IV. MECHANISMS IN EU LAW TO ENSURE LEGAL COMPLIANCE OF MEMBER STATES

1. Introduction

'The European Union is a community of law, based on common values shared by Member States. Applying and enforcing EU law, and respect for the rule of law are at its very foundation'.[1667] These words of the Commission address the application and enforcement of EU law which lead us to a new focus of this book. Having presented, analysed and more generally discussed fundamental questions of EU soft law, we shall now explore various mechanisms which are aimed at ensuring MS' compliance with EU law. The term 'Member States' is to be understood broadly here, as used eg in the context of the Treaty infringement procedure.[1668] Therefore, also procedures performed *vis-à-vis* certain national authorities shall fall within the ambit of this Part.[1669] As regards the term (non-)compliance, *Young's* rather intuitive definition can be applied: 'Compliance can be said to occur when the actual behavior of a given subject conforms to prescribed behavior, and non-compliance or violation occurs when actual behavior departs significantly from prescribed behavior'.[1670] It is an objective understanding of compliance which shall be applied here. A cause-effect relationship between the norm and the behaviour is not required.[1671]

There is a vast body of literature on the question why States comply with their (international) obligations.[1672] From a theoretical perspective, es-

1667 Commission, 'Enforcing EU law for a Europe that delivers', COM(2022) 518 final, 1.

1668 See Andersen, Enforcement 60 f, with references to the case law; see Lenaerts/Maselis/Gutman, Procedural Law 143 f, with further references.

1669 This comprehensive understanding of the term 'MS' does not render irrelevant whether a certain MS or a certain national authority is addressed by an EU body in the course of a compliance mechanism; see also V.3.6. below.

1670 Young, Compliance 3; for a similar definition as behaviour 'consistent with (international) norms and rules' see Börzel, Noncompliance 14, with further references; in case of specific legal acts, eg directives, the question of compliance may encompass various aspects: see eg Falkner/Treib/Hartlapp/Leiber, Europe 11–14.

1671 See Nollkaemper, Role 160.

1672 See also the theoretical overview by Conant, Compliance.

sentially we can distinguish three schools of thought on this question which are reflected upon in realist, institutionalist and normative theories. Realist theories are based on the conviction that States follow their obligations if they have an interest (national interest) in doing so (eg liberal intergovernmentalism). Institutionalist theories stress the importance of institutions established by a group of States (eg neo-functionalism). These institutions can affect State behaviour – not only by the norms they create as such, but in particular by the institutions implementing them, thereby increasing or reducing the incentives of States to comply or not to comply by referring to State reputation, monitoring schemes, cooperation etc. Normative theories put more emphasis on compliance as a result of States (State actors) sensing a moral obligation to comply.[1673] With regard to the EU, interestingly, research on the implementation of Union law by the MS has begun only in the mid-80s.[1674] Even the Commission as the 'guardian of the Treaties' for a long time has sidelined the implementation dimension of Community and later Union regulation, laying emphasis on this issue only since the 90s.[1675] The intention here is not to find out why MS comply with EU law,[1676] but to present and analyse how EU law ensures – by means of certain procedures (compliance mechanisms) – that MS comply with it. Thus, Parts IV and V shall focus on some of the legal tools intended to ensure MS compliance and on their legality, respectively.

While also general-abstract measures – such as generally applicable guidelines or instructions – may aim at ensuring compliance with EU law, namely by concretising it, the following chapter is dedicated to acts which are addressed to one or more MS, covering a concrete case (individual-concrete measures). The former generally are intended to define their addressees' (including the MS) behaviour *ex ante*,[1677] thereby determining the law to be applied in the future, the latter take effect *ex post*, that is to say they provide for a *reaction* to MS action. The Commission as the core actor in this context is often vested with both tasks – to concretise EU law via general-abstract (legally binding or legally non-binding) measures

1673 For these theories see Burgstaller, Theories 95 ff.
1674 See Falkner/Treib/Hartlapp/Leiber, Europe 14 f.
1675 See Mastenbroek, Compliance 1104. *Mastenbroek* in this piece also provides for an overview of research on compliance with Community/Union law.
1676 For an overview of the (mainly political science) literature on implementation of and compliance with EU law and its historical development see Treib, Governance.
1677 Only exceptionally – that is where they have retroactive effect – they function also *ex post*.

on the one hand, and to ensure compliance with EU law (possibly as interpreted in its general-abstract measures), on the other hand.[1678] In the context of the latter procedures, a number of different terms are used (not uniformly), most importantly 'control', 'enforcement', 'implementation', 'supervision'.[1679] The Commission, for example, mainly seems to use the term 'enforcement' when referring to infringement procedures to be initiated by it under the Treaties.[1680] While acknowledging the partly different, partly overlapping meanings of these terms, here the broader term 'compliance' shall be used. The necessary distinction between 'implementation' and 'enforcement' (two categories substantially rooting in the Treaties) shall follow only after the presentation of the mechanisms (see V.3.1. below).

Many procedures laid down in EU law directly or indirectly aim at MS compliance,[1681] but the focus here shall be narrowed to mechanisms which are (at least partly) governed by *administrative* EU actors and which are aimed at ensuring compliance by the MS – by means of EU law or EU soft law – with concrete rules or objectives, as laid down in law or soft law (compliance mechanisms).[1682] While in Part III all kinds of EU soft law acts – those with a general-abstract and those with an individual-concrete scope – have been considered, in the given context it is acts with an individual-concrete scope which are at issue. This is why in particular the following procedures shall not be addressed here: the instrument of State liability which is enforced before national courts; the mechanism laid down in Article 7 TEU or the three-stage process proclaimed by

1678 See J Scott, Limbo 331 f, pointing at 'the Commission's dual role in elaborating guidance and in identifying and prosecuting a breach of the underlying framework norm'.

1679 For the terms 'supervision' and 'control' see Audretsch, Supervision 4; for these terms in German scholarship see Eekhoff, Verbundaufsicht 5–7, with further references; see also Weiler, Supranational Law 413 f, addressing – as a third category next to implementation and enforcement – 'application'; with regard to 'enforcement' and 'management' as two alternative perspectives on compliance see Tallberg, Paths 609 f.

1680 See eg Commission, 'Completing the Internal Market', COM(85) 310 final, para 125, or <https://ec.europa.eu/environment/legal/law/14/Introduction_EU_Environmental_Law.htm> accessed 28 March 2023; applying a broader understanding of 'enforcement': Scholten, Trend.

1681 See the different lines of development relating to ensuring compliance with EU law drawn by Chiti, Governance.

1682 For different categories of compliance mechanisms in public international law see Kingsbury, Concept 64.

the Commission[1683] (highly political rather than 'technical' and applied only exceptionally) which are about compliance with values rather than concrete rules;[1684] the preliminary reference procedure pursuant to Article 267 TFEU which is entirely judicial,[1685] on the part of the EU performed only by the CJEU;[1686] or temporary mechanisms such as the Cooperation

1683 See Commission, 'A new EU Framework to strengthen the Rule of Law' (Communication), COM(2014) 158 final, 7 ff; see also III.3.5.2.2.3. above.

1684 The Commission claims that the situations addressed by this procedure may also 'fall outside the scope of EU law and therefore cannot be considered as a breach of obligations under the Treaties but still pose a systemic threat to the rule of law'; Commission, 'A new EU Framework to strengthen the Rule of Law' (Communication), COM(2014) 158 final, 5; see also Bieber/Maiani, Enforcement 1082 ff; for ideas to apply the Treaty infringement procedure also in case of a violation of values according to Article 2 TEU see Kochenov, Acquis 10–12, with many further references. Similarly inconcrete – both materially and procedurally – is the Council's and the High Representative's power to ensure compliance of the MS with the principles laid down in Article 24 TEU.

1685 For the right of the Commission (and other actors) to submit statements of case or written observations to the Court in preliminary reference cases see Article 23 para 2 of the Statute of the CJEU. For the complementarity of preliminary reference procedures to Treaty infringement procedures according to the Commission's enforcement policy see Commission, 'EU law: Better results through better application' (Communication), 2017/C 18/02, 15.

1686 The legislator has established alternative mechanisms entailing a similar procedure, partly with the backing of the Court. The latter has accepted, for example, a provision of a Commission notice, according to which national courts or tribunals, in case they have doubts with respect to the quantification of the amount of State aid to be recovered, are invited 'to contact the Commission for assistance in accordance with the principle of cooperation in good faith'. And while it did not consider the respective Commission statements as binding for the respective national court or tribunal, it stressed the fact that they were 'intended to facilitate the accomplishment of the task of the national authorities in the immediate and effective execution of the recovery decision'; case C-69/13 *Mediaset*, paras 30 f. According to Council Regulation 2015/1589, Recitals 37 f, the Commission may even provide advice to national courts on ist own motion; see also the assistance by the EASO to national courts (upon their request) 'with full respect of judicial independence and impartiality with handling appeals by, among others, performing legal research, analysis and other legal support', as proposed by the Commission in Article 16a para 4 of Proposal COM(2018) 633 final – a provision which was, in this version, not taken over in the outcome of the legislative proceedings, ie Regulation 2021/2303; see furthermore Article 15 para 3 of Regulation 1/2003, according to which '[w]here the coherent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States'; with regard to this provision see case C-429/07 *Inspecteur van de Belastingdienst*; for this kind of assistance to national courts see also Prete, Infringement 384–386; for a less problematic

and Verification Mechanism for Bulgaria and Romania[1687].[1688] Neither shall the procedure laid down in Article 37 of the ESM-Treaty (which is not laid down in EU law[1689]) or the procedure pursuant to Article 105 TFEU, according to which the Commission shall – in cooperation with the MS authorities – investigate cases of suspected infringements (by undertakings) of the principles laid down in Articles 101 f TFEU, be presented here.[1690] Also tools not providing for the creation of law or soft law do not fall within the research focus at issue here. An example is the Internal Market Scoreboard (IMS) which contributes – *inter alia*, but not primarily – to improving compliance with EU law by the MS by publishing reports on the implementation of EU law in the MS.[1691] Procedures by means of which EU law is enforced *vis-à-vis* individuals or undertakings (eg EU competition law as enforced by the Commission) in general fall outside the scope of this work.[1692]

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mechanism which shows parallels to the preliminary reference procedure see Article 5 of Decision ECB/2004/3 on public access to ECB documents, according to which certain documents 'may be disclosed by the NCB only subject to prior consultation of the ECB concerning the scope of access, unless it is clear that the document shall or shall not be disclosed. Alternatively the NCB may refer the request to the ECB'.

1687 See <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania_en> accessed 28 March 2023; see also von Bogdandy/Ioannidis, Deficiency 85–87.

1688 Excluded from this survey is also the mechanism laid down in Article 38 TEU in which a Political and Security Committee shall, among other things, monitor the implementation of agreed policies. The decisions it may take upon an authorisation pursuant to para 3 *leg cit* also concern a broadly formulated matter, namely political control and strategic direction of the operation at issue.

1689 Heed the (meanwhile failed) Commission Proposal COM(2017)827, which suggests to transform the ESM into a European Monetary Fund (EMF) and which – if it were adopted – would have done away with this mechanism; for another compliance mechanism based on public international law, but to be performed by an EU body, see Article 10 para 2 of the Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund.

1690 The appropriate measures according to para 1 *leg cit* are regularly proposed to undertakings. The authorisation of MS by the Commission is, technically speaking, not primarily aimed at ensuring compliance of MS authorities, but at making it possible for MS to act in the first place; see Ludwigs, Art. 105 AEUV, paras 1–4 and 9 f, with regard to the low practical importance of this procedure and claiming a *de facto* obligatory effect on MS authorities of the Commission authorisation just mentioned.

1691 See Koops, Compliance 160–164.

The most prominent of the compliance mechanisms at issue here is certainly the Treaty infringement procedure, but there is also a large number of further mechanisms essentially serving the same aim (within specific policy fields), particularly, but not only in secondary law. These mechanisms have mainly been introduced as an addition to the Treaty infringement procedure. The latter procedure has been considered dysfunctional in many cases as 'not always adequate to ensure compliance with the relevant Community provisions particularly at a stage when infringements can be corrected'.[1693] It is due to the large number of compliance mechanisms laid down in secondary law that the subsequent presentation cannot be exhaustive.

In this Part, selected compliance mechanisms shall be sorted in terms of their rough legal origin (primary law or secondary law), and in terms of their use of law and/or soft law *vis-à-vis* the MS, respectively. For this reason, the compliance mechanisms are assigned to either of these three categories: hard mechanisms (exclusively providing for acts of law), mixed mechanisms (providing for both acts of law and acts of soft law) and soft mechanisms (exclusively providing for soft law acts). Since the procedures shall be perceived from a MS perspective, the indicator for either category is the acts *addressed to MS*, not, for example, a Commission recommendation addressed to the Council which is a requirement for the adoption of a Council decision addressed to a MS. These acts addressed to EU bodies will be mentioned for the sake of completeness, though.

The structure shall be as follows: After an account of the general compliance mechanism of the EU – the Treaty infringement procedure – with a focus on the acts addressed to a MS in the course of this procedure, special

1692 Only where such a procedure is contained in a compliance mechanism as defined above – in particular as an *ultima ratio* in case the competent national authorities do not comply with EU law even upon request by the Union body in charge – it shall be included in the discussion. Contrasting these indirect mechanisms ('monitoring the enforcement efforts of national authorities') with 'direct enforcement', that is to say ensuring compliance with EU law by private actors: Scholten/Luchtman/Schmidt, Proliferation 1 and 5 ff.

1693 Preamble to Council Directive 89/665/EEC; see also, with reference to this passage, case C-433/93 *Commission v Germany*, para 23. For the room for improvement in the resolution of alleged infringements on the part of the MS see also the Report to the EEC Commission by the High Level Group on the Operation of Internal Market, presided over by then former Commissioner *Peter Sutherland* (1992; so-called 'Sutherland-Report'), in particular Recommendations 20, 27 and 31; for the variation of non-compliance with EU law per policy field see Börzel, Noncompliance 140 ff.

compliance mechanisms – that is to say mechanisms aimed at ensuring compliance within a specific field of EU law – shall be addressed in accordance with the above categorisation. Following a condensed presentation of each mechanism, the sequence and the legal quality of acts addressed to a MS in the course of the respective procedure shall be recapitulated and analysed briefly. The findings with respect to each category shall be conflated in summaries.

Part IV as such aims at providing a broad, but still exemplary account of the different compliance mechanisms laid down in EU law, thereby providing, as it were, the raw material for the comprehensive analysis of the selected compliance mechanisms which is proffered in Part V under the heading 'classification and legal assessment of compliance mechanisms'.

2. The mechanisms in detail

2.1. The general compliance mechanism: the Treaty infringement procedure

2.1.1. Introduction

The central and general (ie not restricted to specific fields of EU law) mechanism for ensuring compliance of MS with EU law is the Treaty infringement procedure. Apart from the sanctions regime now provided for in Article 260 para 2 TFEU and the fast-track procedure according to para 3 *leg cit*, it has been laid down in the founding treaty of the E(E)C (and now: the EU) ever since its inception.[1694] Exceptions apart,[1695] it now also applies to the EAC.[1696] The ECSC had its own procedure essentially governed by the High Authority.[1697] With the Treaty of Maastricht, the sanctioning

1694 See Articles 169–171 TEEC.

1695 Eg Article 38 para 3 TEAC which constitutes a fast-track procedure comparable to Article 260 para 3 TFEU, but without the immediate possibility to impose sanctions.

1696 Article 106a TEAC. For specific infringement procedures laid down in the historical versions of the TEAC see Schermers/Waelbroeck, Protection, § 1215.

1697 Articles 86–88 TECSC. A decision of the High Authority could be made subject to review by the Court. Counter-measures could be applied by the High Authority 'with the concurrence of the Council acting by a 2/3 majority'. For a comparison between this procedure and the Treaty infringement procedure see Ionescu, Wirkungen 271–273. In the past 20 years, the Commission has repeatedly demanded

regime just mentioned was introduced in the then renamed TEC.[1698] In addition to that, since the Treaty of Lisbon the fast-track procedure for failure to notify MS measures transposing a (legislative) directive according to Article 260 para 3 TFEU (as already laid down in the Constitutional Treaty) applies (see in more detail 2.1.2. below).[1699] The Commission, as 'guardian of the Treaties'[1700] the EU authority responsible for ensuring compliance under Articles 258 and 260 TFEU (together with the Court), has a wide discretion on whether or not it launches an infringement procedure, be it on the basis of Article 258, be it (at the next procedural level) on the basis of Article 260 TFEU.[1701] Up until the early 2000s, it had not published any guidance as to which cases it would concentrate on.[1702] Only in its 2002 Communication entitled 'Better Monitoring of the Application of Community Law' it slightly limited its leeway by setting out its priorities for the initiation of infringement proceedings.[1703]

Up until the mid-70s, the meaning of the Treaty infringement procedure in the EEC had been limited (around 30 procedures per year). From 1977 onwards, it had strongly increased, with over 500 initiated procedures in 1985, and reached its peak in 2004 with nearly 3,000 procedures

similar powers in the EC/EU context; see Andersen, Enforcement 124 f, with further references; for support in the literature see Prete, Infringement 369-378.

1698 For the Court's proposal to introduce a financial sanctions regime and for the strong backing it got from the UK see Kilbey, Penalties 744–746.

1699 See Karpenstein, Art. 260 AEUV, paras 56 f.

1700 See also Article 17 TEU.

1701 The High Authority under the TECSC, on the contrary, was obliged to pursue infringements; see Andersen, Enforcement 131.

1702 See Smith, Dialogue 553.

1703 See Commission, 'Better Monitoring of the Application of Community Law' (Communication), COM(2002) 725 final, 11 f. Starting in 2017, the Commission now applies a new prioritisation policy with regard to MS' infringements of EU law; see Commission Communication 'EU law: Better results through better application', 2017/C 18/02; Commission, 'Enforcing EU law for a Europe that delivers', COM(2022) 518 final, 20. For the handling of complaints from civil society and businesses see Commission, 'Updating the handling of relations with the complainant in respect of the application of Union law' (Communication), COM(2012) 154 final; also note the existence of related regimes such as SOLVIT; for the performance of SOLVIT in practice see Hobolth/Sindbjerg Martinsen, Networks; Börzel, Noncompliance 117; for the Commission's Communications related to its powers under what is now Article 260 para 2 TFEU see Prete, Infringement 257–259; see also the recent Communication 'Financial sanctions in infringement proceedings', 2023/C 2/01, in which the Commission reviews its previous Communications on this matter.

launched.[1704] Since then, the number has decreased considerably, not least due to the introduction of EU Pilot in 2008 (see 2.1.2. below). In 2022, the Commission initiated only 551 procedures.[1705]

The sanctioning regime was applied for the first time in a case against Greece in which the Court rendered its judgement in 2000, seven years after the introduction of the scheme.[1706] For several years, the sanctioning of MS has been rather exceptional[1707] and critics have perceived 'a lack of enthusiasm on the part of the Commission and the Court to make effective use of Article 260(2) TFEU'.[1708] In recent years, it has been, if at all, an annual handful of cases – seven in 2020,[1709] none in 2021,[1710] and one in 2022,[1711] respectively – in which the Court has imposed financial sanctions on MS.[1712] On the whole, the Treaty infringement procedure has been criticised as cumbersome, time-consuming and unfit to solve compliance problems in everday administration.[1713] Having said that, with 'about 90 %' the compliance rate reached in the pre-litigation phase of infringement procedures actually initiated is very high.[1714]

1704 See Karpenstein, Art. 258 AEUV, para 8; see graph by Börzel/Knoll, Non-compliance 10.

1705 See <https://commission.europa.eu/law/law-making-process/applying-eu-law/infringement-procedure/2022-annual-report-monitoring-application-eu-law_en> accessed 28 March 2023.

1706 Case C-387/97 *Commission v Greece*.

1707 Analysing the most significant examples of these cases: Harlow/Rawlings, Process 192 f.

1708 Wennerås, Sanctions 145; more positive as regards the more recent years: Harlow/Rawlings, Process 194.

1709 See Commission Staff Working Document, SWD(2021) 212 final, 25.

1710 See Commission, Staff Working Document, SWD(2022) 194 final, 30.

1711 <https://commission.europa.eu/law/application-eu-law/implementing-eu-law/infringement-procedure/2022-annual-report-monitoring-application-eu-law_en> accessed 28 March 2023.

1712 For the historical development of this regime see also Prete, Evolution 71–74.

1713 See Commission Proposal, COM(97) 619 final, Recital 3, according to which the predecessors of Articles 258 and 260 TFEU are 'not capable of ensuring that such breaches are remedied in due time'; see also Eekhoff, Verbundaufsicht 4, with many further references: '[…] schwerfällig und zeitaufwändig. Im Hinblick auf die Lösung von Einzelfallproblemen im täglichen Vollzug und damit als Instrument der Verbundaufsicht erweist es sich als ungeeignet'; for (failed) attempts to reform the procedure see Prete, Evolution 73 f.

1714 <http://europa.eu/rapid/press-release_MEMO-12-12_en.htm> accessed 28 March 2023; see also Prete, Evolution 86 f. For the early days of the EU see Träbert, Sanktionen 30.

2.1.2. The procedure in short

Where the Commission 'considers that a [MS] has failed to fulfil an obligation under the Treaties,[1715] it shall deliver a reasoned opinion on the matter', after it has given the respective MS the 'opportunity to submit its observations'.[1716] This opportunity in practice is given by a so-called letter of formal notice – in the words of the Commission a 'request for information'[1717] – which 'comprises an initial succinct résumé of the alleged infringement'.[1718] The MS is normally given two months to react to the letter. The letter of formal notice and the reasoned opinion, together 'delimit the subject matter of the dispute',[1719] but the formal notice already circumscribes the charges contained in a (possible[1720]) reasoned opinion, and the Commission may normally neither extend nor alter the scope of the complaint in its reasoned opinion.[1721] While the Commission output

1715 A list of what all the term 'obligation under the Treaties' encompasses is, with references to the relevant case law, provided by Andersen, Enforcement 46.

1716 Article 258 para 1 TFEU.

1717 <http://europa.eu/rapid/press-release_MEMO-12-12_en.htm> accessed 28 March 2023.

1718 Lenaerts/Maselis/Gutman, Procedural Law 189. Exceptionally, the Commission may issue a second, supplementary letter of formal notice; see eg case C-10/10 *Commission v Austria*, para 11. For the purpose of the formal notice see also case 211/81 *Commission v Denmark*, para 8: '[A] letter giving formal notice is intended to delimit the subject-matter of the dispute and to indicate to the Member State which is invited to submit its observations the factors enabling it to prepare its defence'.

1719 Case C-280/02 *Commission v France*, para 29. With regard to the reasoned opinion, the Court held that '[i]f a charge was not included in [there], it is inadmissible at the stage of proceedings before the Court'; case C-305/03 *Commission v United Kingdom*, para 22, with further references.

1720 The Commission – in spite of the wording of Article 258 para 1 TFEU: 'shall' – is not obliged to adopt a reasoned opinion after a non-satisfactory reaction to a letter of formal notice on the part of the MS concerned; see Andersen, Enforcement 49; Gormley, Infringement 65, both with further references; see also Müller/Slominski, Role 874 f, with further references; for the (limits of) the Commission's discretion see European Ombudsman, Decision on complaint 995/98/OV concerning the Macedonian Metro Joint Venture (2001) paras 1.6 – 1.9 <https://www.ombudsman.europa.eu/mt/decision/en/1088> accessed 28 March 2023.

1721 See case C-280/02 *Commission v France*, paras 29 f, with further references. This applies with one exception: The Commission may very well limit the scope: see Craig/de Búrca, EU Law 473, with references to the case law. New evidence to underpin the charges may be brought forward also later. For the possible extension of the scope of the reasoned opinion to events occurring after the reasoned opinion was adopted see Andersen, Enforcement 50, with further references; see also

adopted in the course of a Treaty infringement remains confidential until a judgement is handed down by the CJEU,[1722] the fact that a reasoned opinion was issued (not: its exact content) is normally disseminated to the public early on in the form of a press release, also to increase the pressure on the MS concerned.[1723] After all, the pre-litigation phase is coined by the 'quasi-diplomatischen' [quasi-diplomatic][1724] efforts to convince the other side.[1725] It reflects the respectful and considerate approach[1726] towards sovereign States which is known from traditional public international law.[1727] Most Treaty infringement cases are settled in the pre-litigation phase (see 2.1.1. above).[1728] In this context, also 'EU Pilot' is to be mentioned. Operative

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case T-258/06 *Germany v Commission*, para 152, with a further reference. For an example of a complementary reasoned opinion launched by the Commission see the procedure against Hungary relating to its Higher Education Law: <http://europa.eu/rapid/press-release_MEMO-17-3494_en.htm> accessed 28 March 2023.

1722 See Craig/de Búrca, EU Law 474 f, with references to the case law; see also Article 4 para 2 (second and third indent) of Regulation 1049/2001; for the duration of confidentiality in case of the third indent see case T-194/04 *Bavarian Lager*, para 148.

