MASTER THESIS

Addressing the Compliance Deficit with EU Environmental Law:

What Role for the European Environmental Agency?

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7EAP	7th Environmental Action Programme
CJEU	Court of Justice of the European Union
EASA	European Aviation Safety Agency
EEA	European Environmental Agency
EIONET	European Environmental Information and Observation Network
EMSA	European Maritime Safety Agency
ESMA	European Securities and Markets Authority
EP	European Parliament
ETS	Emissions Trading System
MS	Member States of the European Union

Abstract

This thesis aims at establishing the reasons for the compliance deficit in the area of EU environmental law and at analysing whether providing the European Environmental Agency with enforcement powers could address this deficit. Therefore, it focuses on the question as to what extent could the European Environmental Agency play a role in enforcing the compliance with EU environmental law? In order to answer this question, a doctrinal legal research of legal documents and scholarly contributions has been conducted.

This thesis establishes that the compliance deficit is caused by deficiencies which exist in the enforcement measures applied by the Member States, the Commission, and the general public. Currently, the EEA mainly collects, evaluates, and provides information. It could be beneficial to provide the EEA with enforcement powers, allowing it to monitor and sanction infringements of environmental law. Thereby, several of the existing deficiencies could be resolved. However, the transfer of such powers is only possible if certain legal requirements are fulfilled. While these could indeed be fulfilled, they largely depend on the MS' willingness to grant such powers. Furthermore, extensive changes to the EEA's current functioning would be required and the EEA's current powers could be negatively affected. Therefore, the thesis concludes, the EEA could indeed play a role in the enforcement of compliance with EU environmental law, if it is provided with enforcement powers, and that this could be beneficial to solve the compliance deficit. However, before providing the agency with such powers, it should still be considered whether there are even more suitable solutions to address the compliance deficit.

Introduction

Since the EU was conferred the competence to legislate on environmental matters, it has been a very active producer of environmental acts.[1] This is demonstrated by the fact that around eighty per cent of Member States' (MS) environmental legislation was adopted in order to transpose EU obligations.[2] In December 2019, the EU has decided to raise its ambitions even more. Commission President Von Der Leyen proposed a *European Green Deal*, which calls for the revision of existing and the creation of many more instruments, with the aim of making the EU climate neutral by 2050.[3]

However, no matter how many EU environmental acts are adopted, their aims cannot be achieved, if the MS themselves do not comply with the provisions of these acts or if the compliance of private parties is not sufficiently controlled.[4]

In order to comply with their obligations under the EU environmental policy, MS have to implement EU environmental legislation.[5] The implementation consists of four phases: First, where the act takes the form of a Directive, the states have to transpose this Directive into national law through legally binding rules and within a time limit.[6] This is not necessary for Regulations, which are directly applicable in the MS.[7] Second, the act needs to be operationalised,[8] meaning that the state has to designate the national authority, responsible for the further implementation and application of the rules, and to determine the procedures and enforcement measures.[9] Third, the national authorities actually need to apply the rules in specific cases. Fourth, they need to enforce compliance with the legislation,[10] meaning that they have to monitor the observance of the rules, for example through inspections, and, if necessary, impose sanctions for non-

[1] Hedemann-Robinson 2020 (p. 196), p. 199. Bondarouk & Mastenbroek 2018, p. 15; Hedemann-Robinson 2017a (p. 7), p. 8.
[2] Hedemann-Robinson 2017a 8p. 7), p. 8.
[3] State of The Union 2020 [Press Release], The European Green Deal [Communication].
[4] Bondarouk & Mastenbroek 2018, p. 15; ; Hedemann-Robinson 2017a (p. 13), p. 27.
[5] Jans & Vedder 2012 (p. 139), p. 139;
[6] Art. 288 TFEU; Jans & Vedder 2012 (p. 139), p. 139; Krämer 2015, p. 434; Langlet & Mahmoudi 2016 (p. 131), p. 131; Krämer 2016, p. 257.
[7] Krämer 2016, p. 257.
[8] Jans & Vedder 2012 (p. 139), p. 139.
[9] Ibidem.
[10] Ibidem.

compliance with the rules.[11] Also, in accordance with Article 17 TEU, the Commission is responsible for ensuring that the Treaty provisions and secondary legislation by the EU institutions are complied with, meaning that MS fulfil their implementation obligation.[12]

However, it is well-known that European environmental law suffers from a compliance deficit.[13] On the one hand, many environmental policies are adopted through Directives, as for example the *EU Emissions Trading System (ETS) Directive*[14] and the *Energy Taxation Directive*[15]. These Directives will both need to be revised in order to meet the goals set in the *European Green Deal*.[16] Hence, very soon, even more new Directives will be adopted, which need to be transposed.

Despite the clear obligation to transpose Directives into national law, a widespread and longstanding state of poor transposition of environmental Directives can be observed.[17] An especially striking example is the *Energy Performance of Buildings Directive*[18] of 2010, which was not transposed on time by any MS.[19] Even, if one would think that late transpositions, could be mainly caused by too short transposition periods, the Commission rebutted that argument, arguing that half of the Directives, which only had a short transposition period, were still transposed in time.[20]

Furthermore, there are also cases, where Directives are transposed in time, but the transposition is incorrect or incomplete.[21] The Commission dealt with several of these so-called non-conformity cases in 2019.[22] For example, it started an infringement case against Slovakia, for incorrectly transposing the *Habits*

[11] Jans & Vedder 2012 (p. 139), p. 139.
[12] Krämer 2015, p. 437; Krämer 2016, p. 258; Hedemann-Robinson 2020 (p. 196), p. 200.
[13] Hedemann-Robinson 2020 (p. 196), p. 196; Börzel & Buzogány 2019, p. 315; Peeters & Eliantonio 2020 (p. 475), p. 483; Jack 2011, p. 74.
[14] Directive 2003/87/EC.
[15] Council Directive 2003/96/EC.
[16] The European Green Deal [Communication], p. 5 and Annex p. 2.
[17] Peeters & Eliantonio 2020 (p. 475), p. 484; Jack 2011, p. 196.
[18] Directive 2010/31/EU.
[19] Peeters & Eliantonio 2020 (p. 475), p. 483-484.
[20] Annual report Monitoring the application of EU law (Part I) 2019, p. 25
[21] Annual report Monitoring the application of EU law (Part II) 2019, p. 28.
[22] Idem, p. 31.

Directive.[23] Slovakia provided for a broad exemption from the Directive's rules in emergency situations, which was however not foreseen in the text.[24]

On the other hand, there is also a deficit in enforcing the compliance with the provisions of EU environmental legislation. For example, the Commission started infringement procedures in 2019 against several MS for infringing the *Urban Waste Water Treatment Directive*, because they failed to ensure that waste water is actually adequately collected and treated.[25]

A main indicator that the implementation of EU environmental obligations is deficient, is the fact that the environmental policy ranks often amongst the highest in being subject to infringement proceedings and to complaints from the public. [26] For example, in 2019, there were 3813 new complaints by individuals to the Commission, of which 443 concerned the environment.[27] Only the Justice and Consumers area ranked higher, with 986 complaints. Furthermore, the Commission launched 797 infringement cases. The environmental policy ranked highest, with 175 procedures launched.[28] Out of these cases, 59 concerned the late transposition of Directives, which is also the second highest number of late transposition cases in 2019.[29] However, it should also be mentioned that the number of infringement cases differs largely between sectors of environmental law.[30] There are for example, very few cases with regard to chemicals and water protection, while the waste management sector ranks the highest among the environmental infringement cases in 2019.[31] While these numbers differ from year

[23] July infringements package: key decisions 2019; Annual report Monitoring the application of EU law (Part II) 2019, p. 30.
[24] July infringements package: key decisions 2019.
[25] Annual report Monitoring the application of EU law (Part II) 2019, p. 29; January infringements package: key decisions 2019; July infringements package: key decisions 2019; November infringements package: key decisions 2019.
[26] Peeters & Eliantonio 2020 (p. 475), p. 484; Hedemann-Robinson 2020 (p. 196), p. 196; Hedemann-Robinson 2017a (p. 7), p. 9.
[27] Annual report Monitoring the application of EU law (Part I) 2019, p. 15.
[28] Idem, p. 20.
[29] Idem, p. 27.
[30] Annual report Monitoring the application of EU law (Part II) 2019, p. 29.
[31] Ibidem: There were 71 new cases, mostly dealing with failures to collect and threat waste appropriately or with failures to transpose waste related Directives on time.

to year, it is still the case that in the last years the environmental area always ranked as one of the areas with the highest number of new infringement cases.[32]

Also, several EU studies revealed that the implementation of EU environmental law is deficient. One confirmed that there is still an insufficient progress in the implementation of EU environmental law, which differs however depending on the sector.[33] In another on, it was estimated that the costs of not implementing EU environmental law are around 55 billion euros per year.[34] Finally, the *7th Environmental Action Programme* (7EAP), which guided the Commissions environmental actions between 2013-2020, also had as one of its main targets, the improvement of implementation, which indicates that the implementation has also been insufficient in the previous years.[35]

In order to address the compliance deficit, it has been suggested to employ EU agencies.[36] EU agencies have become very prominent in the EU's institutional landscape.[37] The advantages of delegating powers to agencies are that they are considered to have expertise and can therefore address very complex issues.[38] Furthermore, agencies are placed in between MS and the EU institutions, which makes them more trustworthy towards MS and facilitates cooperation between the authorities.[39] Additionally, agencies are more flexible than EU institutions in the exercise of their tasks and can address issues uniformly, where harmonization at MS level is not appropriate.[40] However, the delegation of powers to agencies is also the subject to much critique, because delegating powers, previously exercised by MS or by EU institutions, to agencies can disturb the balance of powers which

[32] For example: 73 cases in 2018 (third highest) (Annual report Monitoring the application of EU law (Part I) 2018, p. 19); 173 cases in 2017 (highest) (Annual report Monitoring the application of EU law (Part I) 2017, p. 11); 89 cases in 2016 (fifth highest) (Annual report Monitoring the application of EU law 2016, p. 24); 126 cases in 2015 (third highest) (Annual report Monitoring the application of EU law 2015, p. 23).
[33] IMPEL 2015 (p. 9 and 19), p. 9 and 19; Hedemann-Robinson 2020 (p. 196), p. 196.
[34] European Commission 2019, p. 165.
[35] Decision 1386/2013, art. 2 (1) (d).
[36] Versluis 2005, p. 3; Scholten 2017, p. 1354.
[37] Everson et al. 2014 (p. 3), p. 3 ; Vos 2014, p. 15 ; Everson & Vos 2016 (p. 139), p. 139.
[38] Everson et al. 2014 (p. 3), p. 3 ; Vos 2014, p. 15 ; Everson & Vos 2016 (p. 139), p. 139 ; Schout 2008 (p. 257), p. 262.
[39] Everson et al. 2014 (p. 3), p. 3 ; Vos 2014, p. 15 ; Everson & Vos 2016 (p. 139), p. 139; Scholten 2017, p. 1354.
[40] Everson et al. 2014 (p. 3), p. 3; Vos 2014, p. 15 ; Everson & Vos 2016 (p. 139), p. 139.

exists between the EU institutions or the division of powers between the institutions and the MS laid down in the Treaties. [41]

Therefore, it would be highly relevant to examine whether EU agencies could be involved in the enforcement of EU environmental legislation in order to address this deficit. This thesis will thus look into this matter. There are already some agencies, which are more or less involved in these processes.[42] However, they are often only active in specific areas of the environment, as for instance the European Aviation Safety Agency (EASA), which is only responsible for the aviation sector.[43] Contrary to that, the European Environmental Agency (EEA) was explicitly created with the goal of improving and achieving the aims of environmental protection as a whole and not limited to a specific sector.[44] However, currently the EEA is only provided with very limited powers, which do not seem to allow it to play an active role in enforcement yet.[45] This thesis will therefore focus on examining whether and how especially the EEA could be involved in the enforcement of EU environmental legislation.[46]

Moreover, several authors have already suggested to empower the EEA, with the enforcement of the EU environmental policy,[47] but there has not yet been much research on the role that agencies actually play in this field.[48] The few scholars that deal with the role of agencies in environmental policy include Maria Lee[49] as well as, in a more recent contribution, Annalisa Volpato and Ellen Vos[50]. These contributions only deal very briefly with the role of EU agencies or introduce the topic.[51] None of them aims at analysing whether it is possible and beneficial to extent the EEA's powers in order to tackle the compliance deficit in EU environmental law. Therefore, this thesis will aim at answering the question: **To**

[41] Case 9/56, p. 152; Vos 2014, p. 40; Scholten & Van Rijsbergen 2014; p. 393; Simoncini 2015, p. 314.
[42] Volpato & Vos 2020, p. 59-63.
[43] Regulation 2018/1139; Volpato & Vos 2020, p. 60-63, Lee 2014 (p. 28), p. 45.
[44] Volpato & Vos 2020, p. 60-63 ; Lee 2014 (p. 28), p. 45.
[45] Ibidem.
[46] Regulation 401/2009, art. 1 (2).
[47] Faure 2020 (p. 248), p. 260; Peeters & Eliantonio 2020 (p. 475), p. 484-485; Jack 2011, p. 80.
[48] Volpato & Vos 2020, p. 56.
[49] Lee 2014.
[50] Volpato & Vos 2020.
[51] Lee 2014 (p. 28), p. 44-47 ; Volpato & Vos 2020, p. 56.

what extent could the European Environmental Agency play a role in enforcing the compliance with EU environmental law?

