V. CLASSIFICATION AND LEGAL ASSESSMENT OF COMPLIANCE MECHANISMS

1. Introduction

Having presented a range of different compliance mechanisms in Part IV above, namely those laid down in primary law and a selection of those laid down in secondary law, we shall now address this material, as it were, with a view to its classification and with a view to its legal assessment, thereby also resorting to the more general findings on EU soft law which Part III above resulted in. It is important to bear in mind that our basis for discussion – to the extent it is composed of compliance mechanisms laid down in secondary law – is only exemplary. The conclusions made in this respect first and foremost relate to these examples. They will be of use also in the context of compliance mechanisms which are not addressed here, in which many of the properties of our sample recur, but they cannot claim universality in the sense that they could simply be 'extrapolated' to other compliance mechanisms.

The above categories of hard, mixed and soft mechanisms are one way to structure the large number of compliance procedures laid down in EU law. As most classifications, it entails a certain simplification in order to facilitate an image and an understanding of reality. It ought to be emphasised that this taxonomy does not intend to suggest too strict a separation of these three categories. Exceptionally, there is room for different interpretations which may lead to categorial overlaps within one mechanism.[2121] What is more: Where the Commission, as the most prominent actor in the mechanisms presented above, is empowered to perform a hard mechanism, in practice it may, *qua* Article 292 TFEU, address a recommendation to

2121 See eg Article 108 TFEU. With regard to new aids it lays down, according to para 2 *leg cit*, a hard mechanism. With regard to existing aids it may be perceived – if the measures to be proposed pursuant to para 1 *leg cit* are qualified as soft law (in Articles 22 f of Council Regulation 2015/1589 the term 'recommendation' is used; see IV.2.2.2.2.2. above) – as a mixed mechanism. Where this qualification is refused, and thus the proposal of measures is located below the level of soft law, the mechanism remains to be hard.

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the MS concerned prior to adopting a decision and thereby render the mechanism, in its application in the concrete case, a mixed mechanism.[2122]

The classification in terms of the legal quality of the output adopted on the part of the EU actors involved was chosen here because it is the use of soft law which builds the focus of this work. Notwithstanding, there are other factors according to which the mechanisms presented here could be structured, eg the (number of) EU actors involved (mono-, bi- or even poly-institutional mechanisms), the respective policy-field, whether it is a general or a special mechanism, whether its application constitutes day-to-day administration or forms the reaction to an emergency situation), etc. These and other factors shall be addressed in the following chapter on classification (2.).

At first, the actors involved in the compliance mechanisms shall be singled out with a view to getting an idea of where the mechanisms are to be localised in an institutional perspective. After all, compliance mechanisms do not only entail procedural questions such as the sequence of acts or substantial questions such as the material law to be applied, but they also raise institutional questions (2.1.). Then the policy fields within which the compliance mechanisms presented here have been established shall be looked at with a view to answering the question whether there are certain (types of) policy fields which are more likely to display compliance mechanisms than others (2.2.). This matter is strongly connected to the question of the legal basis of (secondary law-based) compliance mechanisms.[2123] Eventually, the output-related structure of the mechanisms shall be referred to. While the categorisation in hard, mixed and soft mechanisms was applied in Part IV, here the sequence of EU output in the single procedures shall be pinpointed with a view to better understanding their respective structure (ie their 'logic'; 2.3.). Another point to be addressed is the various purposes of providing for the adoption of soft law acts in compliance mechanisms. Against the background of the purposes of soft law more generally, as addressed under III.5. above, here we shall try to reveal and after that discuss the purposes of the soft law acts provided for in (mixed and soft) compliance mechanisms (2.4.). A further point of interest is the deviation from the Treaty infringement procedure, the general compliance mechanism and hence the

2122 See III.3.4.3.2. above.

2123 The legal bases of compliance mechanisms shall be recapitulated and analysed in more depth in the chapter on the legal assessment of the compliance mechanisms (see 3.2. below).

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genuine point of reference in this context: While it is apparent that the special compliance mechanisms are all different from the latter in one or the other respect, it shall subsequently be explored in which way exactly they deviate from it (2.5.). Finally, the question why a concrete compliance mechanism 'looks the way it looks' shall be addressed, and a number of the multifaceted (actual or potential) reasons for the various designs of compliance mechanisms (efficiency considerations, weak EU competence, genuinely 'political' reasons, etc) shall be disclosed (2.6.).

With respect to the legal assessment of the above compliance mechanisms, the distinction between implementation and enforcement in the system of the Treaties and the characteristics of either of these categories shall be fleshed out. This distinction is central for various aspects of the legal assessment of the compliance mechanisms, which is why it stands at the beginning of Chapter 3 (3.1.). This leads us to the question of legality. Against the background of their categorisation in terms of implementation and enforcement, the secondary law-based compliance mechanisms presented above shall be examined with a view to the primary law provisions on which they are based. In this context Article 114 TFEU, as the most frequently used legal basis, stays in the centre of the discussion. Other, more specific legal bases for the establishment of compliance mechanisms shall be approached thereafter (3.2.). In this context, we can also draw on the general discussion on the (primary law) competences of soft law contained in Part III (III.3.4. above). Subsequently, we will turn to the EU's institutional balance. It shall be scrutinised whether the secondary law-based compliance mechanisms distort this competence-related balance, in particular: whether they constitute – on their respective own or *in toto* – an unlawful deviation from the Treaty infringement procedure, or whether they are in accordance with this equilibrium (3.3.). As a next step, secondary law-based compliance mechanisms shall be perceived against the background of the principles of subsidiarity and proportionality, and the question to which extent these principles (should) influence the design of soft, mixed and hard mechanisms shall be addressed (3.4.). After that, the allegedly different effects of soft law with special attributes (eg requiring 'utmost account' to be taken of them) as compared to 'regular' soft law shall be examined with a view to whether the former display a higher authority than the latter and whether therefore a hierarchy of soft law can be established in this context (3.5.). Eventually, the judicial review MS can avail themselves of against the EU output adopted in the course of compliance mechanisms

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shall be presented, thereby also drawing from the results of Chapter III.6. above (3.6.).

