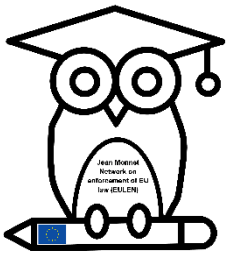

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The Rule of Law in the Enforcement of EU law: Shortcomings and future standards

Frank Meyer[1]

Abstract

The rule of law is a key tenet of the EU's constitutional structure and an overarching constitutional foundation of the general principles of EU law. It is very broadly construed. Its content is defined by a host of sub-component rights and principles that underpin it. The research paper takes a deeper look at the conceptualisation of the rule and its sub-components. On this basis, the papers turns to developments in the enforcement of EU law. While rule of law backsliding and political battles with Poland and Hungary have galvanized EU constitutional lawyers, the implications of the rule of law in EU institutions or multilevel structures have received less attention.

The paper takes a first step in this direction. The specificities of the three main developments in enforcement, which the EULEN network has identified, give rise to many questions with respect to the rule of law. The main part of the analysis characterizes, categorizes and assesses the main challenges that these developments pose with respect to the requirements of the rule of law as defined in the paper. At the end of each section it will also sketch ideas and proposals for future improvements.

Keywords:
Rule of Law, Multilevel Governance, Effectiveness, Agencification, Enforcement, Judicial Review, Fundamental Rights

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I. Introduction

The conference "The Rule of Law in the Enforcement of EU law: Shortcomings and future standards" intends to foster a deeper understanding of rule of law-related challenges and aims at providing vital input for the normative assessment of enforcement mechanisms. When the network started its joint research activities, most participants seemed to agree that developments in the enforcement arena outpace discussions about procedural safeguards and substantive limitations. This picture has not changed. Rather, one witnesses even more acceleration, experimentation, and diversification. This general observation does not claim that no discussion is taking place at all. It does not deny that fundamental rights have evolved in primary and secondary law; in certain areas even remarkably. However, it appears that many legal questions remain unanswered and legal debates often compartmentalized. As intriguing and impressive these efforts might be, pulling them together into an integrated-comprehensive conversation about their compatibility with first principles of EU law still needs to be done.

This conference is part of the network´s efforts in this direction. These first principles embody, partly overlapping or conflicting, basic tenets of the legitimacy (substantive and procedural), role, and proper functioning of law in human societies. The most prominent and important of these foundational principles is the rule of law. Yet, despite (or perhaps because of) omnipresent solemn commitments to the rule of law (RoL), a closer RoL-focussed analysis of enforcement has not taken off. RoL backsliding captures headlines and consumes the attention of European governments, courts and academics of various disciplines. Alas, they pay muss less attention to the activities of the EU and its multi-level, multi-agency enforcement structures. The sujet of this conference is hence supposedly more pressing than ever. Alas, getting a handle on the problem has not become easier either. It starts with the concept of the rule of law itself which some might even consider indefinable.

1. The concept of rule of law

The rule of law historically implied that every citizen is subject to the law. Today, it is an umbrella term that goes by many different names (Rule of Law, *Rechtsstaat*[2] and *Etat de droit*) at the national level and exists in many different shapes, colours, and conceptions (substantive or formal).

Formalist or functional strands («thin view») which hold considerable sway among modern legal theorists define the rule of law by purely formal or functional characteristics.[3] Such characteristics comprise generality, accessibility, clarity, and foreseeability of the law; also consistency, certainty, transparency, and equality of its application. The formal notion is agnostic to the content of the law. Human rights obligations may correspond to elements of such a formal objective legal principle but are not being derived from the rule of law itself in this school of thought. Proponents of a substantive or "thicker" conception of the rule of law[4] emphasize that the rule of law is also about a certain (substantial and structural) quality of the law[5] and necessarily

[2] Dieter Grimm, Stufen der Rechtsstaatlichkeit, JZ 12/2009, 596-600, 596 ff.; Peter Huber, Der Rechtsstaat, in: Matthias Herdegen, Johannes Masing, Ralf Poscher, Klaus Ferdinand Gärditz (eds.), Handbuch des Verfassungsrechts, 2021, München: C.H.Beck, pp. 383, 406 ff.

[3] Jørgen Møller, 'The advantages of a thin view' in: Christopher May and Adam Winchester (eds), *The Handbook on the Rule of Law* (Cheltenham: Elgar, 2018), 21; Laurent Pech, 'The Rule of Law as a Constitutional Principle of the European Union', Jean Monnet Working Paper 4/2009, <http://jeanmonnetprogram.org/wp-content/uploads/2014/12/090401.pdf> accessed 30 July 2023.

[4] Adriaan Bedner, 'The promise of a thick view' in Christopher May and Adam Winchester (eds), *The Handbook on the Rule of Law (*Cheltenham: Elgar, 2018), 34; Jeremy Waldron, `The Rule of Law´, The Stanford Encyclopedia of Philosophy (Summer 2020 Edition), Edward N. Zalta (ed.), https://plato.stanford.edu/archives/sum2020/entries/rule-of-law, 5.3.

[5] Frank Meyer, 'EMRK' in: Jürgen Wolter (ed), *Systematischer Kommentar zur Strafprozessordnung* (5th edn, Wolters Kluwer 2019) Art. 8 mn 140ff.; Aalt Heringa and Leo Zwaak, 'Right to respect for privacy' in Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn, 2006) 745ff.

entails protection of fundamental rights. Some would even include democratic self-determination as part of the rule of law.[6]

The observed diversity, conceptional openness, and historical contingency complicates drawing on common national traditions and using them as blueprints for European problems/supranational systems. Indeed, it was no one less than the Venice Commission, which conceded in 2011 when drafting its first report on the Rule of Law,[7] that the Rule of Law was indeed indefinable. Instead of searching, probably in vain, for a theoretical definition, the Venice Commission adopted an operational approach.

It identifies an ecclecic list of benchmarks in five key areas. In sync with its operational approach the Venice Commission then devised a Rule of Law checklist comprising sets of detailed questions in these areas which offers an operational tool for assessing the level of Rule of Law compliance in any given state.

Formulated to guide and measure reforms in member states of the council of Europe the checklist has emerged as the rule of law gold standard in the European hemisphere. As such, it has been widely adopted by the EU and its member states and absorbed into the constitutional rule of law-guarantee in Art. 2 TEU.

These core elements are Legality, Legal certainty, Prevention of abuse/misuse of powers, Equality before the law and non-discrimination, Access to justice. Legality ties the exercise of public authority to democratic rule and protects the supremacy of the law. Legal certainty comprises many protective dimensions. It guarantees foreseeability and accessibility of legal sources, but also bans retroactivity of criminal laws or punishment without valid legal basis. The rule law also prevents abuse or misuse of powers[8]. Exercising public authority not only requires a proper legal basis. Legal authorizations must also satisfy certain qualitative conditions. Legal limitations of individual rights have to provide for safeguards against arbitrariness and guarantee judicial review. Unlimited discretionary power of the state is incompatible with the very basis rule of law. Equality before the law and non-discrimination are of similar importance. The rule of law does not exclude differentiation but expects it to pursue a legitimate aim with reasonable differentiating criteria in a necessary and proportionate manner. Different situations can be and often should be treated differently. Yet, discrimination on grounds such as race, colour, sex, language, religion, political opinion, national or social origin, birth etc. faces much higher hurdles in this regard. Finally, access to justice guarantees the effective protection of fundamental righs and ensures that public authorities may be held accountable in a court of law. Access to justice also entails that the competent tribunals qualifies as independent and impartial judiciary and procedures conform to the right to a fair trial.