1723 See eg <http://europa.eu/rapid/press-release_IP-17-3186_en.htm> accessed 28 March 2023; see also Falkner/Treib/Hartlapp/Leiber, Europe 207.

1724 Wegener, Art. 271 AEUV, para 5.

1725 In the words of the Court, this phase 'is to enable the Member State to comply of its own accord with the requirements of the Treaty or, if appropriate, to justify its position'; case C-159/94 *Commission v France*, para 103, with reference to further case law.

1726 Note the words of AG *Roemer* in his Opinion in case 7/71 *Commission v France*, 1026: 'Moreover, this procedure naturally puts in issue to a certain extent the prestige of the Member State concerned, even though it is merely an objective procedure intended to clarify the legal situation, without any moral judgment. For these reasons it seems proper to rule out any automatic application, any compulsion to initiate it and instead to leave to the Commission a discretionary power to decide whether and when the procedure should be initiated. Many different factors may come into play in this respect, for example, attempts to reach an amicable settlement (which may take time) or the fact that [the alleged infringement] had only relatively slight effects that did not justify judicial proceedings'; for the 'more ad hoc than systematic' contacts between Commission and MS in the pre-litigation phase until the late 80s see Gormley, Infringement 66; see also Audretsch, Supervision 17.

1727 For the differences as compared to traditional public international law and for a critique of the pre-Maastricht set-up of the Treaty infringement procedure see Weiler, Transformation 2419 f.

1728 Each year, several hundreds of new infringement procedures face up to only low two-digit numbers of Court judgements under Article 258 TFEU; see, for example, the general statistical overview of the Commission's Annual Report for 2021 on

since 2008, it is not reflected in any way in the Treaties. It provides for a procedure prior to the pre-litigation phase ('"pre-pre-litigation" phase'[1729]), which is divided in different steps with different deadlines, thereby using an online database and communication tool, with a view to solving the (suspected) non-compliance.[1730] In spite of a positive evaluation of 'EU Pilot', the *Juncker* Commission decided to largely abolish it and avail itself of this 'lengthy step' only where 'recourse to EU Pilot is seen as useful in a given case'.[1731] A broader application of this tool was again envisaged under President *von der Leyen*.[1732]

Coming back to the procedure pursuant to primary law, the reasoned opinion deserves closer attention. It is an act of EU soft law, as, without being legally binding,[1733] it 'formal[ly] request[s] to comply with [it, and thereby also with] EU law'.[1734] If the MS concerned does not comply with the reasoned opinion within a certain period laid down by the Commission (normally it is again two months[1735]), the Commission 'may bring the

'Monitoring the application of European Union law', COM(2022) 344 final, 27 and 31; see also Andersen, Enforcement 52.

1729 Andersen, Enforcement 47. For the pre-litigation tool 'SOLVIT' aimed at supporting EU citizens/undertakings which are denied certain mobility-related rights in another MS, and its reform respectively, see Commission, 'EU law: Better results through better application' (Communication), 2017/C 18/02, 16 f; see also Koops, Compliance 164–168.

1730 See <http://ec.europa.eu/internal_market/scoreboard/_archives/2014/07/performance_by_governance_tool/eu_pilot/index_en.htm> accessed 28 March 2023.

1731 Commission, 'EU law: Better results through better application' (Communication), 2017/C 18/02, 12; critically: Wendenburg/Reichert, Vertragsverletzungsverfahren 1344 f.

1732 See Prete/Smulders, Age 300; see also V.2.5.3. below.

1733 The legal non-bindingness of the Commission's reasoned opinion has been confirmed by the Court on a number of occasions; see eg case C-191/95 *Commission v Germany*, paras 44–46. In para 46 of this judgement the Court specifies that '[t]he reasoned opinion therefore has legal effect only in relation to the commencement of proceedings before the Court […] so that where a Member State does not comply with that opinion within the period allowed, the Commission has the right, but not the duty, to commence proceedings before the Court'; see Audretsch, Supervision 25, referring to literature arguing in favour of a binding effect of the Commission's reasoned opinion.

1734 <http://europa.eu/rapid/press-release_MEMO-12-12_en.htm> accessed 28 March 2023; see also Gil Ibáñez, Supervision 95 f.

1735 <https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en> accessed 28 March 2023.

matter before the Court'.[1736] With these scarce words, Article 258 TFEU – which has essentially remained unchanged over the past 60 years[1737] – sets out the transition from the so-called pre-litigation phase to the litigation phase. The action must be based on 'the same objections' as the Commission's reasoned opinion.[1738] This does not render the reasoned opinion enforceable, though, as it is the (alleged) failure to fulfil an obligation under the Treaties which is at issue in the Court proceedings (not: the failure to comply with the reasoned opinion), and, in connection therewith, it may turn out that, in the view of the CJEU, the MS has in fact complied with its obligations under the Treaties, and that therefore the reasoned opinion is legally wrong.[1739]

Excursus[1740]: Article 259 TFEU addresses the competence of a MS to bring an action before the CJEU against another MS for failure to fulfil an obligation under the Treaties. This is a remnant of the public international legal origin of what is now the EU: that parties to an agreement control each other with a view to compliance with that agreement. Before doing so, under Article 259 TFEU a MS shall 'bring the matter before the Commission'. Also in this procedure, the Commission shall, having given

1736 The Commission is not obliged to take the next step – here: filing an action – immediately after the period set has expired. In a case in which the Commission filed an action only eleven months after expiry of the two months period laid down in its reasoned opinion, the Court held that 'it is for the Commission to choose when it will bring an action for failure to fulfil obligations before the Court'; case C-350/08 *Commission v Lithuania*, paras 29 and 33.

1737 See Smith, Evolution 352.

1738 Case C-11/95 *Commission v Belgium*, para 73; case C-422/05 *Commission v Belgium*, para 25, both with references to further case law.

1739 The Court's superiority *vis-à-vis* the Commission under what is now Article 258 TFEU is reflected in settled case law: '[T]he Commission is not empowered to determine conclusively, by opinions formulated pursuant to Article 169 or by other statements of its attitude under that procedure, the rights and duties of a Member State or to afford that State guarantees concerning the compatibility of a given line of conduct with the Treaty. According to the system embodied in Articles 169 to 171 of the Treaty, the rights and duties of Member States may be determined and their conduct appraised only by a judgment of the Court'; joined cases 142/80 and 143/80 *Amministrazione delle Finanze dello Stato*, para 16. This was confirmed by the Court on many occasions, eg in case C-135/01 *Commission v Germany*, para 24.

1740 Since the topic of this chapter are procedures allowing EU actors to ensure compliance *vis-à-vis* MS, at first sight Article 259 TFEU does not appear to belong here. Since it may lead to the Commission initiating a procedure pursuant to Article 258 TFEU, though, it shall be outlined here as a brief excursus. For the reasons for the low importance of Article 259 TFEU in practice see Tallberg, Paths 615 f.

the MS concerned the opportunity to express their view ('orally and in writing'[1741]), deliver a reasoned opinion. The reasoned opinion here plays a different role than under Article 258. Since the Commission is not a party to the procedure, it is – as an impartial actor bound only by the law – not obliged to support the view of the suspicious MS.[1742] It may as well adopt a negative opinion where it deems the allegations unjustified.[1743] Following the reasoned opinion, and regardless of its content, the suspicious MS may file an action with the CJEU.[1744] Where the Commission fails to deliver such an opinion within three months from being approached by the MS suspecting an infringement of EU law, the latter may file an action with the Court, as well. To put it short: The MS suspecting an infringement of EU law must first address the Commission. After it has delivered a reasoned opinion or where it has failed to do so within three months, this MS may approach the CJEU.

The action of the Commission pursuant to Article 258 or of a MS pursuant to Article 259 is binding to the extent that it specifies the matter of the proceedings before the Court. However, an action does not commit the Court to take a certain decision, in view of the general contradictory character of Court proceedings not even in a legally non-binding way. Thus, its content does not qualify as soft law. Once an action is filed, with the Commission (or the MS) bearing the burden of proof for the infringement,[1745] the Court considers the case. Where it deems the action to be at least partly justified, the MS 'shall be required to take the necessary measures to comply with the judgment of the Court'.[1746]

1741 Note that Article 258 TFEU does not explicitly provide for the possibility of an oral utterance.

1742 See Eberhard, Art. 259 AEUV, para 33; Karpenstein, Art. 259 AEUV, paras 11 f, both with further references

1743 See eg case C-364/10 *Hungary v Slovakia*, para 19. Thus, under Article 259 TFEU, the reasoned opinion constitutes a legal assessment of the MS's allegations which may be positive or negative – with regard to the allegations raised by the MS. Where it is positive, it softly requires the other MS to adapt its behaviour accordingly. Where the opinion is negative, it (softly) confirms the legality of the (non-)action at issue and the other MS is not asked to change its behaviour. In either case it states – in a legally non-binding way – what the law is in a concrete case, and hence qualifies as soft law; see also Karpenstein, Art. 259 AEUV, para 15.

1744 See Eberhard, Art. 259 AEUV, para 23; Wunderlich, Art. 259 AEUV, para 11, both with further references.

1745 See case C-494/01 *Commission v Ireland*, paras 41 f, for the standard of proof and for the MS' duty to cooperate, each with further references.

1746 Article 260 para 1 TFEU.

Where the Commission – not: a MS suspecting an infringement of EU law within the meaning of Article 259[1747] – considers that the MS has not done so, it may, having provided the MS with the opportunity to utter its view, bring the case before the Court according to Article 260 para 2 TFEU. This is the (potentially applied) follow-up part of the Treaty infringement procedure. It is essentially about the infringement of a Court judgement launched in the course of a procedure according to Article 258 or Article 259 TFEU. Since the Treaty – more precisely: Article 260 para 1 TFEU – obliges the MS addressed to comply with the judgement, it is not wrong to also call Article 260 para 2 TFEU (part of) the Treaty infringement procedure.[1748] As under Article 258 TFEU, the pre-litigation procedure officially starts with a letter of formal notice by means of which the Commission must give the MS concerned an opportunity to submit its observations.[1749] Since the Treaty of Lisbon, pursuant to Article 260 para 2 TFEU no prior reasoned opinion is required thereafter.[1750] In its action the Commission shall qualitatively (lump sum 'or' – in the interpretation of the Commission and the Court that means: *and/or*[1751] – penalty payment) and quantitatively (amount) specify the financial sanction it considers appropriate.[1752] Where the Court finds that the MS has not complied with its judgement, it may – thereby disposing of a wide margin of appreciation[1753] – impose a financial sanction.[1754]

According to Article 260 para 3 TFEU, a special (shortened) procedure applies where a MS has failed to fulfil its obligation to notify measures

1747 See Posch/Riedl, Art. 260 AEUV, para 32; Wunderlich, Art. 260 AEUV, para 13, both with further references.

1748 For the distinction between 'first order compliance' (with an obligation under the Treaties) and 'second order compliance' (with the Court's judgement according to Article 260 para 1 TFEU) see Andersen, Enforcement 44, with a further reference.

1749 See Commission, 'Implementation of Article 260(3) TFEU' (Communication), SEC(2010) 1371 final, 2.

1750 See Andersen, Enforcement 102 f; Grohs, Article 258/260, 70; Wennerås, Use 80.

1751 Case C-304/02 *Commission v France*, paras 82 f.

1752 For the Commission's recent adaptation of its calculation method in this respect see Commission Communication 'Financial sanctions in infringement proceedings', 2023/C 2/01.

1753 See W Cremer, Art. 260 AEUV, para 17; Posch/Riedl, Art. 260 AEUV, para 66.

1754 The Court may even impose a financial penalty where the Commission has not requested one; see case C-304/02 *Commission v France*, para 90. For the debate on the introduction of sanctions which has started long before the negotiations on what became the Treaty of Maastricht see Tesauro, Remedies 19 f; for the application of this regime more generally see Wennerås, Sanctions.

transposing a directive adopted under a legislative procedure.[1755] The non-communication of the transposition of directives – or rather: the non-transposition which, most of the time, is the reason for the non-communication[1756] – has been a severe problem and its combatting is one of the priorities of the Commission's current Treaty infringement 'policy'.[1757] Under this procedure the Commission may, when submitting an action according to Article 258 and in order to increase the pressure on the MS,[1758] immediately specify the financial sanction to be paid by the MS.[1759] Where the Court (partly) follows the action of the Commission, it may impose a financial sanction not exceeding the amount specified by the Commission.[1760] This shortened procedure applies to the Commission, but not to a MS suspecting the non-communication of the transposition of a (legislative) directive according to Article 259 TFEU.

2.1.3. Soft and hard elements of the procedure

In terms of the hard law-soft law dichotomy of compliance mechanisms, the Treaty infringement procedure can be described as a 'mixed mechanism'. In the pre-litigation phase under Article 258 TFEU, it is regularly the exchange of views and the endeavour to convince the respective opposite which stays in the foreground on both sides. This phase is coined by the absence of legally binding acts, also on the part of the Commission. The (potential)

1755 For this procedure and the new approach taken in this context since President *Juncker* see Wendenburg/Reichert, Vertragsverletzungsverfahren 1339; for MS' practice to notify to the Commission inappropriate 'transposition measures' in order to gain time for proper transposition see Falkner/Treib/Hartlapp/Leiber, Europe 220 f.

1756 See Wunderlich, Art. 260 AEUV, para 33, also with regard to the issues of wrongful and partial transposition; see also case C-543/17 *Commission v Belgium*, paras 50 ff.

1757 See Commission, 'Better Monitoring of the Application of Community Law' (Communication), COM(2002) 725 final, 17 f; see, more recently, Commission, 'EU law: Better results through better application' (Communication), 2017/C 18/02, 15; for data from practice see Falkner/Treib/Hartlapp/Leiber, Europe 220; with regard to environmental law see Grohs, Article 258/260, 58.

1758 See Karpenstein, Art. 260 AEUV, para 57.

1759 Arguing that this would eventually slow down adjudication: Peers in House of Lords Select Committee on European Union, para 4.161.

1760 In the regular procedure according to Article 260 para 2 TFEU, the Court is not restricted in that way; see Posch/Riedl, Art. 260 AEUV, para 66; Wunderlich, Art. 260 AEUV, para 36.

preliminary output the Commission may forward to the MS concerned in the course of this correspondence normally cannot be qualified as EU soft law. Even the letter of formal notice, by name the most formal act of these preliminary expressions of view of the Commission, 'cannot, of necessity, contain anything more than an initial brief summary of the complaints'.[1761] While the letter of formal notice is of eminent importance as the act initiating the pre-litigation phase of the Treaty infringement procedure pursuant to Article 258 TFEU and providing the MS addressed with the opportunity to utter its view, it does rather not qualify as EU soft law. This is for its lack of a command or at least a capability of being linked to a command[1762] which suggests that its primary purpose is not to ensure compliance (with the letter), but to start off a (formalised) dialogue. The Commission itself has expressed that the purpose of this letter is to request information, not to utter the Commission's legal view[1763] – and that means: not to request a change in the MS' behaviour.[1764]

The legal qualification of the reasoned opinion is different.[1765] While it may not contain new charges as compared to the letter of formal notice (see 2.1.2. above), it must describe the infringement 'in detail and prescribes the time within which the Member State must put an end to it'.[1766] This is a clear – legally non-binding – command addressed to the MS.[1767] The fact that it is the Court and not the Commission which may authoritatively state that there is an infringement of an obligation under the Treaties[1768] cannot do away with the fact that by adopting this opinion the Commission intends to ensure compliance with its own legal point of view (as expressed

1761 Andersen, Enforcement 48.

1762 See II.2.1.1.1. above.

1763 See reference in Horspool/Humphreys, European Union Law 228.

1764 *A fortiori*, this holds true for other letters sent in the course of this dialogue and for utterances given by the Commission prior to the pre-litigation phase, notably during the so-called EU Pilot procedure (see above and also V.2.5.3. below).

1765 For the reasoned opinion adopted under Article 259 TFEU see above.

1766 Koen Lenaerts/Maselis/Gutman, Procedural Law 188.

1767 Lenaerts/Maselis/Gutman, Procedural Law 189 underpin this by expressing that the reasoned opinion is adopted 'in order to ensure that the Member State in question is accurately apprised of the grounds of complaint maintained against it by the Commission and can thus bring an end to the alleged infringement […]'.

1768 See expressly joined cases 142/80 and 143/80 *Amministrazione delle Finanze dello Stato*, para 16; case C-393/98 *Valente*, para 18; joined cases T-440/03, T-121/04, T-171/04, T-208/04, T-365/04 and T-484/04 *Arizmendi*, para 69.

therein).[1769] Where this opinion (which may also propose measures to remedy the infringement,[1770] thereby exhibiting elements of a recommendation) is complied with by the MS addressed, the Commission will not file an action with the Court. Then the only risk for the MS concerned is that the Court may later, in a different procedure, come to the conclusion that the MS, by complying with the reasoned opinion of the Commission, has actually infringed upon its obligations under the Treaties – a possible, but in practice highly unlikely scenario.[1771] It is nevertheless 'significant that [the adoption of the reasoned opinion] takes place in the shadow of formal adjudication'.[1772] The localisation of the reasoned opinion in this particular procedure significantly increases its factual authority,[1773] as does the fact that at the time of its adoption an express *audiatur et altera pars* has been exercised already.[1774] Also the decisive influence of the Commission on whether or not the litigation phase is entered contributes to its authority.

The judgement of the Court rendered according to an action under Article 258 (or Article 259) TFEU is legally binding.[1775] It states in a legally binding way whether or not the MS concerned has infringed an obligation under the Treaties and, in the former case, the MS 'shall be required to take the necessary measures to comply with [it]'.[1776] A judgement establishing a Treaty infringement may form the basis of a State liability claim.[1777] The qualifications made or referred to here *mutatis mutandis* also apply to the respective acts adopted under Article 260 para 2 (and para 3) TFEU.

In summary, the sequence of acts is the following: The Commission addresses at least one legally non-binding act (which does not qualify as soft law) to the MS concerned, which may be underpinned by a subsequent soft law act of the Commission. In case of non-compliance with this soft law act, the Commission may address a largely non-binding non-soft law act to the CJEU, upon which the latter may render a legally binding act addressed

1769 See case T-194/04 *Bavarian Lager*, para 149, with a further reference.
1770 See Lenaerts/Maselis/Gutman, Procedural Law 189 f.
1771 Note the Court's statement that 'except where such powers are expressly conferred upon it, the Commission may not give guarantees concerning the compatibility of specific practices with the Treaty'; case C-415/93 *Bosman*, para 136.
1772 Andersen, Enforcement 90.
1773 See, with many further references, P Stelkens, Verwaltungsrecht, para 82.
1774 See also case T-258/06 *Germany v Commission*, para 152.
1775 For the legal qualification of the submissions of the AG which may precede the judgement see III.3.5.2.5. above.
1776 Article 260 para 1 TFEU.
1777 See Lenaerts/Maselis/Gutman, Procedural Law 207 f.

to the Commission and the MS concerned.[1778] Under Article 260 para 2 TFEU, the Commission may address another legally non-binding non-soft law act to the MS concerned, which may be immediately followed by a largely non-binding non-soft law act to the CJEU, upon which the latter addresses a legally binding act to the Commission and the MS concerned.

The sequences of acts under the Treaty infringement regime are plausible. The Commission step by step increases the pressure on the MS concerned. At the beginning, it is just an exchange of views, the letter of formal notice marking the beginning of the pre-litigation phase. Where the MS does not budge, the Commission, under Article 258 TFEU, adopts a soft law act – the reasoned opinion – which clearly suggests that the MS ought to comply with it. If the MS refuses to comply (which it is, legally speaking, free to do), the Commission may turn to the CJEU, asking for a legally binding decision, a judgement. Under the sanctions regime a reasoned opinion is not envisaged (any more).

While the Court, if it holds the Commission's action to be admissible, may state that there is no infringement, empirical data shows that the risk for the MS to be condemned by the Court is considerable.[1779] If we perceive Articles 258 and 260 TFEU as one procedure, the full Treaty infringement procedure, it is – for the occurrence of acts of both EU soft law and EU law which are addressed to MS – to be qualified as a mixed compliance mechanism.

1778 See Article 88 para 2 of the Rules of Procedure of the Court of Justice. This sequence also applies to the fast-track procedure laid down in Article 258 in conjunction with Article 260 para 3 TFEU.

1779 In 2021, 90 % (18 out of 20; in 2020: 27 out of 28, that is 96 %) of the actions filed with the CJEU resulted in a judgement in the Commission's favour. Commission, 'General Statistical Overview', SWD(2022) 194 final, 30 f; Commission, 'General Statistical Overview', SWD(2021) 212, 24; see also Prete, Evolution 72.

2.2. Special compliance mechanisms

2.2.1. Hard compliance mechanisms

2.2.1.1. In primary law

2.2.1.1.1. Article 106 para 3 TFEU

Article 106 TFEU defines the role of undertakings owned or privileged by the MS, and of the MS themselves respectively, in EU-wide competition. Para 1 stipulates that with regard to public undertakings and with regard to undertakings to which MS grant special or exclusive rights, MS are bound by the rules contained in the Treaties, in particular[1780] in Article 18 and Articles 101–109 TFEU. Para 2 lays down special rules with regard to undertakings entrusted with the operation of services of general economic interest[1781] or having the character of a revenue-producing monopoly. Para 3 provides that the Commission shall ensure the application of the provisions of this Article, *inter alia* by addressing, where necessary, appropriate directives or decisions to MS.[1782]

The mechanism laid down in Article 106 para 3 TFEU is hard, as it provides for two, pursuant to Article 288 TFEU legally binding, categories of acts the Commission may adopt alternatively: directives or decisions.[1783] A decision on the basis of Article 106 para 3 TFEU is regularly addressed to one MS, obliging it to refrain from, or to take respectively, certain action. In the given context, the Commission's power to adopt decisions is most relevant, as it is a means of enforcing EU law individually *vis-à-vis* one or more MS. By means of a directive, on the contrary, the Commission

1780 The Court has also applied Article 106 TFEU in other areas, for example in the context of fundamental freedoms; see eg case C-157/94 *Commission v Netherlands*, para 32 (freedom of goods).

1781 For a monographic account of this concept see Melcher, Dienstleistungen, in particular 70 ff.

1782 Other measures against the MS, eg Commission measures under Article 114 TFEU or the Treaty infringement procedure, are not thereby excluded; see Wernicke, Art. 106, para 78, who also deems lawful the adoption of Commission opinions and recommendations under Article 106 para 3 (para 82); note, in this context, case C-325/91 *France v Commission*; for the relationship of what is now Article 106 para 3 TFEU and the Treaty infringement procedure see Gil Ibáñez, Supervision 107–109.

1783 See also explanations in joined cases 188–190/80 *France v Commission*, paras 11–14.

may set *general* standards on the relationship between MS and state-owned and/or privileged undertakings according to Article 106 para 1 TFEU.[1784] If the Commission intends to launch a Treaty infringement procedure after the above procedure, no short-cut – as provided for in Article 108 TFEU – can be used.[1785]

2.2.1.1.2. Article 108 TFEU

This provision belongs to the TFEU's State aid regime which is presented in most textbooks on EU law. Here Article 108 para 1, para 2 subparas 1 and 2, and para 3 TFEU shall be focused on. The procedure laid down in paras 1 and 2 applies to existing aids, the one laid down in paras 3 and 2 (in chronological order) to new aids.

As regards existing aids, para 1 stipulates that the Commission shall keep under constant review all systems of aid existing in the MS. It shall propose to them 'any appropriate measures required by the progressive development or by the functioning of the internal market'.[1786] If these measures are not taken, the Commission may initiate the procedure laid down in para 2. As regards new aids, para 3 provides that the Commission shall be informed of any MS plans to grant or alter aid. In a perspective exclusively based on primary law, the Commission – where it considers that any such plan is incompatible with the internal market having regard to Article 107 TFEU – shall initiate the procedure provided for in para 2.

1784 It is true that in general a directive may also be addressed only to one MS. However, with regard to Article 106 TFEU (and its predecessors) the Court held that the Commission shall adopt a directive only 'where, without taking into consideration the particular situation existing in the various Member States, it defines in concrete terms the obligations imposed on them under the Treaty. In view of its very nature, such a power cannot be used to make a finding that a Member State has failed to fulfil a particular obligation under the Treaty'; case C-202/88 *France v Commission*, para 17; for the distinction between directives and decisions in this context see case C-163/99 *Portugal v Commission*, paras 25–28; see also Gil Ibáñez, Supervision 106 f. For the Commission's past administrative practice in this context see Jung, Art. 106 AEUV, paras 68 ff; Wernicke, Art. 106, paras 86 and 88.

1785 See Gil Ibáñez, Exceptions 154 f.

1786 Article 22 of Council Regulation 2015/1589 stipulates that these appropriate measures shall take the form of a Commission recommendation, which appears as an adequate concretisation of primary law; see also 2.2.2.2.2. below; for Commission communications based on what is now Article 108 para 1 TFEU, and their exceptionally binding effect, see H Adam, Mitteilungen 107–113.

