areas. The increasing enforcement powers of the EU are, however, not considered as a new type of functional spillover that warrants its own investigation; additional enforcement powers are mentioned in the same breath as the EU’s rule creation and interpretation capacities (and later also monitoring capacities). It is hence about *more* competences, not what *type*. Moreover, competences are positioned such that they can either deepen or broaden; there is no discussion about treating enforcement as an own type of functional spillover next to a deepening or broadening. One could, of

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These points do not take away that the increasing enforcement competences may, in fact, be classified as part of functional, political and cultivated spillover at the same time; these categories are not mutually exclusive. As one refers to the driver and the others to the agents acting upon them, they can coincide.

course, argue that a move from regulation to enforcement powers is part of a deepening. This, however, would ignore the difference that exists between a deepening of competences, as in more capacities within a single policy cycle stage, and the addition of competences in another policy cycle stage, i.e. adding enforcement powers to the norm setting competences. This important distinction between a deepening and a *furthering*, we would argue, can and perhaps should be made to describe the nuance better (see '3D' Figure 1). In the end, the positioning of competences and the focus on the amount instead of the type seems to indicate that we are stumbling upon a new type of functional spillover, that of a policy cycle type.

**Figure 1. Functional spillover: broadening, deepening and furthering**



With the concept's novelty within the functional spillover literature established, we can turn to the next question: whether the development of growing EU direct enforcement powers can be considered a (functional) spillover effect. Appropriate criteria for assessment have been introduced by Moravcsik (2005). He suggest investigating to what extent 1) state preferences for integration reflect exogenous pressures or unintended and unwanted consequences of past bargains; 2) negotiated deals among states are a function of relative bargaining power of MS or a function of the actions of supranational entrepreneurs<sup>5</sup>; and 3) states delegate with the intention of creating

<sup>5</sup> The scale mentioned by Strøby Jensen (2000) could further refine this point. He distinguishes between who decides in five stages: all policy decisions by national processes – only the beginning of community decision processes – policy decisions on both, but national activity predominates – most decisions must be taken



credible commitments or subsequent constraints are an unintended consequence of delegation? Of these, the first point seems tailor-made for functional spillover. The second seems less relevant when assessing the presence of functional spillover. Who (MS, lobby groups or EU) drives the process or picks up on the need for further integration is beside the point of whether there is a necessity to further integrate to achieve earlier set policy goals. The point is clearly more attuned towards political and/or cultivated spillover and the broader neofunctionalist vs intergouvernementalist debate; we hence leave it out of our assessment.<sup>6</sup> The final point, in our opinion, is already captured in the first and seems superfluous by definition. As such, we propose to investigate the following:

- Does the shift from regulation to enforcement in the EU policy cycle occur due to exogenous pressures or pressures originating from previous integration bargains, i.e. from specific events like crisis or from functional necessity?

In this sense, when we find that the expansion of the EU's competence in direct enforcement of EU law follows the already given regulatory (norm setting) competence to the EU for the reason that the achievement of the set policy goals necessitates the expansion, we consider this as proof to the policy cycle type of functional spillover. If, however, it is not functional necessity but specific developments that launched the expansion of enforcement competence, then it is not.

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jointly, but substantial decisions are still taken autonomously at national level – all policy decisions taken by joint community processes.

<sup>6</sup> For assessing broader neofunctionalist claims (vis-à-vis those of intergovernmentalists) regarding the EU integration process it is of interest to see the different actors' contributions to increasing enforcement powers in order to understand the phenomenon better. In that case, one should ask: what is the role of supranational actors vis-à-vis member states in driving and deciding on the competence changes? Does it reflect a clear MS position or community interest?

The investigation occurs in two steps. First, we discuss three developments that demonstrate the expansion of the EU's competence in direct enforcement. Second, we investigate whether the proliferation of EEAs, the most far-reaching of the three developments in terms of allocation of direct enforcement powers at the EU level, is due to functional necessity or exogenous pressures. We look at the year of establishment and presence of enforcement powers upon creation, the extension of EEA powers and the reasons for it given by the legislator, and the exogenous pressures mentioned by the legislator. We then debate for each of the EEAs, seven in total, in how far we can consider the increasing enforcement competences as examples of the policy cycle type of functional spillover. Afterwards, we reflect upon the significance of and implications following from our finding.