2. Classification

2.1. The EU actors involved in compliance mechanisms

One way of looking at the above compliance mechanisms is to take an institutional perspective, that is to say to consider the EU bodies[2124] involved, and among them in particular the originators of output addressed to the MS concerned.[2125] Let us begin with the general compliance mechanism: The Treaty infringement procedure places the Commission at the core of the first, the administrative part of the procedure. Even in the rarely applied variant pursuant to Article 259 TFEU, which grants the MS the power to launch an infringement procedure before the Court, the Commission may step in, in its genuine role as guardian of the Treaties. Only after the Commission has adopted its opinion or where it does not deliver a reasoned opinion within three months, the MS may bring the matter before the Court. While the Court takes the final decision on whether or not a MS has failed to fulfil an obligation under the Treaties, the Commission dominates the procedure, as it has a large measure of discretion in deciding whether or not the procedure is initiated in the first place;[2126] as it has considerable leeway as to whether and, if so, when[2127] it files an action with the Court; as it may – in negotiations with the MS concerned and hence 'diplomatically' – settle the dispute before or after the CJEU is addressed and therefore (or for other reasons, thereby again disposing of a certain

2124 In compliance mechanisms *vis-à-vis* MS the non-EU actors are – as a matter of course – in particular the MS concerned (including its authorities).

2125 For the increasing organisational 'Europeanisation' of the enforcement of EU law (also *vis-à-vis* individuals) see Scholten, Trend.

2126 For an early example of the Court criticising the Commission's hesitation in this context: case 43/75 *Defrenne*, paras 72 f.

2127 See case C-177/03 *Commission v France*, paras 17 f; see also Gil Ibáñez, Supervision 174, including references to further case law.

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latitude[2128]) end the procedure until the hearing before the Court.[2129] The dominance of the Commission extends to the sanctions regime pursuant to Article 260 TFEU, which is generally shorter and has 'a much narrower ambit [than Article 258 TFEU]',[2130] but still leaves room for (also informal) communication between the Commission and the MS concerned.[2131] In spite of procedural differences, the core role of the Commission as 'promoter' of compliance with EU law *vis-à-vis* the MS is undisputed also in the procedures laid down in: Article 108 para 2, Article 114 para 9 (here, similar to Article 259 TFEU, also MS may act as promoters), Article 348 para 2 TFEU. According to Article 271 TFEU, exceptionally (ie under the conditions laid down in this provision) it is the EIB, and the ECB respectively, which enjoy the powers conferred upon the Commission by Article 258 TFEU.

Under Article 106 para 3 TFEU it is the Commission only which is empowered to ensure MS' compliance with EU law in the case of public undertakings and undertakings to which MS have granted special or exclusive rights.

According to other regimes laid down in the Treaties, the Commission is involved in ensuring MS' compliance with EU law, together with the Council (Articles 121, 126, 144 and 148 para 4 TFEU) or together with the European Parliament and the Council (Articles 116 f TFEU).

The dominance, or at least strong involvement, of the Commission in – leaving the exceptional variants to the Treaty infringement procedure according to Article 271 TFEU apart – all compliance mechanisms laid down in the Treaties, also beyond Articles 258 and 260 TFEU, fleshes out the role of the Commission as guardian of the Treaties as enshrined in Article 17 TEU.[2132]

2128 For the example of the closing of infringement procedures (a so-called *classement*) and the treatment of complaints in the area of gambling in order 'to be more strategic in enforcing EU law' see Commission, Press release of 7 December 2017, IP/17/5109.

2129 See Articles 147 f of the Rules of Procedure of the Court of Justice; see also eg European Parliament, 'The relationship between the Commission acting as guardian of the EU Treaties and complainants: Selected topics' (Note, 2012) 6 f.

2130 Joined cases C-514/07P, C-528/07P and C-532/07P *API*, para 119, with further references.

2131 See Andersen, Enforcement 103.

2132 See also Commission, 'A Europe of Results – Applying Community Law', COM(2007) 502 final, 3 f.

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As regards (our selection of) compliance mechanisms laid down in secondary law the scene looks decidedly different. In the hard mechanisms we can perceive an involvement of the Commission which ranges from it being the sole promoter (Article 13 para 1 of Directive 2001/95/EC) to the Commission being supported by the expertise of European agencies (Articles 70 f of Regulation 2018/1139, EASA; Article 63 of Regulation 2019/943, ACER) or to (other) MS being involved (safeguard clauses), to the Commission being ousted by newly established European agencies (Article 29 para 2 of Regulation 806/2014, SRB; Articles 18 f of Regulation 1093/2010, EBA).

In the context of mixed compliance mechanisms, it is apparent that powers are frequently shared between the Commission and European agencies, with either the Commission (Article 63 of Directive 2019/944, ACER; Article 25 of Regulation 2016/796, ERA) or the respective agency (Article 17 of Regulation 1093/2010, EBA) taking the upper hand.[2133] In one instance the Commission alone[2134] (Articles 22 f of Council Regulation 2015/1589), in another instance a European agency alone (Article 7 para 4 of Regulation 806/2014, SRB) conducts the respective compliance procedure. In the excessive imbalance procedure as laid down in Regulations 1176/2011 and 1174/2011, it is the Council together with the Commission.

When it comes to soft compliance mechanisms, there are again regimes providing for the Commission alone as promoter of compliance (Article 53 of Directive 2019/944; Article 6 of Regulation 2019/452), for the Commission together with another body (Article 6 paras 5–7 of Regulation 2019/942, ACER; Article 33 of Directive 2018/1972, BEREC) or for other institutions (Article 3 para 7 of Regulation 472/2013, Council) or bodies (Articles 16 f of Regulation 1092/2010, ESRB) on their respective own.

In case of some of the above – hard, mixed, or soft – regimes, the MS (eg in the form of national authorities) have the right to request the initiation

2133 See Alberti, Actors 40 f; for a further category of compliance instruments involving European agencies see the example of the 'alert-warning system'; see Roadmap on the follow-up to the Common Approach on EU decentralised agencies 1, 2; see also eg Vos, Agencies 31 ff. For the 'political and not […] legal dimension' of this tool see Commission, 'Progress report on the implementation of the Common Approach on EU decentralised agencies', COM(2015) 179 final, 7.

2134 Only later in the procedure the CJEU may take over the lead; see Article 28 of Council Regulation 2015/1589.

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of the respective procedure, hence they are additionally involved.[2135] This ought to be mentioned here, even though the focus of this sub-chapter is on EU actors participating in compliance mechanisms.

In conclusion, we can say that a comparison between compliance mechanisms laid down in primary law and compliance mechanisms laid down in secondary law with regard to the actors involved (and in particular the originators of output addressed to the MS concerned) shows that the dominance of institutions in primary law is relativised in favour of newly established bodies, not only but in particular European agencies.[2136] Since the Commission takes the lead or is at least engaged in most of the respective processes (often with a comitology committee being involved[2137]) it can be depicted as a constant. It is therefore fair to say that also with regard to the secondary law-based mechanisms presented here, the Commission – in a holistic perspective – is the main guardian of MS' compliance with EU law.