We shall now explore the procedure laid down in para 2, which may apply both in the context of existing and in the context of new aids – as a follow-up to the procedure laid down in para 1 and para 3, respectively. Where the Commission finds that a certain State aid granted (or planned to be granted or altered) is not compatible with the internal market (within the meaning of Article 107 TFEU), or that such aid is being misused,[1787] it shall – having notified the parties concerned to submit their comments in the course of a formal investigation procedure[1788] – decide that the respective MS 'shall abolish or alter such aid within a period of time to be determined by the Commission'. This decision shall be published in the OJ.[1789] If the MS does not follow this order of the Commission within the period of time determined by the latter, the Commission – or any other interested MS – may, 'in derogation from the provisions of Articles 258 and 259', refer the matter to the CJEU 'direct[ly]'.[1790]

In order to find out what the Treaties prescribe, the legal quality of the output adopted by EU actors in the course of these procedures shall be assessed with an exclusive view to primary law. The concretisation of one of these procedures, namely the one on existing aid schemes, by means of secondary law shall be considered below (see 2.2.2.2.2.). Whether the procedure on existing aid is mixed or hard is unclear in terms of primary law, as the act proposing 'appropriate measures' according to Article 108

1787 'Misuse of aid' means aid used by the beneficiary in contravention of an authorising Commission decision; see Article 1 lit g of Council Regulation 2015/1589.

1788 For the formal investigation procedure see in particular Article 6 of Council Regulation 2015/1589 which shall apply in the cases of notified aid (Article 4 para 4), unlawful aid (Article 15 para 1 in conjunction with Article 4 para 4), misuse of aid (Article 20 in conjunction with Article 4 para 4) and existing aid (Article 23 para 2 in conjunction with Article 4 para 4). The 'parties concerned' in Article 108 para 2 TFEU include the respective MS. For the different types of decisions the Commission may take see Article 9 of Council Regulation 2015/1589.

1789 Article 32 para 3 of Council Regulation 2015/1589. For the confidentiality requirements in order to protect business secrets and other confidential information see Article 9 paras 9 f *leg cit*; for the non-disclosure of confidential or secret information in Commission soft law related to competition or State aid law see Ştefan, Soft Law 102.

1790 That the Council may, exceptionally and unanimously, decide that aid which a MS is granting or intends to grant shall be 'considered to be compatible with the internal market' (subpara 3) and the devolution provided for in subpara 4 shall not be expanded on any further here. After all, this is not a mechanism aimed at ensuring compliance with EU law by a MS, but an exceptional possibility for the Council to legalise an aid which without this exception would not be in accordance with EU law.

para 1 TFEU could qualify as law, soft law or an action below the level of soft law.[1791] What may follow – a Commission decision and an CJEU judgement – are hard law acts. The procedure on new aid is a hard mechanism, as it entails a decision by the Commission which may be followed by a judgement of the CJEU. According to primary law, no soft law acts are involved in this procedure.[1792] The Commission's notification of the parties concerned and its invitation to submit their comments can be neglected in this context. The former is not normative,[1793] the latter merely *invites* the party addressed to make comments. Since none of the two options the addressee has – to submit or not to submit comments – seems to be preferred by the Treaty-maker or the Commission as originator of the invitation, and since therefore the MS addressed is not pushed to act in either way, this output arguably does not entail a (soft) normativity.

The action to the Court, which is implied in the words 'refer the matter to the [CJEU]', is, first, addressed to the Court itself and, second, does not constitute soft law. The procedure can be described as a special form of the Treaty infringement procedure,[1794] as it provides the Commission with the possibility to claim before the Court that a MS has violated an 'obligation under the Treaties', without providing for the pre-litigation phase as laid down in Article(s) 258 (and 260) TFEU.

2.2.1.1.3. Article 114 TFEU

The procedure laid down in Articles 114 paras 4 ff allows for the MS to deviate, within certain limits and following a certain procedure, from an EU harmonisation measure.[1795] This leeway is granted to the MS in

1791 In spite of its potential to be mixed in its application in a concrete case, this procedure shall be analysed here together with the procedure on new aid *sub titulo* 'hard mechanisms'.

1792 Neither does Council Regulation 2015/1589 provide for the adoption of soft law acts in this context.

1793 Compare the letter of formal notice adopted by the Commission under Articles 258 and 260 TFEU, respectively.

1794 Case 301/87 *France v Commission*, para 23: 'This means of redress is in fact no more than a variant of the action for a declaration of failure to fulfil Treaty obligations, specifically adapted to the special problems which State aid poses for competition within the common market'.

1795 Differently: Article 27 TFEU on temporary deviations for economic reasons; for an early legal act providing for MS deviations from internal market law see the

order to ensure the protection of certain interests of high importance, eg the protection of health and life of humans or the protection of the environment. Para 4 concerns the case that a MS deems it necessary to maintain national provisions on grounds of major needs corresponding to the justificatory reasons for restrictions to the freedom of goods pursuant to Article 36 TFEU, or relating to the protection of the environment or the working environment.[1796] Para 5 concerns the case that a MS deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that MS arising after the adoption of the harmonisation measure. In both cases – that of para 4 and that of para 5 – the MS concerned shall notify the Commission of these provisions and of the reasons why they should be maintained/introduced. In either case the Commission shall, within six months of the notification, approve or reject the national provisions involved, after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between MS, and whether or not they constitute an obstacle to the functioning of the internal market.[1797] Where the Commission does not adopt a decision within the six months period (and where this period is not extended in accordance with Article 114 para 6 subpara 3, either), the national provisions at issue shall be deemed to have been approved. A MS measure shall only be applicable once the Commission has approved it (standstill requirement).[1798] Where a MS is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the

Agreement of the representatives of the Governments of the Member States meeting within the Council of 28 May 1969 providing for standstill and notification to the Commission.

1796 The incorporation of this regime was a compensation for the MS for dropping the unanimity requirement in internal market legislation by the SEA; see Eilmansberger, Binnenmarktprinzipien 261 f.

1797 After that request the Commission is not required to hear the MS again before taking its decision; see case C-3/00 *Denmark v Commission*, para 50; joined cases C-439/05P and C-454/05P *Land Oberösterreich*, para 43.

1798 See joined cases C-439/05P and C-454/05P *Land Oberösterreich*, para 42; case C-319/97 *Kortas*, para 20: 'request a derogation'; see also Maletić, Harmonisation 80; for a – procedurally speaking – similar mechanism even prior to the introduction of what is now Article 114 TFEU see Articles 8 f of Council Directive 83/189/EEC (now: Articles 5 f of Directive 2015/1535); see also Gil Ibáñez, Supervision 118 ff.

Commission shall immediately examine whether to propose an adaptation to that measure.[1799]

Article 114 para 9 refers to the case of a MS making 'improper use' of its powers under paras 4 and 5 – a term which shall simply mean non-compliance with a MS's duties under these provisions, no qualification of the misbehaviour being required.[1800] Where the Commission (or[1801] a MS) considers such an improper use to be made, it may – a 'procedural "shortcut[]"'[1802] from Articles 258 f TFEU – bring the matter directly before the CJEU.[1803]

Maintaining or introducing national provisions may be approved or rejected by the Commission by means of a (legally binding) decision. Hence Article 114 paras 4 f TFEU provide for two hard mechanisms. A matter according to para 9 can be 'directly' brought before the Court which means that the pre-litigation phase known from the Treaty infringement procedure does not apply. Considering that the only legal act adopted in this context is the judgement of the Court, also this procedure constitutes a hard compliance mechanism. The Treaty-makers when inserting Article 114 para 9 TFEU drew inspiration from Article 348 para 2 TFEU (see below).[1804] Both notification regimes – para 4 and para 5 – provide for an examination involving the Commission and they are applied before poten-

1799 Article 114 para 7 TFEU; for an alternative road (limited to public health concerns) to having the Commission examine whether to propose new EU measures see para 8 *leg cit*.

1800 With regard to other paragraphs of Article 114, the procedure envisaged in para 9 does not seem to be applicable; see Classen, Art. 114 AEUV, paras 259 f; Tietje, Art. 114 AEUV, paras 226 f. Also with regard to the safeguard clauses referred to in Article 114 para 10 TFEU, the special infringement procedure does not apply. The latter provision does not as such empower the MS, but obliges the legislator. Only the concrete safeguard clause laid down in an act of secondary law empowers the MS (see 2.2.1.2.6. below); *argumentum* 'subject to a Union control procedure' (to be laid down in secondary law); for the applicability of the shortened infringement procedure according to para 9 also in the context of para 10 see Khan, Art. 114 AEUV, para 21; Korte, Art. 114 AEUV, para 70, with further references; differently: Classen, Art. 114 AEUV, para 197.

1801 The conjunction 'and' between 'the Commission' and 'any Member State' in Article 114 para 9 TFEU is to be understood as 'or'; see eg the German version of this provision; see also Article 348 para 2 TFEU, using the term 'or'.

1802 Andersen, Enforcement 129.

1803 See also Koops, Compliance 143, with further references.

1804 See Classen, Art. 114 AEUV, para 259.

tial Court proceedings.[1805] Arguably, this is the reason why the pre-litigation phase pursuant to Article 258 TFEU is dropped in these cases. Only where a MS has failed to notify the Commission of maintained/introduced national provisions, the Commission may bring the matter before the Court, without a prior hearing being provided for by law.[1806] Since such non-notification is a clear 'improper use of [the MS's] powers', a pre-litigation phase appears to be dispensable.[1807] What was said under 2.2.1.1.2. above with regard to the legal qualification of the action filed with the Court and with regard to the relationship of this procedure to Article 258 TFEU *mutatis mutandis* applies here, as well.

2.2.1.1.4. Article 348 TFEU

Like Article 114 para 9 TFEU, Article 348 para 2 TFEU stipulates that, by (explicit) derogation from the general Treaty infringement procedure, the Commission or any MS may bring the matter 'directly' before the CJEU 'if it considers that another [MS] is making improper use of the powers [at issue]'. The powers at issue here are the rights and competences of a MS related to its national security as laid down in Articles 346 and 347 TFEU, that is to say the right not to supply information the disclosure of which the MS concerned considers contrary to the essential interests of its security and the competence to take the measures considered necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material (Article 346 para 1 lit a and b).[1808] It also includes the competence of MS to consult each other 'with a view to taking together the steps needed to prevent the

1805 See 114 para 6, according to which the Commission may approve or reject the notified national provision.

1806 By all means the MS can utter its view before the Court, once litigation has started; see Article 41 of the Statute of the CJEU and Article 124 of the Rules of Procedure of the CJEU.

1807 See Classen, Art. 114 AEUV, para 260. Has the Commission approved the national provision, another MS may – for lack of 'improper use' of the MS's powers – only initiate an annulment procedure against the Commission decision (or initiate a regular Treaty infringement procedure pursuant to Article 259 TFEU); see case C-41/93 *France v Commission*, in which the Court annulled the Commission decision for lack of sufficient reasoning.

1808 At the same time, these measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes (Article 346 para 1 lit b TFEU *in fine*). See case

functioning of the internal market being affected by measures which a [MS] may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security' (Article 347). If measures taken under the regimes of Article 346 or Article 347 TFEU have the effect of distorting the conditions of competition in the internal market, the Commission shall, together with the MS concerned, examine how these measures can be adjusted to the rules laid down in the Treaties.

In case of Article 348 para 2 – ie when a MS has allegedly made improper use of the above powers – the Court shall, in order to protect security-related interests of the MS, give its ruling *in camera*. That does not mean that the judgement is not read in open court pursuant to Article 37 of the Statute of the CJEU, but it means that confidential information contained in the judgement is edited out in the published version.[1809] As regards a prior possibility for the MS concerned to make known its views, the discussion provided for in Article 348 para 1 TFEU is to be underlined. Given the fact that all cases of 'improper use' pursuant to Article 348 para 2 will lead to a distortion of the conditions of competition in the internal market, Article 348 para 1 seems to be an appropriate tool to give the MS concerned the possibility to utter its view *vis-à-vis* the Commission prior to (potential) Court proceedings.[1810] As the normative output on the part of the EU in this mechanism only involves a Court ruling, it constitutes a hard mechanism.

C-372/05 *Commission v Germany*, para 70, according to which the provision now contained in Article 346 TFEU 'cannot however be read in such a way as to confer on Member States a power to depart from the provisions of the Treaty based on no more than reliance on those interests'; for the exclusion of so-called dual-use goods (which fall under the regime set under CCP) see case C-70/94 *Werner*, paras 8 ff.

1809 See Dittert, Art. 348 AEUV, para 16.

1810 Note that the consultations among MS according to Article 347 – as a discussion among peers, not involving the Commission – do not contribute to the MS' right to be heard being fulfilled; see Calliess, Art. 348 AEUV, para 3.

2.2.1.1.5. Article 144 TFEU

The regime of Articles 143 and 144 TFEU concerns only MS 'with a derogation', that is to say non-euro MS.[1811] Where such a MS is 'in difficulties or is seriously threatened with difficulties as regards its balance of payments'[1812] and where these difficulties are 'liable in particular to jeopardise the functioning of the internal market or the implementation of the common commercial policy', the Commission shall examine the case and recommend measures for the MS to take. If these measures, together with the measures the MS may have taken of its own accord, do not prove sufficient to overcome the (threat of) difficulties, the Council may, upon a recommendation of the Commission, grant mutual assistance.[1813] Where mutual assistance recommended by the Commission is not granted or where, together with the other measures taken, it turns out to be insufficient, the Commission shall authorise the MS[1814] to take protective measures (in derogation from Union law[1815]), the conditions and details being determined by the Commission. This authorisation may be revoked and the conditions and details may be changed by the Council.[1816]

Where a sudden crisis[1817] in the balance of payments occurs and mutual assistance according to Article 143 para 2 TFEU is not immediately granted, a MS with a derogation 'may, as a precaution, take the necessary protective measures'.[1818] These 'must cause the least possible disturbance in the functioning of the internal market' and must not go beyond what is 'strictly necessary to remedy the sudden difficulties'.[1819] The Commission and the other MS shall be informed of these measures when they enter into force

1811 For the exact definition see Article 139 para 1 TFEU.
1812 Article 143 para 1 TFEU; for the (required) causes of these difficulties see ibid.
1813 Article 143 para 1 subpara 2 and para 2 TFEU; see Council Regulation 332/2002.
1814 The MS must be 'in difficulties'. Apparently, a threat of difficulties is not sufficient at this stage.
1815 See Häde, Art. 143 AEUV, para 13.
1816 Article 143 para 3 subpara 2 TFEU.
1817 That means a fast and unexpected emergence of a crisis situation; see Hölzer, Art. 144 AEUV, para 6.
1818 Article 144 para 1 TFEU.
1819 Article 144 para 1 TFEU.

at the latest.[1820] The Commission may (still) recommend to the Council the granting of mutual assistance as referred to above.[1821]

The Council, upon a Commission recommendation and after the Economic and Financial Committee has been consulted, may decide that the MS concerned shall amend, suspend or abolish the protective measures it has adopted. It may do so even if it has not granted mutual assistance pursuant to para 2.

This latter mechanism shall build the focus here.[1822] It is a mechanism to ensure that a MS, here: a non-euro MS, complies with EU law. Article 144 para 3 TFEU does not make explicit under which conditions the Council shall amend, suspend or abolish the protective measures, or when the Commission shall adopt its recommendation, respectively. A systematic interpretation, however, reveals that the standard of scrutiny is the lowest possible disturbance in the functioning of the internal market and the strict necessity of the protective measures.[1823] In addition to that, the measures must be directed against the sudden crisis in the balance of payments, not against general difficulties regarding the balance of payments[1824]; for the latter, the regime laid down in Article 143 TFEU may be applicable.[1825]

1820 Compliance with this duty to inform is a requirement for the legality of these measures; see joined cases 6/69 and 11/69 *Commission v France*, paras 28 ff.

1821 Article 144 para 2 TFEU.

1822 The entire system of remedying (threats of) difficulties to the balance of payments of non-euro MS was outlined to put Article 144 para 3 TFEU in context.

1823 Article 144 para 1 TFEU.

1824 Whether or not the MS may uphold its protective measures causing the least possible disturbance in the functioning of the internal market and not going beyond what is strictly necessary, once the Council has granted mutual assistance pursuant to Article 144 para 2 in conjunction with Article 143 – and as long as it is not requested to amend, suspend or abolish them pursuant to para 3 – is not clear from the wording of Article 144. Even if the Council grants mutual assistance later, it has still 'not immediately taken' the respective decision and hence this requirement of para 1 is fulfilled. The term 'as a precaution' may suggest otherwise; see also Häde, Art. 144 AEUV, paras 1 f, with a further reference; arguing that protective measures of a MS need to be abolished as soon as mutual assistance is granted: Bandilla, Art. 144 AEUV, para 11. Even where such coexistence of MS measures and mutual assistance would be unlawful as such, Article 144 para 3 TFEU would still not be redundant, as the Council may take such decision also without having granted mutual assistance.

1825 See Häde, Art. 144 AEUV, para 3; see Kilpatrick, Bailouts 400, with regard to Hungary, Latvia and Romania, which have received assistance under Article 143 TFEU, and with further references.

The fact that the Council only adopts a decision renders this compliance procedure a hard mechanism, as it entails only a legally binding act *vis-à-vis* the MS. The Commission recommendation, a soft law act which is required for the Council decision, cannot change this, because it is addressed only to the Council. For our classification of compliance mechanisms it is the acts addressed to the MS which matter. Neither is the (possible) grant of mutual assistance – whatever legal form it may take – to be considered here, as it is geared towards doing away with an undesirable economic situation in a MS, but not about ensuring compliance of acts of national law with EU law.

2.2.1.2. In secondary law

2.2.1.2.1. Article 13 para 1 of Directive 2001/95/EC

Directive 2001/95/EC of the EP and of the Council, based on what is now Article 114 TFEU (former Article 95 TEC) lays down rules on general product safety '[i]n order to ensure a high level of consumer protection'.[1826] In the given context, it is in particular its Article 13 para 1 which is of interest. It provides for the following procedure involving the Commission and 'various' MS: Where the Commission 'becomes aware of a serious risk from certain products to the health and safety of consumers in various Member States', it may adopt a decision requiring the respective MS to take certain counter-measures from among those laid down in Article 8 para 1 lit b to f (eg a warning of the risk to certain persons or a ban on marketing a product). It shall do so only after consulting the MS and, where 'scientific questions arise which fall within the competence of a Community Scientific Committee', after consulting the competent committee. The decision shall be adopted 'in the light of the result of those consultations' and, unless they concern specific, individually identified products or batches of products, shall be subject to (repeated) re-consideration after one year.[1827]

1826 Recital 4 of Directive 2001/95/EC.

1827 Article 13 para 2 of Directive 2001/95/EC. For further procedural requirements see paras 3–5 *leg cit*.

The procedure which is addressed here is the examination procedure, a comitology procedure according to Article 5 of Regulation 182/2011.[1828] Where the competent committee provides a negative opinion or where it does not provide an opinion on a certain draft, the Commission may not adopt the decision.[1829] The decision shall furthermore be adopted only where, at one and the same time, a) it emerges from prior consultations with the MS that they – the MS – differ significantly on the approach adopted or to be adopted to deal with the risk; b) the risk cannot be dealt with, in view of the nature of the safety issue posed by the product, in a manner compatible with the degree of urgency of the case, under other procedures laid down by the specific Union legislation applicable to the products concerned; and c) the risk can be eliminated effectively only by adopting appropriate measures applicable at Union level, in order to ensure a consistent and high level of protection of the health and safety of consumers and the proper functioning of the internal market (Article 13 para 1 lit a to c). For the duration of the validity of the Commission decision, the (prohibited) export to third countries of the product(s) concerned, the implementation period for the MS (20 days, unless the Commission specifies otherwise), and for the right to be heard of the parties concerned see Article 13 paras 2 to 5 of the Directive.[1830]

From a structural point of view, and in the MS' perspective focussed on here, this is a hard mechanism. The Commission tells the MS concerned in a form of law, namely a decision, which measures it shall take in order to ensure the health and safety of consumers pursuant to Union law. That the Commission in its decision-making depends on a positive opinion of a comitology committee is a different story.[1831] These opinions are addressed to the Commission, not to the MS. The special rules regarding the duration of the validity of the decision and the period for its implementation by the MS as laid down in Article 13 paras 2 and 4 of the Directive are peculiarities which do not affect the decision's legal bindingness.

1828 Article 15 para 2 of Directive 2001/95/EC, to which its Article 13 para 1 refers, in conjunction with Article 5 of Council Decision 1999/468/EC in conjunction with Article 13 para 1 lit c of Regulation 182/2011.

1829 Article 5 para 3 and 4 subpara 2 lit b in conjunction with Article 13 para 1 lit c of Regulation 182/2011. For the rights of scrutiny of the EP and the Council regarding the Commission decision see Article 11 of Regulation 182/2011.

1830 For a comparison of the Article 13 regime with its predecessor, Article 9 of Directive 92/59/EEC, see Weatherill, Consumer Law 213–215.

1831 The comitology opinions adopted in the course of an examination procedure are analysed under III.3.7.2.1. above.

2.2.1.2.2. Articles 70 f of Regulation 2018/1139

Regulation 2018/1139 of the EP and of the Council, based on Article 100 para 2 TFEU, lays down common rules in the field of civil aviation and establishes the EASA[1832]. Its Article 70 is entitled '[s]afeguard provisions'. Para 1 states that Regulation 2018/1139 and the tertiary law adopted on its basis 'shall not prevent a Member State from reacting immediately to a problem relating to civil aviation safety' where the following conditions are met (cumulatively): a) it involves a serious risk to aviation safety and immediate MS action is required to address it; b) it is not possible for the MS to adequately address the problem in compliance with Regulation 2018/1139 and the tertiary law based on it; c) the action taken is proportionate to the severity of the problem. In this case, the MS concerned shall immediately notify the Commission, the EASA and the other MS of the measures taken, their duration and the reasons for taking them. Subsequently, the EASA shall examine whether these conditions have actually been met.[1833] If so, it shall assess whether it is able to address the problem identified by the MS by taking decisions according to Article 76 para 4 of Regulation 2018/1139, thereby obviating the need for MS action. In the affirmative, it shall take the appropriate decision to that effect and inform the MS thereof. If it deems that the problem cannot be addressed that way, it shall recommend to the Commission to amend any delegated or implementing acts adopted on the basis of Regulation 2018/1139 in order to address this issue.[1834]

If the EASA is of the opinion that the above conditions have not been met, it shall address a recommendation to the Commission as regards the outcome of this assessment. The Commission shall then assess itself whether the conditions have been met.[1835] Where it considers that the conditions have not been met or where it departs from the outcome of the EASA's assessment, it shall adopt implementing acts containing its decision and setting out its findings to that effect. If the implementing act confirms that

1832 The original founding regulation – which Regulation 2018/1139 repeals – is Regulation 216/2008.

1833 For the repository which serves the communication of viewpoints in this context see Article 74 of Regulation 2018/1139.

1834 The Commission is not legally bound by the EASA's assessment. However, the authority of the EASA's output is considerable; see Riedel, Gemeinschaftszulassung 123; W Weiß, Agenturen 639; for the phenomenon of agencies predetermining Commission output more generally see Orator, Möglichkeiten 95–97.

1835 Article 70 para 3 of Regulation 2018/1139.

the conditions have not been met, the MS concerned shall, upon notification of this act, immediately revoke the measure taken pursuant to Article 70 para 1 of Regulation 2018/1139.[1836] It appears that these implementing acts shall be adopted without the involvement of comitology committees pursuant to Regulation 182/2011.[1837] Where the EASA and the Commission agree that the conditions have been met, apparently no implementing act of the Commission is provided for to confirm the legality of the MS measure.

According to Article 71, MS may, 'in the event of urgent unforeseeable circumstances affecting [the persons subject to Regulation 2018/1139] or urgent operational needs of those persons', grant exemptions to requirements laid down in Chapter III of Regulation 2018/1139 (other than essential requirements) or in tertiary law based on that Chapter, if the following conditions are met (cumulatively): a) it is not possible to adequately address those circumstances or needs in compliance with the applicable requirements; b) safety, environmental protection and compliance with the

1836 Article 70 para 4 of Regulation 2018/1139. Note, in this context, the deletion of a sentence provided for in Commission Proposal COM(2015) 613 final: 'The Member State concerned shall immediately terminate the measures taken pursuant to paragraph 1 upon the notification of that implementing decision' (Article 59 para 2 subpara 3). Where the Commission confirms that the conditions have been met (thereby departing from the EASA's assessment), it is unclear whether the Commission only adopts a general-abstract implementing act (addressing the underlying issue) or whether the respective MS, in addition to that, also receives a (positive) decision regarding the measure it has taken. At least under the predecessor provision, Article 14 of Regulation 216/2008, the Commission seems to have adopted positive decisions; see Commission Decision of 6 February 2014 authorising Sweden and the United Kingdom to derogate from certain common aviation safety rules pursuant to Article 14(6) of Regulation (EC) No 216/2008 of the European Parliament and of the Council. These decisions apply until amendment of the relevant rule: see <https://www.easa.europa.eu/system/files/dfu/Article%2014%206%20webpage%2020140520.pdf> pages 2 f, accessed 28 March 2023; for the decision-making procedures see ibid 1 and 5.