The EU invokes these core elements of the Rule of Law against member states; especially to specify and highlight RoL backsliding at the national level. Yet the Venice Commission´s benchmarks are not to be mistaken for comprehensive and binding EU standards. Being a cornerstone of the European Union from its inception the EU has slowly but surely developed its own notion of the Rule of Law. Referring to the Venice Commission stresses the pan-European recognition of these standards and deflects criticism against supposed wannabe Brussels overlords. Their specific impact in functionally central areas of supranational organisations and structures is far less clear.

2. Rule of Law in the EU

Neither primary nor secondary EU law contain a comprehensive working definition of the Rule of Law. In fact, it was only with the creation of the EU at Maastricht by the Treaty on European Union (TEU) in 1992 "that explicit reference to the rule of law was incorporated into treaty language (and then chiefly in the context

[6] Laurent Pech, 'The Rule of Law as a Constitutional Principle of the European Union' Jean Monnet Working Paper 4/2009, <http://jeanmonnetprogram.org/wp-content/uploads/2014/12/090401.pdf> accessed 30 July 2023.

[7] European Commission for Democracy through Law (Venice Commission), Report on the Rule of Law, Study No. 512 / 2009, CDL-AD(2011)003rev.

[8] Procedural principles concern the institutional architecture as well as the application processes, Jeremy Waldron, `The Rule of Law´, The Stanford Encyclopedia of Philosophy (Summer 2020 Edition), Edward N. Zalta (ed.), https://plato.stanford.edu/archives/sum2020/entries/rule-of-law, 5.2 (accessed 10 August 2023). Both must (be seen to) comply with Rule of Law standards.

of the EU's external policy)"[9]. It was not before 2014 that the Commission published a framework containing a definition of the rule of law.[10] Yet, as a founding principle, it was hard-wired into the community legal order from its early days.[11] Respect for the rule of law is at the heart of European Union und implicitly embedded in the entirety of its legal order. Actions and relations between EU members were to be gouverned by legal rules and principles ("based on the rule of law")[12] instead of hard-nosed power politics and integrated into a supra-national legal order with its own institutions and processes,[13] as well as recognized transnational individual rights and freedoms. Respect for the rule of law has thus, been "intrinsically linked to respect for democracy and for fundamental rights".[14]

As a concept, that thrives on attributed, demarcated powers and governance through law, not power, it also implies (and implores) a need for faithful implementation as well as adjudication and sanctioning of deviations and deficits in order to prevent erosion of the bedrock of EU legal order. In the absence of a long-established, substantial foundation, it was left to community courts to ensure and specify compliance with the rule of law in the interpretation and application of primary EU law; especially with respect to the rights and freedoms provided by EU law.[15]

Recourse to effective judicial protection has hence been both prerequisite and catalyst of the evolution of the Rule of Law in the EU;[16] underscoring its substantive conception rooted in common values (the rule of law as "a vehicle for ensuring compliance with and respect for democracy and human rights".[17] There can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa'.)[18]

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[9] Amichai Magen and Laurent Pech, The rule of law and the European Union, Christopher May and Adam Winchester (eds), *The Handbook on the Rule of Law* (Cheltenham: Elgar, 2018), 235, 236.

[10] European Commission, 'Communication: A New EU Framework to Strengthen the Rule of Law', COM(2014) 158 final, p. 4: The "Community legal order has evolved a dense corpus of civil, economic, social and cultural rights, as well as administrative legality principles including a general prohibition of retroactive decisions and legislation, the connected concepts of legal certainty and legitimate expectation, interim relief, proportionality, non-discrimination, and transparency. Procedural safeguards of legality, such as legal and professional privilege, the right to a fair hearing, and reasonably access to justice are similarly" are recognized. The Commission underscores its claim with a stream of references.

[11] ECJ, Judgment of 23 April 1984, Case 294/83 (Les Verts), EU:C:1986:166, para 18.

[12] Koen Lenaerts, On Checks and Balances: The Rule of Law within the EU, 29 Columbia Journal of European Law (2023) 25, 28; European Commission, 'Communication: A New EU Framework to Strengthen the Rule of Law', COM(2014) 158 final.

[13] European Commission, 'Communication: A New EU Framework to Strengthen the Rule of Law', COM(2014) 158 final; Amichai Magen and Laurent Pech, The rule of law and the European Union, Christopher May and Adam Winchester (eds), *The Handbook on the Rule of Law* (Cheltenham: Elgar, 2018), 235, 238.

[14] European Commission, 'Communication: A New EU Framework to Strengthen the Rule of Law', COM(2014) 158 final.; ECJ, Judgment of 3 September 2008, Joined Cases C-402/05 P and C-415/05 P (Kadi and Al Barakaat International Foundation v. Council and Commission), EU:C:2008:461, paras. 281ff.

[15] As a key element of the founding EEC treaty a Court of Justice was set up to afford legal protection to individual and legal entities affected by then-EEC law thus paving the way for the creative evolution of rights and principles from common constitutional tenets.

[16] Koen Lenaerts, On Checks and Balances: The Rule of Law within the EU, 29 Columbia Journal of European Law (2023) 25, 30. Such protection, the Court argues, could only be afforded by an independent tribunal, ECJ, Judgment of 27 February 2018, Case C-64/16 (Associação Sindical dos Juízes Portugueses), EU:C:2018:117, para. 41; ECJ, Judgment of 22 February 2022, Joined Cases C-562/21 PPU and C-563/21 PPU (Openbaar Ministerie), EU:C:2022:100, para. 56; on the ECJ´s concept of judicial independence with its internal and external component, see ECJ, Judgment of 19 September 2006, Case C-506/04 (Wilson), EU:C:2006:587, paras. 49-52.

[17] Koen Lenaerts, On Checks and Balances: The Rule of Law within the EU, 29 Columbia Journal of European Law (2023) 25, 29: "substance matters".

