

4th Conference ECPR Standing Group on Regulation and Governance  
University of Exeter, 27-29 June 2012

**THE EU AS AN “ENFORCEMENT PATCHWORK”: THE IMPACT OF  
NATIONAL ENFORCEMENT IN THE ADOPTION OF EU WATER LAW  
IN SPAIN AND BRITAIN**

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**Abstract**

Failures of compliance with European Union (EU) directives have revealed the EU as a political system capable of enacting laws in a wide range of different policy areas, but facing difficulties to ensure their actual implementation. Although the EU relies on national enforcement agencies to ensure compliance with the EU legislation, there is scarce analysis of the differential deterrent effect of national enforcement in EU law compliance. This article examines and compares the enforcement of an EU water directive, the Urban Waste Water Treatment Directive, in Spain and the UK. It focuses on the existing national sanctions for disciplining actors in charge of complying with EU requirements, and on the actual use of punitive sanctions. The analysis shows the impact of national enforcement on the degree of compliance with EU law: a more comprehensive and active disciplinary regime at the national level contributes to explain a higher degree of compliance with EU law. From these findings, the article calls for a detailed examination of the national administrative and criminal sanction system for a more comprehensive understanding of the incentives and disincentives to comply with EU law at the national state level.

**Introduction**

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The European Union (EU) is a multi-level political system where regulatory policy-making is undertaken by EU institutions while ensuring that laws are effective and enforceable is eminently a national obligation. With no European inspectorate or audit, the EU Commission and the European Court of Justice (ECJ) have only limited powers to ensure that EU legislation is adopted and in force throughout the EU. EU institutions rely on EU member states to make sure that the legislation is implemented and monitored, and breaches penalised. National enforcement organisations - administrations, inspectorates, policing bodies, judges and magistrates – are in charge of ensuring that EU law is upheld, and manage national disciplinary action against actors targeted by EU law.

While the role of the Commission and the ECJ in enforcing EU law has received significant attention in the literature (amongst others, Tallberg, 2002; Macrory, 2005), there is a dearth of studies that compare the effects of national variations in the enforcement on the degree national compliance with EU law. However, as a core function of government, law enforcement is one of the most defining features of political power, so examining the role and impact of the national enforcement of EU law can contribute to refine our understanding of how the EU works as a political system.

This article asks whether the differences in national institutions for enforcing EU law can explain the existing cross-national variations in compliance with EU law. To answer this question, it proposes to examine two features of enforcement, derived from the literature on the topic (Kagan, 1994; Macrory, 2005; Shavell, 1993; Ayres and Braithwaite, 1992; Baldwin, 1995). The first concerns the magnitude of the potential sanctions to discipline national actors targeted by EU law if they fail to assume their obligations. It assumes that the greater the sanctions envisaged to punish failures to comply, the more compliant the member state will be. The second looks at the actual use of the national instruments to discipline national actors targeted by EU law, and examines whether a more frequent use of these instruments relates to a more compliant performance.

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The article analyses the cross-national variations in compliance with one EU directive, the Urban Waste Water Treatment Directive (UWWTD) in two member states, Britain<sup>1</sup> and Spain. Britain, according to EU data, complied better with the UWWTD than Spain. The UWWTD was a rather defined and unambiguous law that established clear and detailed requirements with which all member states needed to comply. Thus, it limited the degree of discretion that EU member states could employ to adjust the directive to their preferences; member states had only a reduced scope for interpreting the content of the directive. The unambiguousness of the UWWTD allows comparing the enforcement of the same EU standards in different countries – rather than the interpretation made by the EU member states of such EU standards (Kelemen, 2000). The UWWTD targeted different sets of national actors: the water companies in the UK, whose performance was under the supervision of national regulators – the Environment Agency and OFWAT - and the local, regional and national governments in Spain, who largely self-enforced EU water standards within their territories. The article presents the most relevant results of a structured, comparative qualitative analysis of written national sources (legal texts and official documents) on the magnitude and the actual use of disciplinary measures in each country during the implementation of the UWWTD to examine national variations and their impact on the degree of compliance with the directive.

The cases show that national enforcement of EU law in Spain and Britain fluctuated between an absence of monitoring and disciplinary action against non-compliant actors, to a tight follow-up of the performance of responsible agents and issuing of penalties in case of breach. So, while the EU has developed a number of legally enforceable rights, national actors targeted by EU law faced significantly different constraints and pressures to comply with EU law requirements. In terms of the impact of such differences, the cases examined show that a more deterrent enforcement - both with regards to the potential and actual punishment for compliance failures –facilitated a more compliant performance on EU standards. Thus, it shows that the EU functions as a “patchwork” of different national

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enforcement arrangements that shape and constraint the behaviour of national actors targeted by EU law to different degrees, and with different results. The present article argues that, along with explanations that look at the institutional costs of implementing EU law, the cultural features of the administration, the number of veto players, etc. an analysis of EU law compliance needs to take into account the role of national enforcement to explain the existing cross-national variation in compliance with EU standards.