Another (potential) actor is the CJEU. While it is addressed in the context of the Treaty infringement procedure, its involvement, above all on the basis of Article 263 TFEU, hovers over all hard and mixed mechanisms. The Court is the highest-ranking interpreter of EU law and may, in the course of an annulment procedure, authoritatively decide on whether or not an act of an institution, body, office or agency of the Union which is intended to produce legal effects *vis-à-vis* third parties is in compliance with (higher-ranking) EU law. It may exercise the latter competence (only) when called upon (in particular by the MS concerned) in the course of or following the application of one of the above mechanisms, except for the soft ones. Since EU law acts not intended to produce legal effects *vis-à-vis* third parties pursuant to Article 263 para 1 TFEU are excluded from judicial

2135 See in particular Article 114 para 9 and Article 348 para 2 TFEU, Articles 11 and 39 of Directive 2009/72/EC, Article 17 of Regulation 1093/2010, Article 7 para 4 of Regulation 806/2014, Article 6 paras 5–7 of Regulation 2019/942. In other mechanisms the competent EU actor may act upon a notification by one or more MS.

2136 Describing the role of agencies in enhancing compliance as application of a 'coercive strategy' and a 'persuasive strategy' (among other measures: soft law): Versluis, Catalysts 179; for the activity of European agencies or comitology committees leading to an institutionally mixed (EU) administration see Orator, Möglichkeiten 25, with further references; see also Britz, Verwaltungsverbund 51–53.

2137 For an early example of a compliance mechanism provided for in the field of air safety and for the questionable role the advisory committee of MS representatives has played in a rather 'political' case see Gil Ibáñez, Exceptions 164 f.

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review, with soft mechanisms the route of an annulment procedure is not available to the MS (nor to any other of the potential claimants listed in Article 263; see also 3.6. below).

The competences the CJEU may exert with regard to hard and mixed compliance mechanisms should always be borne in mind as a potential add-on to the respective procedure, even if – unlike in the case of the Treaty infringement procedure and its variants – in a *locus legis* perspective they are laid down separately. The possibility of an application for judicial review with the CJEU in all hard and mixed mechanisms may be perceived as constituting a common factor with the Treaty infringement procedure and its variants, may the applicants in the former group of procedures be the MS concerned.[2138] While it is inherent in the Treaty infringement procedure and its variants, and not a separate procedure as in case of the other compliance mechanisms concerned, from a perspective of legal certainty the CJEU performs a similar role, namely that of a final authority which is only potentially addressed. On the other hand, there are significant differences between these procedures, in particular regarding their respective *telos*: While the Treaty infringement procedure is aimed at establishing whether or not a MS has violated EU law, in the annulment procedure the Court primarily examines the legality of a Union act. Here the Court, if at all, considers the lawfulness of MS action only indirectly.

The possibility of an involvement of the Court always exists, but in practice it does not always materialise. By far not all legally binding acts adopted in the course of a compliance mechanism and addressed to a MS are made subject to judicial review (for various reasons[2139]), and, as was mentioned above (IV.2.1.2.), the vast majority of Treaty infringement procedures which are initiated end prior to the Court having rendered its judgement. Thus, in the given context, the Court as highest interpreter of EU law only sometimes comes into play directly, and in most cases the

2138 With regard to the Treaty infringement procedure, in practice this is only exceptionally the case.

2139 Take the example of the fine imposed on Austria for the misrepresentation of government debt by Council Implementing Decision 2018/818 (based on Regulation 1173/2011), against which Austria refused to file an action for annulment. This was because on the one hand it feared that the CJEU could increase the fine, and on the other hand the *Bund* as addressee of the fine could, according to national law, claim a refund from the *Land* Salzburg whose authorities actually took the incriminated action; see <https://derstandard.at/2000086136034/Oesterreich-bezahlt-Millionenstrafe-der-EU-nach-Salzburger-Finanzskandal> accessed 28 March 2023.

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allegedly correct interpretation of EU law is, for a concrete case, determined by other EU actors. This interpretation will usually be based on previous case law of the Court (if any), which allows the latter to indirectly influence these cases.

2.2. The policy fields and the primary legal bases concerned

All of the specific compliance mechanisms addressed above must root in a policy field in which the EU is competent to act. In addition to that, they must all be based on the Treaties, either directly or indirectly. If the compliance mechanism is laid down in primary law only, the legal basis indicates the policy field. Also in case of compliance mechanisms laid down (also) in secondary law, the policy field concerned and the primary legal basis applied regularly correspond to each other. If not, the legislator may have chosen the wrong legal basis, resulting in the unlawfulness of the act of secondary law.

While the Treaty infringement procedure due to its general scope cannot possibly be assigned to a specific policy field, the other primary law mechanisms – except for the variants of the Treaty infringement procedure, as laid down in Article 271 TFEU – are mainly laid down in the field of approximation of laws, competition law and economic policy. As regards the secondary law mechanisms, Article 114 TFEU – regardless of whether the mechanisms are hard, mixed or soft – is by far the most frequently applied legal basis, by a wide margin followed by other legal bases, such as those on economic, transport or energy policy. While the selection of secondary law compliance mechanisms taken here may not be representative in all respects, the frequency with which the legislator made use of Article 114 TFEU is significant and it appears to indicate the importance of Article 114 TFEU as a legal basis for compliance mechanisms also beyond this selection. This marries well with the fact that Article 114 TFEU in general is considered one of the most important legal bases for secondary law.[2140] As Article 114 TFEU relates to nothing less than the establishment and functioning of the internal market and hence has a very broad scope, it does not come as a surprise that also the legislative acts based on it provide for compliance mechanisms in a wide range of areas, such as

2140 See eg Classen, Art. 114 AEUV, para 5.

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product safety, electronic communications or the supervision of banks.[2141] What is more, Article 114 TFEU not only provides for the incorporation of safeguard clauses in secondary law, in its paras 4 ff it contains a compliance mechanism itself. The latter may have served as a source of inspiration for one or the other compliance mechanisms based on this provision.

In conclusion, we can say that compliance mechanisms are established in all kinds of policy areas, and that the prevalence of Article 114 TFEU as a legal basis for setting-up compliance mechanisms does not result in the possibility to assign them all to one concrete policy area. Due to the malleability of Article 114 TFEU and the encompassing nature of the EU's internal market concept, the contrary is the case. While this brief account of the primary legal bases used may therefore have helped little in localising our selection of compliance mechanisms, fleshing out the importance of Article 114 TFEU also in this context suggests a closer examination of what all (in particular: which kinds of compliance mechanisms) may be based on this provision (see 3.2.2. below).