### **The expansion of the EU's enforcement competence**

Traditionally, the division of competences between the EU and national levels has been “designed to follow the logic of a system of executive federalism” (Türk, 2009, p. 218). In such a system, general and abstract rules would be adopted at the EU level, while the implementation and application of those rules would be the responsibility of the Member States. Once a rule is passed at the EU level, the Member States have to transpose it into the national level, including passing relevant national legislation where relevant, and to enforce it. *Direct enforcement* of EU rules implies monitoring compliance with law by companies and individuals (e.g. checking relevant reports from the industry), investigating suspicious cases (e.g. inspecting business premises), and punishing for non-compliance with EU law (e.g. imposing fines) (Rowe, 2009; Vervaele, 1999a; Duk, 1999). This is in contrast to indirect enforcement, where the Commission monitors national authorities on how they enforce EU law vis-à-vis private bodies. This traditional division between EU norm setting and national direct enforcement has changed drastically.

Three developments show that the EU's competence in direct enforcement of EU law has expanded.

First, the most far-reaching change in terms of the aggregation of power at the EU level is the acquisition of direct enforcement powers by EEAs. Since 1999, the number of EEAs has grown from one - the Commission in the competition law (since 1957/1962) - to seven, including the European Anti-Fraud Office (OLAF), European Medicines Agency (EMA); European Aviation Safety Agency (EASA); European Fisheries Control Agency (EFCA), European Securities and Markets Authority (ESMA) and ECB.<sup>7</sup> The number of EEAs could increase to include a European Public Prosecutor's Office (EPPO, see Article 86 TFEU), the European Banking Authority (the 2014 Court of Auditors' recommendations 2014), the European Railway Agency (the 2013 proposal to amend its founding act), and the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), which will be transformed into a European Border and Coast Guard (Commission's Proposal of December 2015 adopted in June 2016). We look at this development more closely in the subsequent section.

Second, since approximately 1980s, the EU legislator has started to regulate various issues of national direct enforcement - from institutional design of national supervisors to sanctions that national supervisors should have when enforcing EU law (de Moor-van Vugt and Widdershoven, 2015). For instance, Regulation 2729/2000 prescribes the powers for the national authorities in the wine sector. They have to have, among other things, access to vineyards, winemaking and storage installations; they may take samples of wine products and make copies of certain documents. "The most extensive Community influence is to be found in the olive oil and tobacco sectors" (Jans et al., 2007). Relevant EU legislation has required setting up specialized enforcement agencies, whose duties and organization are determined by the EU who also partly finances their operation. Overall,

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<sup>7</sup> This is a result of the scan of all EU policy areas and actors, which has been conducted for an ongoing project of Reinforce 'verticalisation of enforcement in the EU' (<http://reinforce.rebo.uu.nl/en/bouwsteenprojecten/verticalisering-en-toezichthouders/>).

many regulations and some directives regulate national enforcement activities (Jans et al., 2007). Further (quantitative) research is essential to establish the exact scope of the EU's 'regulatory enforcement'. The qualitative expansion is clearly seen in the development of prescribing the type of sanctions for national enforcement authorities by the EU legislator, which has gone from reparatory to administrative punitive and since recently also to criminal sanctions (Vervaele, 2007; Jans et al. 2007).

Third, there is a considerable growth of enforcement networks via which the EU can influence national enforcement and cooperation in cross-border cases. Taking the term network narrowly, i.e., considering the institutional form of the entity, approximately 20 enforcement networks exist; five networks were created in 1990s and 15 networks between 2000-2014.<sup>8</sup> If we understand the term broadly, i.e., from the functional approach, several EU agencies could be added to the list: the earlier mentioned EASA, ESMA, EFCA, which have direct enforcement powers, and the Agency for the Cooperation of Energy Regulators, Body of European Regulators for Electronic Communications, European Banking Authority, European Chemicals Agency, European Insurance and Occupational Pensions Authority, European Maritime Safety Agency, and European Railway Agency, all of which have been created since 2002 (Kaeding and Versluis, 2014).