In order to answer this question, a doctrinal legal research will be conducted. Therefore, the EU Treaties as well as secondary legislation and the CJEU's case law, which lay down the existing enforcement powers and obligations of EU institutions, MS, and EU citizens in the field of the EU environmental policy will be analysed. Furthermore, a literature review will be conducted, in order to gather opinions of other legal scholars on the deficiencies that the enforcement of EU environmental law faces.

To begin with, the existing measures to supervise compliance with EU environmental law will be explained. Therefore, the obligations and powers of the MS, the Commission, and the EU citizens with regard to this area of law will be analysed, focusing especially on the deficiencies they are facing (Chapter 2). Second, the EEA's current powers and organization will be examined, as well as the conflicts that surrounded its creation and the amendments made to its founding Regulation (Chapter 3). Subsequently, the possibility to provide the EEA with enforcement powers will be analysed. It will be considered what enforcement powers entail, what effect this would have on the compliance deficit and what conditions will need to be fulfilled for the conferral of such powers (Chapter 4). Finally, a conclusion will be drawn (Chapter 5).

Chapter 2: The Current Mechanisms to Supervise Compliance with EU Environmental Law

As mentioned in the introduction, the area of European environmental law suffers from a compliance deficit.[52] In order to understand the reasons for this deficit, it is necessary to look into the implementation obligations that currently exist with regard to this area and into the mechanisms used to supervise the compliance with these obligations. In doing this, the focus will lie on the deficiencies these mechanisms face.

This chapter will first focus on the MS obligations, as it is, in the first place, for them to implement European environmental legislation (section 2.1.).[53] The Commission has the primary responsibility to supervise the MS' application of EU law.[54] Therefore, the second section will focus on the Commission's powers (section 2.2.). Finally, the third section will deal with the mechanisms that can be used by the general public (section 2.3.), before a short conclusion will be drawn (section 2.4.).

2.1. MS' Implementation

Article 192 (4) TFEU explicitly mentions, that MS shall finance and implement the EU's environmental policy.[55] This does not only mean that MS have to transpose Directives into national law, but that they actually have to ensure that all rules, enacted by the EU with regard to the environment, have an impact, meaning that they have to monitor the compliance with the measures and impose sanctions on offenders.[56] This is also in line with the principle of sincere cooperation, laid down in Article 4 (3) TEU, which requires the EU institutions and the MS to assist each other in carrying out their tasks under the Treaties.[57] Over time, the Court of Justice of the European Union (CJEU) derived some implicit obligations from this principle: Firstly, in detecting breaches of EU law, the MS have to proceed with

[52] Börzel & Buzogány 2019, p. 315; Peeters & Eliantonio 2020 (p. 475), p. 483; Jack 2011, p. 74.
[53] Jans & Vedder 2012 (p. 139), p. 171.
[54] Jans & Vedder 2012 (p. 139), p. 170; Hedemann-Robinson 2017a (p. 13), p. 25.
[55] Jans & Vedder 2012 (p. 139), p. 153; Langlet & Mahmoudi 2016 (p. 131), p. 131.
[56] Krämer 2016, p. 257-258; Langlet & Mahmoudi 2016 (p. 131), p. 131-132.
[57] Jans & Vedder 2012 (p. 139), p. 163 and 171; Hedemann-Robinson 2017a (p. 13), p. 25; Langlet & Mahmoudi 2016 (p. 131), p. 131; Hedemann-Robinson 2020 (p. 196), p. 200-2011; Hedemann-Robinson 2017b, p. 52.

the same degree of diligence as they would do for breaches of national law.[58] Secondly, national authorities' decisions must be reviewed with due diligence, to ensure that they comply with EU law.[59] Thirdly and most importantly, MS must ensure that infringements of EU law are penalized with effective, dissuasive, and proportionate sanctions.[60]

It should be noted that there is no possibility for the EU institutions to take direct actions against private parties.[61] Therefore, it is especially important that MS fulfil their duties.

2.1.1. Monitoring Compliance with EU Environmental Law

What is problematic with regard to the area of environmental law is the fact that only few specific pieces of environmental legislation, such as the Directives on Waste Management[62] and Industrial Emissions[63], contain actual rules on monitoring, or more specifically on inspections.[64] Moreover, these rules vary significantly in terms of how detailed and stringent they are.[65] Most of them do not have binding requirements, do not necessitate the use of minimum resources, and do not foresee a role for EU level inspections.[66] The main reasons for that are that some sectors, such as the waste management sector, have been prioritized by the EU legislator, because the environmental risk of their activities was considered to be higher.[67] Therefore, measures tailored to their specific needs were adopted, while in other sectors this was not the case.[68] Furthermore, older measures are relatively general and contain only very brief clauses on inspection standards,

[58] Case C-68/88, §25; Hedemann-Robinson 2020 (p. 196), p. 200-201; Hedemann-Robinson 2017a (p. 13), p. 25-26.
[59]Case C-72/95, §58; Hedemann-Robinson 2020 (p. 196), p. 200-201; Hedemann-Robinson 2017a (p. 13), p. 25-26.
[60] Case C-68/88; §24; Case C-354/99, §46 ; Hedemann-Robinson 2020 (p. 196), p. 200-201; Jans & Vedder 2012 (p. 139), p. 163; Langlet & Mahmoudi 2016 (p. 131), p. 132; Hedemann-Robinson 2017a (p. 13), p. 25-26; Faure 2020 (p. 248), p. 260.
[61] Krämer 2016, p. 258.
[62] Directive 2008/98/EC.
[63] Directive 2010/75/EC.
[64] Peeters & Eliantonio 2020 (p. 475), p. 484; Hedemann-Robinson 2020 (p. 196), p. 205; Hedemann-Robinson 2017a (p. 13), p. 28; Hedemann-Robinson 2017b, p. 36.
[65] Hedemann-Robinson 2020 (p. 196), p. 205.
[66] Idem., p. 206.
[67] Hedemann-Robinson 2020 (p. 196), p. 205; Hedemann-Robinson 2017b, p. 38.
[68] Ibidem.

while more recent measures focus on providing more detailed rules.[69] For example, Article 34 (1) of the *Waste Framework Directive*, which was adopted in 2008 but merely copies earlier legislation on waste management, only requires an appropriate periodic inspections by the competent national authorities.[70] Compared to that, Article 23 of the *Industrial Emission Directive* of 2010, lays down very detailed rules on environmental inspections by competent national authorities, namely that the periods between inspections shall not be more than a year for installations posing the highest risks and not more than three years for installations posing the lowest risks.[71]

Furthermore, there exist no general binding minimum criteria for inspection obligations.[72] Since 2001, there is a *Recommendation on Minimum Criteria for Environmental Inspections*.[73] However, this is only a soft-law instrument which,[74] furthermore, has only a limited scope, as it mainly focuses on the industrial emissions sector.[75] Additionally, a review on the effectiveness of the Recommendation, done by the Commission in 2007, revealed that there were significant shortcomings. The main issue was that several MS had failed to transpose the requirements in time and that the existing transpositions were mostly incomplete or unclear.[76] Only five MS had managed to achieve a qualitative transposition.[77] The 7EAP from 2013, also acknowledges that there is a need for extending binding inspection criteria.[78] However, it does not include any explicit

[69] Hedemann-Robinson 2020 (p. 196), p. 205; Hedemann-Robinson 2017b, p. 37.
[70] Directive 2008/98/EC, art. 34 (1); Hedemann-Robinson 2017b, p. 37.
[71] Directive 2010/75/EC, art. 23 (4).
[72] Peeters & Eliantonio 2020 (p. 475), p. 485; Hedemann-Robinson 2017a (p.13), p. 28; Faure 2020 (p. 248), p. 261.
[73] Recommendation 2001/331/EC.
[74] Hedemann-Robinson 2020 (p. 196), p. 202; Faure 2020 (p. 248), p. 261 ; Hedemann-Robinson 2017b, p. 34.
[75] Recommendation 2001/331/EC, II; Hedemann-Robinson 2020 (p. 196), p. 202; Hedemann-Robinson 2017b, p. 35.
[76] Report on the implementation of Recommendation 2001/331/EC, p. 20; Hedemann-Robinson 2020 (p. 196), p. 203; Hedemann-Robinson 2017b, p. 35; Langlet & Mahmoudi 2016 (p. 131), p. 134.
[77] Report on the implementation of Recommendation 2001/331/EC, p. 20; Hedemann-Robinson 2020 (p. 196), p. 203; Hedemann-Robinson 2017b, p. 35.
[78] Decision 1386/2013, §65 (3); Hedemann-Robinson 2020 (p. 196), p. 208.

commitment to adopt new legislation and until now, no binding rules have been adopted.[79]

As a consequence, most EU environmental acts only rely on the compliance with the principle of sincere cooperation and the implicit obligations the CJEU derived from this principle, as explained in section 2.1.[80] However, MS can take very different approaches in order to ensure that these principles are complied with, which makes the system used to monitor compliance with EU environmental legislation very complex.[81] Furthermore, there is no coordination between the instruments, causing inconsistencies, and there are several gaps in the system, as there are no provisions on, for example, inspections on water and air quality or protection of nature and biodiversity.[82]

The complexity of the system can be well demonstrated by the different rules on the updating of inspection plans by MS: The aforementioned *Industrial Emissions Directive* provides that MS have to regularly review their inspection plans but does not mention a specific time for that.[83] This is different in the *Waste Shipment Regulation*, which requires a review every three years.[84] For other sectors, which are not subject to minimum inspection requirements under EU legislation, there are no specific rules on inspection plans at all.[85] Thus, EU environmental legislation is not very consistent with regard to the requirement to update inspection plans, causing major differences between sectors. This makes it especially problematic for national authorities to monitor the correct application of EU environmental law, because they need to have knowledge of all the different inspection standards, instead of a general standard for all sectors.[86]

Also, the fact that most EU environmental acts do not provide for a minimum amount of financial and administrative resources to be used by MS to monitor

[79] Ibidem.
[80] Peeters & Eliantonio 2020 (p. 475), p. 485; Langlet & Mahmoudi 2016 (p. 131), p. 132-133; Faure 2020 (p. 248), p. 260 ; Krämer 2015 (p., p. 430.
[81] Hedemann-Robinson 2020 (p. 196), p. 203.
[82] Hedemann-Robinson 2020 (p. 196), p. 203; Hedemann-Robinson 2017b, p. 38.
[83] Directive 2010/75/EC, art 23 (2); Hedemann-Robinson 2017b, p. 38.
[84] Regulation 1013/2006, art. 50 (2a); Hedemann-Robinson 2017b, p. 38.
[85] Hedemann-Robinson 2017b, p. 38.
[86] Ibidem.

compliance with environmental legislation, means that many MS in fact spend insufficient resources.[87] In several MS the political priority lies on securing economic benefits by participating in the EU single market.[88] Compared to that, there are not many efforts to ensure the protection of the environment.[89]

Some EU legislative acts have also started to use different mechanisms, which do require other bodies than the national authorities to monitor compliance with environmental law.[90] On the one hand, there are acts, which require self-monitoring by private actors.[91] For example, *Regulation 715/2007 on technical emission standards for motor vehicles* requires manufacturers to prove themselves that their new vehicles comply with the emission standards.[92] On the other hand, there are mechanisms, like the EU ETS, which require the operators to be monitored by an independent verifier.[93] However, it is questionable whether these systems are actually reliable, because they largely depend on the verifier's independence and on their personal abilities.[94] Furthermore, MS are still under the duty to ensure that these systems actually work.[95]

2.1.2. Sanctioning of Infringements

Next to the monitoring of environmental measures, MS are under a duty to impose sanctions, if the inspections reveal infringements of EU environmental law.[96] However, EU legislation also in this regard does not contain specific provisions on the imposition of administrative sanctions.[97] Again, only the general principles

[87] Hedemann-Robinson 2015 (p. 196), p. 196-197.
[88] Ibidem.
[89] Ibidem.
[90] Hedemann-Robinson 2017b, p. 40; Peeters & Eliantonio 2020 (p. 475), p. 485.
[91] Peeters & Eliantonio 2020 (p. 475), p. 485.
[92] Regulation 715/2007, art. 4 (1); De Sadeleer 2020 (p. 379), p. 382; Peeters & Eliantonio 2020 (p. 475), p. 485.
[93] Directive 2003/87/EC, art. 15 and annex V; Hedemann-Robinson 2017b, p. 40; Peeters & Eliantonio 2020 (p. 475), p. 485. Hedemann-Robinson 2017b, p. 40; Peeters & Chen 2016 (p. 111), p. 116-117.
[94] Peeters & Eliantonio 2020 (p. 475), p. 485-486; Peeters 2006, p. 188.
[95] Hedemann-Robinson 2017b, p. 40.
[96] Krämer 2015, p. 434; Jans & Vedder 2012 (p. 139), p. 139.
[97] Krämer 2015, p. 434; Peeters & Eliantonio 2020 (p. 475), p. 484.

are applicable, meaning that sanctions need to be proportionate, dissuasive, and effective.[98]

Nonetheless, the CJEU established in its case law that the EU legislator can prescribe the MS to establish criminal sanctions for non-compliance, if these are necessary and proportionate.[99] In response, the EU adopted the *Environmental Crimes Directive*.[100]

While this Directive provides for criminal sanctions, it is still not sufficient to solve the compliance deficit. This is because it does not deal with administrative sanctions, which are, however, traditionally often used by MS.[101] Furthermore, even if the sanctions are themselves effective in discouraging breaches of environmental law, their imposition still depends on a number of different factors.[102] These include the fact that sanctions can only be imposed if infringements are actually detected and if the national authorities decide to bring offenders before the courts.[103] Furthermore, it is still at the national judge's discretion to decide whether to apply these sanctions.[104] Hence, as these areas are not harmonized by EU law, the level of compliance with EU environmental law depends largely on the MS' effort in enforcing these laws.