[18] Recital 6 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, Official Journal of the European Union of 22 December 2020, L 433 I/1: "While there is no hierarchy among Union values, respect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded, such as freedom democracy, equality and respect for human rights. Fundamental rights and the rule of law are entangled in a multidimensional relationship that must be seen in the broader context of constitutionalism; see also DIRECTORATE GENERAL FOR INTERNAL POLICIES POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS CIVIL

Today, the rule of law is the mainstay of the EU's constitutional structure and an overarching constitutional foundation of the general principles of EU law.[19] As I have tried to sketch, the rule of law is "very broadly construed and its content is defined by a host of sub-component rights and principles that underpin it such as".[20] Art. 2 lit. a Regulation 2020/2092[21] illustrates this characteristic when it defines "the rule of law' as a Union value enshrined in Art. 2 TEU which includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. Recital 3 explains that the rule of law requires that all public powers act within the constraints set out by law, in accordance with the values of democracy and the respect for fundamental rights as stipulated in the Charter of Fundamental Rights of the European Union (the 'Charter') and other applicable instruments, and under the control of independent and impartial courts. Echoing Art. 2 lit. a and referring to leading ECJ cases it requires, in particular, that the principles of legality[22] implying a transparent, accountable democratic and pluralistic law-making process; legal certainty;[23] prohibition of arbitrariness of the executive powers;[24] effective judicial protection, including access to justice, by independent and impartial courts;[25] and separation of powers,[26] be respected[27].

Key characteristics of the substantive EU conception of the rule of law – guarded and nurtured by the ECJ – are thus, in a nutshell, that the law has to be [28]

- an expression of the rule of the people through and in the form of law (comprising participation of citizens, control of legislation, minimum and minority rights)
- superior to everyone, whether a citizen, an organ of the state or an EU institution
- a promoter of democratic government and judicial independence;

LIBERTIES, JUSTICE AND HOME AFFAIRS The triangular relationship between Fundamental rights, Democracy and Rule of law in the EU - Towards an EU, Copenhagen Mechanism, 2013 (PE 493.031).

[19] Armin von Bogdandy, 'On the rule of law as a European constitutional principle Founding Principles' in Armin von Bogdandy and JürgenBast (eds), Principles of European Constitutional Law (Hart Publishing and C.H. Beck, Oxford und München, 2nd edn 2010) 11, 28-29.

[20] Theodore Kostadinides, The rule of la was the constitutional foundation of the general principles of EU law, in: Katja Ziegler, Päivi Neuvonen, Violeta Moreno-Lax, Research Handbook on General Principles in EU law: Constructing Legal Orders in Europa (Cheltenham: Edward Elgar, 2022), 287.

[21] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, Official Journal of the European Union of 22 December 2020, L 433 I/1.

[22] ECJ, Judgment of 29 April 2004, Case C-496/99 P (CAS Succhi di Frutta), ECLI:EU:C:2004:236, paragraph 63.

[23] ECJ, Judgment of 12 November 1981,, Joined cases C-212 -217/80 (Amministrazione delle finanze dello Stato v Srl Meridionale Industria Salumi and others Ditta Italo Orlandi & Figlio and Ditta Vincenzo Divella v Amministrazione delle finanze dello Stato), ECLI:EU:C:1981:270, paragraph 10.

[24] ECJ, Judgment of 21 September 1989, Joined cases C-46/87 and C-227/88 (Hoechst AG), ECLI:EU:C:1989:337, paragraph 19.

[25] ECJ, Judgment of 27 February 2018, Case C-64/16 (Associação Sindical dos Juízes Portugueses v Tribunal de Contas), ECLI: EU:C:2018:117, paragraphs 31, 40-41; ECJ, Judgment of 25 July 2018, Case C-216/18 PPU (LM), ECLI:EU:C:2018:586, paragraphs 63-67.

[26] ECJ, Judgment of 10 November 2016, Case C-477/16 (Kovalkovas), ECLI:EU:C:2016:861, paragraph 36; ECJ, Judgment Justice of 10 November 2016, Case C-452/16 (, PPU Poltorak), ECLI:EU:C:2016:858, paragraph 35; and ECJ, Judgment of 22 December 2010, Case C-279/09 (DEB), ECLI:EU:C:2010:811, paragraph 58.

[27] European Commission, 'Communication: A New EU Framework to Strengthen the Rule of Law', COM(2014) 158 final, Annex I.

[28] Also Theodore Kostadinides, The rule of la was the constitutional foundation of the general principles of EU law, in: Katja Ziegler, Päivi Neuvonen, Violeta Moreno-Lax, Research Handbook on General Principles in EU law: Constructing Legal Orders in Europa (Cheltenham: Edward Elgar, 2022), 287, 290.

- committed to fundamental rights protection
- a safeguard against arbitrary govemance providing that there must be equal justice before the law between all EU citizens;
- committed to legal enforcement respecting substantive individual rights and due process.
- Beyond specific principles and guarantees, the rule of law encompasses protecting the institutional design and the "structured network of legal norms provided for by the Treaties".[29]

Awareness of this dimension has grown in recent years when the EU had to find out painfully that it lacked the means to defend constitutional foundations of the EU and hold rule-breakers accountable. In the treaties rule of law enshrined in Art. 2 TEU as core value of EU law is protected, in particular, by Art. 19 TEU and by Articles 47 to 50 of the Charter.[30] Art. 7 TEU adds a "nuclear option" exposing member states to review for seriously breaching the values referred to in Article 2 TEU.[31] It was only in 2022 that Regulation (EU, Euratom) 2020/2092 added a general regime of conditionality for the protection of the EU budget (Conditionality Mechanism) that uses RoL concerns to withhold money earmarked for obstinate rule-breakers.[32]

In the same vein, the ECJ has succeeded in turning a proclamation-based "rule of law as a presumed foundational and shared value into an enforceable substantive principle of law" spanning both the EU and national legal orders through operationalised existing Treaty provisions such as Article 19(1) TEU.[33] The court weaponized the RoL moulding the abstract principle into a behaviour yardstick. This step took away an excuse of the European Commission and the Council for not fulfilling their Treaty mandate to uphold and promote the EU's foundational values "by pretending that they lacked the authority and/or tools to do so".[34] Other instruments allowing ECJ and Commission to hammer out key elements of the Rule of Law are infringement proceedings[35] and fundamental rights litigation (EAW etc.) which links the application of cooperation mechanisms to fundamental constitutional questions.

In theory, such interventions should have never been necessary. Respect for the Rule of Law in its substantive conception is a condition of access to the Union itself, as follows from Art. 49 TEU. Indeed, as Lenaerts put it, "Value alignment and the prohibition of value regression are two essential conditions for a Member State

[29] Koen Lenaerts, On Checks and Balances: The Rule of Law within the EU, 29 Columbia Journal of European Law (2023) 25, 31; Aida Torres Pérez, From Portugal to Poland: The Court of Justice of the European Union a s watchdog of judicial independence, 27 Maastricht Journal of European and Comparative Law (2020), 105, 111.

[30] Koen Lenaerts, On Checks and Balances: The Rule of Law within the EU, 29 Columbia Journal of European Law (2023) 25, 28.

[31] ECJ, Judgment of 27 February 2018, Case C-650/18 (Hungary v European Parliament), ECLI:EU:C:2021:426, paragraph. 41; European Commission, 'Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law' COM (2017) 835 final; European Commission, 'Communication: A New EU Framework to Strengthen the Rule of Law', COM(2014) 158 final; Kim Scheppele, The Treaties Without a Guardian: The European Commission and the Rule of Law, 29 Columbia Journal of European Law (2023), 93, 124 Fn. 107, 150f.

