Jean Monnet Network on EU Law Enforcement

Working Paper Series

Conference:

Enforcement of European Union Law: New Horizons,

19-20 September 2024 at King's College London

Local governments' tools as enforcement actors of EU law: stored in a black box

(work in progress)

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Abstract

As a result of the expansion of EU law, today's local governments are strongly Europeanised. Therefore, over the past decennia, they became increasingly important enforcement actors within the European Union. Even more, a positive execution obligation on the part of local governments can be inferred from EU legal principles such as the primacy principle and the principle of sincere cooperation. In short, this means that local governments are expected to actively apply EU law, even when they are confronted with a contradiction between European law on the one hand and national law on the other. However, political science research illustrates that local governments are not fully aware of their execution obligation to enforce EU law, nor of the scope of it. In other words, local governments are not fully aware of their enforcement responsibilities within the EU legal order. This paper explains that the ambiguity at the local level derives from the diffuse legal framing of the local execution obligation and seeks for the possibility of a more unequivocal approach of local governments as enforcement actors.

Keywords

Enforcement, EU legal principles, Europeanised local governments, local enforcement role

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I. Introduction: a legal analysis of the enforcement role of *'Europeanised local governments'*

Enforcement of EU law is not a one-off event but requires a steady and sustained effort by the Commission and the Member States, to ensure the consistent and effective application of EU rules and to prevent potential problems.[2] Such a steady and sustained effort does not only require the establishment of 'new' enforcement actors, but also implies that it should be assessed whether the 'old' enforcement actors can be strengthened in their enforcement role. Therefore, the following analysis focusses on the role of local governments as enforcement actors.

The ever-expanding process of European integration results in increasing Union regulatory action within the scope of local areas of competence. Consequently, the relationship between the Union and the local governments is increasingly subject to secondary Union law. Although the impact of the Europeanisation process vis-à-vis local governments has long been uncertain[3], today it is clear that the ever-expanding secondary Union law greatly increases reciprocal dependence between these two levels of jurisdiction.[4]

Therefore, it is not surprising that local governments are expected to take a direct approach to European law, and in this way to actively contribute to the enforcement of EU law.[5] Yet it is unlikely that the local level of government today is permeated by the direct approach to European law.[6] This paper assesses the concerning ambiguity at the local level from a legal perspective.

The analysis is conducted from a legal perspective, which is only one aspect of the necessary analysis supporting a 360° oriented proposal for strengthening local governments in their EU enforcement role. For example, an analysis of the current capacity of today's local governments, is another essential aspect allowing to assess the ability of local governments to meet their theoretical enforcement role in practice.

Another caveat to this legal analysis concerns the fact that the local levels of competence of the different Member States lack uniformity. Consequently, the characteristics of local governments of the different Member States are very varied: they are characterised by a different scale, different competences, etc. Therefore, a legal approach of local governments as enforcement actors requires a multi-layered assessment, starting from the abstract legal perspective, moving on to a concrete assessment of the potential enforcement role in practice, based on the local characteristics that differ across Member States. This contribution focusses on the abstract legal reasoning, but when reflecting concretely, it refers to Flemish local governments.[7]

II. The enforcement role of local governments within the EU legal order: grafted on legal principles

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[2] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS : Enforcing EU law for a Europe that delivers, 1 (chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://commission.europa.eu/document/download/b75864f0-8516-4ff0-9e2a-c3e8a557bbfb_en?filename=com_2022_518_1_en.pdf&prefLang=nl).

[33] For some time there was uncertainty about the scope of the phenomenon of Europeanization in general and the appropriate way in which this fact should be approached: See for example . BOBEK, "Europeanization of public law" in A. VON BOGDANDY (ed.), *The Max Planck Handbook of public law in Europe*, Oxford, Oxford University press, 2016, 635-639 and J. P. OLSEN, "The many faces of Europeanization", *JCMS* 2002, 921-952.

[4] See for example A. NOUREAU, *L'Union européenne et les collectivités locales*, Université de La Rochelle, 2011, https://theses.hal.science/tel-00590966/document, 741.

[5] DE MOOR en MORTELMANS pointed out the need for a direct approach to European law from an administrative law perspective as early as 1993. The need to adopt a direct approach applies all the more in the current context of a more advanced integration process: A. J. C. DE MOOR –VAN VUGT en K.J.M. MORTELMANS, "Europees bestuursrecht: de oude en de nieuwe agenda, *NTB* 1992, 4.