2.1.3. Legislative Obstacles

The main reasons why the EU has not been able to adopt binding harmonizing legislation, which would ensure that MS would in fact provide for sufficient resources to monitor compliance and actually sanction infringements accordingly, are the principle of subsidiarity and Article 197 (2) TFEU. The environmental policy is a competence which is shared between the EU and the MS.[105] Therefore, in accordance with the subsidiarity principle, the EU shall only act if the objectives

[98] Ibidem.
[99] Case C-440/05, §66; Krämer 2015, p. 454; Peeters & Eliantonio 2020 (p. 475), p. 484; Faure 2020 (p. 248), p. 248 and 257.
[100] Directive 2008/99/EC; Faure 2017, p. 143.
[101] Faure 2020 (p. 248), p. 259 ; Faure 2017, p. 144.
[102] Idem, p. 260.
[103] Ibidem.
[104] Faure 2020 (p. 248), p. 260; Faure 2017, p. 144.
[105] Art. 4 (2) (3) TFEU; De Sadeleer 2012, p. 67.

of an act cannot be sufficiently achieved at MS level.[106] MS have argued that they are best placed to organize and apply inspection tasks and that the EU should therefore not take harmonizing action.[107] Additionally, Article 197 (2) TFEU, introduced by the Lisbon Treaty, provides that the Union may only support the efforts of MS in improving their administrative capacity to implement Union law, but not create harmonizing measures in this regard.[108] Hence, while that does not mean that the EU cannot stipulate minimum operational requirements for implementation, it is not possible, for example, to require a certain amount of financial resources to be used by the MS.[109]

2.2. Supervision by the Commission

The Commission is, as the guardian of the Treaties, under Article 17 TEU tasked with ensuring that the Treaties and acts adopted pursuant to the Treaties are applied.[110] In line with this duty, the Commission will monitor that Directives are correctly transposed into the MS' national law and that EU law in total is actually applied by the MS.[111] Furthermore, the Commission will take steps if it finds a MS to infringe these obligations.[112]

The procedure mostly used by the Commission to address such infringements is the infringement procedure, laid down in Articles 258-260 TFEU. Under this mechanism, the Commission, first issues a letter of formal notice to the MS, to which the MS is given the opportunity to reply.[113] In case the Commission is not satisfied with the response, it can issue a reasoned opinion.[114] If the MS does not comply with the opinion or the response is still not satisfactory, the Commission has the discretion to start a procedure before the CJEU.[115] It is also possible for another MS to bring the matter to the attention of the Commission.[116] In cases,

[106] Art. 5 (3) TEU; De Sadeleer 2012, p. 63.
[107] Hedemann-Robinson 2017a (p.13), p. 26-27; Krämer 2015, p. 438.
[108] Hedemann-Robinson 2020 (p. 196), p. 201; Hedemann-Robinson 2017a (p. 13), p. 26. Hedemann-Robinson 2017b, p. 55.
[109] Hedemann-Robinson 2017b, p. 56.
[110] Krämer 2015, p. 437 and 438; Jans & Vedder 2012 (p. 139), p. 170.
[111] Jans & Vedder 2012 (p. 139), p. 163 and 166; Krämer 2016, p. 258.
[112] Krämer 2016, p. 258; Jans & Vedder 2012 (p. 139), p. 163 and 166.
[113] Jans & Vedder 2012 (p. 139), p. 178; Krämer 2015, p. 443; Smith 2020 (p. 213), p. 215.
[114] Art. 258 (1) TFEU; Jans & Vedder 2012 (p. 139), p. 178; Krämer 2015, p. 443.
[115] Art. 258 (2) TFEU; Jans & Vedder 2012 (p. 139), p. 178; Krämer 2015, p. 443.
[116] Art. 259 TFEU; Jans & Vedder 2012 (p. 139), p. 178; Krämer 2015, p. 443.

where MS do not comply with the CJEU's judgment, the Commission can start enforcement actions by bringing the matter again before the CJEU, which can then impose a financial penalty on the state.[117]

However, there are, at least in the field of environmental law, several deficiencies with this procedure. First, contrary to areas such as the EU economic policy, the Commission has no inspection powers in the area of environmental law.[118] It is not possible for the Commission to carry out inspections on the MS' environmental situation without the consent of the states.[119] Furthermore, even if the Commission would have the legal mandate to carry out inspections, the EU has no police forces, inspectors or administrative authorities that could carry out such tasks.[120] This is especially problematic, because the Commission has the burden of proof under infringement proceedings, meaning that it must produce sufficient evidence of an MS' infringement of European environmental legislation, in order to bring such a claim before the CJEU.[121] While in theory, MS, under the principle of sincere cooperation, should assist the Commission in conducting its investigations, many MS do not actually cooperate sufficiently in practice, as mentioned by the Commission in a Communication.[122] Therefore, the Commission still has to rely mainly on information and complaints from the general public, from NGOs or from agencies.[123] The mechanisms at the disposal of the general public will be analysed in section 3.

A consequence of these missing inspection powers is that most infringement procedures are brought for failure to transpose Directives in time and only few cases are brought for incomplete or incorrect transpositions or for non-compliance with enforcement obligations.[124] The reason for this is that failures to transpose

[117] Art. 220 TFEU; Jans & Vedder 2012 (p. 139), p. 178; Krämer 2015, p. 443.
[118] Hedemann-Robinson 2015 (p. 30), p. 38-39; Langlet & Mahmoudi 2016 (p. 131), p. 137; Jans & Vedder 2012 (p. 139), p. 166; Krämer 2015, p. 438; Jack 2011, p. 76.
[119] Langlet & Mahmoudi 2016 (p. 131), p. 137.
[120] Krämer 2016, p. 258.
[121] Jack 2011, p. 76-77; Langlet & Mahmoudi 2016 (p. 131), p. 138; Cashman 2006, p. 392.
[122] Better Monitoring of the Application of Community Law 2002, p. 14; Article 4 (3) TEU; Jack 2011, p. 77; Langlet & Mahmoudi 2016 (p. 131), p. 137 ; Hedemann-Robinson 2015 (p. 537), p. 541.
[123] Jack 2011, p. 77; Börzel & Buzogány 2019, p. 327 ; Krämer 2015, p. 441 ; Langlet & Mahmoudi 2016 (p. 131), p. 136.
[124] Langlet & Mahmoudi 2016 (p. 131), p. 131; Hedemann-Robinson 2015 (p. 30), p. 38.

Directives are easier to detect, because Directives include a clear obligation to notify the Commission about the transposition.[125] Therefore, the Commission can become aware of and prove them even without conducting an inspection.[126] Other infringements of the duty to implement EU law are not simply detected through the absence of a notification to the Commission but require an actual inspection of the national measures taken.[127]

Second, it is completely up to the Commission to decide whether it wants to start infringement proceedings and what steps of the procedure it wants to take.[128] Also, in cases where a MS wants to start infringement proceedings against another MS, it is the Commission that decides whether this is actually done.[129]

Furthermore, the Commission has argued that the administrative as well as the judicial phase of the infringement proceedings are confidential, in order to facilitate the cooperation with the MS concerned.[130] Therefore, the Commission keeps the letter of formal notice and the reasoned opinion a secret.[131] This is problematic, because there have been already several instances, in which the Commission did not take any action even if it should have probably done so and instances, in which the Commission failed to bring proceedings under Article 260 TFEU, when a MS clearly did not comply with the CJEU's previous decision.[132] Furthermore, it can be doubted whether the Commission actually takes its decision on the sole basis of the merits of each case or whether its decisions are also very much influenced by political considerations.[133] This is especially true, because the procedure is confident and therefore, allows the general public no insight in the

[125] Langlet & Mahmoudi 2016 (p. 131), p. 136; Krämer 2015, p. 448; Hedemann-Robinson 2015 (p. 30), p. 38.
[126] Ibidem.
[127] Langlet & Mahmoudi 2016 (p. 131), p. 136; Krämer 2015, p. 448; Hedemann-Robinson 2015 (p. 30), p. 38.
[128] Case 247/87, §11 ; Langlet & Mahmoudi 2016 (p. 131), p. 137; Jack 2011, p. 79; Smith 2020 (p. 213), p. 216.
[129] Article 259 TFEU.
[130] Jans & Vedder 2012 (p. 139), p. 175; Krämer 2015, p. 447.
[131] Ibidem.
[132] Krämer 2016, p. 266-268.
[133] Jack 2011, p. 79.

grounds on which the Commission decides whether to start infringement proceedings.

An especially striking example of this problem was identified by Krämer: The Commission started an infringement action against Germany in 2000 for the breach of obligations under the *Wild Birds Directive*.[134] However, after the German chancellor sent a letter to the Commission's President, the Commission decided to close the infringement proceedings.[135] When an NGO requested the Commission to disclose the letter sent by the German chancellor, its request was denied.[136] In a subsequent case, the CJEU decided that the Commission was right in not disclosing the document.[137] This case clearly shows that Commission decisions also seem to be very much based on political considerations, wanting to maintain an amicable relation with national authorities who are also represented in the EU institutions, such as heads of state. Furthermore, the case shows that the general public is mostly prevented from getting insight into the dialogue that takes place between MS and the Commission within infringement proceedings and is therefore unable to get to know the reasons for Commission decisions.

Third, while the procedure under Article 260 TFEU provides a great way to ensure that the CJEU's judgments are actually complied with, as it allows for the imposition of financial sanctions on the MS, there are some problems with the actual calculation of the penalty with regard to environmental damages. The penalty is calculated, taking into account the seriousness of the infringement, its duration and the MS' ability to pay.[138] The CJEU has already recognized that environmental damage is a significant infringement,[139] however, looking at the case law, it seems that a greater weight is still placed on economic policy issues.[140] Also, the duration of the infringement is taken into account by multiplying the

[134] Directive 2009/147/EC; Krämer 2006, p. 409; Jack 2011, p. 79.
[135] Krämer 2006, p. 409; Jack 2011, p. 79.
[136] T-168/02; §8-17; Krämer 2006, p. 409.
[137] T-168/02; §64; Krämer 2006, p. 409.
[138] Jack 2011, p. 83.
[139] Jack 2011, p. 84; Jans & Vedder 2012 (p. 139), p. 178; Langlet & Mahmoudi 2016 (p. 131), p. 139.
[140] Jack 2011, p. 86 : For example, in Case C-119/04 regarding a failure to comply with employment rights, the seriousness was a 14 out of 20 (§33-36), while in Case C-304/02 regarding a threat to a fish species, the seriousness was only a 10 (§99-107).

penalty sum with a co-efficient between 1 and 3.[141] The maximum co-efficient of 3 represents an infringement period of 30 months. However, environmental infringements easily take longer than 30 months, which can then not be taken into account in calculating the penalty.[142]

Fourth, a general issue that infringement proceedings face is their duration. They are too lengthy.[143] On average first round proceedings under Article 258 TFEU concerning the non-communication of transpositions last up to 22 months,[144] while proceedings on non-conformity with and non-enforcement of EU environmental legislation take more than 40 months.[145] Second round proceedings under Article 260 TFEU for infringements of environmental law can last for an average 32 more months.[146] Hence, a long period of time can pass between the detection of an infringement and the imposition of sanctions.

2.3. Mechanisms at the Disposal of the General Public

In the previous sections, it became apparent, thar MS often do not fulfil their enforcement obligations well enough and that the Commission lacks certain powers to effectively monitor compliance. Hence, the general public can contribute to the detection of infringements of environmental law, where the MS or Commission fail to do so. This was also recognized by the Commission, which stated that "complaints are a vital means of detecting infringements of Community law".[147] Furthermore, by providing individuals with a possibility to bring complaints before the Commission or the courts, the EU becomes more accessible to individuals, and they become more aware of their own responsibility for the environment.[148]

While the general public has been given some role in the monitoring of compliance with EU environmental legislation, this role is not an active one.[149] On

[141] Jack 2011, p. 83.
[142] Jack 2011, p. 88: For example, in Case C-304/02 the fisheries conservation laws were not enforced for 14 years, but the co-efficient suggested by the Commission was still three.
[143] Jans & Vedder 2012 (p. 139), p. 175; Krämer 2015, p. 442; Langlet & Mahmoudi 2016 (p. 131), p. 139.
[144] Hedemann-Robinson 2015 (p. 59), p. 67
[145] Idem, p. 68.
[146] Idem, p. 151.
[147] Better Monitoring of the Application of Community Law 2002, p. 12.
[148] Krämer 2015, p. 441.
[149] Peeters & Eliantonio 2020 (p. 475), p. 486; Krämer 2015, p. 456-457.

the one hand, the procedural environmental rights of citizens have been extended, as required by *the Aarhus Convention*.[150] Especially the right to access environmental information is important for individuals, as it allows them to actually get to know the processes used by MS and EU institutions and the reasons that lead to a decision being taken.[151] Furthermore, without this information, it could in many cases be impossible for the general public to know about and proof breaches of EU environmental legislation.[152]

On the other hand, however, the *Aarhus Convention* is still not completely implemented into EU law.[153] Especially, the provisions on access to justice in environmental matters lack implementation and therefore, members of the public face some hurdles when wanting to claim infringements of EU environmental legislation before the courts.[154]

There are three routes which can be used by individuals to claim infringements of environmental law. They can bring a claim before the national courts and make use of the preliminary reference procedure (section 2.3.1.), they can bring a claim directly before the CJEU (section 2.3.2.) or they can make a complaint to the Commission (section 2.3.3.).