**Explaining cross national variations in compliance with EU law**

Compliance with EU law has been a particular concern for EU researchers and practitioners in the last two decades. This concern has come hand in hand with the realisation of the existence of important compliance deficits concerning EU legislation, which have been perceived as a threat to the effectiveness of the EU regulatory system and ultimately the credibility of the EU (Mastenbroek, 2005). As the EU has increased the volume and depth of its regulation, attention has been given to examining why certain EU member states comply with EU law better than others.

The effect of different national institutional features has been examined to explain cross-national variations in compliance with EU law. Some authors have supported approaches linked to the idea of a “goodness of fit”, or match between the demands of the EU and the existing policies of the member states: a member state with less fit will find it more difficult to adjust to EU laws, as the costs of complying with EU requirements will be higher (Duina, 1999; Börzel, 2003). Another set of explanations have looked at the cultural features of national bureaucracies (Knill, 1998; Falkner et al, 2005). Depending on features such as, for instance, the flexibility of national administration, its degree of cooperation or competition, or the importance given to honouring international agreements, EU member states comply with EU requirements or fail to do so. From a different perspective, other authors have focused on the preferences of key domestic actors and their opportunities to block the implementation of EU legislation. Opposition from these

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actors at the domestic level hampers compliance with EU law (Giuliani, 2003; Haverland, 2000).

Although the empirical work has been inconclusive about ultimate reasons that explain why EU law penetrates in some member states while it faces resistance in others, these studies have given invaluable insights into the functioning of the EU as a political system where, under the same regulatory umbrella provided by EU institutions, entrenched national institutional systems coexist (Héritier, 1996). Studies on EU compliance have generally come to the somewhat paradoxical conclusion that, although EU member states implement the same legislation, national differences remain. National institutional features act as “barriers” (Page, 2003) in preventing homogenisation of the EU member states’ national institutions.

However, an elusive element in the literature has been the impact of national enforcement in the adoption of EU law, even though the responsibilities for ensuring the enforcement of EU law belong both to the EU institutions and to the EU member states. One of the reasons that might explain this scarcity is that studies on EU law compliance have frequently used transposition – i.e. the incorporation of an EU law into the national regulatory framework - as a proxy for compliance with EU law (Giuliani, 2003; Steunenberg, 2010). Comparing the date of the actual transposition with the date by which, according to each EU directive, EU member states should have transposed the directive into national legislation gives evidence, according to these studies, of how good or bad a member state is at complying with EU law: the longer a member state takes to transpose the legal text, the worse complier it is.

The use of transposition data has one crucial methodological benefit: as EU institutions employ homogenous criteria for data collection, the information is easily comparable across all EU member states. But considering transposition as a proxy for compliance is limited: law compliance results not only from transposing EU legislation, but from a process of implementing policy instruments to meet the

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legislation' requirements, and of enforcing such requirements. For this, EU data is much less comprehensive. Along with information about the attainment of formal deadlines, the Commission accounts on the state of EU law implementation in regular reports collecting the information that member states provide on the development of EU policies in their countries. Failures both to provide information and to apply EU standards may derive in infringement procedures in front of the EU Commission and the European Court of Justice, which have also been employed by scholars to measure and compare how member states rate with regards EU law compliance (Börzel, 2003). However, these EU data are not exhaustive in accounting for failures to implement EU law either: with no inspectorate or auditing powers, European institutions cannot monitor the attainment of EU standards on the ground or to penalise directly those responsible for the failures to meet EU standards. Thus, the infringement procedures that they initiate are just a fraction of the total number of compliance failures that actually occur across the EU member states (Börzel, 2003). For this reason, a more precise estimate of the adoption of EU law requires examining the implementation of EU legislation by the member states, which depends on the action followed by national actors. For this, national enforcers have a crucial role: if they do not monitor and enforce the performance of national actors during the implementation of EU requirements, EU standards risk failing to take effect. Hence, EU law compliance is understood here as a result of a dynamic process at the domestic level, which involves the enforcement of EU law (Demmke and Unfried, 2001; Sverdrup, 2005).

**The deterrent effect of enforcement**

The effect of enforcement on actors' behaviour has been a focus of analysis by the regulatory and the law and economics literature (Kagan, 1994; Macrory, 2005; Shavell, 1993; Tallberg, 2002; Ayres and Braithwaite, 1992; Baldwin, 1995). Taking actors as boundedly rational decision makers, enforcement has been considered necessary to ensure compliance with the law; only when "it pays the parties to live up" to the agreements, will actors actually meet their obligations (North, 1990). In absence of enforcement, if the benefits of non-compliance are

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higher than the costs, national actors will have strong incentives to disobey the law. Thus, efficient compliance requires making violation unattractive by increasing the costs of non-compliance.