[6] See for example E. VAN BEVER en T. VERHELST, "Towards a more active approach of local level Europeanization", CLP 2013, 19 p; Even in other legal orders, the direct approach to European law at the local level appears almost non-existent. See for example: M. VERHOEVEN and R. WIDDERSHOVEN "Van Costanzo naar Tiel: de bestuurlijke bevoegdheid om met hoger recht strijdige nationale wetten buiten toepassing te laten" in K.J. DE GRAAF, A.T. MARSEILLE, S. PRECHAL, R. WIDDERSHOVEN en H. WINTER, *Grensoverschrijdende rechtsbeoefening: liber amicorum Jan Jans*, Zutphen, Paris Uitgeverij, 2021, 283; L. ENQVIST en M. NAARTTIJÄRVI, "Administrative independence under EU law: Stuck between a rock and Costanzo?", *European Public Law* 2021, 730-731.

[7] Flanders has 300 local governments with an average population of 22,583. For several years now, a voluntary fusion movement has startedat the local level.

Local governments can be considered as EU enforcement actors '*avant la lettre'*: their enforcement responsibility goes further back than the enforcement role assigned to many enforcement authorities the EU enforcement system is relying on today. Unlike many of the existing EU enforcement authorities, local governments cannot be qualified as enforcement authorities with a formal assigned role: no explicit legislate framework regulates their enforcement responsibilities.[8] Despite the lack of an explicit legislative framework that confers enforcement responsibilities to them, they ought to be considered as key enforcement actors within decentralised the EU enforcement system.[9] Their enforcement role can be deduced from the fact that national governments are supposed to play a key role in applying EU law effectively. Indeed, a cumulative reading of a number of EU legal principles leads to the conclusion that the enforcement responsibilities that rest on the national governments also apply to the citizen-related administrative layer that the local governments form. However, other legal principles can be brought up to put this local responsibility into perspective. Both the justifying and the counterbalancing principle will be discussed.

i. The (r)evolutionary establishment of a step-be-step enforcement of EU law by local governments

The enforcement role of local governments has been subject to several cases brought before the European Court of Justice.[10] This p aper does not aim to elaborate on the (r)evolutional development of the Court's reasoning in this regard, but is limited to explaining the Court's expectations towards local governments as enforcement actors and to map the principles put forward in order to claim their key role within the EU enforcement system. [11]

Throughout different cases, the Court put forward the obligation of local governments to enforce the implementation of EU law through a step-by-step approach. The landmark case in which the Court explicitly introduced local governments as enforcement authorities, is the Costanzo case.[12] Costanzo, an Italian builder, had challenged the decision of the Milanese Giunta municipal to reject his tender for carrying out alteration works on a football stadium in the run-up to the 1990 FIFA World Cup on account of it being abnormally low. In carrying out the tendering procedure, which was governed by Directive 71/305, the Giunta had followed the Italian implementing legislation which imposed that if a tender fell below the threshold, it had to be ruled out. Article 29(5) of the Directive, however, determined that Member States had to examine abnormally low tenders, and thus needed to ask the tenderer to prove that it was actual. The Giunta argued that it was following internal guidelines that were based on the Italian law and therefore was not required to consider the terms of the directive. The Court, however, disagreed and set out a clear obligation to achieve a result on the part of local governments: when they are confronted with national law that is in conflict with EU law, refrain from applying these provisions of national law. they must disapply national law in favor of the application of European law. In subsequent judgments, the Court refined and qualified this strongly worded obligation to achieve a certain result. As a result, the enforcement role by local governments can be qualified more as an obligation of means. In short, the enforcement role of local governments means that they adopt an active implementation attitude towards European law in their day-to-day administrative practice. This active attitude towards EU law implies that they critically reflect on the conformity of European law. They should do so, at least according to the Court, by first checking whether the national law they are supposed to apply can be interpreted in conformity with EU law. If this proves to be the case, they are deemed to be applying national law in the light of this interpretation in conformity with the rules. When a compliant interpretative proves

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[8] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS : Enforcing EU law for a Europe that delivers, 2 (chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://commission.europa.eu/document/download/b75864f0-8516-4ff0-9e2a-c3e8a557bbfb_en?filename=com_2022_518_1_en.pdf&prefLang=nl).

[9] Concerning the decentralised enforcement system, see for example T. ROES, *Sincere cooperation and European integration: a study of the pluriformity of loyalty in EU law*, 2023, 113 -146.