2.3. The sequence and addressees of acts in compliance mechanisms

As regards the structure in terms of (individual-concrete) output (hard law, soft law), the mechanisms presented above can also be classified in terms of the peculiar sequence and the addressees of these acts.[2142] The Treaty infringement procedure according to Article 258 TFEU provides for two acts: a soft law act, the reasoned opinion adopted by the Commission, and a hard law act, the judgement of the CJEU. The procedure follows the concept that first there should be an attempt to convince the MS concerned by means of soft law, and only when this attempt turns out to be unsuccessful, an intervention by means of law should be made (law as *ultima ratio*).[2143]

2141 The scope of what is now Article 114 TFEU can be reduced by the creation of more specific legal bases, eg Article 194 TFEU on energy policy; for a compliance mechanism based on the latter Article see IV.2.2.1.2.4. above. Its predecessor was contained in Regulation 714/2009 which was still adopted on the basis of Article 95 TEC (the predecessor of Article 114 TFEU).

2142 For a classification of similar 'models of enforcement', taking account, among other things, of the legal (non-)bindingness of the respective output see Scholten/Ottow, Design 85 ff.

2143 For the role of the Commission opinion under Article 259 TFEU see 2.4.2. below. That the advantages of such a tiered approach may, according to the Court, be used also in other contexts is exemplified in case 245/81 *Edeka*, para 22; for

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Most of the hard compliance mechanisms addressed here are composed of only one act. An exception forms Article 108 para 2 TFEU which provides for a Commission decision (potentially) to be followed by a Court judgement. In derogation from Articles 258 f TFEU, the Commission (or any other interested MS) may directly refer the case to the CJEU if the MS addressed by the Commission decision does not comply with it within the prescribed time. Similarly, also the mechanism laid down in Article 114 TFEU may result in two subsequent acts. Another exception are Articles 18 f of Regulation 1093/2010, according to which the EBA addresses a decision to a national authority (for our purposes that means: a MS[2144]) which may – if not complied with – be followed by a decision addressed directly to the financial institution/financial sector operator concerned, with a (material) blocking effect preventing the competent authorities concerned from ruling on this matter in a different way and hence having legal effects also for the respective MS.[2145]

The mixed compliance mechanisms show a more complex structure. This is hardly surprising, as they – *qua* being mixed – need to provide for at least two acts: a soft one and a hard one. In all our examples of mixed procedures, a hard law act is preceded by a soft law act. While EU law does not provide for any automatism in this respect, this sequence seems to confirm that the law-maker provides for an attempt to convince the MS by means of soft law, which is perceived as less dominating or even less aggressive and is actually less strongly interfering with (potential) MS prerogatives. Only where soft law acts fail in reaching this objective, that is to say where they are not complied with, a hard law act may be adopted to follow. This logic (which is known from the Treaty infringement procedure and its variants

another example in the context of information-gathering by the Commission in competition law see Article 18 paras 2 f of Council Regulation 1/2003. While the procedure was obligatorily tiered under Regulation 17/62 (case 136/79 *National Panasonic (UK)*, para 10), according to the letter of the law of Regulation 1/2003, the soft and the hard request for information may as well be used as alternatives; for the discretion the Commission has in this context see Hennig, Auskunftsverlangen, para 19.

2144 See also 3.1.1.2.1.3. below.

2145 The 'competent authority' may not only be national authorities but may – in the field of banking supervision – also be the ECB as empowered under the SSM; see Article 4 para 2 (i) of the Regulation 1093/2010 (as amended). In this case, it would be the ECB as an institution of the EU which is affected by the EBA decision; critical of the partial superiority of the EBA as compared to the ECB: Weismann, Agencies 195.

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according to Article 271 TFEU) is followed in the mechanisms laid down in Articles 116 f TFEU, in Article 63 of Directive 2019/944, in Articles 22 f of Council Regulation 2015/1589, in Article 7 para 4 of Regulation 806/2014 and in Article 25 of Regulation 2016/796. All of these procedures provide for a soft law act adopted by the Commission (exceptionally: EIB/ECB) or a European agency (ACER, SRB, ERA) which is followed by a hard law act adopted by one (exceptionally: two) EU institutions (exceptionally: the SRB).

Slightly extended is the procedure laid down in Article 17 of Regulation 1093/2010, in which the recommendation of the EBA may be reinforced by the Commission's formal opinion. If also the latter is not complied with, the EBA may address a decision directly to a financial institution/financial sector operator. In the specific case of the prevention of the use of the financial system for the purpose of money laundering or of terrorist financing, where the relevant legislative acts are not directly applicable to financial sector operators, the EBA decision addressed to the financial sector operator concerned is preceded by a decision addressed to the respective national authority.

An almost flamboyant compliance mechanism in the categories discussed here is Article 126 TFEU. It starts with a Commission opinion which may be followed by a Council decision together with Council recommendations. If the recommendation is not complied with, the Council may give notice to the MS to take the respective measures by means of a decision. When also this does not help, the Council may impose sanctions (by means of a decision), and intensify them (by means of another decision), if need be. If we split this long-winded procedure, we can see that also here the logic described above is followed: The Commission opinion suggesting that there is an excessive deficit may be followed by a Council decision stating that – in a legal understanding – there actually is an excessive deficit. This decision is combined with Council recommendations initiating the next step of the procedure. Where these recommendations on how to remedy the excessive deficit in due time are not complied with, the Council may reinforce them by giving notice to the MS in the form of a decision. Where the MS does not react to this decision in a satisfying way, either, the Council may – as a third step – sanction the MS by means of a decision, and intensify the sanctions respectively (again by means of a decision).

Also the excessive imbalance procedure laid down in Regulations 1176/2011 and 1174/2011 needs to be split in order to understand the *telos* of the sequence of soft and hard law acts. At first, there is a Council rec-

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ommendation regarding the existence of an excessive imbalance, followed by a Council recommendation reacting to a corrective action plan submitted by the MS concerned. This recommendation lays down the details of implementation or requests the MS to submit a new action plan. If this recommendation is not complied with, there may be a Council decision establishing the MS' non-compliance with the last recommendation (this meets again the above described logic: soft exhortation, hard reinforcement), possibly (and only for euro MS) combined with a sanctioning decision (imposing an interest-bearing deposit), and a recommendation setting new deadlines. This recommendation initiates the second part of the procedure: The Council shall impose an annual fine where in one and the same procedure there are two successive Council recommendations requesting the submission of a new corrective action plan or two successive Council decisions establishing non-compliance.