[32] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, Official Journal of the European Union of 22 December 2020, L 433 I/1; ECJ, Judgment of 16 February 2022, Case C-156/21 (Hungary v European Parliament and Council of the European Union), ECLI:EU:C:2022:97.

[33] Laurent Pech and Dimitry Kochenov, Respect for the Rule of Law in the Case Law of the European Court of Justice, SIEPS 2021:3, p. 208.

[34] Laurent Pech and Dimitry Kochenov, Respect for the Rule of Law in the Case Law of the European Court of Justice, SIEPS 2021:3, p. 209.

[35] ECJ, Judgement of 6 November 2012, Case C-286/12 (European Commission v Hungary), ECLI:EU:C:2012:687; ECJ, Judgement of 24 June 2019, Case C-619/18 (European Commission v Republic of Poland), ECLI:EU:C:2019:531; ECJ, Judgement of 5 November 2019, Case C-192/18 (European Commission v Republic of Poland), ECLI:EU:C:2019:924; ECJ, Judgement of 6 October 2020, Case C-66/18 (European Commission v Hungary), ECLI:EU:C:2020:792; ECJ, Judgement of 15 July 2021, Case C-791/19 (European Commission v Republic of Poland), ECLI:EU:C:2021:596.

to participate in that structure."[36] Older member states did not imagine or ignored the possibility of RoL backsliding.

While legal and political battles with Poland and Hungary escalated, other pressing issues have been given short shrift. The implications of the Rule of law in EU institutions or multilevel structures have received considerably less attention. Most efforts aiming at preserving the rule of law have set their sight on the national level (in this respect, the EU is much more limited in its means, while the issue seems constitutionally much more sensitive). Presently, the focus is on intransigent member states and their incompatible practices leading to reinvigorated protective mechanisms and innovative new creations targetting RoL backsliding in member states.

Yet, a final and central characteristic of the EU rule of law lies in its duality. It applies at the national as much as at the supranational level. Secondly, the rule of law appears to be a normative guarantee that no action of EU institutions can escape judicial review. It is this dimension, which is of particular interest here. "While, however, most rule-of-law theories emerge from a concern for the limitation of the constituent political power, we are yet to grasp fully how this limitation impacts upon the EU directly, because it is not the centre of political power per se but one derived from Member States' pooled sovereignties".[37]

It would have been an obvious next step to extend and specify the commandments of the RoL for all enforcement areas. But as explained above, the EU was preoccupied with protecting the rule of law ("Venice Commission style") against capricious and increasingly autocratic forces in the past decade. Non-compliance of the EU institutions with the rule of law raises fewer discussions than warranted; As Kostadinides puts it: "Indeed, there is an overlaying presumption that the EU institutions are by default compliant with the rule of law and the general principles of EU law."[38]

This gap grows more problematic as more EU bodies become involved in enforcement matters and as enforcement structures become more complex. The discrepancy is quite striking. While Art. 47 CFR empowers citizens to seek judicial recourse for alleged infringements of their rights, they face stiffer requirements once they pursue the same objective against EU institutions. Partly to blame is the EU`s own judiciary that has curtailed access to actions for annulment ever since its *Plaumann* ruling.[39] However, neither are EU institutions subject to lower RoL standards nor are they exempt from judicial review. The following section flags shortcoming for all three of the identified enforcement trends.

[36] Koen Lenaerts, On Checks and Balances: The Rule of Law within the EU, 29 Columbia Journal of European Law (2023) 25, 54.

[37] Theodore Kostadinides, The rule of la was the constitutional foundation of the general principles of EU law, in: Katja Ziegler, Päivi Neuvonen, Violeta Moreno-Lax, Research Handbook on General Principles in EU law: Constructing Legal Orders in Europa (Cheltenham: Edward Elgar, 2022), 287, 306.

[38] Theodore Kostadinides, The rule of la was the constitutional foundation of the general principles of EU law, in: Katja Ziegler, Päivi Neuvonen, Violeta Moreno-Lax, Research Handbook on General Principles in EU law: Constructing Legal Orders in Europa (Cheltenham: Edward Elgar, 2022), 287, 294.

[39] Theodore Kostadinides, The rule of la was the constitutional foundation of the general principles of EU law, in: Katja Ziegler, Päivi Neuvonen, Violeta Moreno-Lax, Research Handbook on General Principles in EU law: Constructing Legal Orders in Europa (Cheltenham: Edward Elgar, 2022), 287, 295. Kostidinides admits though that the rule of law cannot serve as a ground for review directly for reasons of legal certainty. Yet, a Rule of Law-sensitive interpretation of existing specific grounds of judicial review would be permissible and sound both methodologically and constitutionally.

II. Developments in enforcement from the perspective of the rule of law

At the outset, the founders of the network identified three developments, which are key to understanding the evolving enforcement framework:

1. the increasing emphasis of the EU legislator on enforcement convergence and on how nation states organize their systems of public and/or private enforcement (indirect or decentralized enforcement);

2. the proliferation of new models of transnational enforcement cooperation, i.e. the shift from traditional international cooperation towards new, transnational forms of cooperation under a framework of common goals, rules and institutions (e.g. the European Arrest Warrant, joint investigation teams, operational enforcement networks);

3. the proliferation of EU authorities with direct enforcement powers vis-à-vis private actors, including the sanctioning of infringements of EU law by these actors (direct or centralized enforcement).

The specificities of the three main developments in enforcement give rise to many questions with respect to the rule of law. The main part of this research paper intends to characterize, categorize and assess the main challenges that they pose with respect to the requirements of the rule of law as defined above.

1. Increasing emphasis of the EU legislature on enforcement convergence and on how nation states organize their systems of public and/or private enforcement

Pushing towards greater convergence appears like an almost natural tendency from a rule of law perspective. Integration through (the rule of) law is deemed to be "the only way forward"[40] for a Union which considers governing through law as its raison d´être. Similarly, harmonizing interventions are warranted where national structures impede convergence. Tensions between supposed supranational necessities and national procedural autonomy flare up predictably in the wake of this development. Member states are loth to change their legal systems to accommodate union interests, especially where such adjustments threaten the internal coherence of national law. That said, the general duty to implement EU law at the national level remains essential to the rule of law and typically favours uniformity and convergence. The duty of effective implementation binds not only the national legislative, but also the judicial branch. Judicial decisions are essential to the implementation of EU law.

While member states enjoy procedural autonomy and a quantum of latitude in the design and policies of enforcement, the role of the judiciary is of particular importance. Member states thus need to organize their judiciary in a way that ensures impartial, independent and fair proceedings. This is an organisational minimum requirement that member states must fulfill. Otherwise, the rule of law will remain an abstract aspiration. This necessity entails that national governments must also refrain from interfering with the preliminary reference process (as it secures the central role of the ECJ and supranational uniformity) and abstain from any effort to undermine the communication between national and European judges.[41] And, lastly, member states must also

[40] Koen Lenaerts, On Checks and Balances: The Rule of Law within the EU, 29 Columbia Journal of European Law (2023) 25, 33 also referring to Koen Lenaerts, New Horizons for the Rule of Law Within the EU, 21 German Law Journal 2020, 29, 34.