2.3.1. Preliminary Rulings Under Article 267 TFEU

When using the indirect route, individuals can claim infringements of their rights before national courts.[155] In these proceedings, they can then request the national court to make a preliminary reference to the CJEU under Article 267 TFEU.[156] However, the procedure is deficient due to several reasons: National courts have discretion in deciding whether or not to refer a preliminary question, applicants do not have a right to appeal against this decision, the Commission is usually not

[150] Aarhus Convention 1998; Peeters & Eliantonio 2020 (p. 475), p. 485; Krämer 2015, p. 456-457; Hedemann-Robinson 2017a (p. 13), p. 22; Hedemann-Robinson 2015 (p. 366); p. 366; Van Wolferen & Eliantonio 2020, p. 154.
[151] Aarhus Convention 1998, arts. 4-5; Hedemann-Robinson 2015 (p. 366), p. 369; Peeters & Eliantonio 2020 (p. 475), p. 485.
[152] Hedemann-Robinson 2015 (p. 366), p. 369; Wennerås 2007 (p. 251), p. 295.
[153] Hedemann-Robinson 2017a (p.13), p. 22; Krämer 2015, p. 457.
[154] Aarhus Convention 1998, art. 9; Krämer 2015, p. 457.
[155] Van Wolferen & Eliantonio 2020, p. 149; Langlet & Mahmoudi 2016 (p. 131), p. 136.
[156] Van Wolferen & Eliantonio 2020, p. 149.

aware of these national judgments and there are still standing requirements. These deficiencies will now be further explained.

First, national courts have discretion to decide whether to refer a preliminary question.[157] While the highest courts are under a duty to refer a question, this duty is only applicable if the court considers the issue to be related to EU Law.[158] Furthermore, there is no duty for lower courts to make a preliminary reference.[159] In practice, many national courts are very hesitant to make a reference.[160] This is especially problematic, because individuals have no right to appeal against the national court's decision not to refer a preliminary question.[161]

Second, the Commission does not take into account these national judgments in its supervising activities, which means that such claims do not serve to make the Commission aware of infringements of environmental law.[162]

Third, while the EU has emphasised that the MS should facilitate the standing requirements for cases concerning the environment in accordance with the *Aarhus Convention*,[163] in practice, there are still several national standing requirements that have to be fulfilled by the applicants.[164] Therefore, some very valid claims are never considered by the courts, simply because the applicant cannot fulfil the standing requirements.

In sum, it can be said that the indirect route is not the most efficient and fast way to claim MS' infringements of environmental law.[165] There are more direct ways to claim such infringements or to bring them to the attention of the Commission.[166] However, in cases, where the infringement was committed by a natural or legal person, individuals have no other option than to bring a claim

[157] Art. 267 TFEU.
[158] Ibidem.
[159] Ibidem.
[160] Krämer 2016, p. 256-257: Between 1976 and 2015, more than half of the MS have referred less than for preliminary questions and 7 MS have not made any request.
[161] Krämer 2016, p. 256-257.
[162] Krämer 2016, p. 261.
[163] Aarhus Convention 1998, art. 9 (3); Case C-240/09, §50.
[164] Langlet & Mahmoudi 2016 (p. 131), p. 145; Peeters & Eliantonio 2020 (p. 475), p. 487.
[165] Krämer 2016, p. 259.
[166] Van Wolferen & Eliantonio 2020, p. 149.

before the national courts, as no direct intervention by the EU institutions is possible.[167]

2.3.2. Action for Annulment under Article 263 TFEU

A more direct way to claim MS' infringements, is to bring the case directly before the CJEU under Article 263 TFEU.[168] However, in order for an individual to have standing before the CJEU, the applicant must fulfil certain criteria, namely that the applicant is either the addressee of the act or he is directly and individually concerned by the infringement.[169] However, individuals are usually not the addresses of environmental legislation and, especially, the requirement of individual concern is hard to fulfil in cases concerning environmental damage, as it often affects the population as a whole rather than an individual person.[170]

This was also exemplified by the *Greenpeace case*, in which the NGO Greenpeace was not granted standing, because it could not demonstrate that it had an interest in the construction of a coal-fuelled power plant on the Canary island that could distinguish it from any other inhabitant of the islands.[171] While these very strict standing requirements are contrary to the provisions of the *Aarhus Convention*, the EU did not yet manage to adapt them.[172] Hence, even if this route is in theory more direct and would probably be more efficient, most applicants will in fact not be able to bring their claim before the CJEU, because they will not have standing.[173]

2.3.3. Complaint to the Commission

Next to claims before the courts, individuals also have the possibility to complain to the Commission. As mentioned before, the Commission largely has to rely on complaints by the general public and NGOs in order to detect and proof

[167] Krämer 2016, p. 259.
[168] Van Wolferen & Eliantonio 2020, p. 149.
[169] Case C-25/62; Van Wolferen & Eliantonio 2020, p. 150.
[170] Van Wolferen & Eliantonio 2020, p. 150; Jans & Vedder 2012 (p. 139), p. 179; Peeters & Eliantonio 2020 (p. 475), p. 487.
[171] Case C-321/95.
[172] Krämer 2015, p. 457; Van Wolferen & Eliantonio 2020, p. 158 and 162.
[173] Van Wolferen & Eliantonio 2020, p. 163.

infringements of EU environmental legislation.[174] In 2019 alone, there were 443 complaints made by individuals to the Commission.[175]

Individuals who want to complain to the Commission do not have to fulfil many formal requirements but can simply fill out an online form.[176] All complaints are registered, which allows the individual to follow the procedure and to be informed about the steps taken.[177] In most cases, the Commission will have to further investigate into the issue and therefore, will first seek more information from the claimants and from the MS concerned.[178]

However, it is up to the Commission to decide whether it wants to investigate a complaint and to start infringement proceedings against a state.[179] There is no possibility for the individual to appeal against the Commission's decision.[180] Therefore, the complaints procedure can be very time consuming and does not always lead to the desired result for the individual.[181] Furthermore, the Commission is not very transparent on the procedure followed, on the information provided to it by the MS, and on the reasons for its decision. Practice has shown that the Commission can be very reluctant to examine these complaints and usually rather discourages them through the adoption of new policy approaches.[182]

Another issue is the fact that the general public cannot effectively serve as the watchdog on MS' implementation of EU environmental law.[183] Individuals often do not have the required technical knowledge to completely understand complex environmental issues and NGOs mostly have very limited resources and powers, which do not allow them to have an oversight over the whole environmental

[174] Jack 2011, p. 77; Börzel & Buzogány 2019, p. 327; Langlet & Mahmoudi 2016 (p. 131), p. 136; Krämer 2015, p. 441; Wennerås 2007 (p. 251), p. 295.
[175] Annual report Monitoring the application of EU law (Part I) 2019, p. 15.
[176] Langlet & Mahmoudi 2016 (p. 131), p. 136; Krämer 2015, p. 441.
[177] Langlet & Mahmoudi 2016 (p. 131), p. 137; Krämer 2015, p. 441; Jans & Vedder 2012 (p. 139), p. 179.
[178] Krämer 2015, p. 441 and 447; Jans & Vedder 2012 (p. 139), p. 179.
[179] Krämer 2015, p. 442-443.
[180] Krämer 2015, p. 443; Langlet & Mahmoudi 2016 (p. 131), p. 137.
[181] Krämer 2015, p. 443.
[182] Krämer 2016, p. 443; Krämer 2009, p. 31. For example, Commission Communication Implementing European Community Environmental Law 2008, foresees that the complaints will immediately be communicated to the MS concerned and not actually examined by the Commission.
[183] Hedemann-Robinson 2015 (p. 196), p. 205.

sector.[184] Furthermore, individuals are often just interested in a number of specific environmental issues, while having no interest in other problems.[185] This means that complaints are concentrated on infringements of certain EU environmental acts, while others are left unchecked.[186]

2.4. Conclusion

This chapter has disclosed several deficiencies that exist with regard to the implementation of EU environmental law: First, due to lacking EU harmonization of the MS' monitoring duties, MS' approaches towards these duties differ significantly in terms of effectiveness and quality. Furthermore, there is also much discretion left to MS on the sanctions to be imposed for infringements of environmental law. This is the case, because the EU's harmonizing powers are limited by Article 197 (2) TFEU, and the subsidiarity principle.

Second, the Commission is responsible for supervising the MS' implementation. However, while the infringement is fundamental for this, there are also some problems with this procedure. The main deficiency is that the Commission does not have any inspection powers, making it very complicated for it to actually detect and prove infringements of environmental law. Furthermore, the infringement procedure is not very transparent, time consuming and the calculation of financial sanctions is not well fitted for environmental damages.

Third, due to the restraints to the Commissions powers, the general public can play a vital role in making the Commission aware of infringements. However, the public cannot function as a true watchdog of environmental law. This is the case, because the legal framework limits the possibilities of individuals to claim infringements, by imposing standing requirements on them, leaving discretion to the courts and the Commission, and by not allowing an appeal against these discretionary decisions. Furthermore, the general public also does not have all abilities necessary to detect infringements and usually only focuses on certain infringements instead of monitoring the whole environmental acquis.

[184] Ibidem.
[185] Hedemann-Robinson 2015 (p. 196), p. 205; Jack 2011, p. 77.
[186] Jack 2011, p. 77.

While surely not all deficiencies can be resolved by giving the EEA more powers, there are some aspects in which an involvement of the agency could probably lead to an improvement. Before asserting which role the EEA could play, it is first necessary to look at the EEA's current functioning and powers (Chapter 3).

Chapter 3: The European Environmental Agency

The EEA was created in 1990 by *Council Regulation 1210/1990*.[187] and started operating in 1994.[188]

In order to be able to answer the question how the EEA's powers could be extended to address the compliance deficit, the EEA's evolution from its creation on needs to be considered. The focus here will lie on the initial political disagreements of the EU institutions on the powers that should be awarded to the EEA, as well as on the conflicts that the EEA faced during the first years after its creation (section 3.1.). Additionally, the amendments to the EEA's founding Regulation will be quickly examined (Section 3.2). Next, its organization will be considered (Section 3.3.). Finally, the EEA's current powers will be analysed (Section 3.4.). A short conclusion will be drawn (section 3.5.)

3.1. The EEA´s Creation

When the EEA´s creation was discussed, the EU institutions agreed that such an agency was necessary in order to meet the need for more consistent and uniformly collected scientific information on the environment.[189] However, there were different opinions as to what powers should be delegated to the EEA.[190] While the Commission and the Council wanted to give it only a pure data gathering role and therefore also only very limited powers,[191] the European Parliament (EP) advocated for the establishment of an agency with decision-making powers, which could take the role of an independent environmental inspectorate, tasked with the enforcement of MS' environmental obligations.[192] Therefore, it should have been given extensive supervisory and inspection powers.[193] At the end, a compromise

[187] Regulation 401/2009, §11.
[188] Council Regulation 1210/90, art. 1 (1) and 21; Volpato & Vos 2020, p. 58; Caspersen 1999, p. 72; Krämer 2015, p. 41; Jans & Vedder 2012 (p. 339), p. 390; Hedemann-Robinson 2015 (p. 196), p. 201.
[189] Volpato & Vos 2020, p. 58.
[190] Volpato & Vos 2020, p. 58; Westbrook 1991, p. 260-267.
[191] Volpato & Vos 2020, p. 58; Westbrook 1991, p. 262; Peeters & Eliantonio 2020 (p. 475), p. 458; Hedemann-Robinson 2015 (p. 196), p. 201; Martens 2010, p. 884 and 888.
[192] Volpato & Vos 2020, p. 58; Westbrook 1991, p. 262; Peeters & Eliantonio 2020 (p. 475), p. 458; Martens 2010, p. 884; Jans & Vedder 2012 (p. 339), p. 390; Hedemann-Robinson 2015 (p. 1, 59 and 196), p. 16, 125 and 201; Krämer 2015, p. 41.
[193] Hedemann-Robinson 2015 (p. 196), p. 201; Peeters & Eliantonio 2020 (p. 475), p. 458.

was reached.[194] Indeed, as wished by the Council and the Commission, the EEA did not get any extensive powers, but only powers to collect and provide information and tasks connected to that.[195] However, the possibility to later extent the EEA´s powers was explicitly provided for in Article 20 of the Regulation.[196]

In the years before the first amendment, there were still some discussions on extending the EEA´s role to enforcement of environmental law.[197] However, after the Council still vehemently opposed this possibility in 1997, it was no longer discussed and not taken up by the Commission in any proposal. [198] Therefore, these powers have not been included in the 1999 amendment and the discussion on including such powers has, until now, never been taken up again.[199]

The compromise reached between the institutions caused the Regulation to be rather unclear. [200] Instead of choosing between tasks, the Regulation lists all the tasks which were discussed in the negotiations without specifying which one's belong to the core tasks.[201] This makes it still possible to read different roles for the EEA into the Regulation.[202] For example, it could, focus more on auditing EU institutions' decisions or on providing the general public with reliable information on the environment.[203] The evolution of the EEA's different tasks and its current tasks will be further discussed in the following sections.