Similarly to the hard mechanisms addressed here, also the selection of soft mechanisms is often composed of one act only. An explanation for this could be that within a soft mechanism a soft law act cannot be reinforced by a more compelling subsequent act. However, this argumentation does not consider the fact that also soft law acts may entail different degrees of authority, eg depending on the body adopting the act or, less often, on the category of act (see 3.5. below). This is exemplified by the procedure laid down in Article 33 of Directive 2018/1972, starting with mere comments of the Commission and potentially followed by a BEREC opinion, which may – in case of non-compliance by the MS addressed – again be intensified by a Commission recommendation. Thus, the regime of Article 33 provides for two (including the notification or comments: three) soft law acts aimed at ensuring compliance of a MS with EU law, the BEREC opinion and the Commission recommendation. The fact that both acts essentially serve the same purpose, to ensure compliance with EU law that is, but are named differently – opinion on the one hand, recommendation on the other hand – confirms the close proximity of these two acts. However, in accordance with the low-key conceptual distinction between recommendations and opinions fleshed out above, we can see that the (BEREC) opinion mainly reacts to the Commission notification, whereas with the (Commission) recommendation its commanding character – a concrete (soft) command to a national authority to amend or withdraw the draft measure – is emphasised (see III.3.1.1. above). This procedure allows for both the Commission and an expert body to be involved and is, in that respect, similar to some of the mixed mechanisms. Also the multilateral surveillance procedure pursuant

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to Article 121 TFEU provides for a sequence of two soft law acts seeking to ensure compliance by the MS. The BEPG adopted by the Council in the form of a recommendation are the primary threshold against which compliance with EU economic policy is to be examined. In the course of this examination procedure, the Commission may address a soft law act (a warning) to a MS which may be reinforced by a Council recommendation.

The soft law mechanism enshrined in Article 148 TFEU (Council recommendation) allows for one soft law act to be adopted. Within this category also fall the procedures laid down in Article 6 paras 5–7 of Regulation 2019/942 (ACER opinion), Article 53 of Directive 2019/944 (Commission opinion), Article 3 para 7 of Regulation 472/2013 (Council recommendation), Articles 16 f of Regulation 1092/2010 (ESRB recommendation) and Article 6 of Regulation 2019/452 (Commission opinion).

The output adopted by EU actors is regularly directed to one or more MS. Sometimes the addressee is specified as the national authority competent in the respective field,[2146] sometimes other actors are additional addressees.[2147] Exceptionally, the output is directed to private actors. This is the case with the mechanisms laid down in Articles 17–19 of Regulation 1093/2010 and Article 29 para 2 of Regulation 806/2014 respectively, pursuant to which a decision – not a soft law act – is addressed to the financial institution/financial sector operator, and the institution under resolution respectively. Where the breach of EU law is caused by a private actor (not primarily by a MS[2148]), this is the most direct way of redressing it. Both under Articles 17–19 of Regulation 1093/2010 and under Article 29 para 2 of Regulation 806/2014 this way is provided for the case that the – principally competent – national authorities do not follow the application or interpretation of EU law as provided for by the respective EU actor involved.

2146 See eg Article 63 para 8 of Regulation 2019/943, Articles 17–19 of Regulation 1093/2010, Articles 11 and 39 of Directive 2009/72/EC, Article 7 para 4 of Regulation 806/2014.

2147 See eg Article 114 para 9 and Article 348 para 2 TFEU: Commission; Article 108 TFEU: (legal) persons concerned.

2148 A MS (authority) not abolishing a breach of Union law by a private actor may be breaching Union law itself, but only due to the private actor's behaviour; see eg case C-265/95 *Commission v France*.

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2.4. The purposes of soft law acts in compliance mechanisms

2.4.1. The question of command

As was discussed at some length in Part II above, soft law constitutes an *aliud* as compared to law. Public authority traditionally is regulated by and itself regulates by law. The use of soft law, while being on the rise, is still 'atypical'.[2149] This leads us to the purposes which the use of soft law serves. In the context of soft law more generally (but with a focus on collective rules), the French *Conseil d'État* has listed four functions (see III.5.1. above), each of which is related to law (as the regular case of rule-making): substitution (*substitut*), preparation (*préparation*), company (*accompagnement*) and permanent alternative (*alternative pérenne*). In the given context, we are dealing only with one segment of soft law, namely individual-concrete soft law. With regard to the mixed and the soft mechanisms presented above – hard mechanisms do not entail any soft law act – we shall now examine whether and, if so, which of these and other functions or purposes soft law may serve in each case.

A possible point from where to start in this context is the command contained in soft law. What do the soft law acts adopted in the course of the compliance mechanisms presented here actually tell? Most of the time, these acts tell their respective addressee(s) to take, or to refrain from respectively, certain action. Sometimes, however, they appear to limit themselves to determining a certain situation, eg in the reasoned opinion according to the Treaty infringement procedure and its variants it is stated that an infringement exists. Whether or not it also contains a concrete (soft) command, ie a guideline on how to remedy this infringement, may vary from case to case.[2150] However, even where there is no such explicit command, the statement of an infringement itself certainly effectuates an implicit command; it can be linked to a command.[2151] After all, it is common sense that in a system based on law unlawful situations are undesirable and therefore to be rectified. That in a concrete case the establishment of an unlawful situation by means of soft law – and hence in a legally

2149 See Arndt, Sinn 25, who describes the character of soft law as 'atypisch' [atypical].

2150 In its reasoned opinions adopted in the course of a Treaty infringement procedure the Commission a number of times has stated the measures required for compliance, and hence has included an explicit command – without the CJEU's objection; see Gil Ibáñez, Supervision 94, with references to the CJEU's case law.

2151 For this requirement see also II.2.1.1.1. above.

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non-binding way – is acknowledged, and that the unlawful situation is subsequently rectified by its addressee may have different reasons, eg the authority of the concrete soft law act and its originator (in case of the Treaty infringement procedure: the reasoned opinion of the Commission). It may also be perceived by the addressee as the more 'peaceful' approach, especially where the infringement was done by mistake rather than on purpose.[2152] In our context, another potential reason ought to be mentioned: the further course of the procedure. Soft law may be followed by a hard law act (in case of the Treaty infringement procedure: a Court judgement) or may have (negative) effects for the addressee in a different procedure.[2153] The fact that soft law is thereby adopted in the shadow of hard law, as it were, certainly increases the 'persuasiveness' of its (implicit) command.[2154] Compliance with the soft law act at issue may create an expectation that thereby the unlawfulness is remedied, and that no follow-up action – either an act in the procedure (mechanism) at issue or the initiation/continuation of a Treaty infringement procedure – will be taken, at least not by the body which was involved in the procedure so far.[2155] This applies to the Commission opinion softly determining the existence of an excessive deficit according to Article 126 TFEU; to the ACER opinion according to Article 63 of Directive 2019/944 which may consider the MS decision compliant or non-compliant with pertinent Union law, in the latter case containing an implicit command to remedy this non-compliance; to the Council recommendation determining the existence of an excessive imbalance in the course of the excessive imbalance procedure; to the ERA opinion adopted

2152 Note the words of Chayes/Chayes, Sovereignty 22: 'If we are correct that the principal source of noncompliance is not willful disobedience but the lack of capability or clarity or priority, then coercive enforcement is as misguided as it is costly'.