1837 Article 70 does not make any reference to comitology procedures in accordance with Article 127 of Regulation 2018/1139. Note the difference between the text of Recital 57 of Commission Proposal COM(2015) 613 final which makes all Commission implementing acts subject to comitology and Recital 75 of Regulation 2018/1139 which merely stipulates that 'the majority of […] implementing powers […] should be exercised in accordance with Regulation (EU) No 182/2011'; for the procedure to be followed under the predecessor-Regulation see Article 8 of Regulation 182/2011 (Articles 14 and 65 para 7 of Regulation 216/2008 in conjunction with Article 13 para 1 lit d of Regulation 182/2011); for the EASA's role in supporting the Commission in the adoption of implementing acts more generally see Riedel, Gemeinschaftszulassung 310–312.

applicable essential requirements are ensured; c) the MS has mitigated any possible distortion of market conditions as a consequence of the granting of the exemption as far as possible; d) the exemption is limited in scope and duration to the extent strictly necessary and it is applied in a non-discriminatory manner. In this case the MS shall immediately notify the Commission, the EASA and the other MS of the measure, its duration and its reasoning.[1838]

Where the exemption was granted for a duration of more than eight consecutive months or where the same exemption was granted repetitively (by the same MS) and its total duration exceeds eight months, the EASA shall assess whether the above conditions have been met and shall, within three months, adopt a recommendation to the Commission as regards the outcome of this assessment.[1839] The Commission shall then, taking account of that recommendation, assess itself whether the conditions have been met. Where the conditions have not been met or where the Commission departs from the EASA's assessment, the Commission shall, within three months, adopt an implementing act containing its decision to that effect. If the implementing act confirms that the conditions have not been met, the MS concerned shall, upon notification of this act, immediately revoke the measure taken pursuant to Article 71 para 1 of Regulation 2018/1139. Where the EASA and the Commission agree that the conditions have been met, apparently no implementing act of the Commission is provided for to confirm the legality of the MS measure.[1840]

Articles 70 f of Regulation 2018/1139 contain two regimes under which an EU actor may tell a MS how to comply with EU law. According to Article 70, a MS may take measures reacting immediately to a problem relating to civil aviation safety. Upon a recommendation of the EASA, the Commission – where it deems that the conditions for MS action have not been met or where it departs from the EASA's assessment – may adopt an implementing act to address this problem. It may determine that the

1838 See Article 71 para 1 of Regulation 2018/1139, also with regard to the possibility of applying mitigation measures.

1839 Where the exemption was granted by the EASA itself, the procedure pursuant to Article 76 para 4 of Regulation 2018/1139 applies.

1840 Article 71 para 2 of Regulation 2018/1139. Para 3 provides for the possibility of MS requesting the amendment of delegating and implementing acts regarding the demonstration of compliance with the essential requirements referred to above. Since this does not constitute a compliance mechanism within the understanding applied here, this provision shall not be discussed any further.

conditions have not been met – in which case the MS has to revoke its measure – or it may address the underlying issue otherwise: by a general-abstract regulation of the issue or by simply confirming the legality of the MS measure. The second regime is laid down in Article 71: MS may grant exemptions from requirements laid down in the pertinent EU law under urgent unforeseeable circumstances affecting the persons subject to Regulation 2018/1139 or urgent operational needs of those persons. If the exemption(s) are granted for more than eight consecutive months, the following procedure applies: Following a recommendation from the EASA, the Commission either adopts an implementing act, or where it agrees with the EASA that the conditions are met does not adopt an act, thereby implicitly confirming the legality of the MS measure.

These regimes are, *vis-à-vis* the MS, hard mechanisms. The EASA's recommendation preceding the (possible) Commission acts in both procedures is addressed only to the Commission, with the MS being informed, accordingly. The respective MS only receives the Commission implementing act or, exceptionally under the regime of Article 70, the EASA decision – or, if no intervention is deemed necessary, no act at all.

2.2.1.2.3. Article 29 para 2 of Regulation 806/2014

Regulation 806/2014 of the EP and of the Council, based on Article 114 TFEU, establishes uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund. According to Article 29 para 1 of this Regulation, the national resolution authorities shall implement all decisions referred to in this Regulation.[1841] These decisions emanate, for example, from the Council and the Commission, or, importantly, from the Single Resolution Board (SRB), a European agency established by this Regulation. Where a national resolution authority 'has not applied or has not complied with a decision' of the SRB according to Regulation 806/2014 or 'has applied it in a way which poses a threat to any of the resolution objectives under Article 14 or to the efficient implementa-

1841 For the room for manoeuvre left to the national resolution authorities when following a decision of the SRB addressed to them see Article 6 para 7 of Regulation 806/2014.

tion of the resolution scheme', the SRB – in its executive session[1842] – may order an institution under resolution[1843] to take certain measures.[1844] Before doing so, the SRB shall notify – ideally 24 hours in advance – the national resolution authority or authorities concerned and the Commission of its intention to adopt a decision, thereby providing the details and reasons of the envisaged measures and details on when they are intended to take effect.[1845]

This is a special case: While it is the MS authorities which shall comply with SRB decisions (mostly regarding institutions under resolution), the SRB – in order to remedy non-compliance on the part of the MS – may address a decision directly to the institution concerned. This tool may be considered even more effective than a decision *vis-à-vis* the MS. Since a MS is obliged to comply with decisions of the SRB anyway, it is dubitable whether a second SRB decision *vis-à-vis* this MS would be more effective in ensuring MS' compliance than the first decision. By directly addressing those concerned, namely the institution under resolution, the SRB ousts the national resolution authority (evocation; see also 2.2.1.2.5. below). A decision of the SRB shall prevail over any previous decision adopted by the national resolution authority on that matter (Article 29 para 3 of Regulation 806/2014). Para 4 states that the national resolution authorities, when 'taking action in relation to issues which are subject to [an SRB-decision] taken pursuant to paragraph 2', shall comply with that decision. This stipulation is to be understood against the background of the general rule, according to which '[a] decision which specifies those to whom it is addressed [here: the institution under resolution] shall be binding only on them'.[1846]

While this mechanism does not entail direct intervention of an EU actor *vis-à-vis* a MS, the SRB decision indirectly remedies a MS's non-compliance with pertinent EU law. It is a hard mechanism in that it does not allow a MS to deviate. Even though the SRB decision is not addressed to the MS, the latter is affected (and restricted in its actions) by the decision.

1842 Article 54 para 1 lit b of Regulation 806/2014.

1843 For this term see Article 3 para 1 subpara 14 in conjunction with Article 2 of Regulation 806/2014.

1844 See Article 29 para 2 lit a-c of Regulation 806/2014.

1845 Article 29 para 2 subparas 3 and 4 of Regulation 806/2014. For the publication of the resolution scheme or its main content (including decisions taken pursuant to Article 29 para 2) see Article 29 para 5 of Regulation 806/2014.

1846 Article 288 para 4 TFEU; on this issue see also Geismann, Art. 288 AEUV, para 60, with further references.

2.2.1.2.4. Article 63 of Regulation 2019/943

The compliance mechanism at issue here – in a Regulation on the internal market for electricity, which is based on Article 194 para 2 TFEU[1847] – is placed within a regime under which new[1848] direct[1849] current interconnectors may, upon request and for a limited period, be exempted from certain requirements under this Regulation and under Directive 2019/944. We shall not dwell on these requirements here, for which an exemption may only be granted under certain conditions essentially intended to maintain competition and the effective functioning of the energy market,[1850] but focus on the decision-making mechanism of this regime.

Having received the request, the national regulatory authority[1851] shall send a copy of it to the ACER and to the Commission for information.[1852] It is normally the national regulatory authorities of the MS concerned which decide on such a request, and exceptionally the ACER,[1853] namely where the authorities concerned cannot reach an agreement within six months or upon their joint request. The ACER shall take its decision, having consulted the national regulatory authorities concerned and the applicants.[1854] The decision – either of the national regulatory authorities concerned or of the ACER (the notifying bodies) – shall be notified to the Commission without delay with all the relevant information (reasoning, analysis of effect on competition etc).[1855]

Within an extendable period of 50 days from receipt of this notification, the Commission may adopt a decision requesting the notifying bodies to

1847 Note that the predecessor regulation – Regulation 714/2009 – was still based on Article 114 TFEU; see Article 17 para 8 *leg cit* for the predecessor compliance mechanism. For Article 194 TFEU as the new (ie Lisbon) legal basis for energy-related acts and further acts which have been based on it see Talus, Introduction 11–14; see also Ludwigs, Energierecht, para 142.

1848 For the application of this regime to existing interconnectors in case of significant increases of capacity see Article 63 para 3 of Regulation 2019/943.

1849 For the exceptional application of this regime to alternating current interconnectors see Article 63 para 2 of Regulation 2019/943.

1850 See Article 63 para 1 of Regulation 2019/943.

1851 See definition in Article 2 para 2 of Regulation 2019/943.

1852 Article 63 para 7 of Regulation 2019/943.

1853 Article 63 paras 4 f of Regulation 2019/943. For an overview of the tasks of this authority see Hauenschild, Agentur 108 f; Tišler, Agency 392 ff.

1854 Article 63 para 5 of Regulation 2019/943.

1855 See Article 63 para 7 of Regulation 2019/943.

amend or withdraw the decision to grant an exemption. The addressees of this decision shall comply with it within one month and shall inform the Commission accordingly.[1856] The Commission also takes a decision if it approves of an exemption decision.[1857] Apparently, a decision refusing the request to grant an exemption may not be objected to by the Commission under this regime.

The above procedure shall, *mutatis mutandis*, apply also where the national regulatory authorities decide to modify an (existing) exemption decision.[1858]

The Commission may, upon request or on its own initiative, decide to reopen the proceedings having lead to an exemption where there has been a material change in any of the facts on which the exemption decision was based, where the undertakings concerned act contrary to their commitments or where the decision was based on incomplete, incorrect or misleading information provided by the parties.[1859]

In terms of Commission output, this mechanism consists of one decision. It is normally directed to national regulatory authorities (and exceptionally to the ACER) and obliges them (it) to comply with it.[1860] In the regular case that national regulatory authorities are concerned, it therefore qualifies as a hard compliance mechanism according to the terminology introduced under 1. above.

2.2.1.2.5. Articles 18 and 19 of Regulation 1093/2010

The procedures dealt with here are laid down in the Regulation establishing the EBA. Essentially the same procedures are laid down in the Regulations establishing the two sister authorities involved in the supervision and regulation of the financial market, the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA). These three founding Regulations are all based on Article

1856 Article 63 para 8 subpara 3 of Regulation 2019/943, containing further details of the procedure on the notification of (requested) information to the Commission.
1857 Article 63 para 8 subpara 5 of Regulation 2019/943.
1858 Article 63 para 9 of Regulation 2019/943.
1859 Article 63 para 10 of Regulation 2019/943.
1860 Differently with regard to the earlier generation of compliance mechanisms in energy law: case T-317/09 *Concord*, paras 50–53; see also case T-381/09 *RWE*, paras 44–47.

114 TFEU and are largely drafted alike. In the following, the procedures laid down in Regulation 1093/2010 will be presented and analysed with a focus on the EU legal acts which may be adopted in the course of these procedures.[1861]

Article 18 is entitled 'Action in emergency situations'.[1862] Where the existence of an emergency situation is established by the Council according to para 2 and in exceptional circumstances where the orderly functioning and integrity of financial markets or the stability of at least part of the financial system in the Union or customer and consumer protection is at risk,[1863] the EBA may adopt individual decisions requiring 'competent authorities'[1864] to take the necessary action in accordance with the acts referred to in Article 1 para 2 of Regulation 1093/2010 to address the emergency situation by ensuring that financial institutions and competent authorities satisfy the requirements laid down in this Union law.[1865] Where a competent authority does not comply with such decision within the prescribed period of time, the EBA may, where the EU legislation at issue (and the regulatory and implementing technical standards based on it) is directly applicable to financial institutions, adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under these rules, including the cessation of any practice. This shall apply only in situations in which a competent authority does not apply the above Union law or applies it in a way which appears to be a manifest breach of it,

1861 For a more comprehensive analysis of these procedures see eg Michel, Gleichgewicht 248–255; Weismann, Agencies 138–144, with further references.

1862 Critically of the weak involvement of the Commission in this procedure: Michel, Gleichgewicht 254 f; note the insistence of the legislator – in view of the *Meroni* doctrine – to incorporate the Commission in another procedure involving a European agency (the SRB): case T-628/17 *Aeris*, paras 127–130.

1863 For the full description of these exceptional circumstances see Article 18 para 3 of Regulation 1093/2010.

1864 Originally, the 'competent authorities' were only the national supervisory authorities (see Article 4 para 1 no 40 of Regulation 575/2013). With the SSM starting to operate in 2014, the ECB has – as far as the Regulation 1093/2010 is concerned – become a 'competent authority' as well (see Recital 45 of Council Regulation 1024/2013 and Article 4 para 2 (i) of Regulation 1093/2010).

1865 This illustrates that meanwhile national authorities may be direct addressees of EU decisions; only pointing in that direction: case 310/85 *Deufil*, para 24; more strictly: *von Bogdandy/Bast/Arndt,* Handlungsformen 96 (fn 68); stressing that direct communication between the EU's administration (the Commission) and national authorities is the exception rather than the rule: Eekhoff, Verbundaufsicht 129.

and where urgent remedying is necessary to restore the orderly functioning and integrity of financial markets or the stability of at least part of the financial system in the Union.

Article 19 is about the settlement of disagreements between competent authorities in cross-border situations. The part of the procedure to be focused on here is laid down in paras 3 and 4. The background to this procedure is a disagreement of a competent authority about the procedure or content of an action, proposed action or inaction of another competent authority or cases where legislative acts referred to in Article 1 para 2 of Regulation 1093/2010 provide that the EBA may assist on its own initiative where there is a disagreement between competent authorities.[1866] Here the EBA may act as a mediator, assisting the authorities concerned in reaching an agreement. The EBA may set a time limit for conciliation between the competent authorities.[1867] If the competent authorities concerned fail to reach an agreement in due time, the EBA may adopt a decision requiring them to take specific action or to refrain from action in order to settle the matter and to ensure compliance with Union law. Where a competent authority does not comply with the EBA decision, and thereby fails to ensure that a financial institution – or, in a case relating to the prevention and countering of money laundering or of terrorist financing, a financial sector operator[1868] – complies with requirements directly applicable to the financial institution/financial sector operator, the EBA may adopt an individual decision addressed to a financial institution/financial sector operator which requires the necessary action to comply with its obligations under Union law, including the cessation of any practice.[1869] In cases regarding the prevention of the use of the financial system for the purpose of money laundering or of terrorist financing, the EBA may also adopt such decision where the requirements are not directly applicable to financial sector opera-

1866 Article 19 para 1 of Regulation 1093/2010. Heed the mutual notification duties on the part of the competent authorities and the EBA, respectively, as laid down in paras 1a and 1b.

1867 Article 19 para 2 of Regulation 1093/2010; for further details of this procedure as set out by the EBA itself see EBA Decision concerning rules of procedure for non-binding mediation between competent authorities, EBA/DC/2020/314.

1868 For this term see Article 4 para 1a of Regulation 1093/2010 in conjunction with Article 2 of Directive 2015/849.

1869 For the decision-making procedure in the EBA's Boards of Supervisors see Article 44 of Regulation 1093/2010; for a similar mechanism (regarding the authorisation of medicinal products) triggered by (qualified) disagreement between national authorities see Schütze, Rome 1412.

tors. To that effect, the EBA shall apply all relevant Union law and, where it is composed of Directives, the applicable national law transposing them. Where it is composed of Regulations explicitly granting options for MS, the EBA shall apply national law by which these options are exercised.

The regimes laid down in Articles 18 f of Regulation 1093/2010 are without prejudice to the Commission's powers under the Treaty infringement procedure.[1870] EBA decisions adopted under these regimes shall prevail over decisions adopted by the competent authorities on the same matter.[1871] In general, information on the identity of the competent authority or the financial institution/financial sector operator concerned and the main content of the decision shall be published. Legitimate interests in confidentiality shall be considered, though.[1872] For the prior notification of presumptive addressees of (future) decisions and their right to be heard see Article 39 para 1,[1873] for the internal committee involved in the EBA's decision-making under Article 19 see Article 41 of Regulation 1093/2010.

The part of the procedure of Article 18 focussed on here is a hard mechanism. It may entail two types of decisions – one addressed to competent authorities, the other one addressed to financial institutions. Both kinds of decisions are binding *vis-à-vis* their respective addressees. Where the competent authorities do not comply with the first kind, the EBA may make use of a competence which normally is for the competent authorities to exercise: to order financial institutions to take the necessary action to comply with their legal obligations (here: obligations under Union law). It is true that the competent authorities concerned are not the addressees of this (second) decision, but still it has the effect of ensuring their compliance. Not only is this indicated by the clarification that this power of the EBA is without prejudice to the powers of the Commission under Article 258 TFEU, but it is also made clear by the express determination that the decision prevails over any previously adopted decisions of the competent authorities on the same matter. Any (subsequent) action by the competent authorities in relation to facts which are subject to EBA-decisions under

1870 For the Court's emphasis on the Commission's powers under the Treaty infringement procedure see eg case C-359/93 *Commission v Netherlands*, paras 13 f.

1871 Para 5 of Articles 18 f of Regulation 1093/2010.

1872 Article 39 para 6 of Regulation 1093/2010.

1873 See also Article 19 para 1b of Regulation 1093/2010; for further details of this procedure, eg the convention of an independent panel according to Article 41 para 3 of Regulation 1093/2010, see EBA Decision concerning rules of procedure for the settlement of disagreements between competent authorities, EBA/DC/2020/313.

this procedure 'shall be compatible with those decisions'.[1874] Due to this evocation '*à l'européenne*',[1875] the competent authority may not any more make effective use of its original competence to regulate the issue.[1876]

While the EBA in the Article 19-procedure is involved in the conciliation phase, it is not competent to adopt an act of (soft) law during this phase. Only when conciliation fails, the EBA may adopt a decision addressed to the competent authorities concerned. Where they do not comply with this decision, the EBA may – under certain circumstances – address a decision directly addressed to a financial institution/financial sector operator in order to give effect to its first decision (requiring compliance with EU law). What was said about the effects of this second decision in the context of Article 18, applies here as well. In addition to that, under Article 19 para 4 subpara 2 the EBA may even apply not directly applicable Union law and national law transposing Directives in order to ensure compliance with Union law by a financial sector operator. In conclusion, the regime laid down in Article 19 is a hard compliance mechanism.

2.2.1.2.6. Safeguard clauses

Article 114 para 10 TFEU allows – and, where the requirements are met: actually obliges the legislator to provide[1877] – for the insertion of so-called safeguard clauses in harmonisation measures adopted on the basis of Article 114.[1878] These safeguard clauses authorise MS to deviate – under strict conditions – from the harmonisation measure at issue, more precisely: 'to take, for one or more of the non-economic reasons referred to in Article 36 TFEU, provisional measures subject to a Union control procedure'. It is this Union control procedure, as shaped by secondary law, which constitutes a measure of ensuring compliance with Union law by the MS (normally undertaken by the Commission[1879]), not Article 114 para 10 TFEU itself. We

1874 Article 18 para 5 and Article 19 para 5 of Regulation 1093/2010.
1875 Kämmerer, Finanzaufsichtssystem 1285; see also 2.2.2.2.3. below.
1876 For a similar mechanism see 2.2.1.2.3. above.
1877 See Classen, Art. 114 AEUV, para 190; Korte, Art. 114 AEUV, para 57.
1878 Even before the introduction of Article 100a TEEC (now: Article 114 TFEU) by the SEA the Council has inserted such safeguard clauses in secondary law; see Opinion of AG *Jacobs* in case C-359/92 *Germany v Council*, para 20. For safeguard clauses more generally see Eekhoff, Verbundaufsicht 158–164.
1879 See Maletić, Harmonisation 91.

shall therefore take three exemplary acts of secondary law and analyse the relevant procedures more closely.[1880]

Article 23 of Directive 2001/18/EC on the deliberate release into the environment of genetically modified organisms stipulates the following: Where a MS has – 'as a result of new or additional information made available since the date of the consent and affecting the environmental risk assessment or reassessment of existing information on the basis of new or additional scientific knowledge' – 'detailed grounds' to consider that a genetically modified organism (GMO) approved under this Directive constitutes a risk to human health or the environment,[1881] it may provisionally restrict or prohibit the use and/or sale of that GMO on its territory.[1882] The MS shall immediately inform the Commission and the other MS of the measures it has taken, provide the reasons/information on which it is based, and indicate whether and, if so, how the conditions of the consent to the GMO (laid down in this Directive) should be amended or whether the consent should be terminated. Within 60 days of receipt of this information, the Commission shall take a positive or negative decision on the national measure in the course of an examination procedure.[1883]

Vis-à-vis the MS this procedure is a hard compliance mechanism, as the Commission output consists of a decision.

1880 The Union control procedure has apparent similarities with the derogations provided for in Article 114 paras 4 and 5 TFEU (see 2.2.1.1.3. above) and it is not entirely clear why the Treaty-makers have installed the two regimes in parallel; see Glaesner, Act 461–464; Maletić, Harmonisation 91 f. For the possible co-existence of a safeguard clause and a free movement clause in one act of secondary law and their respective effects see de Sadeleer, Impact 344, with further references; see eg the free movement clause in Article 128 of Regulation 1907/2006.

1881 Since environmental protection is not listed in Article 36 TFEU, it is unclear whether such a safeguard clause is in accordance with Article 114 para 10 TFEU; referring to the different viewpoints in the literature: Korte, Art. 114 AEUV, para 59 f.

1882 Article 23 para 1 subpara 1 of Directive 2001/18/EC; for the case of a 'severe risk' see subpara 2.

1883 Article 23 para 2 in conjunction with Article 30 para 2 of Directive 2001/18/EC in conjunction with Article 13 para 1 lit c of Regulation 182/2011; for the application of both safeguard clauses based on secondary law and of the derogation provided for in Article 114 paras 5 TFEU in the context of GMO see Rosso Grossman, Coexistence 148–150; Vos, Differentiation 167–169. For the balancing between the interest of the public to be informed and confidentiality claims see Articles 24 f of Directive 2001/18/EC.

Another safeguard clause is contained in Article 11 of Directive 2006/42/EC on machinery. It stipulates that a MS which 'ascertains' that machinery 'bearing the CE marking,[1884] accompanied by the EC declaration of conformity and used in accordance with its intended purpose or under reasonably foreseeable conditions, is liable to endanger the health or safety of persons or, where appropriate, domestic animals or property or, where applicable, the environment', it shall withdraw such machinery from the market, prohibit its placement on the market and/or its putting into service, or restrict its free movement. The MS shall immediately inform the Commission and the other MS of any such measure, thereby providing the reasons/information on which it is based.[1885] The Commission shall enter into consultation with the parties concerned, and shall then decide whether the measures are justified and communicate this decision to the respective MS, the other MS, and the manufacturer or 'his authorised representative'.[1886] In principle, these decisions shall be published.[1887]

From the perspective of the MS which took the initiative (the examination of compliance with EU law by the other addressees, the other MS and the manufacturer is not at issue in this procedure[1888]), the compliance mechanism at issue is hard. While for the consultation no legal output is provided for, the only act which the Commission subsequently adopts is a decision.

The third example of a safeguard clause to be discussed here is laid down in Article 129 of Regulation 1907/2006, the so-called REACH-Regulation, based on what is now Article 114 TFEU: Where a MS has 'justifiable grounds for believing that urgent action is essential to protect human health or the environment' of a substance/mixture/article, even if satisfying the requirements of this Regulation, it may take provisional measures accordingly. In this case, the MS shall immediately inform the Commission, the European Chemicals Agency (ECHA) and the other MS thereof,

1884 See Article 5 para 4 of Directive 2006/42/EC; for the CE marking more generally see <https://ec.europa.eu/growth/single-market/ce-marking_en> accessed 28 March 2023.

1885 See in more detail Article 11 para 2 of Directive 2006/42/EC.

1886 Article 11 para 3 of Directive 2006/42/EC; for the further procedure see paras 4–6 *leg cit* and Article 10 of the Directive.

1887 Article 18 para 3 of Directive 2006/42/EC; see para 1 with regard to confidentiality issues.

1888 The decision does have immediate effects on the machinery, it is true, but it is, if at all, only indirectly about the machinery's lawfulness.

thereby indicating the underlying reasons/information. Within 60 days the Commission shall adopt, in the course of an examination procedure,[1889] a decision either authorising the provisional measure for a defined period of time[1890] or requiring the MS to revoke it.[1891]

Also this procedure constitutes a hard compliance mechanism, as its only legal act addressed to the MS concerned is a (positive or negative) Commission decision.