Regulators can rarely monitor and discipline every action of every actor; the costs of doing so are generally excessively high. For this reason, developing a “general” deterrence effect, by which enforcement has a discouraging effect not only on the sanctioned actors themselves, but also on other actors that could potential commit similar offences, is necessary to ensure compliance with the law (Shimshack, 2007). Deterrence, or crime prevention through fear of punishment, is the mechanism that contributes to law compliance (Shavell, 1993). Ayres and Braithwaite (1992) have elaborated on this idea to develop the concept of an “enforcement pyramid”. The pyramid is composed by different hierarchically graduated responses to offences, from persuasion to license revocation. Each layer of the pyramid increases the sanction applicable for an undesirable behaviour. Significantly, in the view of Ayres and Braithwaite, taller pyramids - that is, enforcement systems capable of assigning greater penalties to potential offences- generate greater deterrence and thus more compliance with legal requirements.

Following this literature, an analysis of the impact of national enforcement needs to focus on two elements. First, the magnitude of potential sanctions against offenders concerns the scope of behaviour subject to penalties and the severity of the potential sanctions. If only few actions are punishable, and if the sanctions are set too low, enforcement will not be able to deter undesirable behaviour. Effective enforcement requires that all undesirable behaviour is subject to disciplinary action, and that sanctions are sufficiently high to dissuade actors from committing an offence. If national enforcement rules are more comprehensive and severe, compliance with EU law is expected to be greater. The second element involves the examination of the actual enforcement action initiated against national actors targeted by EU water law. More active enforcement occurs when monitoring to prevent rule breaking is more frequent, and when more breaches are accompanied of a sanction. If the

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enforcement action is more active, the degree of compliance with EU law by the member states is expected to improve.

Compliance with the Urban Waste Water Treatment Directive in Spain and Britain

To examine the effects of national enforcement in the degree of compliance with EU law, the enforcement of one EU directive in two member states - Spain and Britain - is analysed. The UWWTD was a rather explicit and unambiguous piece of legislation, which set clear objectives that member states needed to comply with, thus limiting the opportunities to engage in 'creative compliance', i.e. activities which offend the spirit but not the letter of the law (Ogus, 1998, 780). The UWWTD allows focusing on how national enforcers have monitored and disciplined the performance of national actors targeted by EU law, rather than on the interpretation they have given to the content of the directive.

The UWWTD was adopted in May 1991 with the aim of protecting the water environment from the effects of urban waste water discharges. It demanded member states to introduce infrastructure to provide water treatment to all urban waste water discharges, which could be primary, secondary or tertiary treatment depending on the technology employed for pollution removal. The directive gave instructions to member states on how to prioritise the waste water treatment by setting two criteria: the polluting load of the waters and the type of receiving waters, from Sensitive Areas (the most polluted), Normal Areas and Less Sensitive Areas (the least polluted). The UWWTD gave preference to treating first the most polluting discharges made into the most polluted waters, and set a timetable with successive deadlines that EU member states needed to meet, with 31 December 2005 as the final date by which all discharges needed to comply with all the directive's requirements.

According to EU data, Britain and Spain were, respectively, amongst the better and the worse compliers with the UWWTD<sup>2</sup>. The UWWTD was transposed into national legislation in Britain November 1994<sup>3</sup>, and over a year later in Spain,

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which also faced several infringement procedures by the Commission and the EJC for failures to meet the directive's requirements<sup>4</sup>. Although the national governments of both Britain and Spain were the principal responsible for complying with the UWWTD standards vis-à-vis the EU institutions, the responsibility for implementing the UWWTD was not of the national executives: the directive targeted different national actors depending on how responsibilities were organised nationally.

In Britain the UWWTD targeted ten private regional water and sewerage companies, which have provided most water services since 1989. Water companies in Britain operate vertically as integrated regional monopolies in the areas identified in their licences, charging their customers a price that incorporates the achievement of the environmental and social protections standards set by EU law and by the Government policy objectives. Regarding the UWWTD, water companies had the responsibility for ensuring that waste waters received the appropriate treatment, by building, if required, the necessary infrastructure to meet with UWWTD pollution limits. Water companies' performance is overseen by the Water Services Regulation Authority (commonly known as OFWAT) and the Environmental Agency. OFWAT is responsible for the economic regulation of the water companies (Water Industry Act 1991 [WIA], s. 2A). It examines the water companies' operating and capital expenditure plans, and sets the price limits that water companies can charge to customers, so they do not abuse their monopolistic position. OFWAT, in this sense, was responsible for overseeing the progress in the building of the infrastructure that water companies required to comply with the UWWTD standards. Environment Agency is responsible for enforcing water quality standards in inland, estuarial and coastal waters (Environment Act 1995). During the implementation of the UWWTD, the Environment Agency was in charge of ensuring that water companies did not go over the allowed pollution limits in their consents to discharge, so the UWWTD environmental standards were upheld.