[41] Three risks for the preliminary reference mechanism have been identified. Effective judicial recourse is threatened where the independence of referring courts is called into question (appointment, disciplinary measures on the ground that judges had referred cases to the Court of Justice). Bestowing national courts with the widest discretion in referring matters to the Court of Justice appears equally impermissible. A denial of jurisdiction to examine the compatibility of national legislation with EU law adds an even more serious interfere; see Theodore Kostadinides, The rule of la was the constitutional foundation of the general principles of EU law, in: Katja Ziegler, Päivi Neuvonen, Violeta Moreno-Lax, Research Handbook on General Principles in EU law: Constructing Legal Orders in Europa (Cheltenham: Edward Elgar, 2022), 287, 299ff.; Laurent Pech and Dimitry Kochenov, Respect for the Rule of Law in the Case Law of the European Court of Justice, SIEPS 2021:3, p. 221; Koen Lenaerts, On Checks and Balances: The Rule of Law within the EU, 29 Columbia Journal of European Law (2023) 25, 40ff.

see to the effective execution of judicial decisions were not executed.[42] Law can only rule if its commands are actually carried out and complied with.[43] This includes not second-guessing ECJ decisions, which embody the final say on the interpretation and validity of EU law. Evading effective implementation deprives Art. 47 CFR of its useful effect. Worse, in a rule of law based legal order (systems that governs through law only) lack of implementation erodes sovereignty of the system and corrodes its legitimacy as such.[44]

In practice, though, the situation on the ground turns out murkier than one would expect. Despite the emphasis on convergence, some argue that substantial guidance is wanting. For instance, a lack of legislative detail has been identified as an obstacle for better enforcement. The situation differs from policy area to policy area but in several cases, experts might find the solution for more rule of law-compliant convergence at the supranational level.

However, from a substantial rule of law-perspective it also matters who provides the detail. The enforcement landscape features various models comprising tailor-made directl applicable legislation, regulations referring to substantiating decisions and commission regulations, law-making obligations coupled with monitoring bodies and subsequent guidance on implementation (recommendations) as well as numerous regulatory or supervisory agencies that draft expert opinions (EASA),[45] technical standards or conceptual decisions for later adoption by the commission or as future yardsticks for permissible practices.

It is the independence and scientific standing of some of these agencies that turns their assessment into guiding points of reference[46] with potentially prejudicial effect on later enforcement measures (as they create presumptions of technical conformity or compliance). Such benchmarks and recommendations substantiating abstract legal requirements or even substituting more specific legislation, at least to a certain degree, bypass democratic controls and water down rule through law. Hence, reckoning with the impact and consequences of certain new soft law mechanisms[47] in light of this enforcement trend is overdue.

There are also less obvious rule of law-related concern that are more ambiguous. Princen`s contribution highlights that pursuing and achieving union goals or enforcing EU law more generally does not automatically demand increased levels of convergence. EU law leaves room for differentiation.[48] It signifies an impoverishment of legal and political debates that EU bodies tend to rush convergence without scrupulous consideration of alternatives and better discretionary approaches. On the other hand, the rule of law can ill-afford national Sonderwege ignoring supranational needs. And it cannot tolerate "authoritarian tendencies at national level" aiming at derailing union efforts.[49] While such subversions often disguise true intentions as efforts to preserve national tradition and fundamental legal interests, EU law indeed limits the reach of supranational norms and

[42] European Commission for Democracy through Law (Venice Commission), Report on the Rule of Law, Study No. 512 / 2009, CDL-AD(2011)003rev., para. 58; ECJ, Judgment of 19 December 2019, Case C-752/18 (Deutsche Umwelthilfe), EU: C:2019:1114, para. 37.

[43] In the same way, final, enforceable judicial decisions giving effect to the commands of law must be implemented. Otherwise Art. 47 CFR would be deprived of all useful effect; ECJ, Judgment of 19 December 2019, Case C-752/18 (Deutsche Umwelthilfe), EU: C:2019:1114, para. 37.

[44] Koen Lenaerts, No Member State is More Equal than Others - The Primacy of EU law and the Principle of the Equality of the Member States before the Treaties, in: German Legal Hegemony?, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2020-43, 37, 39; Opinion of Advocate General Tanchev, Case C-824/18 (A.B. and Others), EU:C:2020:1053, para. 101ff. concerning the appointment of judges to the Supreme Court.

[45] EASA formulates opinions for binding aviation safety rules of general application and for implementing measures by the member states.

[46] See e.g. Recital 34 of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

[47] E.g. Mariolina Eliantonio and Oana Stefan, 'Soft Law Before the European Courts: Discovering a common pattern?' 37 Yearbook of European Law (2018) 457, 464.

[48] Sebastian Princen, EULEN Research Paper; on differentiation and standardization in Multi-layered system (with respect to international criminal law), Laura Marscher, International Criminal Law between Standardization and Differentiation, in: Loacker, L. & Zellweger-Gutknecht, C. (eds.), Differenzierung als Legitimationsfrage, APARIUZ Vol. 14, Zurich: Dike 2012, 383, 386.

[49] Koen Lenaerts, On Checks and Balances: The Rule of Law within the EU, 29 Columbia Journal of European Law (2023) 25, 33.

demands careful consideration of national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government, Art. 4 para. 2 TEU.

Nonetheless, there is surprisingly little political and public debate on enforcement practices, standards, and scope for differentiation and experimentation. The duty to implement would deserve a more complex, multi-dimensional analysis. To further this debate, it does not help when recalcitrant member states dig in their heels. The effective functioning of the preliminary reference mechanism proves even more essential in this context.

2. Proliferation of new models of transnational enforcement cooperation

The evolution of enforcement also marks a shift from traditional international cooperation towards new, transnational forms of cooperation under a framework of common goals, institutions, and new operational principles (e.g. the European Arrest Warrant, joint investigation teams, and operational enforcement networks).

"European integration has spawned new modes of (shared, mixed, multilevel, composite, integrated) European administration. New types of authorities and structures of multi-level governance and enforcement have emerged that earlier chapters have already alluded to and for which later chapters will provide illustrative examples. Within these structures, autonomous EU agencies have started to act alongside, above or in lieu of national agencies. They are the institutional embodiment of the EU's stronger commitment to the effective enforcement of its policies and supranational interests.[50] *It is in this vein that more and more agencies have become involved in complex multistage and multilevel processes or even installed at the top of improved vertical supervision systems."*[51]

This trend has been rife with rule of law concerns from the very beginning. The functioning of the new models rests on strong commitments to the rule of law.[52] They run on mutual trust in each other's compliance with EU law and fundamental rights.[53]

a) Mutual trust

Such trust seems no longer justifiable and reliable where discertaining national practives not only create real risks of fundamental rights violations but rule of law regression also erodes the very basis of common commitments. The rule of law is the very foundation of operational principles that sustain systems of mutual recognition, availability, and composite prosecution. Despite the obvious implications of rule of law-backsliding for mutual trust the ECJ and the Commission deny a systemic impact even of systemic failures. Although such deficits virtually invalidate underlying assumptions of these systems, reasons for refusing cooperation shall still be reviewed on a case-by-case basis according to the Commission.[54] Whether its LM test is convincing or realistic in a captured justice system is more than debatable.[55] It is not easy to see why guarantees in captured

[50] M. Scholten, M.Luchtman and E.Schmidt, 'The Proliferation of EU enforcement authorities: a new development in law enforcement in the EU' in Miroslava Scholten and Michiel Luchtmann (eds), *Law Enforcement by EU Authorities*, (2017) 1, 4ff.