2.2.1.3. Summary and résumé

While the compliance mechanisms presented here under the heading 'hard compliance mechanisms' differ from each other as regards in particular the subject matter or the EU bodies involved, there are some overarching characteristics which may explain why it is exclusively legally binding acts of EU law which are directed to non-compliant MS in these procedures.

First to the five compliance mechanisms laid down in primary law: Article 106 para 3 TFEU provides the Commission with the means considered necessary to ensure, in the context of public undertakings and undertakings to which MS grant special or exclusive rights, that MS comply with their duties under EU law, in particular under competition law in the wider sense.[1892] With regard to the regimes set out in Article 108 para 2 TFEU on the one hand and Article 348 para 2 TFEU on the other hand, it is apparent that they provide for a shortened version of the Treaty infringement procedure. The main reason for this arguably is that possible impediments to the internal market shall be eliminated as soon as possible and that the MS concerned has already got a chance to utter its view (and the Commission

1889 Article 129 para 2 in conjunction with Article 133 para 3 of Regulation 1907/2006 in conjunction with Article 13 para 1 lit c of Regulation 182/2011. For the comitology procedures under the REACH regime see Pawlik, Meroni-Doktrin 118–120.

1890 See eg Commission Implementing Decision of 14 October 2013 authorising the provisional measure taken by the French Republic to restrict the use of ammonium salts in cellulose wadding insulation materials; <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013D0505&from=EN> accessed 28 March 2023.

1891 For possible further steps in the procedure see Article 129 paras 3 f of Regulation 1907/2006; for the publication of information on evaluation results more generally see Articles 54 and 109 *leg cit*.

1892 Even the compatibility with State aid law may be scrutinised on the basis of Article 106 para 2 TFEU; see eg case T-125/12 *Viasat*, para 51.

could examine this view) prior to the referral to the CJEU. This applies also with regard to Article 114 paras 4 f in conjunction with para 9 TFEU – procedures which are initiated only upon MS request.[1893] Therefore the pre-litigation phase as prescribed in Article 258 TFEU (see 2.1.2. and 2.1.3. above) may be considered superfluous.[1894] As regards Article 144 TFEU, it is arguably the *ultima ratio* competences a MS with a derogation is granted which justify (potentially) sharp action on the part of the EU. In addition to that, the MS action *a priori* is considered to be only provisional (*argumentum* 'as a precaution')[1895] and potentially detrimental to the functioning of the internal market.

With a view to the secondary law mechanisms listed above, most of which are based on what is now Article 114 TFEU, it appears that they either provide for exceptional MS competences, a situation of emergency or at least of urgency, and/or a prior possibility for the MS concerned to utter its view. Article 13 para 1 of Directive 2001/95/EC is about product safety (urgency), provides for a consultation of the MS concerned (point of view of MS concerned considered) and the hard law measure is based on a comitology procedure (points of view of all MS considered); Articles 70 f of Regulation 2018/1139 in the two regimes provide for an exceptional permission for MS to deviate from EU law (exceptional MS competence) and the decision-making by the Commission is coined by comitology (points of view of all MS considered).[1896] Article 29 para 2 of Regulation 806/2014 deals with banking resolution, in general an area in which fast decision-making is required regularly (urgency). While the provision does not explicitly provide for a right to be heard of the MS concerned, it at least provides for its prior information. That this information is delivered on short notice (24 hours) underpins the urgency of final decision-making in this area; Article 63 of Regulation 2019/943 is about an exemption from

1893 Article 108 para 2 TFEU: 'parties concerned'; Article 114 paras 4 and 5 TFEU; see Korte, Art. 114 AEUV, paras 111 f, with further references; see case C-3/00 *Denmark v Commission*, para 49: 'It is therefore clear that the authors of the Treaty intended, in the interest of both the applicant Member State and the proper functioning of the internal market, that the procedure laid down in that article should be speedily concluded. That objective would be difficult to reconcile with a requirement for prolonged exchanges of information and observations'; with regard to Articles 346 f TFEU see eg Jaeckel, Art. 348 AEUV, para 7, with further references.

1894 See Opinion of AG *Wahl* in case C-527/12 *Commission v Germany*, paras 25 f, with further references.

1895 See Bandilla, Art. 144 AEUV, para 8.

1896 Only exceptionally, it is the EASA which is competent to take the decision.

requirements laid down in EU law (exceptional MS competence); Article 18 of Regulation 1093/2010 is about an emergency situation (determined by the Council) which – according to the legislator – seems to justify cutting on the MS' right to be heard[1897]; according to Article 19 of Regulation 1093/2010, the EBA decision follows a conciliation procedure in the course of which the MS concerned appear to have sufficient possibilities to utter their respective view (points of view of MS concerned considered); the exemplary safeguard clauses laid down in secondary law on the basis of what is now Article 114 para 10 TFEU are by definition about safety issues (urgency) and entail an exceptional MS competence to (provisionally) deviate from Union law. The MS' viewpoints are considered either in the course of a comitology procedure or otherwise.

While it is not intended here to make generalisations beyond the hard compliance mechanisms addressed in this context, it must be reiterated that the exclusive use of hard law in our examples coincides with an exceptional MS competence to deviate from EU law (an exception to supremacy), time pressure and/or a possibility for the MS concerned to be heard prior to the adoption of the respective hard law act. After all, soft law is not the only means of giving a party to a procedure the possibility to utter its view. This conclusion is not to be understood as a confirmation of the lawfulness of the procedures laid down in secondary law (the primary law provisions, in an EU law perspective, being lawful by definition), but as a finding in the search for the rationale of setting up hard law mechanisms – both on the part of the MS when adopting primary law and on the part of the legislator when adopting secondary law.

1897 See case T-510/17 *Del Valle Ruíz*, para 123, with regard to the applicability of this 'principle and fundamental right of the EU legal order' (also) to MS, and paras 146 f, with regard to the objective of ensuring financial market stability which may justify a limitation on this principle/right; case T-481/17 *SFL*, paras 250 f, with regard to a situation of urgency.

2.2.2. Mixed compliance mechanisms

2.2.2.1. In primary law

2.2.2.1.1. Articles 116 and 117 TFEU

Article 116 TFEU provides: Where the Commission considers 'a difference between the provisions laid down by law, regulation or administrative action' in MS to be 'distorting the conditions of competition in the internal market' and where it considers that this distortion is 'to be eliminated', it shall consult the respective MS. Article 116 addresses differences in the law of the MS which so far have not been subject to harmonisation, and which are – in principle – lawful.[1898] Only where they cause a distortion of the conditions of competition in the internal market which *needs to be eliminated* (that is to say: a very strong distortion[1899]) Article 116 may be applied. If the consultations do not result in an agreement on the elimination of the distortion, the EP and the Council shall adopt, in the ordinary legislative procedure, the 'necessary directives'. These directives should be addressed only to the MS concerned,[1900] because it is not the purpose of Article 116 to harmonise, but to abolish a strong distortion of the conditions of competition in the internal market in one or more MS.[1901] Any other 'appropriate measures' laid down in the Treaties may be adopted. That is to say that consultations according to Article 116 para 1 do not entail a blocking effect (*Sperrwirkung*) for the application of other competence clauses, eg and in particular Article 114 TFEU.[1902] The application of Article 114 TFEU may turn out to be more opportune, because it does not require

1898 See Classen, Art. 116 AEUV, para 5; see Declaration No 26 which provides for a certain procedure to be followed in case a MS 'opts not to participate in a measure based on Title IV of Part Three of the [TFEU]'. In addition to that, the Declaration says, a MS may ask the Commission to examine the case on the basis of Article 116 TFEU.

1899 See M Schröder, Art. 117 AEUV, para 9; Tietje, Art. 116 AEUV, para 15, both with further referenes.

1900 See Classen, Art. 116 AEUV, para 31; M Schröder, Art. 116 AEUV, para 12; see also below; in favour of allowing also for EU-wide directives: Korte, Art. 116 AEUV, para 15.

1901 Even though this regime is not governed by an administrative body, but by legislative actors, in spite of the limitation to administrative procedures announced under 1. above it is presented here. This is justified by the individual-concrete and thus *quasi*-administrative compliance thrust this mechanism displays.

1902 See Classen, Art. 116 AEUV, paras 33 f; Tietje, Art. 114 AEUV, para 5.

proof of a distortion of the conditions of competition in the internal market which needs to be eliminated.

Article 117 TFEU is one step ahead of the situation described in Article 116. Here it is not a MS's law, regulation or administrative action currently in force which is at issue, but there is a mere 'reason to fear' that the adoption/amendment of a MS's law, regulation or administrative action may cause a distortion within the meaning of Article 116. While Article 116 forms the repressive prong of the regime, Article 117 has a preventive function.[1903] A MS 'desiring to proceed' with the adoption/amendment shall consult the Commission. After that, the Commission shall recommend to the MS concerned measures 'as may be appropriate to avoid the distortion in question' (para 1). Para 2 stipulates that where a MS acts against this recommendation, other MS are not required, according to Article 116, to amend their own law in order to eliminate the distortion. This is to make clear that the active perpetrator, the MS causing the distortion, shall be obliged by Article 116, not the other (passive) MS which have not amended their *corpus* of law. This provision may also be understood as a clarification that directives according to Article 116 para 2 may only be directed against the MS actively distorting competition.[1904] Furthermore, it says that where a MS ignores the Commission recommendation and thereby causes a distortion 'detrimental only to itself', Article 116 shall not apply. While Articles 116 and 117 TFEU, leaving minor modifications apart, have been in force ever since the foundation of the EEC, their significance in practice has remained marginal.[1905]

A structural view suggests perceiving Article 116 and Article 117 TFEU together. When following this view, the regime is a mixed mechanism. Article 117 may result in a Commission recommendation addressed to the MS concerned, according to Article 116 – where the MS actually adopts the measure in question – a legislative act, namely a directive adopted by the EP and the Council addressed only to the MS concerned, may follow. Of course, both Articles may also be applied on their own, independently of the respective other Article. Then Article 117 is a soft mechanism, whereas Article 116 qualifies as a hard mechanism. Both provisions aim at abolishing an actual or impending non-compliance with Union law, because it can be assumed that a distortion of the conditions of competition in the internal

1903 See M Schröder, Art. 117 AEUV, para 2.
1904 See M Schröder, Art. 117 AEUV, para 8.
1905 See Classen, Art. 116 AEUV, paras 1 and 35; M Schröder, Art. 117 AEUV, paras 1 f.

market which 'needs to be eliminated' is contrary to EU law, in particular to the aims laid down in Article 3 para 3 TEU.[1906] More concretely, such a distortion may constitute an infringement eg of one of the fundamental freedoms or of State aid law. If this is the case, the Treaty infringement procedure or the procedure laid down in Article 108 TFEU may be applied as alternative roads to ensure compliance with EU law. There is no derogatory relationship of speciality (*lex generalis – lex specialis*) between these procedures and the regime set out in Articles 116 f TFEU. Where the respective requirements are met, either regime may be applied.

2.2.2.1.2. Article 126 TFEU

Article 126 TFEU sets out one of the two main regimes of EU economic policy, the excessive deficit procedure. The other regime is about the economic policy coordination and multilateral surveillance procedure as laid down in Article 121 TFEU (see 2.2.3.1.1. below). It is 'two forms of coordination', a 'softer' one and a 'harder' one.[1907] While Article 121, the soft mechanism, is essentially about coordinating and monitoring the economic policy of the MS (and of the EU), Article 126 TFEU, the harder mechanism, is about remedying excessive deficits and possibly 'punishing'[1908] the incriminated (Eurozone) MS. While a comprehensive analysis of the functioning in practice of these mechanisms must take into account also the pertinent secondary law,[1909] in particular the Stability and Growth Pact (as amended), here it is the bare Treaty provisions which should be addressed. This is due to the aim of this chapter to clearly separate primary law from secondary law mechanisms, a distinction which is important when it comes

1906 This provision of EU law is, admittedly, drafted in very broad terms. Note, however, that the Court in the context of a Treaty infringement procedure has accepted the Commission's accusation that a MS has acted against the 'system, scheme, or spirit' of an EU measure; case C-202/99 *Commission v Italy*, para 23. The endeavour to combat such distortions is as old as the idea of a common market in Europe; see the Brussels Report on the general common market of 21 April 1956 ('Spaak Report'), 14 <http://aei.pitt.edu/995/1/Spaak_report.pdf> accessed 28 March 2023.

1907 Craig/de Búrca, EU Law 771 f.

1908 The inverted commas are due to the fact that not all of the measures laid down in Article 126 para 11 TFEU actually qualify as sanctions. Some are mere incentives – 'nudges' – to resolve the excessive deficit; see below; for the discussion on nudges see III.4.3.2.1. above.

1909 See Article 121 para 6 TFEU, Article 126 para 14 TFEU; see also 2.2.2.2.4. below.

to the classification and legal assessment of compliance mechanisms which shall be undertaken in Part V of this work. What is more, Articles 121 and 126 TFEU as such are not mere fragments, but provide for a relatively detailed framework of the economic policy coordination and multilateral surveillance procedure and the excessive deficit procedure, respectively.

According to Article 126 para 1 TFEU, MS shall avoid excessive government deficits.[1910] The procedure laid down in Article 126 TFEU is to 'encourage and, if necessary, compel the Member State concerned to reduce a deficit which might be identified'.[1911] The Commission is in charge of monitoring the budgetary situation and the government debt in the MS.[1912] The two criteria to be considered are laid down in para 2, the respective reference values are specified in Protocol No 12 to the Treaties; they shall not be expanded on here. Where a MS does not fulfil either or both of these criteria, the Commission *shall* or, where there is a mere risk of such an excessive deficit in a MS, *may* prepare a report,[1913] upon which – in either case – the Economic and Financial Committee (EFC) shall formulate an opinion.[1914] If the Commission deems that an excessive deficit in a MS exists or may occur (the latter case corresponding to the 'risk of an excessive deficit' referred to above), it shall address an opinion to the respective MS and inform the Council accordingly.[1915] The Council shall then, on a proposal from the Commission and having considered observations which the MS at issue may have made, decide – on the basis of an 'overall assessment'[1916] – whether an excessive deficit exists.[1917]

Where the Council decides in the affirmative, it shall, 'without undue delay' and on a recommendation from the Commission, address recommendations to the MS concerned 'with a view to bringing that situation [ie the excessive deficit] to an end within a given period'.[1918] Only where the MS does not take effective action in response to these recommendations

1910 See Amtenbrink/de Haan, Governance 1088, describing this requirement as the most precisely drafted MS duty in Article 126 TFEU.
1911 Case C-27/04 *Commission v Council*, para 70.
1912 For the definitions of the term 'government' (and the terms 'deficit', 'investment' and 'debt') in the context of Article 126 TFEU see Article 2 of Protocol No 12.
1913 Article 126 para 3 TFEU.
1914 Article 126 para 4 TFEU.
1915 Article 126 para 5 TFEU.
1916 This assessment takes into account factors which go beyond the two criteria laid down in Article 126 para 2 TFEU; Häde, Art. 126 AEUV, para 34.
1917 Article 126 para 6 TFEU.
1918 Article 126 para 7 TFEU.

within the prescribed period, the Council may – on a recommendation from the Commission[1919] – make its recommendations public.[1920] Where a Eurozone MS persists in failing to comply with the recommendations, the Council may, on a recommendation from the Commission,[1921] give notice to the MS to take, again within a specified time limit, certain measures for the deficit reduction as proposed by the Council; this is done in the form of a Council decision.[1922] The Council may request the MS to submit the relevant reports, on the basis of a specific timetable.[1923] The applicability of the Treaty infringement procedure pursuant to Articles 258 f TFEU in the context of Article 126 paras 1 to 9 is explicitly excluded.[1924]

As long as a Eurozone MS[1925] fails to comply with the measures laid down in the Council decision, the Council may, on a recommendation from the Commission,[1926] apply or – subsequently – intensify one or more of the following measures:

a) to require the respective MS to publish additional information (as specified by the Council), before issuing bonds and securities,
b) to invite the EIB to reconsider its lending policy towards the respective MS,
c) to require the respective MS to make a non-interest-bearing deposit of an appropriate size with the EU until the excessive deficit has been corrected,
d) to impose fines of an appropriate size.[1927]

According to para 12, the Council shall, on a recommendation from the Commission,[1928] abrogate some or all of its decisions or recommendations referred to above to the extent that the excessive deficit in the respective

1919 Article 126 para 13 TFEU.
1920 Article 126 para 8 TFEU; for the requirements for such 'soft sanctions' to be effective see Hodson/Maher, Soft law 807.
1921 Article 126 para 13 TFEU.
1922 See Article 126 para 11 TFEU. When adopting measures relating to excessive deficits concerning Eurozone MS, the voting rights of non-euro MS in the Council shall be suspended; Article 139 para 4 TFEU.
1923 Article 126 para 9 TFEU.
1924 Article 126 para 10 TFEU.
1925 See Article 139 para 2 lit b TFEU.
1926 Article 126 para 13 TFEU.
1927 Article 126 para 11 TFEU. Critically with regard to fines: Hahn/Häde, Währungsrecht 317.
1928 Article 126 para 13 TFEU.

MS has been corrected. Where recommendations have been made public, the Council – once the decision to publish the recommendations has been abrogated – shall make a public statement that an excessive deficit in the respective MS no longer exists.

From a structural point of view, and in the perspective of the MS, the following can be said about Article 126 TFEU. Contrary to the Treaty infringement procedure, at the EU level it is largely the Commission and the Council (instead of the CJEU) which act, with the Commission having monitoring tasks and important rights of initiative, but with the final 'responsibility for making the Member States observe budgetary discipline […] essentially [lying] with the Council'.[1929] The Commission monitors the situation in the MS and prepares a report where a MS does not comply or where there is a risk that it will not comply. This report is neither a legally binding nor a soft law act, as it merely sets out the Commission's observations. It essentially contains information (and its analysis, respectively), not norms. The opinion which the EFC shall formulate on the report is mainly about whether or not an excessive deficit exists. It does not qualify as soft law *vis-à-vis* the MS concerned (which is regularly informed of the opinion).[1930] Whether it qualifies as soft law *vis-à-vis* the Commission is dubitable.[1931] The subsequent opinion of the Commission which is addressed to the MS concerned and of which the Council is informed clearly qualifies as soft law. While it does not explicitly request a certain behaviour from the MS concerned, it *softly* determines the existence of an excessive deficit and hence of a situation entailing concrete legal consequences.

As regards the Council, it shall decide on a Commission proposal to state that an excessive deficit exists. Following this declarative decision, the Council may address recommendations to the MS concerned. These

1929 Case C-27/04 *Commission v Council*, para 76.

1930 See Hamer, Art. 126 AEUV, para 99.

1931 The Committee's opinion constitutes a highly authoritative view on the question whether an excessive deficit exists or impends. It does not entail an explicit request *vis-à-vis* the Commission (not) to proceed according to Article 126. In view of the importance of its statement, however, it may be perceived as a suggestion (not) to do so. The question whether or not an excessive deficit exists is paramount for the question whether an Article 126-procedure is launched/continued. This output is not a classical expert opinion, but has a pronounced 'political' stance. It states the existence or non-existence of a legally decisive situation. Hence the author would qualify it as soft law; see Hamer, Art. 126 AEUV, para 99. For the Commission's duty to take 'fully into account' the Committee's opinion see Article 3 para 2 of Council Regulation 1467/97.

recommendations constitute soft law, that is to say they are norms which are legally non-binding. Where the MS addressed fails to comply with them, however, it may face negative effects. First, the recommendations may be published,[1932] second, they may be reinforced by a decision of the Council, setting a timetable for certain measures to remedy the deficit. In this decision, the Council may also request the MS to submit certain reports. This decision may again be reinforced by a set of other measures, most prominently fines. In a Eurozone MS's perspective, in a full procedure, ie a procedure encompassing all steps provided for in law, we therefore have the following steps of the Article 126 procedure: a soft law act (Commission opinion according to para 5) and a decision (Council decision according to para 6). This is the basis and the prerequisite for the following steps: recommendations, publication of these recommendations, decision, decision (and, in case of an intensification according to para 11: another decision). That Council decisions under Article 126 are regularly based on Commission recommendations – which the Council, within the frame of its broad discretion, is free to counteract by the measure subsequently adopted[1933] – does not affect the (Eurozone) MS's perspective. Article 126 entails a mixed mechanism aimed at ensuring compliance of MS with EU law.[1934]

2.2.2.1.3. Article 271 lit a and d TFEU

Article 271 lit a and d lay down that the EIB (its Board of Directors) and the ECB (its Governing Council) shall, under certain conditions, enjoy the same powers as the Commission does under Article 258 TFEU. That is to say Article 271 lit a and d provide for two variants of the Treaty infringement procedure.

Let us start with Article 271 lit d TFEU which is to be read in conjunction with Article 35 para 6 of the Statute of the ESCB and the ECB. It states that where a NCB fails to fulfil an obligation under the Treaties or the Statute, the ECB shall deliver a reasoned opinion on the matter after having given

1932 Up until this stage, *Ibáñez* claims the procedure to have a 'non-binding character'; Gil Ibáñez, Supervision 110.

1933 See case C-27/04 *Commission v Council*, para 80; see also Hahn/Häde, Währungsrecht 316.

1934 While for MS with a derogation the procedure is shorter, it still qualifies as a mixed mechanism.

the NCB concerned the opportunity to submit its observations. If the NCB concerned does not comply with the reasoned opinion within the period stated by the ECB, the latter may bring the matter before the CJEU.

This is a relatively simple procedure, inspired by Article 258 TFEU and entailing two formal steps.[1935] First, the ECB issues a reasoned opinion (in practice preceded by a letter of formal notice[1936]) to the respective NCB. This soft law act contains a clear command *vis-à-vis* the NCB. Where the latter does not follow this opinion, the ECB may file an action with the CJEU. The Court then renders a judgement – a legally binding act – to settle the matter. Article 271 lit d TFEU in conjunction with Article 35 para 6 of the Statute constitutes a mixed compliance mechanism.

Whereas the Commission pursuant to Article 258 TFEU is the general 'prosecutor' of MS violating EU law, it may not play this role where the alleged infringement by a MS is caused by the behaviour of its respective NCB.[1937] This is due to the independence of the NCBs according to Article 130 TFEU. While they are independent *vis-à-vis* Union institutions, bodies, offices or agencies, and *vis-à-vis* any government of a MS or any other body, the NCBs form part of the ESCB. Pursuant to Article 129 para 1 TFEU, the ESCB shall be governed by the decision-making bodies of the ECB which is why the NCBs may receive, and shall comply with respectively, instructions from the ECB.[1938] They are not independent *vis-à-vis* the ECB.[1939] Therefore, it is consistent with the logic of this independence regime[1940] that violations of Union law committed by NCBs are not 'prosecuted' by the Commission (according to Article 258 TFEU), but by the ECB, which

1935 See Gramlich, Wirtschafts- und Währungspolitik 625; Hahn/Häde, Währungsrecht 157. The comments made under 2.1. above in the context of Article 258 TFEU *mutatis mutandis* apply here as well.

1936 See Hahn/Häde, Währungsrecht 160; see 2.1. above.

1937 See Schima, Art. 271 AEUV, para 13; see also Karpenstein, Art. 271 AEUV, paras 26 f.

1938 Article 14 para 3 of the Statute of the ESCB and of the ECB.

1939 See Hahn/Häde, Währungsrecht 218.

1940 But possibly not with the logic of the regular Treaty infringement procedure which lays down the liability of the MS also for the actions of independent bodies (eg national courts); see also Hahn/Häde, Währungsrecht 160, both with further references.

may bring the matter before the Court.[1941] An (analogous) application of the sanctions regime according to Article 260 TFEU is excluded.[1942]

A similar regime applies with regard to the European Investment Bank – which also is a legal person of its own[1943] – according to Article 271 lit a TFEU.[1944] The main addressees of the acts adopted under this procedure are the MS. Whether Article 260 TFEU applies by analogy is contested.[1945]

2.2.2.2. In secondary law

2.2.2.2.1. Article 63 of Directive 2019/944

The mechanism addressed here is about compliance with Commission network codes and guidelines referred to in Directive 2019/944 – which is based on Article 194 para 2 TFEU – or in Chapter VII of Regulation

1941 See Ehricke, Art. 271 AEUV, para 20, also with regard to the fact that Article 271 lit d TFEU explicitly addresses the NCBs, not 'the MS'. In case of the EIB the powers are granted in respect of MS (lit a *leg cit*), in case of the ECB in respect of NCBs (lit d *leg cit*); trying to explain the latter specificity: Potacs, Zentralbanken 38.

1942 See Ehricke, Art. 271 AEUV, para 21; Schwarze/Wunderlich, Art. 271 AEUV, para 11.

1943 Article 308 para 1 TFEU.

1944 Unlike Protocol No 4, Protocol No 5 on the Statute of the European Investment Bank does not provide for a concretisation of the procedure.