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In Spain the obligation to meet the UWWTD standards belonged to the national, the regional and the local governments. The national and regional authorities were at the same time in charge of developing the necessary infrastructure and adopting financial measures to meet EU standards, and of enforcing that all waters under their jurisdictions complied with the environmental pollution threshold of the EU directive. They operated in geographically different areas. The national government was in charge of the 9 long, interregional rivers, whereas the 17 regional governments did the same in the rivers that flow within their regional territory and the coastal areas (Ley De 2 De Agosto De 1985, De Aguas; Ley 22/1988, De 28 De Julio, De Costas). As for the local authorities (around 8100 for the whole of Spain), they were responsible for the day-to-day management of the water treatment plants (Ley 7/1985, of April 2, Reguladora De Bases De Regimen Local). Their activities were monitored and subject to enforcement by regional and national governments depending on where they took place: by national government in interregional rivers, by regional authorities in intraregional and coastal waters.

**Magnitude of sanctions in Spain and Britain**

What sanctions could be imposed against implementers in Britain and in Spain during the implementation years until to 2005? The following sections analyse national enforcement rules in Britain and Spain, and show that British implementers faced a more comprehensive and stricter sanctioning system than their Spanish counterparts when they failed to meet the UWWTD standards.

*Magnitude of sanctions in Britain*

The UWWTD targeted the 10 water and sewerage companies, which needed to ensure that the appropriate infrastructure would be in place by the deadlines and that waste water would be treated to the appropriate level. Their performance was overseen by the Environment Agency and OFWAT. The Environment Agency was responsible for the monitoring and enforcing of all environmental standards derived from the application of EU environmental law, whereas OFWAT was in charge of

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regulating the standards of service given by the water companies, and to discipline them if they were not satisfactory.

To carry out its regulatory functions, the Environment Agency had powers to inspect water companies, investigate their activities, and, if necessary, take action against offenders. The Environment Agency inspectors were entitled to enter the premises of water companies, to remove samples of effluent from their discharges, and to interview water companies' staff so to collect information on the companies' performance (Environment Act 1995). The regulator could examine the company's performance to identify whether breaches had occurred. If a breach in environmental standards was identified, the Environment Agency needed to investigate the incident to identify whether it was an accidental or deliberate breach, and to identify its cause. Subsequently, the Environment Agency classified the pollution incident from 1 (most polluting) to 4 (least polluting). Depending on the severity of the damage caused, the Environment Agency could put in place three different types of enforcing measures: for less grave category 3 and 4 incidents, the Environment Agency might opt to issue a caution, which gave a second opportunity to the polluter to mend their actions. When less grave failures happened, voluntary agreements could be approved between the Environment Agency and the water companies, by which the regulator and the company agreed on a corrective measure. Finally, notices obliged water companies to implement measures to forestall damage or to repair the damage caused. They might be of two types: a "works" (or "improvement") notice specified what action a permit holder must take to prevent that pollution entered into controlled waters, so to remove or mitigate an existing damage. A "prohibition notice" was usually issued when the risk of pollution was high and it entailed the ban to carry out a harmful activity. In addition to these penalties, the Environment Agency could initiate a court action. Prosecution was the highest regulatory measure and was reserved to category 1 and 2 pollution incidents. Magistrates' and Crown Courts dealt with all environmental criminal offences brought to justice. The maximum penalty that courts could impose for an environment incident was £20,000 and/or 3 months imprisonment on

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summary conviction, which was four times the value of the existing statutory maximum fines for most other crimes (Water Resources Act 1991, s 85).

For its part, OFWAT could initiate an action against water companies that failed to implement the infrastructure plans and the financing instruments to comply with EU law. To do so, OFWAT was responsible for monitoring water companies' activities to verify that their investment commitments to build water treatment plants and collectors were carried out according to the agreed schedule, and to control that water tariffs increases were kept within the approved limits. Every June, water companies were asked to provide OFWAT wide-ranging data on their levels of service standards. OFWAT was also to receive annual information on water companies' environmental performance from the Environment Agency and the Drinking Water Inspectorate on aspects such as quality standards for water treatment, distribution and sewerage, pollution incidents and on progress on water quality and serviceability. This regular monitoring permitted OFWAT to oversee how water companies implemented their national infrastructure plans and their price limits during the implementation period (WIA 1991 s 34(3)).