[10] Different cases will be mentioned throughout this paper.

[11] For an elaboration on this development, see for example M. VERHOEVEN en R. WIDDERSHOVEN, "Van Costanzo naar Tiel: De bestuurlijke bevoegdheid om met hoger recht strijdige nationale wetten buiten toepassing te laten" in *Grensoverstijgende rechtsbeoefening: liber amicorum Jan Jans*, Zutphen, Uitgerij Paris, 2021.; L. ENQVIST en M. NAARTTIJÄRVI, "Administrative independence under EU law: Stuck between a rock and Costanzo?", *European Public Law* 2021; T. ROES, *Sincere cooperation and European integration: a study of the pluriformity of loyalty in EU law*, 2023.

[12] ECJ 22 June 1989, nr. C-103/88, ECLI:EU:C:1989:256, (Fratelli Costanzo), 30.

impossible, local governments have the ultimate remedy to disapply the non-EU compliant national law and to apply EU law with direct effect.

ii. Principles justifying an active local enforcement role

The main building blocks for the Court's reasoning that led to this this step-by-step approach, are the principle of sincere cooperation and the primacy principle.

a. The principle of sincere cooperation

"La loyauté est au cœur du système juridique communautaire."[13] The Court confirms that indeed the principle of loyalty also is of paramount importance with regard to local governments because it forms the foundation of the relationship between the European Union and all authorities[14] [15]

This legal principle has been developed through case law.[16] Today article 4, 3 TEU forms its legal basis stating: *"Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."*

The formulation of this clause undeniably entails the obligation to by all appropriate measures, whether general or particular', the obligations arising from EU law, both primary and secondary, perform loyally.[17] This obligation applies to each competent public authority designated by national law.[18] The case-law of the Court of Justice has shown a development in this regard which leads to a semi-positive effect of case-law:[19] if the national court or a national public authority has a certain competence, following the directly effective EU law, it may be obliged to exercise this competence.[20] In other words, the semi-positive effect that the Court of Justice has established, results in the conversion of a national competence into a European enforcement obligation.[21] Although the Court points to the responsibility of domestic law with regard to safeguarding the European implementation obligation on the part of all internal levels of competence, the Court of Justice,[22] the Court of Justice stresses that local governments cannot put forward national law as a reservation with regard to their obligation to implement EU law. In other words, national law that is, or appears to be, contrary to EU law does not prevent local governments from implementing the provisions of EU law in question. This position of the Court is in line with the functional way in which it interprets the concept of 'State' in its case-law.[23]

b. The primacy principle (under the condition of direct effect)

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[13] D. SIMON, *Le système juridique communautaire*, Paris, PUF, 2001, 149.

[14] E. CHEVALIER, "Espace administrative européen" in J.-B. AUBY en J. DUTHEIL DE LA ROCHERE (eds.), *Traité de droit administratif européen: 3e édition*, Brussel, Bruylant 2022, 907.

[15] The principle provided a basis to create new obligations furthering the treaty's effectiveness. As a result, many of the most momentous constitutional decisions like for example the well known Costa v ENEL and Francovich case-law.

[16] The Court introduced this obligation on 10 February 1983: ECJ 10 February 1983, C-230/81, ECLI:EU:C:1983:32, 37. For an explanation of the further jurisprudential development of this principle, see for example X. MAGNON, "La loyauté dans le droit institutionnel de l'Union européenne", *Revue des Affaires européennes/Law & European affaires* 2011, 245-251.

[17] Despite this obligation under the designated level of competence, it remains the Member State itself that is liable in case of non-compliance with Union law. Zie bijvoorbeeld ECJ 19 November 1991, Francovich e.a. C-6/90 en C-9/90. 33-36.

[18] ECJ 22 June 1989, nr. C-103/88, ECLI:EU:C:1989:256, (Fratelli Costanzo), 30.

[19] Article 4(3) TEU became the natural repository for a wide range of positive obligations for national administrations: T. ROES, *Sincere cooperation and European integration: a study of the pluriformity of loyalty in EU law*, 2023, 114.

[20] This obligation applies to all public authorities belonging to the various Member States. See for example ECJ 8 October 1987, Kolpinghuis Nijmegen,80/86, pt. 12.

[21] J.H. JANS, S. PRECHAL en R.J.G.M. WIDDERSHOVEN, *Inleiding tot het Europees bestuursrecht*, Nijmegen, Ars Aequi Libri, Nijmegen, 47.