[51] Meyer, F. 2020. „Protection of fundamental rights in a multijurisdictional setting of the EU." In *Controlling EU Agencies*, herausgegeben von M. Scholten, A. Brenninkmeijer, Cheltenham: Edward Elgar, 134, 145.

[52] ECJ (GC), Judgment of 25 July 2018; Case C-216/18 PPU (LM), EU:C:2018:586, para. 36; Koen Lenaerts, On Checks and Balances: The Rule of Law within the EU, 29 Columbia Journal of European Law (2023) 25, 43ff.

[53] Based on the fundamental premises that Member States shares a set of common values on which the EU is founded, as stated in Article 2 TEU and effectively recognize that they share with all the other Member States, ECJ (GC), Judgment of 27 February 2018, Case C-64/16 (Associação Sindical dos Juízes Portugueses), para. 30.

[54] ECJ (GC), Judgment of 25 July 2018; Case C-216/18 PPU (LM), EU:C:2018:586, para. 59.

[55] Laurent Pech and Dimitry Kochenov, Respect for the Rule of Law in the Case Law of the European Court of Justice, SIEPS 2021:3, p. 208.

systems should be trusted. In addition, the systemic impact on individual decisions is given short shrift[56] and fiendishly difficult to prove for the individual concerned.

b) Effective judicial recourse

Effective judicial recourse is a key component of the rule of law. Its fundamental importance shows in times of great innovations and legal changes. Predicting the actual impact and practice of newly introduced models is next to impossible. No reasonable observer would expect lawmakers to resolve all potential legal issues in advance. This shifts the attention and responsibility to ex post judicial review. It falls to the judicial branch, especially the ECJ, to carefully assess new models, introduce or reshape legal doctrines, and guarantee legal accountability. However, this requires effective access to courts, which, at the same time, must demonstrate monumental creativity and willingness to tackle unresolved matters. Alas, both are seemingly wanting at the time of writing.

In terms of access to courts, Art. 47 CFR is the central gateway to ensure effective judicial protection.[57] Enforcement of EU law has brought about new types of (composite) interactions that defy traditional categories. In an earlier paper, I referred to them as composite investigations.[58] In essence, these are integrated multi-level enforcement actions of various actors and qualitites, which may include sanctioning mechanisms. It is obvious, that where multiple actors over longer periods contribute to a joint effort at various times in various ways legal effects and responsibilities become hard to gauge and allocate respectively. Such innovations tend to escape traditional fundamental rights doctrines. Doctrinal limitations complicate assessing the legal effect of measures, the interrelation of composite activities, indirect steering mechanisms or effects, and their overall cumulative impact. Actions and administrative tools taken by the agencies involved often do not fit classical ECHR categories anymore, thus, adding to a perception of urgency to start rethinking entrenched doctrinal concepts such as infringement or jurisdiction. New theories of joint responsibility and infringement are required to categorize new types of enforcement and legal accountability.

Coming to terms with such challenges presupposes effective access to courts capable of performing effective transnational legal review. Effective judicial protection comprises the right to access to a court, and a right to a comprehensive judicial review. Both dimensions suffer from shortcomings. Many parts of the composite proceedings lack direct and individual legal effect and thus fall outside the union courts´ scope of review according to their strict interpretation of admissibility criteria.

Luis Arroyo has identified five types of transnational administrative actions (transnational administrative decisions, transnational requests for administrative cooperation, transnational information exchange, transnational preparatory measures, administrative action taken in other states), at One could add operational and infrastructure support (Eurojust, EASO[59]) to this list. Most of them raise questions in terms of their reviewability.

For example, intelligence gathering and sharing is bound by EU data protection rules. However, analyzing and using personal information in combination with other data is more complex, and their impact and ensuing accountability more difficult to discern (composite governance by data may comprise monitoring, planning, allocation, predictions, evidence-based decision-making and involve data controllers, data processors, data

[56] See for example Koen Lenaerts, On Checks and Balances: The Rule of Law within the EU, 29 Columbia Journal of European Law (2023) 25, 44 ff., 47, whose argumentation is dominated by its intention not to imperil the functional of the mutual recognition system.

[57] ECJ, Judgment of 16 May 2017, Case C-682/15 (Berlioz), para. 51.

[58] Frank Meyer, Verbundstrafverfolgung in der EU, in: Rechtsstaatlicher Strafprozess und Bürgerrechte, Gedächtnisschrift für Edda Weßlau, 2016, Berlin: Duncker & Humblot, 193, 199ff.

[59] EASO, for instance, provides operational support to national asylum authorities, Salvatore F. Nicolosi and David Fernandez-Rojo, Out of Control? The Case of the European Asylum Support Office, In *Controlling EU Agencies*, M. Scholten, A. Brenninkmeijer (eds.), Cheltenham: Edward Elgar, pp. 177, 181ff.

intermediaries). The same goes for preparatory acts, which might prompt, predetermine, or guide future interferences (like decisions later taken by member states' authorities[60]), yet lack direct adverse effects (even when and where they are binding, which is quite usual for staged enforcement mechanisms[61]).

Factual actions for their part could imply individual legal obligations to acquiesce. Yet, such implicit legal effect does not necessarily exist in all cases. In some situations, it might prove quite difficult to identify their legal effect or individual adverse impact. In the same vein, decisions such as the adoption of administrative rules (e.g. on transfer of cases), soft law acts (e.g. recommendations coupled with comply or explain-requirements a tool of supervisory authorities in banking but also used by Eurojust[62]; resolutions on transfer of cases), or administrative certifications are not traditional limitations that are easy to deal with using standard doctrines. Technically not legally binding, subtle factual or normative steering effects are hard to deny for at least some of these instruments.

That Union courts stick to their narrow reading of Art. 263 TFEU compounds the problem.[63] Whenever direct and individual effects are depending on formal endorsements (rubber-stamping) or implementating decisions taken by other actors, actions for annulment remain inadmissible.[64] This deprives not only Union courts but also EU citizens of any option to review new types of integrated, multi-level enforcement at the supranational level. Yet, without access to competent courts, the rule of law will be seriously undermined.[65]

Arroyo suggests such inconclusive actions be controlled indirectly through actions lodged against final or implementing measures.[66] Implicit review becomes necessary when implementing measures build on certain preparatory acts, draw conclusions from prior actions or give effect to them. The problem is, that authorities of Member States or (where actions occurred in one state) bodies of other Member states will usually take these measures. This creates additional jurisdicitional difficulties as it is not settled whether and to what extent that would be admissible; the legal consequences of findings of illegality are not clear either.