While networks do not have direct enforcement powers on their own, their importance can be threefold. First, they can enhance cooperation between national authorities and promote enforcement of EU law in cross-border cases. Second, the Commission, being part of these networks, can influence national enforcement through coordination, informal pressure and data, which they receive from the member states and on their own initiative. Third, informal networks could be seen as an initial step towards more centralized and powerful structures like EU agencies (the case of ESMA).

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<sup>8</sup> This data is taken from an ongoing project of Prof. M. Luchtman.

## **Proliferation of EEAs – functional spillover?**

Having established the novelty of the concept and delineated the expansion of the EU's competence in direct enforcement, we now turn to determining whether the trend constitutes a new type of functional spillover, what we called the policy cycle type. We investigate the most far-reaching of the earlier discussed developments - the proliferation of EEAs - by addressing the question whether the expansion of the EU's direct enforcement competence occurred due to functional necessity (pressures originating from previous integration bargains) or specific developments (exogenous pressures).<sup>9</sup>

To determine the origin of the initial impetus, we check the year of creation of EEAs and whether enforcement powers were given to EEAs from the outset or not (column 2). Furthermore, we investigate when and how enforcement powers of EEAs were expanded (column 3) and the reasons given by the legislator for this expansion (column 4). Finally, we also investigate the exogenous pressures mentioned by the legislator for this expansion (column 5). In this sense, if the legislator references 'past regulatory imperfections', and not specific events, as the reason for increasing enforcement competences, it indicates a 'spillover' from the regulation to enforcement stage.<sup>10</sup> Table 1 shows an overview of the studied legislation and literature.

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<sup>9</sup> We have considered the initial impetus behind the establishment of enforcement power at the EU level as the decisive criterion in section 2. If the functional necessity stemmed from the existing regulatory integration and is not launched due to exogenous pressures like crisis, we see this as an indication of functional spillover.

<sup>10</sup> An EEA (or its predecessor) without original enforcement powers indicates a policy cycle type of functional spillover if it receives such powers later in order to overcome 'past regulatory imperfections'. In cases where an EEA (or its predecessor) did exist with weak enforcement powers but expanded them after the crisis, we consider the crisis (exogenous pressures) as an accelerating factor and the case as the policy type of functional spillover because the crisis did not launch centralization enforcement. In the cases where enforcement competences did not exist before and appeared after a crisis, no functional spillover takes place.

**Table 1. The spillover test; an overview of relevant factors**

	<b>Initial establishment of the EEA (its predecessor<sup>11</sup>) / direct enforcement competence</b>	<b>Establishing /expanding direct enforcement competence</b>	<b>Reasons mentioned by the legislation</b>	<b>Exogenous pressures mentioned by the legislator</b>
Commission (competition law)	1957/no 1962/yes	1957 Treaty of Rome; Regulation 17/1962	In order to secure uniform application of Articles 85 and 86 in the common market (recital 7 of the Regulation)	
OLAF (replacing Task Force 'Anti-Fraud Coordination Unit' (UCLAF))	1999 (1988)/yes (no)	1967 – the first calls for measures to combat fraud ((Commission Recommendation 67/651/EEC, available in the original six languages); 1988 – Establishment of UNCLAF, an anti-fraud unit within the Commission; 1995 - internal reorganization expanding the size of the Unit (a number of legislative decisions expanding its powers) (Vervaele, 1999b; Stefanou et al., 2011), 1073/1999 and 883/2013 Regulations establishing and expanding enforcement powers of OLAF accordingly.	Fight against fraud and any other illegal activities detrimental to the Communities stemming from the budgetary power of the EU; to <u>reinforce</u> the means available for combating fraud, OLAF (Recital 1 of 1073/1999 Regulation)	
EASA (building upon the pan-European Joint Aviation Authorities (JAA) (Coman-Kund, 2015, Schout, 2011)	2002 (1970)/yes (no)	3922/1991 Regulation harmonising technical safety requirements and administrative procedures and 2407/1992 Regulation harmonising licensing of air carriers; 1592/2002 and 216/2008 Regulations establishing and expanding enforcement powers of EASA	The objective is the establishment and uniform application of common rules in the field of civil aviation safety and environmental Protection (recital 18 of the 2002 Regulation)	
EMA (replacing European Agency for the Evaluation of Medicinal	2004 (1993)/yes (no)	Council Directive 87/22 harmonising certain national measures, 2309/93 Regulation establishing EMA's predecessor, 726/2004	"Whereas the <u>experience acquired</u> as a result of Directive 87/22/EEC has shown that it is necessary to establish a centralized Community	