[22] ECJ 22 June 1989, nr. C-103/88, ECLI:EU:C:1989:256, (Fratelli Costanzo), 30.

[23] ECJ 22 September 1988, C-31/87, ECLI:EU:C:1988:422, 11 en 12.

The Court's functional approach of the 'State', is an essential condition to ensure the effective pursuit of the primacy of EU law.[24] Otherwise, the phenomenon of the decentralisation of competences would imply an unjustifiable withdrawal of certain authorities from EU law.[25]

Thus, the primacy principle is the second building block of the enforcement role of local governments.[26] For a long time, the dependence of the primacy principle of the direct effect was subject to discussion since the importance of the direct effect in this regard was rather unclear.[27] The question arose whether the primacy principle was not in itself sufficient to induce national actors to apply European law to the detriment of a conflicting source of national law. Until 2018, the relationship between the primacy principle and direct effect was open to debate. Indeed, the wording of the Simmenthal obligation, combined with subsequent ECJ case-law, could lead to the conclusion that the application of the primacy principle was distinct from a requirement of direct effect.[28] The Poplawski case raised the question of the required consistency between the primacy principle and direct effect. The referring court asked the Court for a preliminary ruling on whether, as a result of the priority principle, it should disapply national legislation that is contrary to a European framework decision, which, by definition, has no direct effect. Mr Poplawski's case led to two preliminary questions to this effect.[29]

In response to the second question, the Court of Justice removed any possible doubt by stating that the primacy principle has effect only in cases of directly operating Union law. More specifically, the Court emphasised that the application of the primacy principle must not result in undermining the distinction between directly operating Union law, on the one hand, and indirectly operating Union law, on the other hand.[30] Consequently, local governments are only tasked with the enforcement of EU law that has direct effect.

c. An active local enforcement role: excessive or evident?

The active enforcement role of local governments implies a differentiation of the legality test applicable to the legal actions of local governments. When local governments implement national law, a legality test of their actions amounts, in principle, to a test that examines whether they have correctly implemented the law. Moreover, when these same - Europeanised - local governments give effect to European legal rules with direct effect, the legality test raises the question of whether they have implemented the right law.[31] At first sight, this differentiation might be perceived to be rather excessive, but from the perspective of both the principle of sincere cooperation and the primacy principle, it appears to be evident.

The principle of sincere cooperation provides a framework for the implementation of EU law. [32] Therefore, from a European perspective, it is not at all remarkable that this principle is the stepping stone for the Court of Justice make the enforcement role of local governments explicit.

In addition, taking into account the primacy principle, it seems to be evident that local governments play a key role within the EU enforcement system. Local governments can be seen as the first line guardians of EU law

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[24] A. NOUREAU, *L'Union européenne et les collectivistés locales*, Université de la Rochelle, https://tel.archives-ouvertes.fr/tel-00590966 , 3193 (consultatie 15 mei 2023).; On the primacy principle, see "*b.The primacy principle"*.

[25] See conclusion adv.-gen. DARMON 4 mei 1988 bij ECJ 20 September 1988, nr. C-31/87, ECLI:EU:C:1988:226, pt. 11.

[26] ECJ 4 December 2018, nr. C-378/17, ECLI:EU:C:2018:979.

[27] Zie bijvoorbeeld J. L. DA CRUZ VILACA, "Le principe de l'effet utile du droit de l'Union dans la jurisprudence de la Court" in A. ROSAS, E. LEVITS en Y. BOT (eds.), *The Court of Justice and the construction of Europe; Analyses and perspectives on sixty years of case-law*, Den Haag, Asser Press, 2013, 281-288.

[28] D. MIASIK en M. SZWARC, "Primacy and direct effect – still together: Poplawski II", *Common Market Law Review* 2021, 578-579; G. BEBR, *Development of judicial control of the European communities*, Den Haag, Martinus Nijhoff Publishers, 1981, 643.

[29] In the first judgment, the Court held that a conforming interpretation of national law was possible.

The Court therefore did not address the requirement of direct effect in this judgment. Indeed, a lack of direct effect does not affect the duty of conforming interpretation: ECJ 29 June 2017, C-579/15, EU:C:2017:503 (Poplawski I), 43.

[30] ECJ 24 June 2019, C-573/17, EU:C:2018:957 (Poplawski II), 60.