Also, when the EEA started operating, the Commission's DG Environment saw the agency as a competitor rather than an ally.[204] It did not want the EEA to start evaluating policy effects or reviewing implementation, because this would allow tit to criticize the Commission.[205] Instead, it wanted the EEA to stick to collection

[194] Volpato & Vos 2020, p. 59; Jans & Vedder 2012 (p. 339), p. 390.
[195] Council Regulation 1210/90, art. 1 (2) and 2; Volpato & Vos 2020, p. 59; Jans & Vedder 2012 (p. 339), p. 390 ; Martens 2010, p. 882.
[196] Council Regulation 1210/90, art. 20; Martens 2010, p. 885; Hedemann-Robinson 2015 (p.481), p. 520 and 547; Krämer 2015, p. 41.
[197] Krämer 2015, p. 41; Hedemann-Robinson 2015 (p. 481), p. 519-520 and 547.
[198] Council Resolution (1997) C321/01; Commission Proposal (1997) 282 final; Commission Proposal (1998) 191 final; Hedemann-Robinson 2015 (p. 481), p. 519-520 and 547.
[199]Council Regulation 933/1999.
[200] Martens 2010, p.884.
[201] Idem, p.884-885.
[202] Idem, p.885.
[203] Martens 2010, p.885.
[204] Volpato & Vos 2020, p. 59; Martens 2010, p. 888.
[205] Ibidem.

of data only.[206] However, with time, the acceptance of EU agencies in general grew.[207] Furthermore, after some years of operation, the different roles of DG Environment and the EEA became more clear in practice.[208] Consequently, the EEA and DG Environment started to collaborate more, which became especially apparent, when the EEA narrowed its scope to the six core areas provided for in the EU's *Sixth Environmental Action Programme*.[209] This good relationship still exists today and, according to the EEA's website, the EEA even aligns its multi annual-work programme with the Commission to ensure greater coherence. [210]

3.2. The amendments to the EEA's founding Regulation

To date, the founding *Council Regulation 1210/1990* has been amended three times.[211] There have been amendments in 1999 and 2003.[212] Furthermore, in 2009, the Regulation was replaced by *Regulation 401/2009*.[213]

The 1999 amendment was made in line with Article 20 of the Regulation, which required the Council to decide on further tasks for the agency no later than two years after the entry into force of the original Regulation.[214] As mentioned in the previous section, the amendment did not provide the EEA with enforcement powers.[215] Also, with regard to other aspects, it has not made immense changes to the EEA's original powers, but only slightly increased its tasks.[216] This was the case, because the overall assessment made of the EEA's status and performance revealed that it would not be appropriate to give the agency major new tasks.[217] Therefore, the tasks were mostly just made clearer, instead of being broadened.[218] For example, Article 2 (ii) became more detailed, also providing that the EEA shall assist in the monitoring of environmental measures through appropriate support

[206] Ibidem.
[207] Volpato & Vos 2020, p. 59; Martens 2010, p. 890.
[208] Ibidem.
[209] Decision 1600/2002/EC; EEA strategy 2004-2008 ; Martens 2010, p. 891.
[210] European Environment Agency 2020b ; Volpato & Vos 2020, p. 59; Martens 2010, p. 890.
[211] Khuchua 2009, p. 81.
[212] Council Regulation 933/1999; Regulation 1641/2003; Khuchua 2009, p. 81.
[213] Regulation 401/2009; Khuchua 2009, p. 81.
[214]Council Regulation 1210/90, art. 20; Commission Proposal (1997) 282 final, §1.
[215] Council Regulation 933/1999.
[216] Council Regulation 933/1999; Khuchua 2009, p. 83.
[217] Commission Proposal (1997) 282 final, §4.
[218] Khuchua 2009, p. 83.

for reporting requirements and that it shall advise individual MS upon their request. [219] Furthermore, it was added that the EEA shall maintain and develop further a reference centre of information on the environment.[220] Also, subparagraphs (xi) to (xiii) were added, which all three relate to the diffusion or exchange of information.[221]

Likewise, the second amendment only related to improving access to the documents of the agency in line with *Regulation 1049/2001* and with the *Financial Regulation 1605/2002*.[222] It did not make changes to the EEA's main tasks and powers.[223] Finally, the new Regulation adopted in 2009 also did not change the content of the provisions.[224] It only served to codify the previous EEA Regulations in order to bring together all amendments in one single concise document.[225]

Therefore, apart from slight changes, the EEA´s powers and functioning have not changed much since its creation. In the next sections, these powers and the functioning will be explained.

3.3. The EEA´s Organization

The EEA's membership is not only open to the EU MS, but also to other states, which share the EU's and MS' concern as regards the EEA´s objectives.[226] Currently, the EEA has 32 Member Countries, including the 27 EU MS.[227]

[219] This is only a very marginal monitoring role and cannot be seen as an actual inclusion of the additional task in former Article 20 of the Regulation.
[220] Council Regulation 933/1999; Council Regulation 1210/90, Article 2 (iii); Khuchua 2009, p. 83.
[221] Council Regulation 933/1999; Council Regulation 1210/90, Article 2 (xi)-(xiii); Khuchua 2009, p. 83.
[222] Regulation 1641/2003 recitals (1) and (2); Council Regulation 1210/90, Article 6, 8 (6) and (7), 12 and 13; Scherer & Heselhaus 2010 (p. 96), p. 98; Regulation 1049/2011; Council Regulation 1605/2002.
[223] Regulation 1641/2003.
[224] Commission Proposal (2007) 667 final; Khuchua 2009, p. 81.
[225] Regulation 401/2009, recital 1; Khuchua 2009, p. 81.
[226] Regulation 401/2009, recital 12; Scherer & Heselhaus 2010 (p. 96), p. 97; Khuchua 2009, p. 82.
[227]European Environment Agency 2015, p. 2. (before 33, but due to the Brexit, the UK is no longer a member).
The term Member Countries will be used to describe all members of the EEA including the EU MS and the non-EU MS.

Furthermore, the EEA closely cooperates with six West Balkan countries, referred to as Cooperating Countries, and Greenland has an observer status.[228]

Next to around 200 expert staff members,[229] the EEA has three main bodies: The Management Board, the Executive Director, and the Scientific Committee. The Management Board is composed of one representative from each EU MS and from each of the other Member Countries, two representatives from the Commission and two scientific experts designated by the EP based on the contribution they can make to the agency's work.[230] The Regulation and Rules of Procedure do not require the Board members to be independent, hence, they are representatives of their institution or MS.[231] Decisions of the Board are all taken by a two-third majority.[232] However, the Member Countries, who are not EU MS, are only advisory members who have a right to participate in meetings but no right to take part in the votes.[233] The Management Board's main tasks include the adoption of the EEA's multi-annual work programme and annual work programmes, the appointment of the Executive Director, the designation of the Scientific Committee members and the adoption of the annual report on the agency's activities.[234] For the effective operation of the agency, a bureau, consisting of designated members from the Management Board, takes executive decisions in between the Board's meetings.[235]

The agency is headed by an Executive Director, currently Hans Bruyninckx,[236] who is accountable to the Management Board.[237] He is mainly responsible for the day-to-day management of the agency, for the proper implementation of the

[228] European Environment Agency 2015, p. 2.
[229] European Environment Agency 2021; European Environment Agency 2015, p. 3.
[230] Regulation 401/2009, art. 8 (1); Krämer 2015, p. 41; European Environment Agency 2015, p. 4; List of Management Board Members 2021; Ryland 1994, p. 139.
[231] Regulation 401/2009; Rules of Procedure of the Management Board and the Bureau 2015.
[232] Regulation 401/2009, art. 8 (3).
[233] Commission Proposal (1997) 282 final, §6.3.
[234] Regulation 401/2009, art. 8 (4), art. 9 (1) and art. 10 (2); European Environment Agency 2015, p. 4; Martens 2010, p. 887,
[235] Regulation 401/2009, art. 8 (2); Rules of Procedure of the Management Board and the Bureau 2015, art. 2.
[236] European Environment Agency 2016.
[237] Regulation 401/2009, art. 9; Krämer 2015, p. 41; European Environment Agency 2015, p. 4.

Management Board's decisions and for the implementation of the work programme.[238]

Lastly, the Scientific Committee is composed of maximum twenty scientists, who are particularly qualified in the field of the environment.[239] These scientists shall act independently when working in the Scientific Committee.[240] As in the Management Board, the scientists from non-EU Member Countries do only have a right to participate in meetings, but they hold no voting right.[241] Currently, the Scientific Committee has 20 members, of which only one does not come from an EU MS, namely Prof Dr Ahmet Mete Saatçi from Turkey.[242] The Scientific Committee is an advisory body, which delivers opinions on scientific matters concerning the agency's activities to the Management Board and to the Executive Director on their request.[243] For example, it delivered an opinion on environmental impacts of bioenergy, recommending that EU legislation and policies shall be revised to encourage the use of bioenergy.[244] This was then taken into account in the EEA Report on *EU bioenergy potential from a resource-efficiency perspective*.[245] Furthermore, it also delivers its opinion on the multiannual and annual work programme and on the recruitment of scientific staff in accordance with the Regulation.[246] The independent scientific opinions are adopted by a two-third majority and are taken into account by the Management Board and the Executive Director in the exercise of their duties.[247] However, they are not binding.[248]

[238] Regulation 401/2009, art. 9 (1) (a) and (b); Krämer 2015, p. 41; European Environment Agency 2015, p. 4.
[239] Regulation 401/2009, art. 10 (2); Rules of Procedure of the Scientific Committee 2016, arts. 1 and 2; Martens 2010, p. 887; European Environment Agency 2015, p. 4.
[240] Rules of Procedure of the Scientific Committee 2016, art. 1 (2).
[241] List of Scientific Committee Members 2021.
[242] Ibidem.
[243] Regulation 401/2009, art. 10 (1); Martens 2010, p. 887; Rules of Procedure of the Scientific Committee 2016, Annex III.
[244] Opinion on Greenhouse Gas Accounting in Relation to Bioenergy 2011-
[245] EEA Report No 6/2013.
[246] Regulation 401/2009, art. 8 (4); Rules of Procedure of the Scientific Committee 2016, Annex III.
[247] Rules of Procedure of the Scientific Committee 2016, art. 8 (1) and Annex III.
[248] Regulation 401/2009, art. 8 (4); Rules of Procedure of the Scientific Committee 2016, Annex III.

Finally, it should also be noted that the EEA is financed, for the most part by the European Union and by contributions of the third country members.[249]

3.4. The EEA´s Current Powers

The EEA´s main objective is to provide the EU and its MS with objective, reliable and comparable information, which will then be used by the EU and national legislators in deciding what measures are needed under the environmental policy.[250] Furthermore, it provides the necessary technical and scientific support.[251] This information and services are not only supplied to the EU institutions and the EU MS, but also to the other Member Countries and to the Cooperating Countries, even if this is only hinted at in the Regulation.[252]

In order to achieve this objective, the EEA has several tasks, which are all laid down in Article 2 of the Regulation. First, regarding its role in providing information, the EEA's prime task is to provide the EU institutions, especially the Commission, and the Member Countries with objective information necessary for the implementation of a sound and effective environmental policy.[253] Second, the EEA publishes a report on the state of the environment every five years and can also draw up reports on specific issues.[254] Third, the EEA also ensures that this information is disseminated to the general public.[255]

To be capable of providing this information, the EEA has to actually be able to get access to environmental information. Therefore, the EEA is also responsible for establishing and coordinating the European Environmental Information and

[249] Regulation 401/2009, arts 11-14; Khuchua 2009, p. 87; European Environment Agency 2015, p. 15.
[250] Regulation 401/2009, art. 1 (2) (a); Volpato & Vos 2020, p. 59; Lee 2014 (p. 28), p. 45; Caspersen 1999, p. 71; Ryland 1994, p. 139.
[251] Regulation 401/2009, art. 1 (2) (b); Volpato & Vos 2020, p. 59; Krämer 2015, p. 41.
[252]. While art. 2 of the Regulation only mentions MS, it is apparent from Recital 12 and Article 19, as well as from the EEA's own statement on its website, that this also applies to Member and cooperating countries (European Environment Agency 2020a).
[253] Regulation 401/2009, art. 2 (b); Volpato & Vos 2020, p. 60; Hedemann-Robinson 2015 (p. 481), p. 519; Khuchua 2009, p. 82.
[254] Regulation 401/2009, art. 2 (h); Volpato & Vos 2020, p. 59; Lee 2014 (p. 28), p. 45; Krämer 2015, p. 41.
[255] Regulation 401/2009, art. 2 (m); Volpato & Vos 2020, p. 59-60.