<sup>11</sup> We consider the existence of intergovernmental cooperation regulating specific sector (institutionalized or not) as a predecessor.

	Initial establishment of the EEA (its predecessor <sup>11</sup> ) / direct enforcement competence	Establishing /expanding direct enforcement competence	Reasons mentioned by the legislation	Exogenous pressures mentioned by the legislator
Products)		establishing EMA, 658/2007 Commission Regulation regulating imposition of financial penalties	authorization procedure” (Recital 2 of 1993 Regulation); EMA’s predecessor was given advisory tasks in relation to supervision. “In the light of the Commission's report on the <u>experience gained</u> , it has proved <u>necessary to improve</u> the operation of the authorisation procedures for the placing of medicinal products on the market in the Community and to amend certain administrative aspects of the European Agency for the Evaluation of Medicinal Products” (Recital 2 of the 2004 Regulation).	
EFCA (known as Community Fisheries Control Agency before 2012)	2005/no	2847/93 Regulation establishing a control system applicable to the common fisheries policy, 768/2005 Regulation establishing the Agency, 1224/2009 Regulation amending the 2005 Regulation	“The <u>experience gained</u> in the application of Council Regulation (EEC) No 2847/93 <...> has shown that the current control system no longer suffices to ensure compliance with the rules of the common fisheries policy. <...> Some parts of the control system are poorly implemented by Member States which results in insufficient and divergent measures in response to infringements of the rules of the common fisheries policy thereby undermining the creation of a level playing field for fishermen across the Community” (recitals 3 and 4 of the 2009 Regulation).	
ESMA (replacing the Committee of European Securities Regulators (CESR))	2010 (2001)/yes (no)	2001/527/EC Commission Decision establishing CESR, 1060/2009 Regulation on credit rating agencies, 1095/2010 Regulation establishing ESMA, 648/2012 Regulation on OTC derivatives, central counterparties and trade repositories	ESMA “should act with a view to improving the functioning of the internal market, in particular by ensuring a high, effective and consistent level of regulation and supervision taking account of the varying interests of all Member States and the different nature of financial market participants. Its tasks should also include promoting supervisory convergence” (Recital 11 of the 2010 Regulation).	2007-2008 financial crisis

	<b>Initial establishment of the EEA (its predecessor<sup>11</sup>) / direct enforcement competence</b>	<b>Establishing /expanding direct enforcement competence</b>	<b>Reasons mentioned by the legislation</b>	<b>Exogenous pressures mentioned by the legislator</b>
ECB (replacing the European Monetary Institute)	1998 (1994)/no	2009 Lisbon Treaty (Article 127 (6)), 1024/2013 Regulation conferring supervisory tasks on the ECB	To intensify the integration of banking supervision in order to bolster the Union, restore financial stability and lay the basis for economic recovery (Recital 2 of the Regulation).	

Analyzing the data gathered in Table 1, we can roughly distinguish three categories of EEAs related to the spillover question.

First, OLAF, EMA and EFCA clearly indicate the (functional) spillover effect. Regulatory integration in these sectors, including harmonization of national rules, preceded the establishment of these EEAs (or their predecessors). The EU legislator has explicitly mentioned ‘past imperfections’ leading to reforms (see Table 1, words underlined), which necessitated the ‘spillover’ to the enforcement stage. The legislator did not refer to any exogenous pressures while reasoning the expansion of enforcement powers.