When OFWAT identified that water companies failed to meet their statutory obligations, or provided a deficient service, it could impose three types of measures: undertaking, enforcement action and licence revocation. An undertaking was a legally binding instrument by which water companies committed themselves to modify their performance and meet OFWAT's requirements within a period of time. Enforcement actions were monetary sanctions imposed for violating regulatory requirements, calculated by OFWAT depending on the fault. Finally, revoking a company's licence was the strongest sanction that OFWAT could issue against a licensed private company. It was reserved for cases when companies missed their obligations repeatedly, and involved the suspension of all activity of the sanctioned company. Beyond these powers, OFWAT's enforcement did not include initiating court prosecution, as breaches of service duties did not constitute criminal offences (WIA 1991, part II).

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In this sense, regarding the magnitude of the sanctions that could be imposed against UWWTD offenders, the British enforcement framework was comprehensive. All activities destined to implement UWWTD requirements were monitored and could be subject to infringement action by regulators. The applicable sanctions were gradually stricter, as a series of measures could be progressively employed against non-compliant companies, including the high penalties such as licence revocation and criminal proceedings.

*Magnitude of sanctions in Spain*

As explained above, the UWWTD targeted national, regional and local authorities. National and regional governments were responsible for putting in place the necessary infrastructure to provide waste water treatment timely and to the required level, while local authorities were in charge of the day-to-day functioning of the infrastructure. Regarding enforcement of their obligations, though, whereas local authorities were overseen and disciplined by either the national or regional authorities – depending where they undertook their functions as water service providers – the national and regional governments were not subject to external administrative enforcement to ensure they meet their obligations as UWWTD implementers.

Local authorities carrying out their functions as water services providers in interregional river basins were monitored by the national government, by means of the Rivers' Water Inspectorates (Comisariías de Aguas). The Inspectorates were responsible for ensuring that local authorities provided primary, secondary and tertiary treatment before waste waters were discharged, and for disciplining them when they did not meet environmental standards. To do so, the Inspectorates were entitled to enter the water treatment plants to examine their functioning and to test water quality so to identify the degree of contamination and any breaches of environmental standards. Once a pollution incident was identified, the Inspectorates could initiate an investigation to clarify the nature of the incident and its causes.

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The incident was subsequently classified as Minor, Less severe, Severe and Very severe, depending on the environmental damage caused, the public health hazard created and the degree of maliciousness of the polluter. For Minor and Less severe damages, the Inspectorates could ask for a preventive and temporal halt of all operations causing pollution. When stopping the pollution activities was impossible, the Inspectorate could instead impose a financial charge on the local authority, to help to remedy the damage caused by pollution, or a fine for infringing its pollution authorisation. The amount could vary from over €6000 for minor infringements to over €600 000 for very severe infringements. Finally, the Inspectorates were entitled also to revoke licences and to order that installations might be (temporarily) closed down. If cases when incident were classified Severe and Very Severe, they needed to be referred to the Ministry of Environment to determine what particular action to take (Real Decreto Legislativo 1/2001, de 20 de julio, por el que se aprueba el texto refundido de la Ley de aguas, títuloVII).

When local authorities provided services in waters under regional jurisdiction (i.e. rivers whose basins are situated within the borders of a region, and coastal waters), they were monitored by regional governments, which had the same competences of the national government and undertook their functions via their Regional environmental inspectorates. Regional inspectorates applied the same enforcement rules as their national counterparts, so they could collect samples, enter pollution sites and initiate enforcement measures when consents of discharge were breached. For coastal areas, however, protection was lower - pollution in coastal areas is considered a lesser environmental and public policy hazard. Thus, the most severe infractions could receive a fine of up to €300,500 – half of the highest fine that could be imposed in river areas (Ley 22/1988 de 28 de julio de costas, título V).

Regarding national and regional authorities, the measures to monitor and discipline were scarcer. The distribution of responsibilities across the territory made the national and the regional authorities sovereign over their jurisdictions, so no external administrative controls existed to monitor or penalise national or regional

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authorities that failed to implement measures necessary to comply with the UWWTD, such as the building of infrastructures and the funding of water treatment services. Court procedures could be initiated for this purpose, at the instance of other administrations or any other interested parties that considered that public authorities failed to act in agreement with two main principles: legality and guarantee of protection of citizens' rights and interests. After the hearing, the administrative courts might invalidate a decision by the administration or decide on a course of action that the administration should take (Ley 29/1998 de 13 de julio reguladora de la jurisdicción contencioso-administrativa).