2153 For example: The adoption of a reasoned opinion in the course of a Treaty infringement procedure may, if that is prescribed by secondary law, lead to the suspension of financial support granted within the framework of cohesion policy: see European University Institute, Research 22 and 47.

2154 See Peters, Typology 426 f, using the expression 'shadow of the law' (emphasis in original); see also Aldestam, Soft Law 26; de Búrca/Scott, Introduction 6–10; Rošic Feguš, Soft law 54 ('shadow of hierarchy'); Ştefan, Enforcement 209; U Stelkens, Rechtsetzungen 407; discussing this phenomenon on a larger scale: Héritier/Lehmkuhl, Introduction; in the context of public international law: Franzius, Paris-Abkommen 524. For this metaphor in the context of private rule-making see Mnookin/Kornhauser, Bargaining, in particular 968 f.

2155 See von Bogdandy/Arndt/Bast, Instruments 115, with a further reference.

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pursuant to Article 25 of Regulation 2016/796, softly establishing that and why the draft national rules should not enter into force.

Also among the soft mechanisms both soft law acts establishing an infringement and soft law acts containing an explicit command are provided for in law. The Commission warning which may be adopted under Article 121 TFEU, for example, according to this provision either states that the economic policies of the MS addressed are not consistent with the BEPG or that they risk jeopardising the proper functioning of economic and monetary union. The subsequent Council recommendations, on the contrary, already according to the letter of the law contain soft commands on how to remedy the infringement (*argumentum* 'necessary recommendations'). The situation is similar under Article 33 of Directive 2018/1972, in which – following the Commission's notification – the BEREC may adopt an opinion on whether MS action complies with Union law, which may be followed by a Commission recommendation requesting concrete action. In our sample, it appears that the legislator (by tendency) has provided an opinion where a statement is to be made on whether or not a MS complies with relevant Union law (see eg Article 6 of Regulation 2019/452), and that it has envisaged a recommendation where concrete action is requested by its addressee (see eg Articles 16 f of Regulation 1092/2010). This is in accordance with a semantic distinction which can be drawn between these two categories of acts and which is sometimes, but not always reflected upon in general practice (see III.3.1.1. and III.3.9. above). However, and as was mentioned above, the line between statement and command is blurry, and where the law – in a systematic view – provides for concrete (negative) effects in case a MS does not adequately react to a statement made in an opinion (see eg Article 6 paras 5–7 of Regulation 2019/942), it is difficult to deny the (implicit) command effectuated by such an opinion.

2.4.2. The Treaty infringement procedure

Before addressing the different purposes of soft law with a view to specific mixed and soft compliance mechanisms presented in Part IV above, we shall take a look at the purposes soft law has in the Treaty infringement procedure as the general compliance mechanism laid down in the Treaties. In the Treaty infringement procedure according to Article 258 TFEU (and in the respective variants) the soft law act – the reasoned opinion – serves a number of purposes detailing the broader objective, that is to convince its

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addressee to remedy the situation accordingly.[2156] To a limited extent, the content of the reasoned opinion prepares a hard law act, namely the CJEU's judgement. Obviously, the CJEU is not bound in deciding the case, but the case itself is defined by the opinion (to which definition the subsequent action must stick[2157]) and in accordance with the principle *non ultra petita* the Court is bound by that definition or delimitation. For reasons of clarity, it ought to be stressed that the content of the reasoned opinion is coined already by the letter of formal notice, and that the Court is addressed only by an action. Thus, the reasoned opinion is only an in-between on the way to define the scope of the matter *vis-à-vis* the Court. Where the reasoned opinion suffices to convince the MS addressed and the alleged infringement is remedied accordingly, it also works as *alternative pérenne*, because it then settles this (individual) matter for good.[2158]

Under Article 259 TFEU the purpose of the Commission opinion is slightly different, as it is directed to two MS which regularly have opposing views on the matter at issue. In this procedure the Commission may not only support the allegations of the accusing MS, but it may as well express its view that the accused MS has not violated EU law. The Commission here exercises the function of a soft arbitrator, in its scope comparable to that of the Court.[2159] If no recourse to the Court is made, the reasoned opinion also in this case may work as *alternative pérenne*.

2.4.3. The purpose of preparation – not always a matter of course

The purpose of soft law to prepare subsequent (binding) output is apparent in many compliance mechanisms. Sometimes, however, it is ousted by more dominant purposes of the soft law involved. In the following, we shall have a look at examples for both cases.

2156 See case C-371/04 *Commission v Italy*, para 9, with further references.

2157 For the strong link between the reasoned opinion and the action filed with the CJEU; see Gil Ibáñez, Supervision 178; Prete, Infringement 154–159, with references to the differentiated case law.

2158 This does not imply an authoritative statement on the underlying questions of Union law. When considering that between 1978 and 2017 around 9,000 reasoned opinions were launched in Treaty infringement procedures which eventually resulted in around 2,000 Court judgements (in ca 90 % *against* the MS at issue), reasoned opinions seem to display a remarkable degree of effectiveness; for the data see Börzel, Noncompliance 28 f.

2159 See Wunderlich, Art. 259 AEUV, paras 8 f, with further references.

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In the regime laid down in Articles 116 f TFEU the Commission recommendation may – if it is adopted (prior to the directive) in the first place – serve as a preparation for a hard law act, a directive of the EP and the Council. While this is a legislative act, under Article 116 TFEU it is directed only to one or a small number of MS and hence has an individualised character.[2160]

Under Article 126 TFEU, the soft law acts each immediately preceding a hard law act are the Commission opinion and the Council recommendation. The former allows for the involvement of the Commission (thereby objectifying the initiation of the procedure), the latter may allow for increased flexibility for both the Council and the MS addressed, meaning that the duration of the procedure is extended and thereby leaves the MS time to react. In a more political procedure such as the excessive deficit procedure it can be opportune for the decision-maker not to be forced to adopt a legally binding act, which may be appealed against only within a certain deadline and hence increases pressure on its addressee, but to resort to a soft law act which structures the procedure – a general (collateral) effect of soft law, in particular in mixed compliance mechanisms – and increases the political rather than the 'legal' pressure (ie: pressure to apply for judicial review in case of discontent with the command at issue). The preparation aspect of these acts is sidelined here by the Commission recommendations which are required for the Council to adopt its output. These (preparatory) Commission recommendations are addressed only to the Council and hence are not considered here *in extenso* (see also IV.1. above).