Second, the Commission and EASA are the group where the policy cycle type of functional spillover did not happen due to past imperfections but in order to avoid possible imperfections in the future. Created by the Treaty of Rome (1957), the Commission received enforcement powers in the area of competition law almost immediately (1962). The transfer was not based on ‘past imperfections’ (or specific events for that matter), rather on the anticipation of challenges to ensuring uniform application of EU law without a strong role of the Commission in enforcement (see Table 1). Similarly, the creation of EASA with enforcement powers in 2002 has the ‘forward looking’ logic behind it. While the Pan European regulatory integration in the aviation sector was ongoing since the 1970s and the regulation of certain aspects existed in the form of harmonizing legislation, EASA



with its enforcement competences comes from the existing regulatory integration at the time and the desire to establish and apply relevant rules in a uniform manner.

The third group is the most intriguing one since the 2008 financial crisis certainly played a crucial role in shaping the EU's current financial architecture. At the same time, the crisis did not start centralization of financial supervision. As the 2009 De Larosiere report stated, 'Supervisory reform has so far relied on an evolutionary approach <...>. While certain progress in convergence has been achieved, this progress has not allowed the EU to identify and/or deal with the causes of the current financial crisis.' To promote internal market, the financial reforms started in 2000 with a report by the Committee of Wise Men (Lamfalussy Report). The report identified a 'common belief' that the European Union's regulatory framework was 'too slow, too rigid, complex and ill-adapted to the pace of global financial market change' and that at that time existing rules and regulations were 'implemented differently', which resulted in inconsistencies in the treatment of the same type of business (Final Report, 2001). Following the report's recommendation, three committees (networks of national supervisors) were created to assist the implementation of EU rules at home. However, in contrast to the Lamfalussy Report's expectation that the outcome of the work of these committees would have authority, measures agreed in these committees were not applied consistently by national supervisors. Some national supervisors issued guidance diverging from guidance agreed at the EU level. The problem was two-fold. On the one hand, standards and guidelines adopted by networks of national supervisors were non-binding, which caused an inconsistent interpretation and application of the agreed standards at the national level. On the other hand, it was the absence of any binding power of the committee to tell a national supervisor that its interpretation of EU law was wrong. In addition, differences in administrative and criminal sanctions at the national level remained significant (Commission, 2010). Whether we would have as strong ECB and ESMA as we have today without the crisis is certainly a valid question. However, the policy cycle type of functional spillover can be witnessed in the fact that the financial reforms started before the crisis

and led to the creation of networks dealing with, among other things, questions of improving uniform enforcement. Therefore, the spillover to the enforcement stage was on its way, even if it would not have led to the powerful ECB and ESMA of today without the boost from the crisis.

Overall, while at least in five out of seven cases functional needs are at the core of why enforcement competences of the EU have grown, no EEA was found to trace its roots solely to exogenous pressures. This leads us to conclude that we are indeed witnessing a new type of functional spillover.

As an additional remark, some literature exists indicating functional needs appearing from the ongoing regulatory integration as the reason for the expansion of the EU's competence in direct enforcement regarding the other two developments, regulatory enforcement and proliferation of enforcement networks (de Moor-van Vugt and Widdershoven, 2015).

Implementation and enforcing EU law and policies has not gone without problems (Commission's regular reports on application of EU law, e.g., Report from the Commission 31st Annual Report on monitoring the application of EU law (2013) COM(2014) 612 final). A limited number of comprehensive studies show that monitoring of specific directives was not intensive. Also, compliance by companies was not characterized very positively (Versluis, 2007; Versluis, 2003). Non-compliance by MS can have different causes ranging from complexity of EU law to the lack of resources and political willingness (the 'salience issue' (Versluis, 2007)), especially if other countries (also) fail to comply or if compliance may affect economic competitiveness of a MS, which pushed for regulatory enforcement (Moor-van Vugt and Widdershoven, 2015). The infringement procedure tool of the Commission has its limits, especially when MSs repeatedly violate EU law, even after successful actions brought by the Commission before the CJEU (Wenneras, 2006). In addition, differences in enforcement laws as well as in powers, capacities, regimes and strategies among national supervisory authorities exist and may cause disparities and ineffectiveness of EU law and policies (Scholten and Ottow, 2014).