[31] M. VERHOEVEN en R. WIDDERSHOVEN, "Van Costanzo naar Tiel: De bestuurlijke bevoegdheid om met hoger recht strijdige nationale wetten buiten toepassing te laten" in *Grensoverstijgende rechtsbeoefening: liber amicorum Jan Jans*, Zutphen, Uitgerij Paris, 2021, 336; L. ENQVIST en M. NAARTTIJÄRVI, "Administrative independence under EU law: Stuck between a rock and Costanzo?", *European Public Law* 2021, 709.

[32] E. CHEVALIER, "Espace administrative Européen" in J.-B. AUBY en J. DUTHEIL DE LA ROCHERE (eds.), *Traité de droit administratif Européen: 3e édition*, Brussel, Bruylant 2022, 908 – 908.

that should directly affect these citizens. Consequently, to individuals, who face administrative authorities more often than judges, the Costanzo mechanism is the true capstone of direct effect.[33]

iii. Principles counterbalancing an active local enforcement role

Nevertheless, from the perspective of both the principle of sincere cooperation and the primacy principle, it seems to be evident that local governments need to play an active enforcement role, other EU principles form the basis for reasonings questioning the Court's teleological approach of the local enforcement role. The possible challenge of this approach, which is usually nationally driven, is grafted on the national identity principle on the one hand and on the institutional autonomy principle on the other.

d. The national identity clause

The Maastricht Treaty formally introduced national identity by stating that the Union 'respects the national identity of its member states'. This clause thus, in its then form, guaranteed national identity without further defining it.[34] The national identity clause at the time served to remedy member states' concerns that the progressive content of the Maastricht Treaty would cause them to lose too much sovereignty.[35]

Subsequently, the Treaty of Lisbon made the guarantee of national identity not only legally enforceable[36,] but also introduced a definition of national identity.[37] The current artikcle 4,2 TEU states: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."[38] This definition of national identity is vague and therefore leaves room for concrete interpretation from the national perspective of the respective member states. Indeed, it is obvious that European law does not give a precise unilateral interpretation of national identity. Indeed, national identity is a construct that is given substance in the public debate on the basis of specific ideas and preferences that appeal to it.[39] In other words, the scope of this concept is evolutionary and not in the least subjective. Due to the subjective nature of the principle of national identity, it cooperates with the principle of subsidiarity and the proportionality principle [40] a guiding role in the political debate leading up to the drafting of Union legislation.[41] [42] Notwithstanding the open-ended wording of the national identity clause, it explicitly recognises the local level of government. In any event, the recognition of the local level of competence under primary law underscores the Union's respect for the internal organisation of the Member States.[43]

Although the explicit mention of the local level of government is a significant prelude to the European decision-making debate, the primary recognition of the local government level is a step in the right direction.[44] Action by the European Union in relation to the local level of government is not irrevocably excluded. However, the effect of the identity clause is that the Union can only intervene with the local level of

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[33] Concerning the decentralised enforcement system, see for example T. ROES, *Sincere cooperation and European integration: a study of the pluriformity of loyalty in EU law*, 2023, 17.

[34] Art. F, lid 3 TEU, later art. 6, lid 3 TEU.

[35] G. A. BERMANN, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States", *Columbia Law Review* 1994, 334–335.

[36] On the lack of judicial enforceability until then, see for example E. CLOOTS, *National identity in EU law*, Oxford, Oxford University Press, 2015, 135.

[37] P. VAN NUFFEL, "De nationale identiteit van de lidstaten: bouwsteen of splijtzwam voor het recht van de Europese Unie?", TBP 2017, 357.

[38] Own underlining.

[39] J.H. JANS, S. PRECHAL en R.J.G.M. WIDDERSHOVEN, *Inleiding tot het Europees bestuursrecht*, Nijmegen, Ars Aequi Libri, Nijmegen, 38-39; P. VAN NUFFEL, "De nationale identiteit van de lidstaten: bouwsteen of splijtzwam voor het recht van de Europese Unie?", *TBP* 2017, 358.

[40] Art. 5, 4 TEU.

[41] Due to its guiding role in the political debate, the legal or political nature of the principle of subsidiarity has been under discussion since its introduction by the Maastricht Treaty. See, for example J. ZILLER "Principe de subsidiarité" in J.-B. AUBY en J. DUTHEIL DE LA ROCHERE (eds.), *Traité de droit administratif européen: 3e édition*, Brussel, Bruylant 2022, 465.