1945 In the affirmative: Schwarze/Wunderlich, Art. 271 AEUV, para 11; Wegener, Art. 271 AEUV, para 2; sceptically: Schima, Art. 271 AEUV, para 9, with (further) references to both views. In my view the powers of the Commission under Article 260 TFEU are taken over neither in the case of the EIB nor in the case of the ECB. This is because, first of all, Article 271 TFEU does not stipulate any such competence. With regard to the EIB, this would not mean an unplanned *lacuna* in the legal order. Rather, the Commission may initiate proceedings pursuant to Article 260 TFEU. After all, this procedure is not about 'the fulfilment by Member States of obligations under the Statute of the European Investment Bank', as Article 271 lit a TFEU lays down, but about non-compliance by a MS with a judgement of the CJEU, rendered in the course of a Treaty infringement procedure. As regards Article 271 lit d TFEU, an application for sanctions is outright excluded. Suffice it to say that the extraordinary power of the ECB (or the Commission) to apply to the CJEU for sanctions against the NCBs (not: the MS) would require a clear indication in primary law; coming to the same result: Ehricke, Art. 271 AEUV, para 21; raising arguments in favour of and against a broader perception of Article 260 TFEU more generally, so as to allow for sanctions also in case of non-compliance with judgements rendered in different procedures, eg the preliminary reference procedure: Wennerås, Use 81–83.

2019/943.[1946] These network codes and guidelines are legally binding (delegated or implementing acts).[1947] A national regulatory authority (hereinafter: 'MS authority') or the Commission may request an opinion from the ACER on the compliance with these network codes and guidelines of a decision taken by a(nother) MS authority.[1948] Within three months the ACER shall provide its opinion to the requesting body (MS or Commission) and to the MS authority which has taken the respective decision. Where the MS authority concerned does not comply with the opinion within four months, the ACER shall inform the Commission.

Where the decision of the MS authority is relevant for cross-border trade, another MS authority may inform the Commission where it deems this decision not to be in compliance with the Commission network codes or guidelines. (In this case the Commission, not the ACER, is the first point of contact.)

Where the Commission, within two months of having been informed by the ACER or a MS authority, or – on its own initiative – within three months from the date of the decision, finds that the decision 'raises serious doubts as to its compatibility with the network codes and guidelines', it may decide to examine the case further.[1949] It shall then, within four months of the decision to examine the case further, issue a final decision a) not to raise objections against the decision of the MS authority, or b) to require this authority to withdraw its decision for lack of compliance with the network codes or guidelines. In the latter case the MS authority shall withdraw its decision within two months and inform the Commission thereof. Where the Commission has not taken a decision to examine the case further or a

1946 For similar mechanisms established with regard to other forms of energy see Gundel, Energieverwaltungsrecht, para 37.

1947 See eg Article 58 para 1 of Regulation 2019/943. For the instrument of Commission guidelines more generally see W Weiß, Leitlinien(un)wesen; see also W Weiß, Verwaltungsverbund 149–151.

1948 Article 63 para 1 of Directive 2019/944. The scope of scrutiny only covers these network codes and guidelines as tertiary law, not (also) the pertinent secondary law; see (for the predecessor regime) Gundel, Energieverwaltungsrecht, para 47 (fn 221); differently: the scope of scrutiny of the compliance mechanism laid down in Article 6 paras 5–7 of Regulation 2019/942; see 2.2.3.2.1. above.

1949 For the possibility of the MS authority and of the parties to the proceedings to submit their observations see Article 63 para 5 of Directive 2019/944.

final decision within the respective periods, it shall be deemed not to have raised objections to the decision of the MS authority.[1950]

This regime involves a number of actors and different kinds of output. For our purposes, the essentials of the procedure are the following: Upon request by a MS authority or the Commission, the ACER shall issue an opinion on the compliance with the Commission network codes and guidelines of the decision of a(nother) MS authority. This opinion is (also) addressed to the latter. Where it does not comply with the opinion, the Commission may, first, decide to examine the case further and, in this case, as a second step, may adopt a final decision directed to the MS authority at issue. That means that the MS authority first receives an EU soft law act. Where it does not comply, the Commission may possibly adopt a first decision (to examine the case further). If it has done so, it may adopt a second (final) decision addressed to the MS authority. Thereby the Commission can detect potential non-compliance with its network codes and guidelines by a MS authority and, where it turns out to be actual non-compliance, determine this failure on the part of the MS concerned. As this regime involves acts of both soft law and law which are addressed to an (allegedly) non-compliant MS (authority), it constitutes a mixed compliance mechanism. Only in the variant according to Article 63 para 4, according to which the Commission is addressed by a MS authority without the ACER rendering its opinion beforehand, the procedure is to be called a hard mechanism.[1951]

2.2.2.2.2. Articles 22 f and 28 of Council Regulation 2015/1589

This regime laid down in Council Regulation 2015/1589, based on Article 109 TFEU, is about the review of existing aid schemes pursuant to Article 108 para 1 TFEU.[1952] Where the Commission considers that such an existing aid scheme is not or no longer compatible with the internal market, it

1950 Article 63 paras 2–8 of Directive 2019/944; for the very similar predecessor mechanism and for the German transposition see Koenig, Entflechtungszertifizierung 506 ff.

1951 The exclusion of the ACER in this variant is mitigated by the fact that the ACER may address an opinion to the Commission on any matter, be it upon request or on its own initiative; Article 3 para 1 of Regulation 2019/942.

1952 For this term see Article 1 lit b of Council Regulation 2015/1589; see also eg W Cremer, Art. 108 AEUV, para 3, with further references.

shall inform the MS concerned of its 'preliminary view' and shall give it opportunity and time (one month; extendable) to submit its observations.[1953] Where these observations cannot dispel the concerns of the Commission, it shall address a recommendation to the MS, thereby proposing in particular amendments, procedural requirements or the abolition of the aid scheme.[1954]

Where the MS accepts the recommendations, it shall inform the Commission thereof, and the Commission shall record that finding and inform the MS in turn. By this recorded acceptance the MS shall be bound to implement the recommended measures. Where the MS does not accept the recommendations, the Commission – if it still considers the recommended measures to be necessary – shall initiate proceedings in accordance with Article 108 para 2 TFEU and Article 4 para 4 of Council Regulation 2015/1589. If the Commission finds that the aid scheme is not compatible with the internal market, or that it is being misused, it shall decide that the MS concerned shall abolish or alter such aid within a certain period of time (to be determined by the Commission[1955]).[1956] Where the MS concerned does not comply with a conditional or negative decision, the Commission may refer the case to the CJEU directly, following which the CJEU shall render a judgement.[1957]

The sequence of recommendation and decision envisaged in this procedure is relatively common in EU compliance mechanisms (and, what is more, already sketched out in Articles 108 paras 1 f TFEU). Where the MS does not follow (in this context that means: 'accept') the soft law act, it may eventually be forced to do so by law – in the form of a decision. A specificity of this procedure is that where the MS *accepts* the measures set out in the recommendation the Commission will record this acceptance, whereby the MS shall be legally bound. This does not change the soft law character of

1953 Article 21 para 2 of Council Regulation 2015/1589.
1954 Article 22 of Council Regulation 2015/1589.
1955 See Article 108 para 2 TFEU.
1956 For the publication of this decision in the OJ see Article 32 para 2 of Council Regulation 2015/1589; for other possible decisions see Article 9 *leg cit*.
1957 Article 28 para 1 of Council Regulation 2015/1589 in conjunction with Article 108 para 2 TFEU. For the possibility to sanction a MS not complying with a Court judgement in this context (in accordance with Article 260 TFEU), see Article 28 para 2 of Council Regulation 2015/1589.

the recommendation.[1958] What makes its content binding is the recorded acceptance of its addressee (agreed law).[1959] That the recommendation is also referred to as 'proposal'[1960] does not entail special effects. Since it is addressed to a MS (not: to the Council), the varying designation of the soft law act is insignificant.[1961] The possibility of the Commission to directly refer the case to the CJEU, thereby skipping the pre-litigation procedure as laid down in Article 258 TFEU, is in accordance with primary law, namely Article 108 para 2 TFEU (see 2.2.1.1.2. above). The Court may then add another hard law act in this – all in all: mixed – procedure.

2.2.2.2.3. Article 17 of Regulation 1093/2010

The regime to be discussed here is laid down in Article 17 of Regulation 1093/2010. In the following, it will be presented and analysed with a focus on the EU legal acts which may be adopted in the course of this procedure.[1962]

Article 17 of Regulation 1093/2010 provides for a possibility for the EBA to react to a breach of Union law by the competent national authorities.[1963]

1958 For the bindingness of the determination of existing aid see case T-354/05 *Télévision française*, paras 60–81; on the slightly different regime provided for in Article 9 of Regulation 1/2003 see case C-441/07P *Alrosa*, paras 47–50.

1959 See Rusche, Art. 108 AEUV, para 11; for the legal bindingness of these agreements – normally dubbed 'guidelines', 'disciplines' or 'frameworks' – see H Hofmann, Rule-Making 165–169. For the consequences of non-compliance of a MS with a recommendation it has previously accepted see Rusche/Micheau/Piffaut/Van de Casteele, State Aid, para 17.515 (with regard to the predecessor provisions, Articles 18 f of Council Regulation 659/1999).

1960 See the headings of Articles 22 f of Council Regulation 2015/1589. In the German version the German word for 'recommendation' is not used at all. Other language versions – *raccomandazione* (Italian), *recommandation* (French), *recomendación* (Spanish) – of the provision, however, suggest that it actually refers to a recommendation pursuant to Article 288 TFEU.

1961 See case T-354/05 *Télévision française*, para 65.

1962 For a more comprehensive analysis of this procedure see eg Michel, Gleichgewicht 243–248; Weismann, Agencies 133–138; for further procedural details see Article 39 of Regulation 1093/2010 and EBA Decision concerning rules of procedure for investigation of breach of Union law, EBA/DC/2020/312.

1963 The Commission itself has framed this compliance mechanism in the context of ensuring an independent application of EU law; see Commission, 'EU law: better results through better application' (Communication), 2017/C 18/02, 3 f; for an EBA request to a competent national authority for investigation related to the

In this context, 'Union law' means the pertinent acts of secondary law as laid down in Article 1 para 2 of Regulation 1093/2010, including the regulatory and implementing technical standards adopted by the Commission (with the EBA being strongly involved). The alleged breach[1964] (including the non-application) of Union law shall be investigated by the EBA, after having informed the competent authority concerned, on its own initiative (eg based on well-substantiated information from third parties) or upon a request from one or more of the following bodies: a competent authority, the EP, the Council, the Commission or the Banking Stakeholder Group.[1965] In deciding whether or not to open an investigation, the EBA disposes of a discretion comparable to that of the Commission under Article 258 TFEU.[1966] If the EBA decides in the affirmative, the competent authority concerned shall provide all the information the EBA considers necessary for its investigation. The EBA may also request information from other competent authorities. No later than two months from initiating its investigation, the EBA may address a recommendation to the competent authority concerned, setting out the action necessary to comply with Union law.[1967] Within ten working days, the competent authority shall then inform

prevention and countering of money laundering and of terrorist financing (which may also result in a procedure pursuant to Article 17) see Article 9a of Regulation 1093/2010.

1964 That in practice not any breach, but only a qualified breach of Union law is pursued by the EBA under Article 17 follows from Annex 2 to the pertinent Decision of the EBA's Board of Supervisors EBA DC 054. According to Recital 27 of Regulation 1093/2010, the 'mechanism should apply in areas where Union law defines clear and unconditional obligations'; for the wide interpretation of this term by the Court see case C-501/18 *Balgarska Narodna Banka*, para 88.

1965 See Article 2 of EBA Decision concerning rules of procedure for investigation of breach of Union law, EBA/DC/2020/312; see also case T-660/14 *SV Capital*, paras 69 f.

1966 Case T-660/14 *SV Capital*, paras 47 f; confirmed by C-577/15P *SV Capital*, para 40; Joint Board of Appeal, *C v EBA*, BoA-D-2022–01, paras 65–69; see also Simoncini, Regulation 161; for the EBA-internal division of powers regarding this question see Article 6 of EBA Decision concerning rules of procedure for investigation of breach of Union law, EBA/DC/2020/312.

1967 For the decision-making procedures of the EBA – which apply, *mutatis mutandis*, also to the adoption of recommendations – see Article 39 of Regulation 1093/2010; for the contents of the (draft) recommendation in more detail see Article 5B para 6 of the Decision of the EBA's Board of Supervisors EBA DC 054. For the effect of this particular recommendation on national bodies see case C-501/18 *Balgarska Narodna Banka*, paras 78–81; for the possible 'engagement' between the EBA and

the EBA of the steps it has taken or intends to take to ensure compliance with Union law.

Where the competent authority has not complied with Union law within one month, the Commission may, upon information by the EBA or on its own initiative, issue a formal opinion, thereby taking into account the EBA's recommendation, which requires the competent authority to take the action necessary to comply with Union law. The Commission shall do so no later than three months (possibly extended by one month) of the adoption of the EBA recommendation. The competent authority shall, within ten working days,[1968] inform the Commission and the EBA of the steps it has taken or intends to take to comply with the formal opinion.

Where the competent authority has not complied with the formal opinion in due time and where it is 'necessary to remedy, in a timely manner, such non-compliance in order to maintain or restore neutral conditions of competition in the market or ensure the orderly functioning and integrity of the financial system',[1969] Regulation 1093/2010 provides for a further instrument. Explicitly without prejudice to the powers of the Commission under the Treaty infringement procedure, the EBA may, where the relevant requirements of the legislative acts at issue are directly applicable to financial institutions/financial sector operators, adopt an individual decision addressed to a financial institution or, in cases regarding the prevention and countering of money laundering and of terrorist financing, to another financial sector operator which requires the necessary action to comply with its obligations under Union law, including the cessation of any practice.[1970] The EBA decision, if it is taken in the first place,[1971] shall be in

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the competent authority prior to the adoption of a recommendation see Article 17 para 2a of Regulation 1093/2010.

1968 Article 17 para 6 of Regulation 1093/2010 ('period of time specified therein') appears to suggest that the Commission may also allow for a longer period of time (arguably taking account of the complexity of the case).

1969 See also Böttner, Mechanism 184 f.

1970 For the publication requirements regarding EBA decisions taken under Article 17 see Article 39 para 6 of Regulation 1093/2010.

1971 The EBA is not obliged to take action, even if the Commission's formal opinion was not complied with. For another procedure in which an EU institution provides a soft assessment (with high authority), upon which an EU agency may take a decision, see the ECB's 'failing or likely to fail' (FOLTF) assessment and the resolution decision the SRB may take after that (Article 18 of Regulation 806/2014); for the rationale of this sharing of tasks the Court held that 'the SRB, while not bound by the ECB's examination and view, did not err in law by taking the latter

conformity with the formal opinion of the Commission.[1972] Article 17 para 6 subpara 2, introduced as part of a reform of Regulation 1093/2010 (by the end of December 2019), provides for a deviating procedure where the prevention of the use of the financial system for the purpose of money laundering or of terrorist financing is concerned and where the relevant requirements of the legislative acts at issue are not directly applicable to financial sector operators. Here the EBA may adopt a decision requiring the competent authority to comply with the Commission's formal opinion. If the competent authority does not comply with the EBA decision, the EBA may address a decision to the financial sector operator. To that effect, the EBA shall apply all relevant Union law and, where it is composed of Directives, the applicable national law transposing them. Where it is composed of Regulations granting options for MS, the EBA shall apply the national law by which these options are exercised.

In terms of output, this procedure is threefold,[1973] exceptionally (in case of para 6 subpara 2) fourfold. An EBA recommendation to the competent authority may be followed – reinforced, as it were – by a formal opinion of the Commission. Where the competent authority does not comply with this opinion,[1974] either, the EBA may – under certain conditions – address an individual decision to a financial institution/financial sector operator to enforce its legal view. Under para 6 subpara 2 the EBA may do so even where the relevant legislative acts are not directly applicable to financial

as its basis, since the ECB was the institution best placed to carry out the FOLTF assessment in respect of the applicant'; case T-280/18 *ABLV*, para 108. Applying these thoughts to the EBA regime at issue, we could say that the Commission – due to its competence and experience under the Treaty infringement procedure – is well placed as an actor involved in a mechanism which displays some similarities with the Treaty infringement procedure.

1972 See Article 17 para 6 subpara 3 of Regulation 1093/2010. For the effects of the decisions and the public report on non-compliant competent authorities see Article 17 paras 7 f of Regulation 1093/2010.

1973 See Recital 28 of Regulation 1093/2010: 'three-step mechanism'.

1974 The (misleading) wording of Article 17 para 7 subpara 2 of Regulation 1093/2010 does not render the formal opinion binding upon its addressee. It merely clarifies that where a formal opinion is the last step in a concrete procedure, the competent authority shall (or rather: should) comply with it. However, where an EBA decision was subsequently adopted, the competent authority (even if it is not the addressee) shall ensure compliance with this decision (not the formal opinion). According to Regulation 1093/2010, there should not be significant differences in the approaches taken in the two acts anyway (see below).

sector operators, but only after having addressed, in vain, the competent authority.

While the Commission's involvement arguably shall increase the political legitimacy of the procedure, the meaning of its formal opinion requires some more attention. Article 17 para 4 stipulates that the Commission shall 'take into account' the EBA recommendation when drafting its formal opinion. This means that it may deviate from the recommendation, eg in order to do justice to new arguments or evidence brought forward by the competent authority concerned.[1975] It may also decide not to adopt a formal opinion at all (*argumentum* 'may'), in which case the procedure comes to a halt. Where the EBA adopts a decision subsequent to a formal opinion, it shall, according to Article 17 para 6 subpara 3, be 'in conformity with' this opinion. This certainly suggests a larger degree of accordance than the phrase 'take into account'. To the extent that the formal opinion is legally binding (only) upon the EBA, it ensures the Commission a leading role in the procedure.[1976] Conformity does not, however, mean identity. The EBA does have some room for manoeuvre, the scope of which has to be concretised case by case. Otherwise, the legislator could as well have empowered the Commission to adopt a (binding) decision instead of a formal opinion, the third step – the EBA decision – being abolished as superfluous.[1977]

This mixed procedure, if applied in full, entails two soft law acts – the EBA recommendation and the formal opinion of the Commission – and the EBA decision. While the recommendation and the formal opinion are both legally non-binding for the competent authority addressed, the formal opinion may have a higher *de facto* authority: First, because it stems from the Commission which is also competent to initiate Treaty infringement procedures (which it may do independently of an Article 17-procedure), and, second, because the formal opinion, unlike the EBA recommendation (with regard to the formal opinion), largely determines the content of its follow-up (the EBA decision). Except for the specific first case of Article 17 para 6 subpara 2, the individual decision is not addressed to the competent authority, it is true, but indirectly – via an evocation '*à l'européenne*'[1978] – it

1975 See Michel, Gleichgewicht 245.
1976 See Michel, Gleichgewicht 247, with further references.
1977 Similarly: case T-317/09 *Concord*, para 52, with regard to preliminary output in a multiphased procedure.
1978 Kämmerer, Finanzaufsichtssystem 1285; see also 2.2.1.2.5. above.

does away with the competent authority's breach of Union law and it limits its competences in this respect.[1979]

The existence of Article 17 para 6 subpara 2 proves the legislator's conviction that a decision directed to the competent authority is the more moderate interference with MS' decision-making power. Nevertheless, it did not take this route in the remaining cases. There, the formal opinion of the Commission, if not complied with by the competent authority addressed, may be directly followed by an EBA decision addressed to the financial institution/financial sector operator at issue.

2.2.2.2.4. The excessive imbalance procedure laid down in Regulations 1176/2011 and 1174/2011

Regulation 1176/2011 on the prevention and correction of macroeconomic imbalances is based on Article 121 para 6 TFEU, and hence is to lay down detailed rules for the multilateral surveillance procedure referred to in Article 121 paras 3 f TFEU. Among other things, this Regulation sets out the excessive imbalance procedure to correct 'severe imbalances, including imbalances that jeopardise or risks [sic] jeopardising the proper functioning of the economic and monetary union'.[1980] Upon a recommendation from the Commission which has previously carried out an in-depth review of a certain MS,[1981] the Council shall adopt a recommendation (mentioned in Article 121 para 4 TFEU; see 2.2.3.1.1. below) establishing the existence of an excessive imbalance in that MS, and recommending the MS concerned to take corrective action.[1982]

Upon such a recommendation, a MS shall submit a corrective action plan to the Council and the Commission within a certain deadline. This

1979 See Eekhoff, Verbundaufsicht 142, describing comparable evocation rights of the Commission as 'ein schärferes und zugleich wirksameres Intstrument als eine verbindliche Aufforderung' [a harsher and at the same time more effective instrument than a binding request].

1980 Article 2 para 2 of Regulation 1176/2011.

1981 For the in-depth review see Article 5 of Regulation 1176/2011; for the other EU actors to be informed of the Commission's assumption that a certain MS is affected by excessive imbalances see Article 7 para 1 *leg cit*.

1982 In practice, the Commission has detected excessive imbalances in certain MS, but – in reaction thereto – has not applied the corrective arm. It merely intensified surveillance; Pierluigi/Sondermann, Macroeconomic imbalances 40.

plan shall set out the specific policy actions the MS has implemented or intends to implement and shall include a timetable for those actions.[1983] It shall be consistent with the BEPG which renders the latter legally binding for the purposes of this procedure.[1984] The Council and the Commission shall then, to put it short, assess the corrective action plan, and where the Council – upon a Commission recommendation – considers it sufficient, it shall endorse it by means of a recommendation setting out the details of the implementation of the plan. Where the Council, upon a Commission recommendation, considers the plan insufficient, it shall adopt a recommendation to the MS to submit, within two months as a rule, a new corrective action plan.[1985]

The Commission shall monitor implementation of the Council's approving recommendation, for which purpose the MS shall submit progress reports (to be published by the Council).[1986] The Commission shall then provide a – later to be published – report to the Council on whether or not the MS has taken corrective action in accordance with the Council recommendation. Where the MS has not done so, the Council – on a recommendation from the Commission – shall adopt a decision (applying reverse qualified majority voting[1987]) establishing non-compliance, together with a recommendation setting new deadlines for corrective action.[1988] Otherwise – ie where the MS has taken the corrective action recommended – the excessive imbalance procedure shall be considered to be on track and shall be held in abeyance, the Commission continuing to monitor. Where a MS is no longer affected by excessive imbalances, the Council, on a recommendation from the Commission, shall abrogate its recommenda-

1983 Article 8 para 1 of Regulation 1176/2011.

1984 It ought to be emphasised that the BEPG, while setting out clear objectives, leave some discretion to the MS as to how to reach these objectives. The BEPG do not form part of the Stability and Growth Pact, although they are in places mentioned in its context. On the (wider) scope of the BEPG see Deroose/Hodson/Kuhlmann, Guidelines 828; for the consideration of country-specific recommendations in the excessive imbalances procedure see Bénassy-Quéré/Wolff, Imbalances 31.

1985 For the publication requirements see Article 7 para 4 of Regulation 1176/2011.

1986 For the details of the monitoring procedure, for the possility of the Council to amend its recommendations and for the possible revision of the corrective action plan by the MS see Article 9 para 4 of Regulation 1176/2011; for an enhanced surveillance mission the Commission may carry out see para 3 *leg cit*.

1987 Article 10 para 4 subpara 2 of Regulation 1176/2011; for the application of reverse (qualified) majority voting in the Council see III.4.4. above.

1988 For the information of the European Council and publication requirements see Article 10 para 4 subpara 1 of Regulation 1176/2011.

tions in accordance with Article 11 of Regulation 1176/2011 and publish this information (for the requirement of a *contrarius actus* see III.3.8. above).

In terms of output *vis-à-vis* the MS, the procedure looks as follows: Council recommendation regarding the existence of an excessive imbalance; following a corrective action plan submitted by the MS: Council recommendation on the details of implementation or Council recommendation to submit a new action plan; possibly Council decision establishing non-compliance and recommendation setting new deadlines; Council recommendation abrogating its recommendations. All of this Council output can be adopted only upon an appropriate Commission recommendation. While the Council has discretion when acting on these Commission recommendations,[1989] it is bound by the procedural route the Commission has taken.[1990] Therefore it appears that the Council may not, for example, adopt a recommendation that the corrective action plan is insufficient according to Article 8 para 3 where the Commission has recommended to consider it sufficient according to para 2. Where the required majority for a decision is not achieved, no decision is taken.[1991]

It is to be noted that all Council measures aimed at steering MS behaviour are recommendations, ie legally non-binding. The only hard law measure – the decision according to Article 10 para 4 – merely establishes the MS's non-compliance, but does not require action. Action is required by a Council recommendation accompanying this decision.