Increasing access to judicial review must go hand in hand with an extension and intensification of the scope of review. Judicial review should be comprehensive in the sense that joint transnational measures should be reviewable in their entirety, functional interrelations, and legal interdependencies. As illustrated above, crucial measures may have subtle indirect or preparatory effects only, thus excluding them from standard avenues of judicial review.

This restriction is hard to reconcile with Art. 47 CFR. Viewed in combination with Art. 51 CFR, Art. 47 is to guarantee effective control of exercises of supranational public authority by EU bodies and member states´

[60] For Eurojust see Frank Meyer, Verbundstrafverfolgung in der EU, in: Rechtsstaatlicher Strafprozess und Bürgerrechte, Gedächtnisschrift für Edda Weßlau, 2016, Berlin: Duncker & Humblot, 193, 204 ff.; for EASO's soft powers see Stephanie Schneider and Caroline Nieswandt 'EASO – Support Office or Asylum Authority? Boundary Disputes in the European Field of Asylum Administration' (2018) 43 Österreichische Zeitschrift für Soziologie 13-35.

[61] See e.g. ESMA and SRB Jolien Timmermans and Merijn Chamon, Controlling the SRB´s resolution powers, In *Controlling EU Agencies*, M. Scholten, A. Brenninkmeijer (eds.), Cheltenham: Edward Elgar, pp. 293 ff.

[62] Meyer, *Enzyklopädie Europarecht* (2nd edn, 2019) vol. 3, § 44 mn. 50, 52, § 43 mn 109.

[63] As Prechal/Widdershoven explain, the CJEU follows a strictly formalistic approach that denies those instruments any immediate relevance. This is understandable from an institutional standpoint but largely ignores their normative and factual influence; for further reflections on judicial protection in composite or mixed procedures see Sacha Prechal and Rob Widdershoven, Principle of effective judicial protection, In *Controlling EU Agencies*, M. Scholten, A. Brenninkmeijer (eds.), Cheltenham: Edward Elgar, pp. 80, 86 ff.

[64] Sacha Prechal and Rob Widdershoven, Principle of effective judicial protection, In *Controlling EU Agencies*, M. Scholten, A. Brenninkmeijer (eds.), Cheltenham: Edward Elgar, pp. 80, 91ff.; M.C. Arons, 'Judicial Protection of Supervised Credit Institutions in the European Banking Union' in Danny Busch and Guido/Ferrarini (eds), *The European Banking Union* (OUP 2015), recital 13.62.

[65] Luis Arroyo, Effective Judicial Protection and Mutual Recognition in the European Administrative Space, German Law Journal 22 (2021) 344-370, 355 ff.; Frank Meyer, 2020, „Protection of fundamental rights in a multijurisdictional setting of the EU." In *Controlling EU Agencies*, M. Scholten, A. Brenninkmeijer (eds.), Cheltenham: Edward Elgar, pp. 134, 146: "The lack of a binding effect shields many agencies against actions for annulment, whereas their toolkit or expertise still (explicitly or implicitly) allows exerting sufficient influence to have a sizable impact on the actions taken at the national level or by other EU actors affecting individuals or legal persons."

[66] Luis Arroyo, Effective Judicial Protection and Mutual Recognition in the European Administrative Space, German Law Journal 22 (2021) 344, 357ff.

authorities acting in their capacities as functional Union bodies. Measures producing direct and individual effects on civil rights are not the only admissible cause of action. In Berlioz, the ECJ emphasized that whenever individual and legal entities raise arguable claims of arbitrary or disproportional exercizes of EU public authority interfering with private activities at least some sort of judicial review must be provided for.[67] This barrier is quite low and not hitched to the existence of a specific right.

The ECJ does not specify this requirement. The court has no intention to promulgate abstract rules assigning judicial tasks. Which courts should be in charge and in what country is a matter not to be settled by supranational courts. Primary and secondary Union law as well as international law set boundaries that the ECJ drew on in the Berlioz case. Within this framework, especially in transnational cases, courts must figure out a viable legal solution.

Art. 47 CFR stipulates an obligation. It is not a silver bullet justifying a concentration of jurisdiction in a single court, let alone overriding supranational and international rules on jurisdiction and sovereignty. Yet, after *Berlioz* there must be judicial review of some sort. Not providing effective judicial review is not an option.

Yet, *Berlioz* leaves precariously open what counts as an inference. Above, multiple categories have been identified that do not constitute classical interferences but still warrant effective transnational review. As I argued elsewhere, traditional doctrinal and formalistic approaches risk missing the realities and subtle forces of multilevel enforcement to the detriment of effective fundamental rights protection. I suggested all actions materially decisive for limitations of CFR rights must be subject to legal review. Admittedly, it is open to further discussion what is to be considered "materially decisive". In light of the above, this standard is perhaps too rigid. A better, more inclusive yardstick would be "materially relevant". Whenever recommendation, resolutions, certification, preparatory steps, and operational or legal advice exerts measurable influence on an individual interference with fundamental rights, Art. 47 CFR calls for at least implicit review.

Unfortunately and finally, the ECJ´s case law does not explain standards and intensity of review either. Crucial concepts like "full review" or "deference" not defined autonomously despite their central roles for the allocation of competences between national courts or vis-à-vis the supranational level.[68] This legal uncertainty allows for alignment with national practices but it also opens the door for inequality before the law and disparate legal standards across the union.

As explained in an earlier publication, substantive and procedural human rights safeguards are in limbo, too. The EU follows a substantive rule of law concept, which contains a strong countermajoritarian fundamental rigths element. Yet as new types of enforcement emerge older standards and safeguards struggle with keeping track. While there is no shortage of abstract obligations, their adaptation to new contexts, has proven protracted and complicated. Notwhitstandig such constructive difficulties, "denying direct access to the CJEU does not absolve from the need to integrate safeguards commensurate with the risks and idiosyncrasies of the decision-making processes."[69]

Finally, these novelties and innovations may not only pose a formidable challenge for the effectiveness of judicial review but also have detrimental side effects for the rule of law itself. This might come as a surprise. While these new models were all conceived as modes of particularly effective implementation their new designs, tasks, institutional architecture, or competence limitations may at least for longer transitional periods compromise their mission.

[67] ECJ, Judgment of 16 May 2017, Case C-682/15 (Berlioz), EU:C:2017:373, para. 52.

[68] It is not entirely clear what full review means under Art. 47 CFR. National courts might have very different opinions and traditions; regarding the scope for deference in transnational settings see Luis Arroyo, Effective Judicial Protection and Mutual Recognition in the European Administrative Space, German Law Journal 22 (2021) 344, 363 ff.