Thus, national enforcement in Spain was rather incomprehensive: monitoring and enforcement actions (which could, however, have high pecuniary value) targeted only local authorities' activities. Limited mechanism existed to monitor the activities of regional and national administrations and penalties against to implement the UWWTD could exclusively be issued by courts. Enforcement sanctions in Spain were significantly lesser than in Britain.

**Use of enforcement action against non-compliance with UWWTD standards in Spain and Britain (1994-2005)**

Along with the penalties that can be potentially issued against non-compliant actors, the actual imposition of disciplinary sanctions may also contribute to deter infringements. This section assesses the extent to which enforcement powers were employed in Britain and Spain during the implementation period.

*Use of enforcement action in Britain*

Analysing the use of punitive sanctions in Britain shows that monitoring the activities of water companies was at the centre of both the Environment Agency's and OFWAT's enforcement activity during the implementation of the UWWTD from 1994 to 2005. Indeed, the Environment Agency centred its enforcement activity on carrying out site inspections to ensure that water companies met their environmental obligations and their infrastructure was in good order. Around half

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of the total number of inspections by Environment Agency was to water companies, which received monthly to quarterly visits. The inspections revealed the water industry as an important polluter: 11% of all the water incidents in England and Wales were caused in waste water treatment plants. Moreover, water companies were systematically situated amongst the top environmental offenders: around 12 % of the severest pollution incidents were caused by such plants (Environment Agency, 2000, 2006).

Despite the high number of pollution offences, the Environment Agency decided to employ enforcement against polluters only in a small number of cases. The Environment Agency stated its preference for a restoring approach by which polluting company committed itself to modifying its actions in order to reduce pollution risks. Enforcement notices and cautions were thus reserved to only extraordinary cases. For instance, in 2001, while the number of recorded incidents (category 2 to 4) was 33572, only 770 were followed by either a caution or a notice; the rest were dealt with by means of voluntary agreements. As for criminal action initiated against polluters causing a category 1 incident, only 35% to 50% of the total number faced prosecution. The Environment Agency decided only to initiate or continue a prosecution in cases when the offender had been unfailingly identified and if there was a realistic prospect of conviction. Furthermore, the fines awarded on convictions for pollution incidents were significantly lenient if the annual turnover of water companies is considered, and oscillated in a range between £1000 and £17000 with an average fine for prosecuted business of £8,532 (National Rivers Authority, 1995, 1996; Environment Agency 1997, 1998, 1999). The harshest penalty against a water polluter (i.e. Thames Water, in 2003) rose to £70,000 - a reduced figure compared with the company's annual turnover of around £1.1 billion. In the same year, the water company Anglian Water received fines for its pollution infringements of £50,000, while its turnover was of £750 million (House of Commons, 2005).

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OFWAT's enforcement activities were similarly characterised by a close monitoring of the activities of water companies, and a reticent issuing of penalties when service breaches were identified. Indeed, OFWAT showed a strong preference for a remedial and preventive approach rather than the use of disciplinary action. During the implementation of the UWWTD from 1994 to 2005, water companies submitted regular reports that permitted OFWAT to identify the instances when they failed to introduce the infrastructure that would guarantee compliance with the UWWTD requirements. OFWAT reported annually on the performance of each company, highlighting the cases when companies lagged behind their statutory obligations – such was the situation, at different times in the implementation period, of the water companies Northumbrian Water, Southern Water Services, South West Water Services and Welsh Water (OFWAT, 1999; OFWAT, 2001). For all these cases, OFWAT decided to employ a case-by-case approach so to analyse the reasons of the failings. It asked companies to submit reports on progress and demanded plans for correcting malpractices. No enforcement orders or licence revocations were ever employed even when water companies' failures entailed missing UWWTD deadlines. In fact, OFWAT considered that the companies approached their planning and implementation duties with due diligence, and considered that the full completion of the works had been delayed for reasons beyond the direct control of the water companies. Resorting to issuing enforcement orders was, in OFWAT's view, not necessary and could be, in fact, counterproductive (House of Lords, 2007).

Thus, examining the use of punitive sanctions in Britain gives evidence of the active role that regulators had during the implementation period. OFWAT and the EA monitored the activities of the water companies both with regards to their adoption of pollution control limits and their infrastructure building. Significantly, the actual issuing of penalties was rather reduced, as regulators preferred to deter infringements by threatening with disciplinary action rather than by actually imposing sanctions, which were reserved to the worst compliers and thus it had only limited deterrent power.

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*Use of enforcement action in Spain*

The analysis of the monitoring and penalising action carried out in Spain from 1995 to 2005 shows that actors targeted by the UWWTD were scarcely monitored and disciplined if they failed to implement the directive's requirements. The use of enforcement in Spain had limited ability to deter national actors; when implementers shirked away from their duties, they rarely received a sanction.