[42] In this context, the principle of subsidiarity acts de facto as a mechanism for the preservation of national identities: E. CLOOTS, *National identity in EU law*, Oxford, Oxford University Press,2015, 184.

[43] A. NOUREAU, L'Union européenne et les collectivistés locales, Université de la Rochelle, https://tel.archives-ouvertes.fr/tel-00590966 , 29 (consultatie 16 February 2023).

[44] See for example A. NOUREAU, *L'Union européenne et les collectivités locales*, Université de La Rochelle, 2011, https://theses.hal.science/tel-00590966/document, 19 (consultatie 15 mei 2023).

government[45] where the legislative debate, which examines national identity, subsidiarity and proportionality, demonstrates the necessity and political desirability of such interference.

In any case, with the primary law enshrining national identity in primary Union law, Member States are fundamentally reticent about the impact of European law on their local governments. This reluctant attitude of the Member States in this regard differs remarkably from the attitude they take towards the impact of Union law with regard to their citizens. Increasingly far-reaching Union law has now led to the Statutory recognition of the fact that nationals of the various Member States are not only national citizens but also Union citizens[46] Article 9 TEU emphasises the principle of equality between all Union citizens.[47] This equality can bridge the gap between nationals of member states and the Union.[48] However, despite the growing impact of the integration process on the various local governments, Member States have strongly chosen to protect the local level of government to a large extent through the national identity clause. A guarantee of equal treatment of local governments, similar to that vis-à-vis Union citizens, is therefore lacking under primary EU law, leaving the gap between local governments and the European Union largely intact. Despite the far-reaching Europeanisation of local governments under the responsibility of the various member states, there is a lack of homogeneity at the local level.[49] In short, there is no such thing as European local government. However, a homogenisation of the local level of government would have the advantage of giving local governments a clear legal recognition as public subjects of European law.[50]

[45] The Court of Justice confirmed that the principle of national identity is not an absolute prohibition. See for example ECJ 12 June 2014, nr. c-156/13, ECLI:EU:C:2014:1756, 34.

[46] Union citizenship has its basis in Articles 2, 3, 7 and 9 to 12 TEU, Articles 18 to 25 TFEU and Articles 39 to 46 of the Charter of Fundamental Rights of the Union

[47] Art. 9 TEU: In all its activities, the Union shall respect the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Citizen of the Union means any person holding the nationality of a Member State. Citizenship of the Union is additional to national citizenship and does not replace it.

[48] Each national legal order should ensure an equal degree of protection of the rights of these Union citizens.

[49] A. NOUREAU, L'Union européenne et les collectivistés locales, Université de la Rochelle, https://tel.archives-ouvertes.fr/tel-00590966 , 19.

[50] J.-B. AUBY, "L'Europe et la décentralisation", *Revue frnçaise* de la décentralisation 1995, 16.

iv. The principle of institutional autonomy

The guarantee of national identity actually concerns a 'constitutional' enshrinement of the principle of institutional autonomy specifically with regard to regional and local governments. Institutional autonomy implies that it is up to the member states to allocate the power to exercise Union law themselves within the internal legal order.[51] In other words, it is not for the EU legislature in principle to determine the level at which the rules of EU law are to be implemented. Consequently, a local authority has competence to implement secondary EU law only if it has, under domestic law, the substantive competence to act within the regulated domain. These may be powers which local governments already possessed independently of EU law, or powers conferred on them by the central State authority as a result of European legislative action which necessitates the designation of a competent level of implementation. In other words, the principle of institutional autonomy guarantees the primacy of the State with regard to the internal division of powers. Because EU law is highly dependent on national law and the national (administrative) organisation for its implementation, it can be argued that the principle of institutional autonomy has a paradoxical effect.[52]

Like the principle of national identity, the principle of institutional autonomy stands in the way of the creation of European local government. Indeed, this principle implies that a competence-sharing intervention by the Member States - a priori or a posteriori - is necessary. It is specifically through the application of the principle of institutional autonomy that the Union legislature can act without prejudice to the heterogeneity of the local governance landscape.[53]

e. An active local enforcement role: a delicate balance between the European functional and the national protective instrumentalisation of legal principles

From a national perspective, an active enforcement role of local governments is frequently critically challenged[54] or practically questioned.[55]