A purpose of the soft law acts discussed here which appears to be a sub-category of preparation is to involve the output of other (specialised or expert) bodies. This is apparent in the regimes laid down in Article 63 of Directive 2019/944 and Article 25 of Regulation 2016/796 in which a European agency (the ACER and the ERA, respectively) may adopt an opinion preceding a (possible) Commission decision. In Article 17 of Regulation 1093/2010 it is the way round. Following an EBA recommendation, the Commission may adopt a formal opinion, after which the EBA may adopt a decision. Here it seems that the Commission was involved in order to cater for democratic legitimacy and in particular in order not to shake the EU's institutional balance.[2161] The preparatory function is inherent in

2160 See Eekhoff, Verbundaufsicht 127.

2161 The content-wise continuity of the sequence of EBA/Commission acts (see IV.2.2.2.2.3. above) may be compared to the Treaty infringement procedure and

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the involvement of a second body which adopts soft law, because the main reason for that certainly is to improve – in whichever way (expertise, political legitimacy, involvement of the different perspectives) – the quality of the subsequent hard law act provided for.[2162]

The mechanism laid down in Articles 22 f of Council Regulation 2015/1589 is mono-institutional, as is the procedure provided for in Article 7 para 4 of Regulation 806/2014. In the former, the Commission adopts recommendation and decision, in the latter the SRB addresses a warning to a MS, after which an SRB decision may follow. Also in these procedures the preparation aspect is apparent.

The excessive imbalance procedure laid down in Regulations 1176/2011 and 1174/2011 – from the perspective of the MS concerned – is mono-institutional, as well. The preparatory function is fulfilled by the Commission recommendations (addressed to the Council), only upon which the Council may adopt its output *vis-à-vis* the MS concerned.

In the context of soft mechanisms, the purpose of preparation as proposed by the *Conseil d'État* – that is to say: preparation of law – does not apply for obvious reasons. However, in an adapted understanding, soft law may also serve the preparation of soft law.[2163] The majority of soft mechanisms presented here consist of one act only, which means that no later (soft law) act can possibly be prepared in the course of these procedures. The mechanisms involving more than one act addressed to the MS concerned are laid down in Article 121 TFEU and in Article 33 of Directive 2018/1972, respectively. As regards Article 121 TFEU, the Commission warning addressed to a MS – a possibility introduced only by the Treaty of Lisbon – ought to increase the pressure on the MS.[2164] It is not, however, to be seen as a preparation of the Council recommendations (potentially) subsequently adopted. They are rather prepared by the Com-

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the continuity required in its administrative phase; see W Cremer, Art. 258 AEUV, para 16.

2162 For the potential of an improved reasoning of acts in this context see case T-576/18 *Crédit agricole*, para 138, with further references.

2163 For the preparation of soft law by another act see the Commission's 'preliminary view' preceding its recommendation according to Articles 21 f of Council Regulation 2015/1589. The 'preliminary view' arguably does not qualify as soft law, as it merely invites the MS concerned to submit its comments, but does not request compliance with the 'view'.

2164 See Schulte, Art. 121 AEUV, para 14; see also Hattenberger, Art. 121 AEUV, para 34; Part, Art. 121 AEUV, para 26.

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mission recommendation addressed to the Council. As regards the named procedure laid down in Directive 2018/1972, the Commission notification has the effect of preventing the adoption of the national draft measure at issue for three months. The BEREC may then issue an opinion on this notification, that is to say on its content. The Commission recommendation which may be released subsequently to the adoption (or for lack) of a BEREC opinion shall take "utmost account" of the latter (if any). Thus, if a BEREC opinion has been adopted, content-wise it has a strong influence on the Commission recommendation.[2165] The same is true, one procedural step ahead, for the Commission notification with regard to the BEREC opinion. The tiered output – Commission notification, BEREC opinion, Commission recommendation – ensures that both the Commission and the BEREC have a say, at the same time guaranteeing that the Commission has, if the procedure is applied in full, the first and the final word. Therefore, the Commission notification and the BEREC opinion meet a certain preparatory or preliminary function. At the same time, they are complete even without a 'follow-up' and have the capacity – where, in a concrete procedure, no subsequent act is adopted – to serve as the final EU output in a procedure.

2.4.4. The purpose of company ('accompagnement') and the right to be heard

As regards the function *accompagnement*, we have to bear in mind that in the given context, where ensuring the 'individual' compliance of a MS with Union law is at issue, it is mostly the application of a general rule in a concrete case which is at issue. This application often entails concretisation,[2166] even though concretisation is normally understood as a collective explanation, not only an explanation given with regard to an individual case.[2167] The conception of the Conseil d'État as 'le droit souple comme

2165 For the effects of the requirement to take 'utmost account' of soft law and similar epithets see 3.5. below.

2166 With regard to concretisation as the main purpose of implementation see 3.1.1.2.1.2. below.

2167 For the concretisation by means of EU soft law see Storr, Wirtschaftslenkung 41 f, who stresses, taking the example of Commission guidelines in state aid law, that concretisation by means of soft law *may* also lead to undue complexity; on the other hand, the MS are sometimes very keen on the Commission providing

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instrument d'accompagnement de la mise en œuvre du droit dur' seems to be broad enough to cover both aspects.[2168] However, since the application of rules to a concrete case is a characteristic of the executive more generally, not only of the one that is expressed by soft law, this cannot be referred to as a unique characteristic of the soft law acts provided for in the compliance mechanisms at issue here.

In the context of these mechanisms, another (potential) function of soft law is to be examined: that is to fully inform the MS addressed of the respective allegations and to thereby ensure a comprehensive right to be heard before a (hard law) decision is taken on the matter.[2169] In this regard, it is to be noted that the initiation of compliance mechanisms is regularly – if the matter is not urgent – preceded by a (comparatively) informal contact on the part of the competent EU institution, body, office or agency (most often: the Commission). Thereby the MS is informed about the concerns of the EU actor at issue and is given the possibility to utter its point of view, before the mechanism as laid down in EU law is initiated. This is relatively well documented in the context of the Treaty infringement procedure, but arguably also applies to most other compliance mechanisms. For this reason, the meaning of soft law acts to allow for the MS addressed to react and thereby to make use of its right to be heard at an early stage of the procedure may be limited.[2170] Soft law has a strong informative function, nevertheless.