[69] Frank Meyer, 2020. „Protection of fundamental rights in a multijurisdictional setting of the EU." In *Controlling EU Agencies*, herausgegeben von M. Scholten, A. Brenninkmeijer, 134-156. Cheltenham: Edward Elgar, pp. 134, 151.

The effective division of labour between the various parts of these networks may turn out to be less clear than expected. A lack of integration between the parts of the networks causes all sorts of shortcomings from communication to cooperation.[70] For instance, interaction between administrative agencies and punitive law enforcement is a highly intricate matter as it operates across different legal regimes for want of overarching integration.[71] Further examples could be added from the admissibility of evidence to the transnational validity of rulings. Inspite of their obvious relevance such issues remain unresolved.

Interaction with traditionally competent national bodies might also give rise to tensions. In some areas uncertainties about enforcement requirements, standards, benchmarks, or the scope of legitimate discretion and differentiation may exacerbate the problems.

A lack of integration and normative guidance, hence, threatens the promise of efficiency. From a rule of law perspective, stricter monitoring could provide a more accurate, practical understanding of what is needed to improve implementation.

3. Proliferation of EU authorities with direct enforcement powers vis-à-vis private actors, including the sanctioning of infringements of EU law by these actors (direct or centralized enforcement).

Today, EU authorities possessing powers to enforce and sanction directly are commonplace in the EU. Their most visible exponents operate in the areas of competition, securities, banking.[72] To perform their regulatory or supervisory tasks agencies in these sectors hold powers to investigate or to assist and coordinate national inspections (EFSA, ESMA, SRB). Their findings and conclusions could then result in binding orders and sanctions.

Where EU bodies exercise direct enforcement powers judicial recourse is key to the rule of law. The clarity of their mission and powers has considerable advantages. With respect to judicial review their competences resolve any doubts about the availability of legal remedies. The general courts will hear cases challenging the exercise of direct powers by aggrieved parties, especially sanctioning decisions. With respect to the rule of law, access to courts against EU authorities with direct enforcement powers serves two classic, neatly intertwined purposes: protecting the fundamental rights of those affected and compliance with EU law in the enforcement process. On this side, the status quo appears to satisfy rule of law-standards.

Rule of law-related problems lie elsewhere. The establishment of new authorities must be provided for by law. For instance, exercising sanctioning powers requires a proper legal basis; especially where measures constitute quasi-criminal sanctions pursuant to the ECJ´s Bonda jurisprudence. The legality principle also entails foreseeability and accessibility of sanctioning norms and standards. The scope of prohibitions and sanctions must be clear and predictable. Typical examples include enforcement measures taken by the Commission, ESMA, or the ECB. Calculation of fines in competition proceedings has sparked particular criticism as it rests almost entirely on guidelines and formulae invented by the Commission, not the European Parliament and the Council. This phenomenon is not exclusive to, but most pronounced in competition law. So far, the ECJ quickly rushes to the defense of executive law making of this kind; provided sanctioning competences contain an abstract

[70] Vervaele proposes building a European network model which combines vertical and horizontal elements,.to create an integrated enforcement chain between administrative and criminal law enforcement, John Vervaele, Towards a European Reassessment of Punitive Law Enforcement?, 2023 (The Hague: eleven), p. 47.

[71] New modes of cooperation include interaction between administrative agencies and punitive law enforcement which despite their plausibility cause difficulties because such interaction would operates across different legal regimes, John Vervaele, Towards a European Reassessment of Punitive Law Enforcement?, 2023 (The Hague: eleven), p. 42. This is partly due to the separation of the harmonisation of administrative enforcement and criminal enforcement, pp. 34-35.

[72] Meyer, F. 2020. „Protection of fundamental rights in a multijurisdictional setting of the EU." In *Controlling EU Agencies*, herausgegeben von M. Scholten, A. Brenninkmeijer, Cheltenham: Edward Elgar, pp. 134, 148; Jolien Timmermans and Merijn Chamon, Controlling the SRB´s resolution powers, In *Controlling EU Agencies*, M. Scholten, A. Brenninkmeijer (eds.), Cheltenham: Edward Elgar, pp. 293 ff..; see also on this evolution, Vervaele, John Vervaele, Towards a European Reassessment of Punitive Law Enforcement?, 2023 (The Hague: eleven), p. 36.

mandate and a general orientation marks for the enforcement agencies to exercise their discretion and stipulate terms thereof.

Bearing in mind the findings of the previous section, it is equally worth discussing to what extent and how specific concepts of limitation or composite interaction should be defined and regulated with respect to the panoply of measures at the disposal of these agencies. In cases of direct enforcement, their cumulative impact deserves particular attention. The ECJ´s recent case law on the ne bis in idem-principle offers a starting point for this analysis. The court has devised a general framework to relate punitive measures in multi-stage or multi-track proceedings.[73] Complementary non-punitive measures are not part of this equation. However, as far as they target the same legal subject and the same set of facts, they are relevant factors for the general proportionality test.

From a substantive and procedural human rights perspective, direct enforcement powers of EU authorities are less complex and closer to traditional law enforcement. Consequently, procedural safeguards and rights established in these contexts should be adjusted to supranational enforcement as a first step. In some cases, this translation will be easier than in others. Some crucial problems are already well known. Scholars criticize a bundling of investigative and adjudicative function that are traditionally kept separate at the national level. Once more, competition law is a case in point.[74] Separation of investigative and sanctioning functions is a solution endorsed by academics but consistently rejected by the ECJ. In the Menarini case, the ECtHR gave its blessing to this concentration of powers. Dismantling these functions is not necessary as long as decisions can be appealed to a court for a full review.[75] The scope of other procedural rights is contigent on the quality and gravity of the measures at stake. At any rate, effective participation in the enforcement and sanctioning process is indispensable.

Generally, rule of law-proponent must carefully scrutinize whether and to what extent this third development of enforcement produces new risks and needs for protective safeguards that did not exist before. If the analysis detects relevant challenges, commitment to a substantive rule of law should trigger a legal discussion about how to deal with these shortcomings. Potent accountability mechanisms and transparency requirements would help that these deficits will not go unnoticed.

New types of enforcement also require regulation and guidance that is more specific. Where the EU relies on autonomous concepts to ensure uniform EU-wide actions it is well advised to provide enough detail to make sense of these concepts. Just how much detail is constitutionally compulsory is largely up for grabs as long as the classification of new modes of actions and interactions lingers on unresolved or overlooked.

[73] ECJ (GC), Judgment of 20 March 2018, Case C-537/16 (Garlsson Real Estate and others); ECLI:EU:C:2018:193: Judgment of 20 March 2018, Case C-596/16 (Di Puma and Zecca), ECLI:EU:C:2018:192; ECJ (GC), Judgment of 20 March 2018, Case C-524/15 (Menci), ECLI:EU:C:2018:197.

[74] The digital market regulation provides a more recent example.

[75] ECtHR, Judgment of 27 September 2011, Appl. No. 43509/08, Menarini/ITA, paras. 61, 63 ff.