Observation Network (EIONET).[256] This network brings together the EEA with so called national focal points, located not only in the Member Countries, but also in the Cooperating Countries.[257] These are national environmental agencies or other national bodies that deal with environmental law,[258] and which provide the EEA with data and studies collected in the countries.[259] Therefore, the EIONET is the EEA's main source of information.[260] However, the Regulation only requires states to cooperate and contribute to the EEA as appropriate.[261] This formulation does not amount to a clear obligation to provide the EEA with information, but leaves discretion to the states in deciding what type and quantity of information they want to provide. Additionally, the EEA records, collates, and assesses the data on the state of the environment and saves it in a reference centre of information on the environment.[262]

Next to the tasks related to the provision of information, the EEA also has some other tasks. It assists in the monitoring of environmental measures.[263] Additionally, on the request of Member Countries and provided that it does not endanger the fulfilment of its other tasks, the EEA can advise Member Countries on their system for the monitoring of environmental measures.[264] However, the proposal from 1997 and the wording of the current text, make it apparent that the EEA cannot actually itself monitor compliance with environmental measures.[265] Instead, it rather coordinates reporting from states, by, amongst others, developing questionnaires and collecting and evaluating the reports provided by the states.[266] For example, in 2020, the EEA, published a report tracking the progress in national

[256] Regulation 401/2009, art. 2 (a); Volpato & Vos 2020, p. 60; Hedemann-Robinson 2015 (p. 481), p. 519; Scherer & Heselhaus 2010 (p. 96), p. 97.
[257] Regulation 401/2009, art. 4 (1) (b); Volpato & Vos 2020, p. 60; Hedemann-Robinson 2015 (p. 481), p. 519; Davies 2004 (p. 67), p. 73; European Environment Agency 2015, p. 5; They are listed on the EEA's website: https://www.eea.europa.eu/about-us/countries-and-eionet/list-of-members-of-the-nfp-eionet-group (last visited on 23 June 2021).
[258] Regulation 401/2009, art. 4 (3); Martens 2010, p. 887; European Environment Agency 2015, p. 5.
[259] Regulation 401/2009, art. 4 (2); Volpato & Vos 2020 p . 60.
[260] Davies 2004 (p. 67), p. 73; Hedemann-Robinson 2015 (p. 196), p. 201; European Environment Agency 2015, p. 5.
[261] Regulation 401/2009, art. 4 (2).
[262] Idem, art. 2 (e).
[263] Regulation 401/2009, art. 2 (c); Volpato & Vos 2020, p. 60.
[264] Regulation 401/2009, art. 2 (d).
[265] Regulation 401/2009, art. 2 (2); Commission Proposal (1997) 282 final, §4.1.1.
[266] Ibidem.

climate change adaptation and supported the Member Countries with the implementation of reporting obligations under the *Industrial Emissions Directive*, by creating an new Industrial Emissions Portal.[267] Furthermore, the EEA can only exercise these functions on request of the Commission and the Member Countries, not on its own initiative.[268] Finally, the EEA also stimulates development, promotes the incorporation of European environmental information into international programmes and cooperates with other bodies and programmes.[269] The EEA's tasks do not include any decision-making powers, inspection powers or other more extensive powers within the implementation of EU environmental policies.[270]

A study, evaluating the EEA and EIONET based on their activities from 2012 to 2016, established that the tasks not directly related to the provision of information, including the advice to individual Member Countries on their monitoring measures, are considered less important by the Management Board.[271] Therefore, there is also only very limited activity of the EEA with regard to these tasks.[272] In fact, these tasks are so seldomly used that they were not even further taken into account in the study.[273] Furthermore, it was indeed not possible to find concrete examples on advice given to Member Countries on the EEA's website. When looking at the EEA's latest multiannual work programme, used for the years 2014 to 2020, the EEA stated itself that its key goal is to be the prime source of knowledge at European level.[274] It has as its main ambition to inform the implementation of environmental policies at EU and national level, be a leading knowledge centre and facilitate knowledge-sharing and capacity building in its field of activity.[275] Its strategy for 2021 to 2030 is named "Delivering data and knowledge to achieve Europe's environment and climate ambitions" and also

[267] EEA Report No 04/2021, p. 11 and 13; EEA Report No 6/2020; For the Industrial Emission Portal see https://industry.eea.europa.eu/ (last visited on 23 June 2021).
[268] Regulation 401/2009, art. 2 (2); Commission Proposal (1997) 282 final, §4.1.1.
[269] Regulation 401/2009, art. 2 (g), (i), (j) and (l).
[270] Hedemann-Robinson 2015 (p. 1 and 59), p. 16 and 125; Lee 2014 (p. 28), p. 45; Jans & Vedder 2012 (p. 339), p. 390; Schout 2008 (p. 257), p. 266.
[271] Evaluation of the EEA and its EIONET 2018, p.28; European Commission 2018, p. 62.
[272] Ibidem.
[273] European Commission 2018, p. 62.
[274] Multiannual Work Programme 2014-2018, p. 11.
[275] Ibidem.

focuses mostly on the provision of information, collection of data and networking.[276] Hence, also in practice, the agency focuses mainly on its role as information provider and is only scarcely active with regard to its other tasks, such as the assistance and advice in the monitoring of environmental measures.

3.5. Conclusion

The EEA's creation was subject to major political debates between the Commission, the Council, and the EP. Furthermore, its first years of operation were marked by disagreements with the Commission, which are however settled by now.

Due to the unwillingness of the Commission and the Council to provide the EEA with more extensive powers, it was and remains, also after several amendments to its founding Regulation, an agency with more limited powers. It is primarily tasked with the collection, evaluation, and provision of information on the environment. Thereby, it has some influence on the development of environmental policies. However, it does not have a great role in the implementation phases of environmental law. While it does have the power to assist the Commission and the Member Countries and give advice to Member Countries in the monitoring of environmental measures, this power is still very limited, because it can only be exercised on request by the Commission or the Member Countries and because it is limited to assistance rather than monitoring by the agency itself. Furthermore, the EEA has no other more extensive powers, like decision-making powers or inspection powers. However, the Regulation leaves some room for interpretation of the tasks, which could allow for the extension of the EEA's powers. The limited extent of the current tasks is not only provided for by law, but also in practice, the agency is more focused on providing information, than engaging in its tasks not directly related to the provision of information. In fact, the task of assisting Member Countries in their monitoring is very rarely used.

The EEA's organisation is also rather complex, also some third countries can participate in it. The agency can provide its services also to these counties and they

[276] EEA-EIONET Strategy 2021-2030.

form part of the EIONET. The Member Countries, which are not EU MS, can actively participate in the agencies bodies meetings but do not have any voting rights.

The EEA has three main bodies, next to expert staff members. Its Management Board is composed of Member Countries', Commission's, and EP's representatives, who do not have a duty to be independent. It also has an Executive Director and a Scientific Committee. The Committee is made up of independent scientific experts. However, its opinions only have to be taken into account, but are not binding.

The aspects mentioned in this chapter should be taken into account in determining whether and how the EEA's powers should be extended. This question will be answered in the following chapter.

Chapter 4: The Possibility of Extending the EEA 's Powers

The analysis made in chapter 2 has revealed that the compliance deficit is mostly caused by deficiencies in the implementation of EU environmental law, more specifically in the enforcement phase.

Furthermore, in chapter 3, it was established that when the EEA was created, it had been argued that it should get powers to enforce EU environmental law. However, due to the opposition of the Commission and the Council, the EEA was not provided with any such power, which is still the case today.

The purpose of this thesis is to analyse to what extent the EEA could play a role in enforcing the compliance with EU environmental law. As mentioned in the introduction, there are several advantages of delegating powers to agencies. However, such delegation of powers should not disturb the balance of powers established by the Treaties. Therefore, this chapter will focus on analysing whether it would be necessary to delegate more enforcement powers to the EEA and whether EU law would allow to do so.

First, the next section will explain the different aspects that enforcement powers can entail (section 4.1.). Second, it will be established whether providing the EEA with such powers would solve the deficiencies established in chapter 2 (section 4.2.). Third, it will be analysed whether EU law actually allows for such an extension of the EEA's powers (section 4.3.). Fourth, a short conclusion will be drawn (section 4.4.).

4.1. Providing the EEA with Enforcement Powers

As explained in the introduction, enforcement powers entail monitoring powers, including itself inspection powers, and powers to impose sanction.[277] With regard to monitoring powers, a distinction should be made between indirect and direct monitoring. There are agencies, who monitor whether the national enforcement authorities are correctly enforcing EU environmental law towards private parties, but also agencies, who directly monitor the compliance with environmental law by private parties.[278]

[277] Jans & Vedder 2012 (p. 139), p. 139.
[278] Groenleer et al. 2010, p. 1216.

There are already agencies which possess such powers. For example, the European Maritime Safety Agency (EMSA) conducts indirect inspections on the implementation of the Community Port State Control regime by the national authorities,[279] while the EASA is responsible for monitoring the national enforcement of EU aviation legislation.[280] The agencies are under a duty to report on their inspections to the Commission, who can then decide, if necessary, to start infringement actions.[281] However, the EASA also conducts direct inspections of private undertakings in order to ensure that they still comply with the conditions necessary to be certified by the agency.[282] Also, the European Securities and Markets Authority (ESMA) can itself inspect credit rating agencies and even impose fines on them, if it detects infringements.[283]

In section 3.4. it was already mentioned that the EEA mainly collects, evaluates, and provides information on the environment to the EU institutions, the general public and the Member Countries.[284] While it can assist the Commission and the MS in the monitoring of environmental measures, it does not have enforcement powers on its own.[285] Therefore, it could be considered to provide the EEA with powers to monitor, either, indirectly whether the national authorities are complying with their enforcement duty, or directly whether private parties are complying with EU environmental law.

In order to exercise this power, the EEA would have to rely on information provided to it by the private parties or by the MS. However, the EEA could also be given the power to conduct itself inspections. Thereby, the EEA would be enabled to detect infringements and collect evidence on its own.

[279] Regulation 1406/2002, art. 3; Groenleer et al. 2010, p. 1219 and 1225.
[280] Regulation 2018/1139, art. 85; Vos 2014, p. 21; Groenleer et al. 2010, p. 1222 and 1225.
[281] Regulation 1406/2002, art. 3 (4); Regulation 2018/1139, art. 85 (1) ; Groenleer et al. 2010, p. 1220 and 1224.
[282]Regulation 2018/1139, arts. 62 (2) (c) and 83; Groenleer et al. 2010, p. 1219.
[283] Regulation 513/2011, arts. 23c, 23d and 23e; Scholten & Ottow 2014, p. 84.
[284] Regulation 401/2009, art. 2; Evaluation of the EEA and its EIONET 2018, p. 28; European Commission 2018, p. 62.
[285] Regulation 401/2009, art. 2 (2); Hedemann-Robinson 2015 (p. 1 and 59), p. 16 and 125; Lee 2014 (p. 28), p. 45; Jans & Vedder 2012 (p. 339), p. 390.

The outcome of the indirect inspections would then be reported to the Commission, which could, if the EEA indeed detected an infringement, decide whether to take infringement actions against the MS, as explained in section 2.2.

If infringements by private parties are detected through the EEA's direct monitoring, the agency could be provided with additional powers to impose itself sanctions on these parties.

4.2. The Effects of Providing the EEA with Enforcement Powers

4.2.1. Monitoring of MS' Authorities

If the EEA would be enabled to monitor compliance of national authorities with the implementation obligations and to report infringements to the Commission, it could be allowed to effectively assist the Commission in its supervisory function. This would be advantageous for the Commission since it could focus more on its core tasks, including the actual infringement procedures, instead of having to deal with the monitoring of even the most minor infringement of environmental law.[286]

The EEA has the advantage that it is provided with information collected by national focal points through the EIONET.[287] If it would gain the power to monitor compliance, it could directly analyse this information in order to detect infringements. In this respect, the tasks of collecting and analysing information would be jointly exercised by the EEA, making the process smoother.

However, it can be doubted whether MS will still be willing to provide the EEA with such information, if it could later be used against them to prove infringements. Furthermore, monitoring powers are not very effective if the body holding the power cannot conduct inspections on its own. As shown in section 2.2., the Commission has no inspections powers in the area of EU environmental law, but at the same time has the burden of proof in infringement procedures.[288] Furthermore, it was established that reliance on national inspections has proven to

[286] Everson & Vos 2016 (p. 139), p. 139.
[287] Regulation 401/2009, art. 4 (2); Volpato & Vos 2020 p . 60.; Davies 2004 (p. 67), p. 73; Hedemann-Robinson 2015 (p. 196), p. 201.
[288] Hedemann-Robinson 2015 (p. 30), p. 38-39; Langlet & Mahmoudi 2016 (p. 131), p. 137; Jans & Vedder 2012 (p. 139), p. 166; Krämer 2015 (p. , p. 438; Jack 2011, p. 76.

not be well-placed, because MS often do not cooperate sufficiently.[289] Consequently, the Commission mainly relies on complaints by the general public and is often unable to detect infringements of the duty to implement EU environmental law.[290] Therefore, it would be appropriate to also provide the EEA with the power to conduct inspections itself.

4.2.2. Monitoring and Sanctioning of Private Parties

The advantage of providing the EEA with enforcement powers towards private parties is that it would be able to directly influence the enforcement at MS level. By directly monitoring and sanctioning private parties, the EEA could address the deficiencies which exist in the MS' enforcement, due to the non-harmonization of environmental inspection and sanction rules, as established in section 2.1.