The appearance of weakness of this regime is done away with by the sanctions regime to correct excessive macroeconomic imbalances as laid down in Regulation 1174/2011, based on Article 136 in conjunction with Article 121 para 6 TFEU, which applies only to Eurozone MS. According to Article 3 of this Regulation, the Council shall impose an interest-bearing deposit upon a recommendation of the Commission, where it has adopted a decision establishing non-compliance in accordance with Article 10 para 4 of Regulation 1176/2011.[1992] The Council shall, again on a recommendation of the Commission, impose an annual fine where a) two successive Council

1989 For the political expectation that the Council follows the Commission recommendations see (with regard to related regulations of the 'Six Pack') Schulte, Art. 121 AEUV, para 59.

1990 See case C-27/04 *Commission v Council*, paras 80 f.

1991 See case C-27/04 *Commission v Council*, para 31. As a way out of this predicament, the legislator has introduced reverse (qualified) majority voting in some procedures.

1992 For the amount of this deposit see Article 3 paras 5 f of Regulation 1174/2011.

recommendations in the same imbalance procedure are adopted according to Article 8 para 3 of Regulation 1176/2011 and the Council considers that the MS has submitted an insufficient corrective action plan or b) two successive Council decisions in the same imbalance procedure are adopted establishing non-compliance in accordance with Article 10 para 4 of Regulation 1176/2011. In the latter case the already imposed deposit is converted into an annual fine.[1993] The sequence of two acts of the same legal quality content-wise addressing the same issue does not mean that the Council in the excessive imbalance procedure may adopt another recommendation or another decision to repeat its view. Rather, according to Article 8 para 3, the Council by means of a recommendation may request the submission of a new corrective action plan which is then again subject to scrutiny, and hence – if the Council is not satisfied with it – may be followed by a new recommendation to submit another corrective action plan.[1994] In the case of Article 10 para 4 the Council may adopt a decision establishing non-compliance with the recommendation, and may set – by means of a recommendation – a new deadline. Where this deadline is not complied with either, the Council may establish this by means of a (second) decision. In that sense, the term 'successive' used in Article 3 para 2 of Regulation 1174/2011 does not exclude, in the second case, the adoption of a recommendation in between the two decisions.

The Council decisions on the imposition of sanctions are adopted by reverse qualified majority voting.[1995] Article 3 para 3, last sentence of Regulation 1174/2011 says: 'The Council may decide, by qualified majority, to amend the recommendation'. This means that the Council may, with a qualified majority, amend the Commission recommendation and thereby the content of its (future) decision.[1996] This is to mitigate the shifting of

1993 For the potential (partial) return of the paid amount see Article 3 para 7 of Regulation 1174/2011. For the exceptional reduction or cancellation of sanctions see para 6 *leg cit.*

1994 See Obwexer, System 223.

1995 In practice, no sanctions have been imposed so far; see Koll/Watt, Macroeconomic Imbalance 57.

1996 See Commission Proposal COM(2010) 525 final, 6 f, with regard to the originally provided Commission *proposal* and the accordingly envisaged applicability of Article 293 para 1 TFEU.

power from the Council to the Commission which is brought about by this procedure.[1997]

Thus, the legal non-bindingness of the recommendation according to Article 8 para 3 and the lack of a command of the decision according to Article 10 para 4 of Regulation 1176/2011 are compensated for by the sanctions regime, at least with regard to the Eurozone MS. Legally speaking, this neither makes the recommendation binding nor does it make the declarative decision a command, but *de facto* it substantially increases their respective authority and the likelihood of compliance or at least of attempts to remedy the stated non-compliance by their respective addressees.[1998]

2.2.2.2.5. Article 7 para 4 of Regulation 806/2014

With regard to general information on Regulation 806/2014, see 2.2.1.2.3. above. According to Article 7 para 4, the SRB may – where necessary to ensure the consistent application of high resolution standards under Regulation 806/2014[1999] – address a warning to the relevant national resolution authority where it deems a national authority's draft decision to any entity or group (which the national authorities are principally competent to adopt in accordance with Article 7 para 2) violates Regulation 806/2014 or its – the SRB's – general instructions according to Article 31 para 1 lit a *leg cit.*[2000] The SRB shall be informed by the national resolution authorities of any measure according to para 3 (eg resolution plans or resolvability assessments) to that end.[2001] The Board may also, 'in particular if its warning

1997 See, with regard to a similar provision, Obwexer, System 224 f, with a further reference.

1998 See Recital 11 of Regulation 1174/2011.

1999 These standards are not a specific type of (soft law) act, but standards in the general meaning of the term, that is: the relevant EU law in its correct interpretation; see Zavvos/Kaltsouni, Mechanism 127.

2000 Note that, according to the wording of Article 7 para 4 lit a of Regulation 806/2014, only the (binding) general instructions are included, not: the (non-binding) guidelines which are also mentioned in Article 31 para 1. For the duty of national resolution authorities to submit their draft decisions to the SRB see Article 31 para 1 lit d.

2001 Article 7 para 3 (penultimate subparagraph) of Regulation 806/2014. While this provision merely speaks of 'measures', it appears that what is actually meant are 'draft measures' (*argumentum* 'to be taken', 'closely coordinate with the Board when [ie: before] taking those measures').

[…] is not being appropriately addressed', *sua sponte* or upon request by the national authority concerned, exercise directly all of the relevant powers under Regulation 806/2014 also for entities or groups for which in principle the national authorities are competent under Article 7 para 3.[2002]

The character of the warning deserves further attention. While there is no general definition of this term in Union law, and no specific one in Regulation 806/2014, it is clear that in this case it qualifies as a soft law act. After all, the warnings are about non-compliance with Union law and they should be 'appropriately addressed' by its recipients, namely the national authorities. Both characteristics strongly convey that the warning suggests compliance in more or less detailed terms.

This is not a perfect mixed compliance mechanism, as the evocation (para 4 lit b) by the SRB may not only follow (non-compliance with) a warning according to lit a (*argumentum* 'in particular'). Since lit a and lit b are therefore potential alternatives, one could also perceive them separately as one soft and one hard compliance mechanism.[2003] The term 'in particular' and the common legal basis in one paragraph suggest, however, that lit a and lit b were rather conceptualised as *one* regime.

This regime involves a soft law act, a warning, which is sent to the national authority and which may be followed – where the warning has not been 'appropriately addressed' by the national authority – by a hard law act by means of which the SRB attracts competences of the national authorities, to ensure that they are exercised in compliance with Union law. As explained, the hard law act may also stand alone, without a preceding warning, but it shall 'in particular' be adopted where the warning has not been duly considered. Whether the SRB's decision suffices to ensure compliance with Union law depends on whether the national resolution authority has already adopted the measure at issue. If so, the SRB may take a decision *vis-à-vis* the entity or group according to Article 7 para 3 of Regulation 806/2014.[2004] If the relevant national measure is still a draft, the national authority has – *qua* SRB decision – lost its competence to adopt it.

2002 For the possibility of a participating MS to transfer these competences to the Board by a decision see Article 7 para 5 of Regulation 806/2014; see also J-H Binder, Resolution 137. In the context of the preparation of draft resolution plans and draft group resolution plans relating to specific entities or groups, the SRB may – in what is to be called a hard mechanism – address (binding) instructions to its national counterparts; Article 8 para 3 of Regulation 806/2014.

2003 Note that the decision according to lit b is preceded by 'consulting' with the national authority.

2.2.2.2.6. Article 25 of Regulation 2016/796

Regulation 2016/796 on the European Union Agency for Railways (ERA) is based on Article 91 para 1 TFEU. The mechanism laid down in Article 25 which is at issue here builds on the MS' obligations under Article 8 para 4 of Directive 2016/798 and under Article 14 para 5 of Directive 2016/797, according to which MS shall submit the draft of new national rules on certain issues[2005] to the ERA and the Commission 'for consideration'.[2006] Upon receipt, the ERA shall examine the draft national rules within an extendable period of two months. Where the ERA deems the drafts to be in compliance with the relevant Union law,[2007] it shall inform the Commission and the MS concerned of its positive assessment. Where the ERA fails to inform the Commission and the MS concerned of its assessment within the (extended) period, the MS may proceed with the introduction of the rule.[2008]

Where the ERA's assessment is negative, the ERA shall inform the MS concerned and ask for its position on the assessment. If, following that exchange of views, the ERA maintains its negative assessment, it shall, within one month, address an opinion to the MS concerned,[2009] stating the reasons why the draft national rules should not enter into force and/or be

2004 This situation – an individualised act adopted by a national authority, which is contrary to EU law – may pose a challenge to supremacy; see eg Clausing/Kimmel, § 121 VwGO, paras 116b-116h. Article 29 para 2 of Regulation 806/2014 does not apply here. Since the national authority has not violated an SRB decision (but, at most, a warning of the SRB), the requirements of this provision are not met. What is more, if Article 29 para 2 applied, there would be no need for the special regime of Article 7 para 4.

2005 See the issues listed in Article 8 para 3 of Directive 2016/798 and in Article 14 para 4 of Directive 2016/797, respectively.

2006 For the case of urgent preventive measures in case of Directive 2016/798 see its Article 8 para 5. Under the regime of Directive 2016/797 no special procedure applies: see its Article 14 para 4 lit b. Note that the ERA has true decision-making power in certain cases; see eg Article 10 or Article 17 of Directive 2016/798; see, in conjunction therewith, Article 14 of Regulation 2016/796. For the role of the ERA in ensuring compliance of MS with EU law see Versluis/Tarr, Compliance.

2007 For the creation and qualification of rules of Union law referred to as 'common safety measures' (CSMs), 'common safety targets' (CSTs) and 'technical specifications of interoperability' (TSI) which are highly relevant in this context see Granner, Verkehrsagenturen 229–232.

2008 Article 25 para 2 of Regulation 2016/796.

2009 On the ERA's opinions more generally, and in particular on its publication, see Article 10 of Regulation 2016/796.

applied, and inform the Commission accordingly.[2010] The MS shall inform the Commission of its position on the ERA's opinion within two months, including its reasons in case of disagreement. Where the reasons provided are deemed insufficient or where the MS has failed to provide them, and where the MS adopts the respective national rule without 'paying sufficient heed' to the ERA's opinion, the Commission may adopt an implementing decision according to Article 291 TFEU to the MS concerned, requesting it to modify or repeal the rule.[2011]

This regime[2012] constitutes a mixed compliance mechanism. As the first act addressed to a MS, there is the opinion of the ERA, stating non-compliance of the draft national rule and implicitly (and in a legally non-binding way) commanding compliance with it. Following adoption of national rules which are not compliant with that opinion, the Commission may adopt a decision requiring the MS concerned to modify or repeal these rules, ie to comply with Union law.

2.2.2.3. Summary and résumé

Mixed compliance mechanisms provide for both soft and hard law acts adopted by EU bodies and addressed to MS. Compliance with Union law is first 'suggested' and, if the MS does not comply, eventually ordered by law. The mixed procedures presented here appear to be more generous towards the MS than hard ones. It should be borne in mind, though, that also hard compliance mechanisms regularly provide for a possibility for the MS concerned to utter their respective view. It is not so much different rights of MS which signify the increased generosity of mixed as compared to hard compliance mechanisms, but it is the extended time frame available for the MS and the (at least temporary) reduction of legal pressure exerted on it. Mixed compliance mechanisms – or at least those presented above, regardless of whether they are laid down in primary law or in secondary law – are not so much about matters considered very urgent, but about matters which allow for some time to be settled and/or in which the EU

2010 Article 25 para 3 of Regulation 2016/796.
2011 Article 25 para 4 of Regulation 2016/796.
2012 A parallel regime is laid down in Article 26 of Regulation 2016/796 for the examination of *existing* national rules, that is to say rules which are existing already (not: drafts) at the beginning of the procedure.

has a particular interest in (trying to reach) an amicable settlement of disagreements with MS.

The sequence of acts in mixed compliance procedures regularly is that one or more soft law acts preceed one or more hard law acts. It is a tiered procedure during which the pressure on the MS to comply is gradually increased. Article 271 lit a and d TFEU, laying down a parallel procedure to Article 258 TFEU, is an example for the increased amount of time available. Also the regimes laid down in Article 7 para 4 of Regulation 806/2014 and Article 25 of Regulation 2016/796, respectively, seem to address important, but not urgent issues. They are both about the examination of drafts of MS measures by EU bodies. Drafts are not yet in force, which is why the legislator catered for a more extended formalised exchange of views between the EU and the national level here. Similar in this respect is Article 117 TFEU which applies where there is a mere 'reason to fear' that (future) national measures may distort the conditions of competition in the internal market.[2013]

Another point is the question of competence. Where the policy field at issue is delicate because it addresses traditional prerogatives of sovereign states (such as fiscal policy or penal jurisdiction) or where the involvement of EU bodies the empowerment of which is subject to strict conditions is intended, a mixed compliance mechanism may appear to be more appropriate than a hard compliance mechanism.

An example for the former are the multilateral surveillance procedure and the excessive deficit procedure. The MS as Masters of the Treaties have decided that the EU shall have a merely coordinating competence in the field of economic policy according to Article 5 TFEU. The compliance mechanisms contained in Articles 121 and 126 TFEU have to be understood in this light.[2014] While economic policy coordination and the multilateral surveillance procedure laid down in Article 121 TFEU are entirely soft, the excessive deficit procedure of Article 126 TFEU also provides for legally binding Union acts which are, however, conceptualised as the *ultima ratio* in a long-winded procedure with many possibilities for the MS concerned

2013 Article 116 TFEU, on the contrary, allows for a (hard) reaction where this risk has materialised. Taken together, as was set out above, these two provisions form a mixed compliance mechanism.

2014 As provisions of primary law, Articles 121 and 126 TFEU are not to be examined with regard to their compliance with Article 5 TFEU, but they can be assumed to be set up against the background (and in the spirit) of the competence regime addressed therein.

to show its good will to tackle its fiscal problems (and thereby prevent or at least delay the adoption of hard law on the part of the EU). What is more, a decision determining the existence of an excessive deficit or even to impose a financial sanction is to be adopted by the Council – which makes the procedure more 'political' than if the Commission were in charge. From that we can deduce that the MS intended to provide certain competences for the EU in the field of economic policy, but that they wanted the intrusion with this traditional MS prerogative to be mild. The considerable intensification of both regimes brought about by the so-called 'Six Pack' and 'Two Pack'[2015] in the course of the Euro crisis – the Regulations 1176 and 1174/2011 (transforming, in addition to a material extension, the soft multilateral surveillance procedure as laid down in Article 121 TFEU into a mixed procedure) have been addressed above – *qua* primacy of the TFEU could not do away with that approach *in principle*.[2016]

Examples for conscious limitations to the empowerment of EU bodies are the regimes laid down in Article 39 of Directive 2009/72/EC, Article 17 of Regulation 1093/2010 and Article 25 of Regulation 2016/796. All these cases involve specialised bodies mainly composed of MS representatives – European agencies which were established, among other things, to support the Commission in the implementation/enforcement of Union law.[2017] Since the amount of powers such agencies may be vested with is limited in particular by the so-called (and meanwhile reconsidered) *Meroni* doctrine,[2018] in our case specifically in order not to interfere with the Commission's central role as guardian of the Treaties (as one aspect of maintaining the EU's institutional balance), the legislator tried to do justice to the role of the Commission in the respective mechanisms. In the procedures involving the ACER and the ERA, respectively, these agencies adopt a soft law act *vis-à-vis* the MS, which may then be reinforced by the Commission in a legally binding way. In the regime laid down in Article 17 of Regulation 1093/2010 the role of the Commission is comparatively weaker, with the last act in the (possible) sequence of acts stemming from the EBA. However, with its formal opinion the Commission can largely predetermine the content of the ultimate – hard – EBA output.

2015 See Craig, Administrative Law 207–209; see also 2.2.3.2.4. below.
2016 See Antpöhler, Emergenz 382.
2017 See Commission, European Governance – A White Paper, COM(2001) 428 final, 30.
2018 See III.3.7.2.2. above and V.3.3.1. below.

In the case of Article 22 f of Council Regulation 2015/1589, the mixed character of the procedure was pre-determined in primary law – namely: Article 108 paras 1 f TFEU. The cited provisions of the Council Regulation merely concretise primary law and clarify that the Commission's proposition pursuant to Article 108 para 1 TFEU shall take the form of a recommendation.

2.2.3. Soft compliance mechanisms

2.2.3.1. In primary law

2.2.3.1.1. Article 121 TFEU

The regime of Article 121 TFEU – in a primary law perspective – constitutes a soft compliance mechanism. For examples of its concretisation by means of secondary law see 2.2.2.2.4. above and 2.2.3.2.4. below.

Under Article 121 TFEU, the Council shall monitor, *inter alia*,[2019] the consistency of MS' economic policies with the broad economic policy guidelines (for the drafting and the adoption of these BEPG see III.3.5.2.1.2. above).[2020] For that purpose, the MS shall forward information to the Commission 'about important measures taken by them in the field of their economic policy and such other information as they deem necessary'.[2021] Where it is established either that the economic policies of a MS are not consistent with the BEPG or that they risk jeopardising the proper functioning of the EMU, the Commission may address a warning to the MS concerned.[2022] On a recommendation from the Commission, the Council may – in addition to a (potential) Commission warning – address the 'necessary recommendations' to the respective MS. It may, on a proposal from the Commission, make these recommendations public.[2023] When adopting

2019 For the broader scope of multilateral surveillance see Article 121 para 3 subpara 1 TFEU.

2020 Article 121 para 3 subpara 1 TFEU.

2021 Article 121 para 3 subpara 2 TFEU.

2022 For this procedural step introduced by the Treaty of Lisbon see Louis, Economic Policy 288.

2023 For the potential 'Prangerwirkung' [pillory effect] such publication may create see Häde, Art. 121 AEUV, para 14. While the recommendations according to Article 121 TFEU are legally non-binding, and a publication is the strongest means of 'enforcement', the initiation of a Treaty infringement procedure appears possible

recommendations addressed to Eurozone MS in the framework of multilateral surveillance, the voting rights of non-euro MS in the Council shall be suspended.[2024]

In terms of the output of EU institutions *vis-à-vis* the MS, Article 121 is a sequence of soft law acts: Starting with the BEPG, a recommendation adopted by the Council, over the Commission warning[2025] and eventually ending with the Council recommendation in case of inconsistency of MS economic policies with the BEPG (which may be published[2026]).[2027] Thus, Article 121 TFEU constitutes a soft compliance mechanism.

2.2.3.1.2. Article 148 para 4 TFEU

Article 148 TFEU provides for a regime of monitoring the employment situation in the Union. The European Council shall each year consider this situation and adopt conclusions accordingly, on the basis of a joint annual report by the Council and the Commission. Against the backdrop of these conclusions, the Council shall draw up guidelines annually (on a proposal from the Commission[2028]) which the MS shall take into account in their employment policies. These guidelines shall be consistent with the BEPG adopted pursuant to Article 121 para 2 TFEU.[2029] Each MS shall provide

where a MS infringes its duty to participate in the cooperation laid down in Article 120 TFEU; see ibid, para 15, with further references.

2024 Article 139 para 4 lit a TFEU. It is not clear how the reference to 'warnings' in this provision is to be understood. After all, it is the Commission – not the Council – which may adopt a warning under Article 121 para 4 TFEU. Notwithstanding this unclarity, it seems that the understanding underlying this provision is that a warning (according to Article 121 para 4 TFEU) is a sub-category of recommendations.

2025 See Verhelst, Reform 10 f, stating that warnings are legally non-binding, but silent as to their qualification as EU soft law; referring to the policy advice contained therein: Louis, Economic Policy 288 (fn 6); for the pillory effect of warnings see Feik, Verwaltungskommunikation 428.

2026 The publication of recommendations is effected by a legally binding Council act, arguably a decision. But since this decision does not impose duties on the MS concerned and hence does not in principle alter the soft character of this mechanism, it shall be left aside here.

2027 For the distinction of these measures in *ex ante* and *ex post* mechanisms see Amtenbrink/Repasi, Compliance 154 f.

2028 And after consulting the EP, the ESC, the CoR and the Employment Committee referred to in Article 150 TFEU.

2029 Article 148 paras 1 and 2 TFEU.

the Council and the Commission with an annual report on the principal measures taken to implement its employment policy in the light of these guidelines.[2030] The Council shall then – in short – examine compliance of the employment policies of the MS with the Council guidelines, and may – on a recommendation from the Commission – make recommendations to the MS accordingly.[2031]

The compliance mechanism focussed on here is embedded in the system of Article 148 TFEU which – for reasons of contextualisation – was presented briefly. The Council recommendation according to para 4 seeks compliance of the MS concerned with EU law, namely with the (non-binding) Council guidelines for employment.[2032] The recommendation is addressed to single MS[2033] and is legally non-binding. Being adopted by the Council on the basis of the conclusions of the European Council, the latter convey high (political) authority; *Hemmann* considers them a politically 'machtvolles Instrument' [powerful instrument].[2034]

2.2.3.2. In secondary law

2.2.3.2.1. Article 6 paras 5–7 of Regulation 2019/942

The ACER disposes of a number of means to ensure – sometimes together with the Commission – compliance of the regulatory authorities in the MS.[2035] Article 6 paras 5–7 of Regulation 2019/942, based on Article 194

2030 Article 148 para 3 TFEU.

2031 For the joint annual report to the European Council see Article 148 para 5 TFEU.

2032 Such a recommendation may only be adopted upon a Commission recommendation. The Council has a wide discretion on whether, and if so: in which way, to follow the Commission recommendation (*argumentum* 'may', 'if it considers it appropriate in light of that examination'); see Hemmann, Artikel 148 AEUV, para 11. The legal status of the guidelines is not entirely clear. Apparently they are adopted in the form of a Council decision (see eg Commission Proposal COM(2017) 677 final), arguably because Article 148 TFEU does not mention the 'recommendation' as the adequate legal form; see Hemmann above, para 14; for a discussion of whether these guidelines are legally binding see Braams, Koordinierung 39 f, with further references.

2033 See Niedobitek, Art. 148 AEUV, para 18.

2034 Hemmann, Artikel 148 AEUV, para 11; for the possibility of a publication of these recommendations see Steinle, Beschäftigungspolitik 371.

2035 See eg Article 51 para 1 of Regulation 2019/943 or the mechanism addressed in 2.2.1.2.4. above.

para 2 TFEU, shall be taken as an example of a soft compliance mechanism here.[2036] At the request of one or more national regulatory authorities or the Commission, the ACER shall provide a 'factual opinion'[2037] on whether a decision of a regulatory authority complies with (binding[2038]) network codes and guidelines referred to in Regulation 2019/943,[2039] Regulation 715/2009,[2040] Directive 2019/944[2041] or Directive 2009/73/EC or with other relevant provisions of those directives or regulations. Thereby the ACER may also list which further information or other components the decision at issue should have contained.[2042] Where a regulatory authority does not comply with the opinion of the ACER within four months, the ACER shall inform the Commission and the MS concerned.[2043] Its opinion being a legally non-binding instrument,[2044] the ACER cannot force the regulatory authority to comply. This could be achieved by a Treaty infringement procedure subsequently initiated by the Commission,[2045] or – at least with regard to some of the guidelines addressed here – in an extended, and mixed, procedure as set out eg in Article 43 of Directive 2009/73/EC. In the latter case, the Commission may – following a regulatory authority's non-compliance with an ACER opinion – take a (legally binding) decision requiring the regulatory authority concerned to withdraw its decision on the basis that the guidelines have not been complied with.[2046]

2036 For another soft compliance mechanism involving the ACER see Article 63 para 8 of Regulation 2019/943.

2037 Apparently and comprehensibly so, the ACER also utters its legal viewpoint in this opinion; see Tišler, Agency 397, with regard to the predecessor provision, Article 7 para 4 of Regulation 713/2009, which depicted the opinion as 'based on matters of fact'.

2038 See eg Article 66 para 1 of Regulation 2019/943, with regard to guidelines and network codes; see also Recital 88 of Directive 2019/944. Framework guidelines – on the contrary – are explicitly qualified as non-binding (see eg Article 59 para 4 of Regulation 2019/943).

2039 See Articles 58–61 of Regulation 2019/943.

2040 See Articles 23 f of Regulation 715/2009.

2041 This Directive does not only refer to guidelines and network codes of the Commission but, misleadingly, also to guidelines of national regulatory authorities (eg in its Article 8 para 3). Since they do not constitute EU law, arguably the mechanism addressed here does not specifically aim at compliance with these acts.

2042 See case T-671/15 *E-Control*, para 74, with regard to the predecessor mechanism.

2043 Article 6 para 6 of Regulation 2019/942.

2044 See case T-63/16 *E-Control*, paras 46 f, with regard to the predecessor mechanism.

2045 See Tišler, Agency 397.

2046 Article 43 para 6 lit b of Directive 2009/73/EC.

As was mentioned above, the procedure described here constitutes a soft compliance mechanism: Upon request by a national regulatory authority or the Commission, the ACER issues an opinion determining whether or not a decision of a national regulatory authority is in compliance with the relevant EU law. No further acts are provided for in the regime of Article 6 paras 5–7 of Regulation 2019/942.