This is not to say that enforcement action was absent during the implementation of the UWWTD. Indeed, both the national and the regional governments introduced measures to monitor pollution levels in the rivers and coastal areas under their jurisdiction as a result of the application of the UWWTD. The national and regional inspectorates installed new sampling water devices that picked up signals regarding water quality in rivers, aquifers and coastal areas in real time, and helped to check certain parameters of pollution across the country - environmental inspectorates could thus identify exactly when pollution exceeded a maximum level. This new system improved the regularity and the precision in the collection of water pollution data and provided more exhaustive information to control the water quality (Ministerio de Medio Ambiente, 2009).

However, these measures were concerned with identifying the presence of water pollution rather than with identifying the responsible actor. Controls of the local governments' infrastructures were very irregular, and visits to sites by inspectorates were infrequent. The records of one of the most active national inspectorates - River Duero - evidence that only 376 administrative sanctions were issued against local authorities in the period 1995 to 2005, out of a total amount of 4300 urban waste water discharges authorised in that period. Amongst the regions, the degree of monitoring provided by regional governments oscillated enormously, but averaged at only 3 times/year even in the regions that kept a more vigorous environmental policy, such as Catalonia and Andalucia (Consejeria de Medio Ambiente, 2000). Besides, even when responsibility was clearly attributable to local authorities and

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breaches caused clear harm, only a reduced number of pollution incidents were followed with a sanction<sup>5</sup> (Ministerio de Medio Ambiente, 2005). In this sense, the use of punitive sanctions against local authorities during the implementation of the UWWTD was inconsistent.

The monitoring and penalising national and regional governments for contravening environmental policy was rather inexistent. Breaches in their duties to build waste water treatment plants were seldom monitored penalised, despite their direct impact to the degree of compliance with the UWWTD. At the end of the implementation period, the national government acknowledged that an important number of infrastructure plans necessary to comply with the UWWTD, including the building of water treatment plants and collectors in agglomerations in 14 of the 17 regions, had not been completed. The works were estimated to cost over €1197 million (Ministerio de Medio Ambiente, 2007). Similarly, regions failed repeatedly to ensuring waste water treatment in several of their towns and cities<sup>6</sup>, causing, in some instances, that the EU institutions initiated infringement procedures for failures to comply with the UWWTD – such were the cases of the towns of Vera and Sueca, where the responsibility for the construction of adequate treatment infrastructures fell on regional governments. At the domestic level, though, such failures did not command any sanctioning action to the regions for falling short of providing adequate water treatment to urban waste water discharges (Fundacion Nueva Cultura del Agua, 2004).

### **Comparison of the cases**

Although the UWWTD was a strictly defined piece of legislation that made equal strong demands to all EU member states, the analysis has shown that national actors targeted by EU law faced different degrees of regulatory pressure at the national level, which derived both from the potential sanctions that they could face if they failed to meet the directive's standards, as well as for the actual use of such punitive powers. The findings reveal that greater sanctions and a more active use of

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enforcement powers generated mechanisms facilitating member states' compliance with EU law.

Indeed, regarding the magnitude of the potential sanctions, British national actors confronted a more comprehensive enforcement regulatory framework to monitor and enforce national policies implementing the UWWTD requirements than its Spanish counterparts. OFWAT and the Environment Agency had powers both to monitor all measures undertaken by water companies and to impose sanctions when they failed to fulfil their statutory obligations. This contrasts with the Spanish case, where, although higher sanctions could be imposed against local authorities for failing to comply with environmental standards, initiating court proceedings was the only measure to punish regional and national authorities if they did not carry out their duties as implementers – no administrative sanction could be started when they failed to implement the infrastructure plans required to meet the directive's requirements. Due to this deficit in enforcement rules, Spain developed weak disincentives against national actors shirking their duties. The potential sanctions that Spanish implementers had to face were significantly lesser than those in Britain.

As with regards to the use of enforcement powers, the analysis has shown that, in Britain, OFWAT and the Environment Agency monitored closely whether companies built the infrastructure to provide water treatment, if they operated within the agreed price limits, and whether they surpassed the pollution limits. The regulators followed the performance of water companies, but remained reluctant to sanction the companies when they failed to meet their obligations, preferring to employ voluntary measures rather than penalties to correct infringers' behaviour. Thus deterrence in Britain relied on the threat to use disciplinary action, but not on its actual use. In the Spanish case, the use of punitive powers was rather limited. Regional and national authorities focused exclusively on controlling the degree of pollution in water areas. Little activity was carried out to identify responsible agents amongst the local authorities, and to address, either via voluntary measures or

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penalties, the breaches of environmental standards. National and regional authorities understood their role as watchers of environmental quality standards, not administrators of disciplinary measures. As for measures against non-compliant regional or national governments, no court proceedings were initiated for failures to comply with UWWTD demands, so neither national nor regional government faced disciplinary measure for their failures as implementers. During the implementation of the UWWTD, environmental liability in Spain was far from being an extensive practice.