If the EEA would be provided with monitoring powers only, its possibilities to detect infringements would be rather limited, as it could only make use of the information provided to it and of inspections conducted by the MS. However, if its powers would also include inspection powers, it would not have to deal anymore with rather poor national inspections and the MS' unwillingness to provide more resources to ensure effective inspections.[291] Furthermore, by also allowing the EEA to sanction private parties directly, the agency would not have to rely on national courts, who could, due to the discretion they have, impose sanctions, which are not sufficiently dissuasive. Instead, the EEA could itself ensure that infringements of EU environmental law are detected and sanctioned. Thereby, it would become the main enforcer, while the MS' role would be reduced to that of an assistant to the EEA.[292] As a consequence, the national enforcement measures would become less relevant and hence, the deficiencies of these measures would be less problematic.[293]

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[289] Better Monitoring of the Application of Community Law 2002, p. 14; Article 4 (3) TEU; Jack 2011, p. 77; Langlet & Mahmoudi 2016 (p. 131), p. 137 ; Hedemann-Robinson 2015 (p. 537), p. 541.
[290] Jack 2011, p. 77; Börzel & Buzogány 2019, p. 327 ; Krämer 2015, p. 441 ; Langlet & Mahmoudi 2016 (p. 131), p. 136.
[291] Hedemann-Robinson 2015 (p. 196), p. 196-197; Scholten 2017, p. 1355; Decision 1386/2013, §56-58.
[292] Ibidem.
[293] Ibidem.

Furthermore, the EEA would be the only entity exercising these powers in the joint territory of all MS.[294] Therefore, contrary to the non-harmonized MS' enforcement measures, the EEA would be able to apply its enforcement measures uniformly in all MS.[295]

Also, if the MS would no longer be mainly responsible for enforcing EU environmental law towards private parties, there would also be less MS' infringements of their enforcement duty. Consequently, the Commission would also have to bring less infringement cases in the environmental area.[296] Thereby, several of the issues mentioned in section 2.2. could be addressed. First, there would be less dependency on the Commission's discretionary decision to actually bring proceedings. Second, the Commission's and CJEU's workload would be reduced, which would allow them to make the infringement procedures faster and more qualitative. However, it could also be the case that, instead, more claims are brought against the EEA's decisions, which would then leave the CJEU with a similar amount of cases as is currently the case.

4.2.3. General Effects

Another advantage that the EEA has is that it is specialized in the environmental area only.[297] Contrary to the Commission and the MS, it could, in its enforcement activities, focus specifically on environmental infringements, instead of having to deal with many different EU policy areas. As a consequence, it could be much more effective in detection infringements of environmental law.

Finally, due to the fact that several of the existing deficiencies would be addressed, reliance on individuals or NGOs in detecting infringements would also be less necessary. Of course, it cannot be excluded that the EEA will also be unable to detect all existing infringements. Therefore, the contribution by the general public will still be valuable. However, in most cases, the EEA should be able to address infringements itself without the need for assistance by the general public.

[294] Scholten 2017, p. 1354.
[295] Scholten 2017, p. 1354; Everson & Vos 2016 (p. 139), p. 139.
[296] Scholten 2017, p. 1355.
[297] Regulation 401/2009, art. 1 (2); Volpato & Vos 2020, p. 60-63 ; Lee 2014 (p. 28), p. 45.

This is especially the case because the EEA has much more expertise in the environmental area. Furthermore, it would be provided with more direct powers to address such infringements, as it could take actions on its own or directly address the national authorities or the Commission. This is not possible for private individuals, whose possibilities to address infringements are much more limited, as explained in section 2.3. Additionally, the EEA is not only interested in specific areas of environmental law but aims at gathering information from the EU's whole environmental acquis.[298]

However, there are also some drawbacks to providing the EEA with enforcement powers. As mentioned before, if the EEA could monitor or even sanction the compliance of MS with their implementing obligation, it is rather likely that the MS will not be willing anymore to provide it with the necessary information. Therefore, it could be the case that the EEA would no longer be able to exercise its current main function of providing information. This could be very problematic, because even if the power to provide information does not address the compliance deficit, it is still very important in order to guide decision-making on environmental matters at EU level.[299]

Also, in order to ensure that the EEA will actually be able to exercise enforcement powers, it would most certainly be necessary to provide the agency with much more financial and human resources.[300] Currently, the Commission has to rely on national inspections, because, amongst other reasons, it does not have sufficient human resources to conduct its own inspections.[301] Furthermore, MS' inspections are often rather poor, because insufficient resources are provided for them.[302] Therefore, in order to exercise inspection powers, the EEA would either have to collaborate with the national authorities, whose costs are born by the MS, or would have to be given the necessary resources to recruit its own inspectors. Furthermore, the agency would have to recruit more staff in general in order to deal effectively with the largely increased workload and would also have much

[298] Regulation 401/2009, art. 1.
[299] Everson & Vos 2016 (p. 139), p. 140.
[300] Evaluation of the EEA and its EIONET 2018, p. 32; Khuchua 2009, p. 87.
[301] Krämer 2016, p. 258.
[302] Hedemann-Robinson 2015 (p. 196), p. 196-197.

more expenditures. It is questionable whether the EU institutions and the MS will be willing to provide the agency with such extensive resources.

Finally, the extension of the EEA's powers could urge a stronger debate on its independence and accountability.[303] It could be questioned, on the one hand, whether the EEA is independent enough from the EU institutions, the MS or from stakeholders to exercise such functions. On the other hand, it would have to be considered to which entity the EEA should be obliged to respond. However, as an analysis of these aspects would go beyond the scope of this thesis, they will not be further considered within this context. Instead, the next section will aim at determining under which conditions, the EEA could legally be provided with such powers in the first place.

4.3. Legislative Conditions to Extent the EEA's powers

4.3.1. The Meroni 2.0. Doctrine

While the EU Treaties do not have any provision on the delegation of powers to agencies,[304] the CJEU in its case law established the Meroni 2.0. Doctrine. It decided in the *Meroni* case that the delegation of powers to bodies other than those referred to in the Treaties, such as agencies, is possible if the balance of powers between the EU institutions and the MS is not distorted.[305] Therefore, five conditions need to be fulfilled: Firstly, there must be an explicit act of delegation and secondly, the powers delegated cannot be different from those that the delegating authority has itself under the Treaties.[306] Thirdly, the same conditions and limits for the exercise of the powers need to be applied and fourthly, the exercise of the powers must be subject to supervision by the delegating authority.[307] Fifthly, only clearly defined executive powers can be delegated, no discretionary powers implying a wide margin of discretion.[308] Subsequently, in the

[303] Busuioc 2010.
[304] Vos 2014, p. 43; Hofmann et al. 2011 (p. 222), p. 241.
[305] Case 9/56, p. 152; Vos 2014, p. 40; Scholten & Van Rijsbergen 2014; p. 393; Simoncini 2015, p. 314.
[306] Case 9/56, p. 150-151; Vos 2014, p. 40 ; Hofmann et al. 2011 (p. 222), p. 241-242 ; Simoncini 2015, p. 315.
[307] Ibidem.
[308] Case 9/56, p. 150-152; Vos 2014, p. 40 ; Hofmann et al. 2011 (p. 222), p. 241-242 ; Simoncini 2015, p. 315 and 316.

ESMA case, the CJEU loosened this final condition, by allowing for the delegation of limited discretionary powers, as long as they are precisely delineated and amenable to judicial review.[309] Hence, it needs to be analysed whether the delegation of enforcement powers to the EEA would fulfil these conditions and, consequently, not infringe the institutional balance.

4.3.2. Explicit Act of Delegation

The first condition would easily be fulfilled. The EEA's tasks already include the collection and evaluation of information and the assistance in monitoring of environmental measures.[310] Hence, a simple monitoring power, without a right to conduct inspections, could already be read into the EEA's mandate without amending the Regulation. In order to provide the EEA powers to conduct inspections and possibly also a mandate to impose sanctions on private parties, it would be necessary to amend the EEA's founding Regulation to include an explicit mandate.

4.3.3. No More Powers Than and Same Limits as the Delegating Authority

Because the balance of powers established by the Treaties should not be disturbed, it is important that the powers conferred do not exceed the delegating authority's mandate. The legal basis to amend the EEA's founding Regulation is to be found in Article 192 TFEU, which allows the EU to take action, amongst others, in order to achieve the objective of preserving, protection and improving the quality of the environment.

Such action is to be taken in accordance with the ordinary legislative procedure in Article 294 TFEU. Hence, the EP and Council, as delegating authorities, are indeed empowered to provide the EEA with more extensive powers, because this could benefit the detection of infringements of EU environmental law, as established in section 4.2., and thereby help achieving aforementioned objective.

However, there are several obstacles to delegating enforcement powers to the EEA. First of all, in the ordinary legislative procedure, it is usually up to the

[309] Case C-270/12, §53; Scholten & Van Rijsbergen 2014, p. 401; Simoncini 2015, p. 328.
[310] Regulation 401/2009, art. 2 (a) and (c).

Commission to propose amendments to a Regulation. However, as mentioned in section 3.1., the Commission initially opposed the idea to give the EEA enforcement powers. Furthermore, in the early years of the EEA's work, it did not want the agency to be able to gain more powers, enabling it to compete with DG Environment.[311] Therefore, it could be questioned whether the Commission would actually be willing to propose such amendment.[312] However, looking at the Commission's benefits of providing the EEA with enforcement powers, as demonstrated in section 4.2., it can be argued that the Commission will most likely be inclined to provide the EEA with monitoring powers, in order to gain assistance it in detecting MS' infringements. Furthermore, the Commission has over the years started to cooperate closely with the EEA and, thereby, realized its added value.[313] Also, in order to reach the ambitious goals, set in the *European Green Deal*, there is probably a general need for expanding cooperation with agencies and other entities.[314] However, there is also a possibility that the Commission would like to remain in force and therefore, argue that such powers should be conferred to it directly rather than to the EEA, as it is already the case for other policy areas.

Another obstacles, especially with regard to the enforcement towards private parties, is compliance with the subsidiarity principle. As mentioned in section 2.1.3., the environmental policy is a shared competence and consequently, subject to the principle.[315] Previously, several MS have argued that the EU should not get involved in inspections and sanctioning of EU environmental law, because MS are better placed to carry out these duties.[316] Furthermore, as mentioned in section 3.1., the Council, which is the MS' representation at EU level, strictly opposed the idea of giving the EEA enforcement powers.[317] Therefore, providing the EEA with such powers could lead to strong MS opposition, as part of their enforcement powers would be given to an EU entity.[318]

[311] Volpato & Vos 2020, p. 59; Martens 2010, p. 888.
[312] Art. 17 (2) TFEU; Versluis 2005, p. 19.
[313]Volpato & Vos 2020, p. 59; Martens 2010, p. 890-891.
[314] Volpato 20-12-2019.
[315] Art. 4 (2) (e) TFEU; Art. 5 (3) TEU.
[316] Hedemann-Robinson 2017a (p. 13), p. 26-27; Krämer 2015, p. 438.
[317] Hedemann-Robinson 2015 (p. 481 and 537), p. 519-520 and 547.
[318] Scholten 2017, p. 1355.

However, the argument that MS are best placed to enforce EU environmental law can be clearly refuted by the findings established in the previous chapters of this thesis. When looking at the many infringement cases brought every year, as mentioned in the introduction, and at the many deficiencies that exist in the MS' enforcement, as established in section 2.1, it can be clearly established that the MS are not doing the best job in enforcing EU environmental law and that the non-harmonization of the national measures leads to inconsistencies and gaps. Therefore, it can be argued, in order to justify the conferral of powers to the EEA, that EEA enforcement could be more effective. Furthermore, it would automatically lead to some kind of harmonization, as the EEA would apply the same enforcement rules in each MS.

Furthermore, instead of just sending own inspectors, the EEA could also collaborate with national inspection authorities. Thereby, it could use already existing national resources instead of having to create its own, which would also be beneficial in light of its limited resources. Furthermore, the MS would not be set aside, but could jointly with the EEA conduct inspections, which is also in line with the principle of sincere cooperation, mentioned in section 2.1. This is already done by other agencies. For example, while the EMSA has no duty to involve national assessors in investigations, its investigating team is still usually composed of agency experts next to experts of national maritime authorities.[319]

As already mentioned in the introduction, the lack of harmonization was also recognized in the EU's 7EAP.[320] Therefore, the programmes' goals include the extension of requirements relating to inspections and surveillance of EU environmental law.[321] As this is adopted by the EP and the Council, it proofs that there is already some willingness of these institutions to extent the EU's enforcement powers in this area.[322]

Also, as has been seen with the delegation of powers to other agencies, the MS are usually more willing to surrender some of their powers to agencies than to the

[319] Regulation 1406/2002, art. 3; Groenleer et al. 2010, p. 1220.
[320] Decision 1386/2013, Annex §58.
[321] Decision 1386/2013, art. 2 (1) (d) and Annex §60; Hedemann-Robinson 2020 (p. 196), p. 208.
[322] Hedemann-Robinson 2020 (p. 196), p. 208.

EU institutions.[323] The reasons for this include the advantages mentioned in the introduction, namely that agencies are considered to be more independent and to have a more expertise and technical knowledge.[324] Furthermore, the delegation of powers to agencies became generally more accepted over time.[325] This is also demonstrated by the powers that more recently created EU agencies hold.[326] The greatest example is the ESMA, which was created 20 years later then the EEA and which has much more extensive powers, as already mentioned in section 4.1..[327]

Finally, the MS and Commission would not completely lose control over the EEA's exercise of these powers. The enforcement conducted by the agency would be subject to the Management Board's supervision, which is made up by Commission representatives, scientific experts, and Member Country representatives.[328] Hence, the MS and Commission would retain the power to oversee the EEA's enforcement activities.