The national identity principle and the principle of institutional autonomy protect the constitutional uniqueness of Member States. Therefore, from a national perspective, it is not at all remarkable that these principles sustain the national counterbalancing of the active local enforcement role the Court of Justice has established. One of the most striking arguments that can be observed regarding the counterbalancing national approach of the local enforcement role is the fact that the hierarchical position of local governments prevents such active role, as well as the reference to the enforcement role of the independent judiciary within the EU legal order.[56]

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[51] ECJ 12 June 2014, c- 156/13, ECLI:EU:C:2014:1756; ECJ 12 June 1990, nr. c-8/88, ECLI:EU:C:1990:241; ECJ 25 mei 1982, nr. c-96/81, ECLI:EU:C:1982:192, 12.

[52] J.H. JANS, S. PRECHAL en R.J.G.M. WIDDERSHOVEN, *Inleiding tot het Europees bestuursrecht*, Nijmegen, Ars Aequi Libri, Nijmegen, 15.

[53] See for example A. NOUREAU, L'Union européenne et les collectivités locales, Université de La Rochelle, 2011, https://theses.hal.science/tel-00590966/document, 19.-25. The need to maintain this heterogeneity may be questionable from a legal perspective, see for example A. TAILLEFAIT, "Coopération transfrontalière" in J.-B. AUBY en J. DUTHEIL DE LA ROCHERE (eds.), *Traité de droit administratif Européen: 3e édition*, Brussel, Bruylant 2022, 993.

[54] E. CLOOTS, *National identity in EU law*, Oxford, Oxford University Press, 2015; Bruno de Witte, "Direct Effect, Primacy, and the Nature of the Legal Order" in Paul P Craig and Gráinne de Búrca (eds), The Evolution of EU Law (Oxford University Press, 2011, 233.

[55] ; L. ENQVIST en M. NAARTTIJÄRVI, "Administrative independence under EU law: Stuck between a rock and Costanzo?", *European Public Law* 2021, 730-731.

[56] E. CLOOTS, "De Fratelli Costanzo rechtspraak van het Hof van Justitie" in A. ALEN, S. SOTTIAUX, J. CLEMENT, P. GERARD, F. MEERSCHAUT, J. THEUNIS, M. VAN DEPUTTE en W. VERRIJDT, *Leuvense staatsrechtelijke standpunten* 2, Brugge, die Keure, 2010,33-75.

III. The enforcement tools of local governments within the EU legal order: stored in a (national) black box

The - above analysis has made it clear that both the teleological and the restrained approach to the local enforcement role can be justified from a legal perspective.

It is striking that European law captures the relationship between the two levels of jurisdiction through principles. Indeed, they are, by definition, rather vaguely formulated. Vagueness confers discretion on the rule-interpreter and that discretion may be used both to over- and under-emphasize State consent, i.e. to favour State sovereignty or to further une certaine idée de l'Europe.[57]

However, the interesting thing about principles - especially within the European context - is that their open nature allows them to easily bridge different standards systems. Indeed, principles allow the same problem to be solved in different ways.[58] Principles have the potential to fulfill a '*gap-filling function'*.[59] This '*gap-filling function'* guarentees the autonomy and coherence of the European legal order.[60] With regard to the enforcement role of local governments, it is necessary today that a number of principles perform such 'gap-filling' function. Indeed, there is no formal regulatory framework that explicitly facilitates the enforcement role of local governments. However, the 'dichotomy' outlined above between the justifying principles and the counterbalancing principles, results in ambiguity as to how local governments should position themselves as enforcement authorities.

v. Opening the black box of local enforcement: a national matter?

However, the Court has nuanced its initially very strongly formulated obligation to achieve a certain result on the part of local governments, it remains clear that the Court expects local governments to make an effort to bring EU law to the citizen. Even when this requires a critical reflection on the conformity of national law with EU law.

Apart from putting forward a graduated reflection that consists of interpreting before disapplying, the Court does not provide local governments with concrete tools to enable local governments to position themselves within their national legal order as key players within the EU enforcement system. By doing so, the Court puts the responsibility for providing such concrete tools in the hands of the Member States. This restrained attitude of the Court is in line with the scope of the local identity principle and the principle of institutional autonomy which safeguard the heterogeneity of the local competence level.[61] However, the consequence of this is that when Member States fail to provide clear tools, local governments at most know what is expected of them from a European law perspective, but not how to legitimately achieve this within their own national legal order.