Proliferation of EU networks and agencies has been explained by functional needs, political motives and social logics (Groenleer et al., 2010; Eberlein and Newman, 2008; Martens, 2006; Kelemen, 2002). Enhancing coordination, cooperation, exchange of best practices and sometimes centralizing certain enforcement tasks via EU entities have been thought to address non-implementation problems. Such structures represent a more acceptable solution for the MS to transfer some powers to the EU level and yet keep control over the powers. This is in contrast to letting the Commission gain more direct powers. Moreover, whereas enforcement jurisdiction of national authorities is bound by national borders, which could hinder cross-border investigations, the territorial competences of EU authorities can include joint territories of all the participating MS. Depending on their specific institutional designs, these advantages gain even greater weight when time consuming schemes for mutual legal (administrative or criminal law) assistance are removed from their legal design (Luchtman and Vervaele, 2014).

## **Discussion**

The identified policy cycle type of functional spillover is significant in several respects: for the notion of functional spillover, for neofunctionalism as a theory of integration, and for the debate between neofunctionalism and intergovernmentalism.

First, it brings awareness to the difference between the addition of competences in other policy cycle steps and a deepening of competences within a single policy cycle step. So far, the concept of functional spillover has been discussed only from the perspectives of broadening and deepening of competences, which do not necessarily include the 'furthering' type of expansion of competence (from regulation to enforcement). This nuance deserves its own attention as it gives new insights on the integration process. It also could, combined with the identified EU's growing competence in direct enforcement (via three developments), influence the debate between neofunctionalists and

intergovernmentalists, which so far has primarily focused on the 'rule-making' EU. Does the policy cycle type of functional spillover, for example, show that the integration process actually continues in times where we otherwise consider it at a halt?

Second, the policy cycle logic provides a more concrete possibility for predicting next integration efforts. One of the major points of theoretical critique of neofunctionalist theory is the argument that "neofunctionalism sought to construct a comprehensive synthesis without a reliable set of theoretical elements, <...> to predict without a reliable explanation" (Moravscik 2005). In other words, while spillover theory might predict ever more integration in the case of functional necessity (when), it cannot really state what, where and how. The policy cycle type of functional spillover, however, can to a certain extent. The three developments and the analysis of EEAs discussed earlier show that enforcement power follows the transfer of regulatory power to the EU level in cases where the set EU policy goals are expected not to be attained or have not been achieved due to the lack of uniform application of EU law (functional necessity).<sup>12</sup> It is true that the EU's competence in direct enforcement varies from having own strong direct powers (EEAs) to regulating national direct enforcement via norms and/or networks. Nevertheless, it is there and has been expanding following a certain logic – regulation at the EU level spurs the expansion of the EU's competence in direct enforcement to avoid potential challenges or to address proven imperfections in achieving EU policy goals. This shows two things. First, that the sequential character of the policy cycle provides the means to answer the what and where question: the next step in the policy cycle and the same policy area; a broadening and deepening seem to miss this clear sequential logic. Second, that the how

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<sup>12</sup> Despite the idea of spillover leading to ever more integration, we do not consider it an automated process; a lack of functional necessity, after all, implies no (further) spillover, neither along the policy cycle or otherwise. This would be the case, for example, if enforcement by MS would be completely adequate so that no necessity for EU enforcement competences would arise. This point seems often forgotten in writings that stress the ongoing nature of integration.

question still remains somewhat illusive: what shape will the furthering along the policy cycle get (via EEAs or otherwise)? It would be interesting to investigate in this light whether exogenous pressures could explain the preference of one type of another. In all, the ability to predict next integration efforts more precisely may be considered an important addition for neofunctionalism as a theory of integration.