### **Conclusions**

This article has examined the coercive powers of national enforcement institutions to explain the cross-national variations in compliance with EU law. Although the implementation of EU policy depends on the monitoring and disciplinary action undertaken at the national level, the role of national enforcement in facilitating compliance with EU law has received little attention in the EU literature. When analysing the variations in compliance with EU law, EU scholars have commonly examined national institutional features that facilitate or hamper policy change, but have significantly overlooked the capacity of national enforcement to modify actors' preferences and performance. A structured, focused comparison of the enforcement of the UWWTD in Spain and Britain EU has allowed for a conceptually examination of the role of national enforcement institutions for EU compliance and the causal mechanisms that they generated.

Albeit disregarded in the EU compliance literature, the effect of enforcement on actors' behaviour has been a classic theme in policy analysis and regulation, from which the analysis has drawn. Following this literature, the article has shown that national enforcement aids compliance with EU legislation by deterring national actors from failing to comply with EU requirements. The threat of imposing sanctions, as well as their actual issuing, has been seen to collaborate in correcting undesirable behaviour. For this reason, with a less comprehensive enforcement system, compliance failures are more present.

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Examining the impact of national enforcement in the EU law compliance has required moving away from static examinations of compliance variation with EU law. Unlike several approaches to EU compliance, the present article does not consider compliance as not the result of a single act of transposing EU law, but considers it the product of a process of implementing national policy instruments. National enforcement intervenes in the degree of effectiveness of EU law by constraining and shaping the performance of the domestic implementers targeted by EU policies, on which EU compliance depends. By doing this, the analysis has examined the role of domestic actors that are actually involved in the implementation of EU law. It goes beyond an analysis that focuses exclusively on the role of the national administrations, which, while responsible vis-à-vis the EU institutions for compliance with EU law, have at times only a minor role in the implementation of the national policies.

At its core, the analysis of the enforcement of the UWWTD in Spain and Britain has shown that rules need to be applied, or “activated” (Aubin, 2008) to individual cases to become effective and to produce particular desired effects at grassroots level. The transposition of EU law into national regulatory frameworks, or the development of new national policy initiatives and agreements to meet EU requirements do not suffice to bring about the policy change required by EU law unless the preferences and interests of the actors responsible for policy change are altered. The article has shown that national disciplinary powers, as distributed by the political authorities in exercise of their sovereign powers, are a key mechanism to ensure this change as they change the system of incentives for misbehaving and aspire to produce positive collective action.

The proposals by the EU to establish more mandatory monitoring requirements and to define minimum national penalties have been met with resistance by the member states, arguably due to the difficulties of finding common agreement on an issue that addresses core powers and responsibilities of the EU countries. So, only

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guidelines and recommendations for member states on how best to enforce EU legislation have been adopted<sup>7</sup>. National enforcement of EU law remains an important element that distinguishes EU policy-making in the member states. The effect of this variation on the functioning of the EU as political system, including but also beyond EU law compliance, requires further detailed consideration - which should surely benefit from the existing insights of the wider regulatory and comparative politics literatures.

While it may be that EU policy is discussed and agreed by representatives at the international level, its actual impact on the citizens is shaped at the local level and articulated by the preferences and interests of national implementers. For this reason, the development of interlinkages between EU-based explanations of EU law compliance and wider approaches to policy implementation and compliance can aid to explain how the same EU law affects EU countries to varying degrees and via different paths. The present work has been an attempt to do precisely so.

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### Footnotes

<sup>1</sup> More accurately, England and Wales. Northern Ireland and Scotland are not considered as they have significantly different regulatory and institutional frameworks for water regulation.

<sup>2</sup> In the EU-12, Britain was the third country to transpose the UWWTD; Spain the 8<sup>th</sup>.

<sup>3</sup> Urban Waste Water Treatment (England and Wales) Regulations 1994.

<sup>4</sup> Real Decreto-ley 11/1995, de 28 de diciembre, por el que se establecen las normas aplicables al tratamiento de las aguas residuales urbanas. See European Court of Justices cases C-419/01, C-416/02 and C-219/05.

<sup>5</sup> Such as the closing of beaches La Calita y Las Murallas, from September 2000 to May 2001, and La Puntilla and El Aculadero, from April and May 2001 in Andalucía

<sup>6</sup> Amongst others towns, in Sueca, Nerja, Fuengirola, Álbufera.

<sup>7</sup> The Recommendation of 4 April 2001 providing for minimum criteria for environmental inspections in the Member states, and the Commission communication better monitoring of the application of Community law.