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[57] To use the well-known phrase coined in Pierre Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (1984) 8 ELRev 155, 157; Or see, in the republished version of this article, Pierre Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (2015) 40(2) ELRev 135, 137; See also Hjalte Rasmussen, On Law and Policy in the European Court of Justice (Nijhoff 1986) 14.

[58] H. JANS, S. PRECHAL en R.J.G.M. WIDDERSHOVEN, *Inleiding tot het Europees bestuursrecht*, Nijmegen, Ars Aequi Libri, Nijmegen, 2017, 16; The principle of procedural autonomy is a striking example of this.

[59] The function of principles is threefold: they have the potential to fill (legistic) gaps, are a means of interpretation and provide a benchmark for review by the law, see H. JANS, S. PRECHAL en R.J.G.M. WIDDERSHOVEN, *Inleiding tot het Europees bestuursrecht*, Nijmegen, Ars Aequi Libri, Nijmegen, 2017, 127; K. LENAERTS en J.A. GUTTIERREZ, "The constitutional allocation of powers and general principles of EU law", *Common Market law review* 2010, 1629.

[60] K. LENAERTS en J.A. GUTTIERREZ, "The constitutional allocation of powers and general principles of EU law", *Common Market law review* 2010, 1629.

[61] However, a homogenisation of the local level of government would have the advantage of giving local authorities a clear legal recognition as public subjects of European la: J.-B. AUBY, "L'Europe et la décentralisation", *Revue française* de la décentralisation 1995, 16.

However, a reflection on the Flemish local government landscape shows that the Courts position and local enforcement practice are far apart. For example, political science research shows that Flemish local governments are often not or only partially aware of the enforcement role that the Court attributes to them. Legal scholars also question the conformity of this role with the organisation of the internal legal order.[62]

vi. Pushing the horizons of local enforcement: a European matter?

Moreover, the national counterbalance with regard to the active local enforcement role put forward by the Court raises the question whether it is not up to the EU legislator to clarify.

The lack of clarity about the local enforcement role stems in the first place from primary EU law.

An adaptation of primary EU law that could lead to the clarification of the local enforcement role concerns the adaptation of the explicit recognition of the role of local governments within the framework of the aforementioned principles. That only the national identity clause explicitly recognises the local level of government is somewhat problematic. National identity protects the internal legal order from direct interference with the local level of competence. The explicit recognition of State primacy in terms of territorial decentralisation, however, contrasts with the functional impact of EU law on local governments. The decentralisation trend at the national level with the aim of further developing national welfare states expands the local remit and consequently the competences of local governments within the European context. This increasing functional impact of EU law requires an unambiguous explication of the role of local governments within the framework of the discussed functionally applied principle of sincere cooperation In this way, the primary law enshrinement of local governments would not only serve the confirmation of the primacy of Member States in terms of the organisation of local government, but would also reflect the current functional impact on this level of competence and acknowledge the resulting enforcement responsibilities. This would counterbalance the paradoxical effect of the principle of institutional autonomy in this regard.

Moreover, it is notable that primary Union law recognises and supports the role of judges as enforcement actors.[63] Although citizens come into contact with local governments more often than they come into contact with courts, analogous recognition and framing of local governments is lacking in primary Union law. This leads to the paradoxical situation that the first line of enforcement is not supported in, for example, interpreting, while the second line does enjoy support.

In short, the key to the local enforcements' black box, today lies in national hands. Given the safeguarding of the heterogeneity of the local levels of government of the respective Member States, the facilitation of the local enforcement role also remains best a national matter. However, the current restraint of Union law leads to the paradoxical situation that local heterogeneity poses a high risk of unequal effect of EU law on citizens.

Therefore, pushing the horizons of local governments as enforcement actors within the EU systems, requires a debate on the extension of the recognition of local governments, provided in the national identity clause to the recognition of local governments as enforcement actors. A corresponding adaptation of the sincere cooperation principle might be considered as one of the possibilities.

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[62] With regard to Flemish local governments for example, the conformity of this an active local enforcement is questioned in the light of art. 159 of the Belgian Constitution. See for example: J. THEUNIS, “De techniek van het buiten toepassing verklaren: De invloed van het Europese recht op de exceptie van onwettigheid” in E. TERRYN, V. SAGAERT en I. SAMOY, Invloed van het Europees recht op het Belgische privaatrecht, Antwerpen, Intersentia 2012.

[63] Art. 19, 3, b) TEU and art. 267 VWEU.