On a more critical note, this paper has merely shown that the policy cycle type of functional spillover exists. It has yet to be investigated to what extent it also exists elsewhere (besides the establishment of EEAs we discussed). It is also recommended to research cases where the step towards enforcement did not happen even though functional necessity would require it. Nevertheless, even in the case of an absolute absence in other cases, we would argue that this only lessens the notion's importance but not its existence (the purpose of this paper). This also justifies our focus on EEAs in this paper - it is here where policy cycle type of functional spillover is most visible -, leaving the other two trends (and other potential cases) alone for now.

Then again, future quantitative research on the scope of EU's regulatory enforcement could also strengthen our argument. We have provided the original data on all EEAs and enforcement networks and agencies existing in the EU as of this writing. These entities exist in nearly all policy fields of the EU integration, from competition to transport and medicines. This institutionalization process seems to have followed (challenging) harmonization attempts to create a uniform application of EU law at the national level. For instance, EMA's predecessor was created because "the experience acquired as a result of Directive 87/22/EEC [harmonizing certain national measures] has shown that it is necessary to establish a centralized Community authorization procedure" (see Table 1). What is therefore important is a further analysis of the extent to which the EU regulates issues of national enforcement in all (exclusive/shared) competences via its norm setting. Such data could strengthen our argument of the existence of the policy cycle type of functional spillover and shed light on the scope of regulatory enforcement. In addition, future case studies in those areas

where harmonization attempts succeed without subsequent institutionalization (creating a network or EEA) could contribute to policy makers and academics regarding the development of factors on when what type of EU involvement in direct enforcement could and should be necessary.

## **Conclusion**

The expansion of competences from one step in the policy cycle to another (regulation --> enforcement), what we have dubbed the policy cycle type of functional spillover, is something that seems to have gone unnoticed in the works on functional spillover. While the increasing enforcement powers of the EU are occasionally mentioned, it is mostly in relation to a deepening of competences within one policy area, not in terms of a furthering of competences along the policy cycle. No distinction is made between the type of competences, i.e. between adding capacities within one policy cycle stage (regulation) and increasing competences in another stage (enforcement). In other words, it is not treated as a unique type of functional spillover that warrants its own investigation.

We conducted a literature study on functional spillover looking for references to enforcement and policy cycle spillover as part of the functional spillover concept (whether it is new) and seeking to identify criteria with which to assess when a development can be considered a spillover effect or not. Noting the lack of attention to policy cycle spillover in the functional spillover literature, we concluded that the concept as such is new. Regarding the criteria, we settled around the question: does the expansion of competences along the policy-cycle occur thanks to the pressures from previous integration (functional necessity) or was it due to exogenous pressures (specific developments)?

After detailing the expansion of the EU's competence in direct enforcement along three developments, we investigated whether the proliferation of EEAs, the most far-reaching of the three

developments in terms of allocation of direct enforcement powers at the EU level, is due to functional necessity or specific developments. Our analysis showed three types of cases. In at least five out of seven cases the policy cycle type of functional spillover could be noticed. We found that no EEA was created because of exogenous pressures only. This led us to conclude that we are indeed dealing with a new type of functional spillover.

Identifying the new type of functional spillover has a number of broader theoretical implications. First, it brings the awareness that the policy cycle type of functional spillover deserves its own attention within the spillover literature. Second, the policy cycle logic provides a more concrete possibility for predicting next integration efforts. Spillover theory might predict ever more integration, but cannot really state what, where and how; the cycle aspect at least would enable the 'what' and 'where' question to be more precise: if implementation of regulation is failing, enforcement at the community level is likely to follow in the same policy area. The questions that warrants further investigation here is which type of enforcement (EEA, network or regulatory enforcement) would follow upon what conditions. Finally, we believe that our comprehensive discussion (via three developments) on the so far under studied EU's growing competence in direct enforcement gives new insights on the EU integration process, which invite a revisiting of intergovernmentalists-neofunctionalists debate on how EU integration has evolved and where it is heading.

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