2.2.3.2.2. Article 53 of Directive 2019/944

Directive 2019/944 is based on Article 194 para 2 TFEU and concerns common rules for the internal market in electricity. Its Article 53 which is at issue here sets out restrictions on electricity transmission operations by third-country actors.[2047] Where a certification is requested by transmission system owners/operators controlled by third country nationals, the national regulatory authority shall notify the Commission.[2048] The national authority shall then adopt a (positive or negative[2049]) draft decision on the certification within four months, which shall be notified to the Commission together with the relevant information with respect to that decision. MS shall provide (in their respective national law transposing the Directive) for the national authority concerned[2050] to request, before the (final) decision is taken, an opinion from the Commission on whether a) the entity concerned complies with the requirements of Article 43 of the Directive and b) granting certification will not put at risk the security of energy supply to the EU.[2051] The Commission shall examine the request and deliver an opinion within two months (which may be extended by two months).[2052]

2047 For the parallel provision in the natural gas sector see Article 11 of Directive 2009/73/EC; see also Luca, Framework 132 f; Schweitzer, Funds 280.

2048 Article 53 para 1 subpara 1 of Directive 2019/944; see also Article 53 para 1 subpara 2 and para 2.

2049 For the legal reasons for a negative decision, a refusal, see Article 53 para 3 and para 8 of Directive 2019/944.

2050 This can be the regulatory authority or the designated competent authority according to Article 11 para 3 lit b of Directive 2009/72/EC.

2051 Article 53 para 5 of Directive 2019/944. The content of Article 43 need not be discussed any further in this context. Suffice it to say that it is the compliance with (relevant) Union law of the draft decision which is to be examined by the Commission.

2052 For the details of the Commission's examination see Article 53 para 6 subparas 1 f and para 7 of Directive 2019/944.

Where the Commission does not deliver an opinion within the prescribed period, the Commission shall be deemed 'not to raise objections to the decision' of the national authority.[2053] Upon receipt of the opinion (or expiry of the period), the national authority shall take its final decision on the certification, thereby taking 'utmost account' of the Commission's opinion (if any). The decision and the Commission opinion shall be published together. Where the final decision diverges from the Commission opinion, the MS concerned shall provide and publish, together with that decision, the reasoning underlying such decision.[2054]

Upon request of a national authority, the Commission shall send an opinion on the compliance of the authority's draft decision with specific EU law. The national authority shall take 'utmost account' of this opinion when adopting the final decision and the MS shall provide the reasons for any divergence. This emphasises the legal non-bindingness of the Commission opinion, which is why the regime is to be called a soft compliance mechanism.

2.2.3.2.3. Article 33 of Directive 2018/1972

Directive 2018/1972 on a common regulatory framework for electronic communications networks and services is based on Article 114 TFEU. Its Article 33 which shall be focussed on here is entitled 'Procedure for the consistent application of remedies'.[2055] For a certain category of (intended) measures to be taken by national regulatory authorities[2056] the Commission may, within one month, notify the national regulatory authority concerned and the Body of European Regulators for Electronic Communications (BEREC)[2057] of its reasons for considering that the draft measure would create

2053 Article 53 para 6 subpara 3 of Directive 2019/944.

2054 Article 53 para 8 of Directive 2019/944; for further details of the regime see paras 9 f *leg cit*.

2055 For a contextualisation of this procedure with regard to other procedures laid down in the very similar regime under the predecessor Directive 2002/21/EC: Kühling, Telekommunikationsrecht, para 69; for the practical application of this procedure by the Commission see ibid, para 71.

2056 Namely those specified in Article 33 para 1 of Directive 2018/1972.

2057 For an overview of organisation and tasks/powers of the BEREC see Van Cleynenbreugel, Supervision 66–68. The BEREC does not qualify as a European agency, only the Office does; <https://www.berec.europa.eu/en/berec-office/tasks-and-mission> accessed 28 March 2023. While the BEREC in the political negotiations

a barrier to the internal market or of its serious doubts as to its compatibility with Union law. In this case, the draft measure shall not be adopted for a further three months following the Commission's notification. Otherwise – ie where the Commission has not made a notification – the national authority concerned may adopt the measure, taking 'utmost account' of any comments made by the Commission,[2058] the BEREC[2059] or any other national regulatory authority.

Within six weeks from the beginning of the three months period, the BEREC shall issue a reasoned opinion on the Commission's notification.[2060] If the BEREC in its opinion (which is to be published) shares the serious doubts of the Commission, it shall cooperate closely with the national authority concerned – to which the opinion is (also) addressed – to identify the most appropriate and effective measure. The national authority may, before the end of the three months, either amend/withdraw its draft measure, taking 'utmost account'[2061] of the Commission's notification and of the BEREC opinion and advice, or maintain its draft measure.[2062] If the national authority does not withdraw its draft measure anyway, the Commission may, within one month after the end of the three months period and taking 'utmost account' of the BEREC opinion (if any): a) issue a reasoned[2063] recommendation requiring the national authority concerned to amend or withdraw the draft measure (including specific proposals to

on its establishment was originally envisaged as a European agency, these plans were later dropped by the Council and the European Parliament; see Schilchegger, Agenturen 123–125.

2058 These comments still leave it 'for [the national] authority alone to decide whether to adopt that measure and to determine its content'; see, with regard to the predecessor regime, case T-109/06 *Vodafone España,* para 161; case T-295/06 *Base*, para 61. See also para 62 of the latter Order (stressing the cooperation required between the Commission and the national authorities) and its para 69 (qualifying the comments of the Commission as 'acte communautaire préparatoire').

2059 For the authority of the BEREC's soft law output more generally see Article 4 para 4 of Regulation 2018/1971 (ie BEREC's founding regulation). For the BEREC's in-between position betwixt the Commission and the national authorities see Kühling, Telekommunikationsrecht, para 62.

2060 For further details see Article 33 para 3 of Directive 2018/1972; for the preceding cooperation between the Commission, the BEREC and the national authority see para 2 *leg cit*.

2061 See also the more general rule of Article 4 para 4 of Regulation 2018/1971.

2062 Article 33 para 4 of Directive 2018/1972.

2063 Reasons should be provided 'in particular where BEREC does not share the serious doubts of the Commission' (Article 33 para 5 lit a of Directive 2018/1972).

that end), or b) take a decision to lift its reservations indicated in the course of its notification.[2064] For specific draft measures, the regime under para 5 lit c applies. Within an extendable period of one month of the Commission having acted as provided in either alternative, the national authority concerned shall communicate to the Commission and the BEREC the adopted final measure.[2065] Where the national authority decides not to amend or withdraw the draft measure on the basis of the Commission recommendation, it shall provide 'reasons'.[2066] The national authority may withdraw the draft measure at any time during the procedure laid down in Article 33.

Let us dwell on the structure of this procedure a bit more: Its first phase may be coined by a Commission notification. While this notification is likely to establish non-compliance in a legally non-binding way, the *act* of the notification does have a legally binding effect (laid down in the Directive),[2067] namely that the national authority shall not adopt the draft measure for three months.[2068]

Where the Commission has not made a notification, the national authority shall take 'utmost account' of any comments the Commission (or other

2064 Article 33 para 5 of Directive 2018/1972.

2065 Article 33 para 6 of Directive 2018/1972.

2066 The pleonastic wording of the predecessor provision, Article 7a para 7 of Directive 2002/21/EC, obliging the national authority to provide 'reasoned justification', has been substituted by a simpler expression.

2067 Tobisch, Telekommunikationsregulierung 99–101 (with examples and with regard to the predecessor regime of Article 7a of Directive 2002/21/EC) qualifies it as 'opinion' pursuant to Article 288 TFEU. Whether the barrier to the internal market also (necessarily) constitutes a violation of EU law must be left open here.

2068 Not respecting the notification requirement would arguably lead – for non-compliance with EU law – to the non-applicability of the national measure; see Commission, Communication concerning the non-respect of certain provisions of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations, 86/C 245/05, claiming that – with regard to a similar, but hard mechanism – 'without notifying the draft to the Commission and respecting the standstill obligation, the [national measure] thus adopted is unenforceable against third parties in the legal system of the Member State in question'; for the problem of non-notification or non-compliance with the standstill period in the context of another legal act see Commission, 'The Operation of Directive 98/34/EC from 1995 to 1998', COM(2000) 429 final, paras 74 f.

bodies involved) may have made. Where these comments contain norms, they (therefore) qualify as soft law.[2069]

A second phase may only follow where the Commission has adopted a notification in the first phase. It is initiated by the (potential) BEREC opinion on the Commission's notification which shall be made public. This opinion is also addressed to the national authority which shall, when amending or withdrawing its draft measure, take 'utmost account' of it. Otherwise, the national authority shall maintain the measure. The BEREC opinion clearly is an act of EU soft law, as it contains norms (it indicates whether 'the draft measure should be amended or withdrawn' and, if so, how[2070]) and is legally non-binding (*argumentum* draft may be maintained).[2071] Where the BEREC does not share the Commission's doubts or where it does not issue an opinion, or where the national authority amends or maintains its draft, the Commission may, taking utmost account of the BEREC opinion, issue a recommendation to the national authority concerned. It thereby requires the latter to amend (and, if so, indicates in which way) or withdraw the draft measure. This is also clearly a soft law measure, as it contains norms and is legally non-binding.[2072]

The procedure is intended to cater for input from BEREC, the expert body in the field, whose main organ is composed of representatives of the national regulatory authorities,[2073] while ensuring that the Commission – as the central administrative authority of the EU 'supervising'[2074] the national authorities here – has the last (soft) word[2075] in case the BEREC in its opinion deviates from the Commission's viewpoint, does not issue

2069 For the content of comments adopted under the predecessor of Article 32 of Directive 2018/1972 (Article 7 para 3 of Directive 2002/21/EC) see Kühling, Telekommunikationsverwaltungsrecht, paras 51–53. For the guidelines adopted on the basis of the predecessor Directive 2002/21/EC see case C-410/09 *Polska Telefonia*.

2070 Article 33 para 3 of Directive 2018/1972.

2071 See also case C-632/20P *Spain v Commission*, para 85.

2072 Article 33 para 7 of Directive 2018/1972.

2073 See Article 7 of Regulation 2018/1971. Also heed the statutory independence of the BEREC as laid down in Article 3 para 3 of Regulation 2018/1971; with regard to the BEREC's independence see also case C-632/20P *Spain v Commission*, paras 119–121.

2074 Opinion of AG *Cruz Villalón* in case C-518/11 *UPC Nederland*, para 52.

2075 See Commission, EU Telecoms Reform, MEMO/09/513 (20 November 2009), para 9; critically with regard to the – in terms of the legal non-bindingness of the Commission recommendation – misleading German version of this document: Tobisch, Telekommunikationsregulierung 98.

an opinion, and/or in case the MS authority concerned amends[2076] or maintains its draft measure. Otherwise it may 'take a decision to lift its reservations indicated in accordance with [Article 33] paragraph 1'.[2077] This 'decision' does not need to be legally binding. According to the *contrarius actus* doctrine, the repeal of a soft law act may also be effectuated by a soft law act of the same kind.[2078] The specific case of para 5 lit c, which allows the Commission to take a binding decision, shall not be addressed here.[2079]

2.2.3.2.4. Article 3 para 7 of Regulation 472/2013

Regulation 472/2013, based on Article 136 in conjunction with Article 121 para 6 TFEU, aims at strengthening the economic and budgetary surveillance of MS in the Eurozone experiencing or threatened with serious difficulties with respect to their financial stability. Together with Regulation 473/2013, it forms the so-called 'Two Pack'.[2080] While making a Eurozone MS subject to enhanced surveillance – a status on the prolongation of which the Commission shall decide every six months[2081] – has a number of consequences,[2082] here we shall focus on one specific measure, as laid down in Article 3 para 7. Where the Commission, on the basis of a review mission provided for in para 5 *leg cit*, deems further[2083] measures to be required in order to address the sources or potential sources of difficulties,[2084] and the financial and economic situation of the MS concerned has significant adverse effects on the financial stability of the Euro area or of its MS, it may propose to the Council the adoption of recommendations to that MS to adopt precautionary corrective measures or to prepare a draft

2076 Where the national regulatory authority amends its draft measure *in accordance with* the BEREC opinion, the Commission in the majority of cases – ie if it does not object to the BEREC opinion in the first place – will lift its reservations pursuant to Article 33 para 5 lit b of Directive 2018/1972.
2077 Article 33 para 5 lit b of Directive 2018/1972.
2078 See III.3.8. above.
2079 If lit c is applied in a concrete case, according to the terminology applied here this will transform the regime under Article 33 into a mixed mechanism.
2080 For the 'Two Pack' more generally see Gerapetritis, Constitutionalism 54.
2081 Article 2 para 1 subpara 3 of Regulation 472/2013.
2082 See eg Borger, European Stability Mechanism 169 f.
2083 That means: measures in addition to those referred to in the rest of Article 3 of Regulation 472/2013, in particular in its paras 3 f.
2084 See Article 3 para 1 of Regulation 472/2013.

macroeconomic adjustment programme. Where the Council adopts such recommendations, it may decide to make them public.[2085]

This is a soft compliance mechanism, as it merely encompasses Council recommendations addressed to a Eurozone MS (which may be made public to increase the pressure on the MS concerned to comply). The final aim of these recommendations is to ensure that a Eurozone MS which is subject to enhanced surveillance[2086] again complies with its duties laid down in Article 120 TFEU.[2087]

2.2.3.2.5. Articles 16 and 17 of Regulation 1092/2010

Regulation 1092/2010 which is based on Article 114 TFEU sets up a regime for EU macro-prudential oversight of the financial system, in particular by creating a European Systemic Risk Board (ESRB).[2088] This ESRB may issue recommendations[2089] in accordance with Article 16 of Regulation 1092/2010 and address these general or specific recommendations, apart from the EU and specific EU bodies, to one or more MS or to one or more of the national authorities in charge of (financial market) supervision, in charge of applying measures aimed at addressing systemic or macro-prudential risk or in charge of bank resolution.[2090] These recommendations shall propose remedial action (possibly including legislative initiatives) where significant risks to the stability of the EU's financial system as circumscribed in Article 3 para 1 of Regulation 1092/2010 are identified, and shall contain a specified timeline for the policy response.[2091]

2085 For the further consequences this publication may entail see Article 3 para 8 of Regulation 472/2013.

2086 See Article 2 para 1 of Regulation 472/2013.

2087 See Wittelsberger, Art. 120 AEUV, para 3.

2088 For organisation and tasks of the ESRB see eg Weismann, Agencies 106 ff; for the composition of its General Board see Article 6 of Regulation 1092/2010.

2089 Under Article 16 of Regulation 1092/2010, the ESRB may adopt both warnings and recommendations. Whether the warnings qualify as soft law needs to be assessed case by case with a view to whether they actually contain a (soft) command. In general, warnings – unlike recommendations – may be uttered already at a stage where the risks at issue are not yet identified in full (see also Article 3 para 2 lit c and d; slightly different: Article 16 para 1). Here only the recommendations shall be addressed.

2090 Article 16 para 2 of Regulation 1092/2010.

2091 Article 16 paras 1 f and Article 3 para 2 lit b of Regulation 1092/2010. For the transmission of these recommendations to the EP, the Council and the Commission

The addressees of the recommendation shall communicate to the EP, the Council, the Commission and the ESRB the actions they have undertaken 'in response' to the recommendation, and shall 'substantiate' any inaction,[2092] '[h]ence, recommendations issued by the ESRB cannot be simply ignored'.[2093] If the ESRB establishes – 'decides' – that its recommendation has not been complied with or that the addressees have failed to provide adequate justification for their respective inaction, it shall inform the addressees, the EP and the Council and, where relevant, the ESA concerned in accordance with Article 17 para 2 of Regulation 1092/2010. While a recommendation, according to Article 16, in principle is handled confidentially by the ESRB, it may make the recommendation public under the conditions laid down in Article 18 of Regulation 1092/2010. Where the ESRB makes a 'decision'[2094] (establishing non-compliance) pursuant to Article 17 para 2 with regard to a (published) recommendation, the EP may invite the Chair of the ESRB to present its 'decision', and the addressee may request to participate in an exchange of views.[2095]

While this mechanism does not necessarily aim at ensuring compliance with detailed provisions of EU law, it aims at ensuring compliance with an important objective of the EU, namely the stability of the financial system of the EU.[2096] In this context, the ESRB shall 'contribute to the prevention or mitigation of systemic risks to financial stability in the Union that arise from developments within the financial system and taking into account macroeconomic developments, so as to avoid periods of widespread financial distress' and to 'contribute to the smooth functioning of the internal

(and possibly to the ESAs) and for the criteria for the classification of risks in the economy see Article 16 paras 3 f *leg cit*.

2092 Article 17 para 1 of Regulation 1092/2010.

2093 Commission Proposal, COM(2009) 499 final, 5.

2094 Even though the legislator in this context uses the terms 'decide' and 'decision' respectively, it is clear already by comparison with other language versions of Regulation 1092/2010 that this does not encompass a decision according to Article 288 TFEU. What is more, Article 3 para 2 of Regulation 1092/2010 does not mention a decision-making power of the ESRB.

2095 Article 17 para 3 of Regulation 1092/2010. Also this effect rather indicates legal non-bindingness.

2096 This aim can be subsumed under Article 3 TEU. For another example in which policy objectives, among others, constitute the threshold against which compliance with EU law is to be examined see Article 29 para 2 of Regulation 806/2014; see 2.2.1.2.3. above; also note, in this context, the wording of Article 4 para 3 subpara 3 TEU.

market and thereby ensure a sustainable contribution of the financial sector to economic growth'.[2097] While the concrete requirements to reach this objective may be, but are not necessarily explicitly laid down in EU law, the ESRB may explicate them in its recommendations.[2098]

This compliance mechanism is a soft mechanism, as it entails a recommendation addressed – among others – to one or more MS or to one or more of the relevant national authorities. This recommendation is legally non-binding,[2099] but non-compliance needs to be adequately justified by the MS/national authority concerned. The ESRB may increase the pressure to comply, or at least to justify non-compliance, by publishing the recommendations at issue.

2.2.3.2.6. Article 6 of Regulation 2019/452

The 'cooperation mechanism' laid down in Article 6 of Regulation 2019/452 establishing a framework for the screening of foreign direct investments into the Union, based on Article 207 para 2 TFEU, relates to foreign direct investements undergoing screening.[2100] Screening in this context means 'a procedure allowing to assess, investigate, authorise, condition, prohibit or unwind foreign direct investments'.[2101] A screening is applied to foreign direct investments on the grounds of MS' security or public order. It is performed by the MS.[2102] According to this provision, MS shall notify the Commission and the other MS of any foreign direct investment in their territory that is undergoing screening by providing certain information on it (eg the ownership structure of the foreign investor or the approximate value of the foreign direct investment[2103]). This notification may include a list of MS whose security or public order is deemed likely to be affected.[2104]

2097 Article 3 para 1 of Regulation 1092/2010.
2098 For the importance of the EU's objectives for the interpretation of Union law see eg Terhechte, Art. 3 EUV, para 12.
2099 See Ruppel, Finanzdienstleistungsaufsicht 109.
2100 For the cooperation mechanism regarding investments not undergoing screening see Article 7 of Regulation 2019/452.
2101 Article 2 para 3 of Regulation 2019/452.
2102 For the fact that these issues largely fall within the prerogatives of the MS see, even if in a different context, Articles 72–74 TFEU.
2103 See Article 9 para 2 of Regulation 2019/452.
2104 For this and further content of the notification see Article 6 para 1 of Regulation 2019/452.

Other MS, if they feel affected in that way or if they have information relevant for the screening, may comment *vis-à-vis* the MS undertaking the screening, normally within 35 days of being informed[2105] (also informing the Commission thereof, which shall again inform the remaining MS).[2106]

Where the Commission considers that a foreign direct investment is likely to affect more than one MS in the above way, or where it has relevant information on that investment, it may issue an opinion to the MS undertaking the screening. The Commission in principle *may* issue an opinion irrespective of whether there have been comments from the other MS, but *shall* issue an opinion ('where justified'), if at least one third of the MS consider that a foreign direct investment is likely to affect their security or public order. The Commission shall adopt its opinion normally within 35 days of being informed,[2107] and it shall inform the other MS that an opinion was issued.[2108] Both the MS' comments and the Commission's opinion shall be reasoned ('duly justified')[2109] and announced in advance.[2110]

Where a MS, as a result of its examination, duly considers that a foreign direct investment in its territory is likely to affect its security or public order, it may request the Commission to issue an opinion or other MS to provide comments.[2111]

Where the MS undertaking the screening exceptionally considers that its security or public order requires immediate action, it shall notify the other MS and the Commission that it intends to take a screening decision before the expiry of the deadlines for comments and opinions referred to above (normally 35 days). The other MS and the Commission shall then attempt 'to provide comments or to issue an opinion expeditiously'.[2112]

2105 For the various deadlines set in this context see Article 6 para 7 of Regulation 2019/452.
2106 Article 6 para 2 of Regulation 2019/452.
2107 For the deadline regime see Article 6 para 7 of Regulation 2019/452.
2108 Article 6 para 3 of Regulation 2019/452. For the effects of this opinion see also de Kok, Framework 45.
2109 Article 6 para 5 of Regulation 2019/452.
2110 For the *ex ante* notification procedure and for requests for further information see Article 6 para 6 of Regulation 2019/452.
2111 Article 6 para 4 of Regulation 2019/452.
2112 Article 6 para 8 of Regulation 2019/452.

The MS taking the final screening decision shall give 'due consideration'[2113] to the comments of the other MS and the Commission opinion.[2114]

The opinion of the Commission is a legally non-binding act, a soft law act.[2115] It aims at furthering an objective not only of the MS, but also of the EU, that is to protect security and public order. Therefore it is (also) about compliance with EU law. Since no (binding) follow-up action to a MS's non-compliance is provided for, this is a soft compliance mechanism.

2.2.3.3. Summary and résumé

Soft law acts are legally non-binding. The fact that some provisions require MS to take 'utmost account' may express enhanced (political) authority.[2116] EU soft law acts do not only 'preserve' MS competences, granting the power to adopt them may[2117] also 'preserve' the institutional balance of the EU. This is why EU bodies not established by primary law (in particular: European agencies), in an attempt to stay within the frame set by *Meroni*,[2118] are often vested with the power to adopt soft law acts, less often with hard law powers.[2119] The soft compliance mechanisms addressed here reflect this situation – as do the mixed mechanisms above (see the explanations under 2.2.2.3.).

Soft compliance mechanisms are the least intrusive compliance mechanisms in the categorisation applied here. As the hard and mixed compliance mechanisms, they can be found in various policy fields. As regards the two mechanisms laid down in primary law, it is apparent that they both are used in delicate policy fields – economic policy and employment policy –

2113 The Commission's legislative proposal (leading to Regulation 2019/452) still required the MS to take 'utmost account' of the Commission's opinion and to provide an explanation to the Commission in case it did not follow it; Article 9 para 5 of Commission Proposal COM(2017) 487 final.

2114 Article 6 para 9 of Regulation 2019/452.

2115 See also Commission Proposal COM(2017) 487 final, 3 (Explanatory Memorandum).

2116 For (potentially) different degrees of authority see V.3.5. below.

2117 Critically: Cannizzaro/Rebasti, Soft law 230.

2118 For the *Meroni* doctrine see III.3.7.2.2. above; for its importance in the context of the EU's institutional balance see also V.3.3.2. below.

2119 See eg Ştefan/Petri, Review 531 f, with respect to the ACER.

in which the EU has only limited competences.[2120] Against this background, it is understandable that the MS (as Masters of the Treaties) have chosen the type of compliance mechanism which puts the least strain on MS competences.

As regards our selection of soft compliance mechanisms laid down in secondary law, the following can be said. Under the regimes of Article 6 paras 5–7 of Regulation 2019/942, Article 53 of Directive 2019/944 and Article 33 of Directive 2018/1972, it is a (draft) decision of a national authority which is assessed with a view to its compliance with the relevant Union law. This assessment may be expressed by a soft law act of the Commission and/or a specialised EU body (European agency). Article 3 para 7 of Regulation 472/2013 is one more mechanism within the framework of the multilateral surveillance procedure. It applies only to Eurozone MS and provides for Council recommendations as a means of ensuring compliance of these MS with the relevant Union law. Its softness is sketched out in Article 121 TFEU. Articles 16 f of Regulation 1092/2010 empower the ESRB to issue recommendations, *inter alia* to the MS. What is special about this compliance mechanism is that it is about compliance with an objective of the EU. This objective – in broad terms – is laid down in Union law. Thus, it can be argued that also this mechanism is about MS' compliance with Union law. The broad objective – the stability of the EU's financial system – and its affecting national policy choices, but also the empowerment of a newly established body may have been the reasons for the legislator to content itself with the soft shape of this procedure. According to Article 6 of Regulation 2019/452, the Commission addresses an opinion to a MS in order to ensure that foreign direct investments do not go against MS' security or public order – again, this procedure seems to be intended to leave enough room for national policies.

2120 For the similarity of the competence categories 'economic policy' and 'employment policy' see Article 5 TFEU; see also Krebber, Art. 145 AEUV, para 1.