However, while all these arguments point at the fact that the MS could indeed be convinced to provide the EEA with enforcement powers, this cannot be said with complete certainty. Especially because these powers are very extensive and intrusive on the MS, it can still be doubted whether the MS would agree. Furthermore, providing the EEA with such powers would require an extensive extension of its budget, which many MS could not be willing to provide.

4.3.4. Supervision

The powers delegated to the EEA should be subject to the continuing supervision by the EU legislator as delegating authority.[329] Furthermore, the Commission as guardian of the Treaties exercises general supervision over the agency.[330] In the EU Institution's *Common Approach on EU decentralised agencies*, it was stated

[323] Groenleer et al. 2010, p. 1217
[324]Vos 2014, p. 15 and 24; Scholten 2017, p. 1354.
[325] Volpato & Vos 2020, p. 59; Martens 2010, p. 890-891 ; Vos 2014, p. 15.
[326] Hofmann et al. 2011 (p. 222), p. 246; Versluis 2005, p. 19 and 21-22.
[327] Regulation 1095/2010; Scholten & Van Rijsbergen 2014, p. 391-392; Krämer 2015, p. 41.
[328] Regulation 401/2009, art. 8 (1); Krämer 2015, p. 41; European Environment Agency 2015, p. 4; List of Management Board Members 2021.
[329]Case 9/56, p.149-152; Vos 2014, p. 40 ; Hofmann et al. 2011 (p. 222), p. 241-242; Simoncini 2015, p. 315.
[330] Krämer 2015, p. 437 and 438; Jans & Vedder 2012 (p. 139), p. 170.

that each agency's founding Regulation should provide for an overall evaluation every five years, commissioned by the Commission.[331] This evaluation shall be used by the delegating authorities to decide whether the agency should continue its mandate.[332]

The EEA's founding Regulation does not include a provision on periodical evaluations yet, however, in practice, the agency is already subject to them.[333] The latest evaluation, which was also mentioned in section 3.4., focused on the EEA's effectiveness and efficiency in the period mid-2012 until end-2016.[334] Furthermore, the agency is obliged to forward an annual report on its activities to the EP, the Council, the Commission the Court of Auditors and the MS.[335] Hence, the EEA's powers and activities are already regularly reviewed. It would only be necessary to extend this review to the EEA's new enforcement powers.

4.3.5. Discretionary Powers

In order to exercise enforcement powers, the EEA would necessarily have to take decisions which require some discretion. For example, it would be responsible for deciding whether inspections should be conducted, whether sanctions should be imposed and what type and amount of sanctions would be appropriate. This is only allowed under the Meroni 2.0. doctrine if these powers are precisely delineated and amenable to judicial review.[336] Hence, it should be exactly determined when inspections should be conducted, what types of infringements could be sanctioned and what sanctions precisely could be imposed by the EEA. This would ensure that the EEA would only have limited discretionary powers.

A possibility would be to empower the EEA only in a specific area of EU environmental law where already more delineated enforcement measures determined. For example, Article 16 (3) of the *EU ETS Directive* provides for the exact amount of penalty that needs to be paid by an operator if he did not surrender

[331] Joint Statement and Common Approach 2012, Annex §60.
[332] Joint Statement and Common Approach 2012, Annex §60
[333] Evaluation of the EEA and its EIONET 2018, p. 3.
[334] Idem, p. 4.
[335] Regulation 401/2009, art. 8 (6).
[336] Case C-270/12, §53; Scholten & Van Rijsbergen 2014, p. 401; Simoncini 2015, p. 328.

sufficient allowances.[337] Such a penalty could be easily imposed by the EEA without having much discretion. Furthermore, the ESMA's power to impose fines on credit rating agencies could be used as a template. It only has the power to impose fines on a clearly defined group, namely credit rating agencies.[338] Furthermore the infringements for which fines can be imposed and the price range, they can have, are exactly specified in the Regulation.[339]

Additionally, it should be clearly determined which actors within the agency should have the power to decide enforcement measures and these decisions should be subject to the CJEU's review.

Looking again at other agencies, the EASA´s Executive Director decides on monitoring activities and the ESMA has a separate Supervisory Board, which takes sanctioning decisions.[340] As the creation of a Supervisory Board is not mandatory,[341] it could be sufficient to provide the Executive Director with these decision-making powers. However, it could be advantageous for the EEA to create another clearly defined body, dealing specifically with enforcement. Especially, because the EEA, like the ESMA, would have more extensive powers than the EASA.

Giving the Scientific Committee or the Management Board such powers is not an option. This is the case, because the Scientific Committee lacks the legitimacy to take such decisions, as it is made up of experts and not of politically elected representative, [342] and because the EEA's Management Board cannot at the same time exercise supervision over the EEA's decisions and itself take these decisions. Additionally, the EEA's current bodies still include representatives from non-EU MS,[343] which should however not be problematic, because the representatives

[337] Directive 2003/87/EC, art. 16 (3).
[338] Regulation 513/2011, 13 art. 36a and Annex III.
[339] Ibidem.
[340] Regulation 1095/2010, arts. 43 and 60.
[341] The EASA, for example, has no Supervisory Board (Regulation 2018/1139).
[342] Regulation 401/2009, art. 10 (2); Rules of Procedure of the Scientific Committee 2016, arts. 1 and 2; Martens 2010, p. 887; European Environment Agency 2015, p. 4.
[343] Regulation 401/2009, arts. 8 (1) and 10 (2); List of Management Board Members 2021; List of Scientific Committee Members 2021.

from non-EU MS do not have voting rights in the agencies bodies and can therefore not significantly influence the agency's decisions.[344]

Finally, if EEA would be provided with decision-making powers, the creation of a Board of Appeal within the agency would be mandatory,[345] as it is already the case for agencies such as the EASA and the ESMA.[346] This Board would be responsible for reviewing the EEA´s decisions and its decisions would in turn be subject to review by the General Court.[347] Furthermore, the creation of such a Board would have the advantage that it could lower the case load on the CJEU even more, because it would resolve some issues the CJEU would otherwise have to deal with.[348]

4.4. Conclusion

In this final chapter, it has been determined that, in order to address the compliance deficit, it would be beneficial to provide the EEA with enforcement powers, including powers to monitor and inspect MS' authorities or private parties as well as powers to sanction infringements by private parties directly. This is the case, because it would enable the EEA to address infringements of EU environmental law directly and thereby, solve several deficiencies established in chapter 2. These include the facts that the EEA could take some workload of the Commission, that it could replace the MS in their rather poor enforcement activities and thereby also create a more uniform enforcement in the environmental area, and that it could address most issues, where previously reliance on the general public was necessary, in a much more direct and professional manner.

However, there are also drawbacks to providing the EEA with such powers, mainly because MS would be less willing to provide the agency with information, if this information could then be used against them. Furthermore, the EEA´s

[344] Öberg 2019 (p. 204), p. 219-221; Bekkedal 2019, p. 384.
[345] Art. 263 (5) TFEU; Chirulli 2015, p. 2: All agencies with decision-making powers have a Board of Appeal, for example the EASA (art. 105 Regulation 2018/1139).
[346] Regulation 2018/1139, art. 105; Regulation 1095/2010, art. 60.
[347] This would be the same as for Boards of Appeal of other agencies, such as the EASA (Regulation 2018/1139, arts. 105 and 114) and the ESMA (Regulation 1095/2010, arts. 60 and 61 (1)).
[348] Chirulli 2015, p. 3.

resources would have to be extensively extended and it would have to be considered whether it is independent and accountable enough.

More importantly, this chapter has established whether the EEA could actually be provided with enforcement powers in light of the Meroni 2.0. doctrine. In order to fulfil the conditions, the MS would have to be convinced, based on the subsidiarity principle, to give up some of their powers, in order to make the enforcement of EU environmental law more effective. Furthermore, several changes to the EEA's Regulation would have to be made in order to include detailed provisions on the enforcement measures the EEA could take. Finally, the EEA's organization would have to be reconsidered, as a body would have to be designed to take decisions on enforcement measures and a Board of Appeal would have to be created.

Hence, it is possible and beneficial to provide the EEA with enforcement powers. However, in order to enable this, extensive changes to the EEA's current mandate and organization would be required. Furthermore, there is a possibility that the MS will not agree to the conferral of such powers to the EEA.

Chapter 5: Conclusion

The thesis started with the premise that there exists a compliance deficit in the implementation of EU environmental law. Therefore, chapter 2 established the deficiencies, causing this deficit, which exist in the supervision of EU environmental law. First, it was established that the MS' approaches are of very different quality and effectiveness due to lacking harmonization of monitoring and sanctioning obligations. Second, the Commission's supervision is also deficient, mainly because the Commission has no inspection powers and is, therefore, often not able to detect infringements. Additionally, the infringement procedure has some shortcomings with regard to infringements of EU environmental law. Third, these deficiencies can also not be resolved by the role the general public can play in detecting infringements, because their possibilities are limited by legal as well as practical obstacles, such as standing requirements, discretion of national authorities, insufficient resources, and technical abilities.

The subsequent chapter focused on the EEA. First, it was established that the EEA's creation was accompanied by major political debates between the EU institutions on the extent of powers to be allocated to the agency. In the end, the agency was only provided with more limited powers. To this day, its activities are mainly focused on collecting, evaluating, and providing information. This is also the case because of disagreements with the Commission in the early days of its operation. Second, the EEA's current division into three different bodies was explained, namely into a Management Board, an Executive Director, and a Scientific Committee. Furthermore, it was established that also third countries are involved in these bodies, but do not have any voting rights.

Finally, the findings of the previous chapters were taken into account in order to determine, whether it would be possible and beneficial to provide the EEA with enforcement powers. Indeed, providing the agency with enforcement powers, including monitoring, inspection, and sanctioning powers towards national authorities or private parties, would allow the EEA to effectively address several of the deficiencies established in chapter 2. Furthermore, it was considered what conditions would need to be fulfilled in order to comply with the conditions of the Meroni 2.0. doctrine. It was determined that it would be possible to provide the

EEA with enforcement powers. However, this would require several changes to be made the EEA's current mandate and organization and the MS' consent would be needed.

Hence, the answer to the question, **to what extent could the European Environmental Agency play a role in enforcing the compliance with EU environmental law**, must be that the EEA could play a more extensive role in the enforcement of EU environmental law. This is the case because the EEA could indeed be provided with enforcement powers including monitoring powers and inspection powers towards private parties or MS' authorities as well as sanctioning powers towards private parties. Such powers would allow the agency to help overcome many of the deficiencies that exist with regard to the enforcement at MS level, in the Commission's supervision and in the mechanism at the disposal of the general public.

The delegation of powers to agencies has many advantages, such as the agencies independence, its faster decision-making, and expert staff. However, it can also be very complicated to actually ensure that the balance of powers established by the Treaties is not disturbed by the agencies' activities. Legally speaking, there is a possibility to extend the EEA's powers to enforcement powers while complying with the Meroni 2.0. doctrine. However, it should also be considered that there are several obstacles which first would have to be overcome as well as drawbacks.

The obstacles include that providing the EEA with inspection and sanctioning powers would require extensive amendments to the EEA's founding Regulation, in order to ensure that the balance of power is preserved. These include the creation of new agency bodies and the provision of very precisely delineated powers in the Regulation's text.

While the EP and the Council have the mandate to adopt such amendments, it would still be indispensable to convince the MS' representatives in the Council that the subsidiarity principle is fulfilled, as the EEA could indeed exercise these powers more effectively than the MS. Furthermore, the MS would not completely

lose their control over the EEA's exercise of these powers due to their representation in the Management Board.

The biggest drawback is the fact that the agency will probably not be able anymore to fulfil its role as information agency as easily because MS would be less willing to provide information if it could be used against them. Furthermore, the agency's budget would have to be extended, which could face much opposition.

Therefore, it could be questioned whether providing the EEA with enforcement powers would actually be the best solution. While it would most likely be very effective in addressing the deficiencies causing the compliance deficit, it would be complicated to provide the agency with such powers without disturbing the balance of power established by the Treaties and thereby upsetting the MS. Furthermore, it could have drawbacks for the EEA's other activities.

Consequently, before providing the EEA with enforcement powers, it still needs to be established whether the MS would in practice be willing to confer enforcement powers to the EEA and more concretely, what extent of enforcement powers, suggested in this thesis, would be most appropriate. Furthermore, it should be considered whether there are other solutions to address the compliance deficit, which were not considered in this thesis, and whether these would be more appropriate. For example, it could be considered to give the EEA less stringent powers, which would be more easily accepted by the MS. For example, the agency could cooperate more with MS' authorities, instead of monitoring them. Another option would be to provide the Commission's DG Environment with more powers and resources to enforce EU environmental law. For example, it could finally be provided with inspection powers as it is already the case for other policy areas.

No matter what solution will be chosen, it is clear that in any case, a way to solve the compliance deficit needs to be found. If this is not the case, it can be doubted whether the goal of making the EU climate neutral by 2050, set in the *European Green Deal*, to will actually be achievable.

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