2.4.5. Substitution or permanent alternative – two purposes which often overlap

In its study on soft law, the French *Conseil d'Etat* has argued that soft law substitutes law where the adoption – for legal or political reasons – is not feasible. It serves as a permanent alternative (to law), however, where it is deemed to be the *better* regulatory approach (see III.5.1. above). Sometimes these purposes overlap. When compliance mechanisms are created on the basis of secondary law, the legislator has to consider the Treaties. They

(non-binding) guidance on the interpretation of EU law, in particular in the field of agricultural or state aid law: U Stelkens, Rechtsetzungen 408.

2168 Conseil d'État, Droit souple 25.

2169 See also 2.5.4. below. The function of soft law to inform more generally is addressed also under III.5.2.1. above.

2170 See case C-371/04 *Commission v Italy*, para 9.

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determine the scope of action of the legislator. Since this scope often is not very clear, also the motivation of the legislator may be blurred: Has it opted for a soft mechanism because it deemed a mixed one to go beyond its competences or because it considered the former as the better approach – or have both motives played a role in the decision-making?[2171] In the following analysis this difficulty is always to be borne in mind. With mixed mechanisms the situation is less unclear: Mixed mechanisms provide for the possibility to adopt hard law in the end, so here soft law normally is not applied because hard law is not (legally or politically) feasible. This may only be the case where different EU actors are involved and one of them, eg a European agency, under primary law may not be granted the power to adopt a legally binding act in the given circumstances, but the legislator deemed its involvement important and hence provided for a soft law competence. Apparently, in these cases also the preparation aspect plays a significant role (see 2.4.3. above).

An example would be the mechanism laid down in Article 63 of Directive 2019/944 which involves the ACER. The ACER may adopt an opinion, upon which the Commission can launch a decision requiring the national authority concerned 'to withdraw its decision for lack of compliance with the Guidelines'. The reason why the ACER here was not granted also the decision-making power – in other contexts the ACER does have individual decision-making power[2172] – probably was the fact that a decision to withdraw a national measure means a legally binding review of national acts, a category of competence which is politically highly sensitive, and which is – if at all – for the Commission to exercise (note Article 17 para 1 TEU).[2173] By granting merely the power to adopt an opinion, the legislator stayed

2171 See Senden, Soft Law 168, emphasising that the Commission hardly ever discloses its motives for adopting soft law instead of (initiating the adoption of) law; for both substitution and preparatory effects of EU soft law see Snyder, Effectiveness 19. For the purpose of 'gaining experience' with a certain body of regulation: Brohm, Mitteilungen 76.

2172 See Hauenschild, Agentur 108 f.

2173 See also the (later withdrawn) draft Interinstitutional Agreement on the operating framework for the European regulatory agencies, COM(2005) 59 final, 12, according to which European agencies shall not 'have responsibilities entrusted to them with respect to which the EC Treaty has conferred direct decision-making powers on the Commission' – a guideline which would not have been infringed by granting to the ACER a decision-making power in this case. Nevertheless, the sensitivity of the matter must have been apparent to the Commission/the legislator; for another example in which the ACER's power to adopt legally binding acts (as

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on the safe side, as this power is certainly in accordance with the ACER's '[g]eneral advisory role'.[2174]

Another example is the procedure laid down in Article 17 of Regulation 1093/2010. Here the EBA may – where the national authority does not comply with Union law – eventually adopt a decision directly addressed to a financial institution/financial sector operator, thereby overruling any decision the national authority may have taken on this matter. This mechanism is different from the one involving the ACER. The EBA does not order the national authority to withdraw a decision, but it may – under certain circumstances (and in specific cases preceded by a decision addressed to the national authority) – adopt a decision of its own, thereby ousting the national authority. The effects may be similar to that of the above procedure involving the ACER, but its *modus operandi* is different. What is more: Non-compliance with EU law need not necessarily find its expression in an act, but may as well be effectuated by the national authority's omission. Thus, the EBA decision may also step in where the national authority has failed to act. This does not alter the fact that the EBA may determine situations which are normally for the national authorities to decide and that this – where a competence of the EU can be confirmed in the first place – is primarily a task of the Commission.[2175] The legislator seems to have taken into account this argument. After all, the decision the EBA may take under Article 17 of Regulation 1093/2010 needs to be 'in conformity' with the preceding formal opinion of the Commission and may only be adopted exceptionally, namely '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'.[2176] This makes the EBA's decision-making power subject to only exceptional application and strongly dependent on the Commission's prior assessment of the matter by means of soft law. While the latter does not substitute the hard law act, but strongly 'complements' it, in a concrete case the formal opinion of the Commission may very well end

proposed by the EP) was rejected by the Commission see Orator, Möglichkeiten 382, with further references.

2174 Commission Proposal COM(2007) 528 final, 12.

2175 In the Commission proposal for what later has become Regulation 1093/2010, a true decision-making power of the Commission was provided for: see Article 9 of Commission Proposal COM(2009) 501 final.

2176 See also Böttner, Mechanism 184 f.

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the procedure for good, namely where it succeeds (ie: is accepted/complied with).

The ERA's power to adopt an opinion on national draft rules under Article 25 of Regulation 2016/796 could not have been lawfully transformed into a hard law power. First of all, and as was mentioned above, this is because the empowerment of EU actors to review national acts is considered very delicate. This is not normally a task for European agencies (without Commission involvement) in general, and in particular the ERA overall may only exceptionally adopt decisions.[2177]

The reverse qualified majority voting applied in the excessive imbalance procedure actually diminishes the power of the Council and at the same time increases the power of the Commission, only upon the recommendation of which the Council may act, thereby possibly distorting the concrete balance struck between these institutions in Article 121 TFEU, para 6 of which – in case of Regulation 1174/2011: together with Article 136 TFEU – forms the legal basis of the excessive imbalance procedure.[2178] Apart from the enforcement measures pursuant to Regulation 1174/2011, the soft and the hard law powers are assigned in the spirit of Article 121 TFEU. The voting mode, however, increases the importance of the soft law act the Commission conveys to the Council. In other words: The conferral of soft power (to the Commission) and hard power (to the Council), as laid down in primary law (Article 121 TFEU), is formally complied with, but reverse qualified majority voting in the Council assigns an importance to the Commission soft law act addressed to the Council which it does not have under primary law. In conclusion, soft law here does not actually substitute hard law, but the likelihood of the (normative) content of the soft law act to be taken over in the form of a hard law act is increased.[2179]

With respect to soft mechanisms, the question of substitution/permanent alternative is even more prevalent because with them, unlike with mixed compliance mechanisms, also the final act – if more than one act is provided for at all – is a soft law act. Thus, if hard regulation at the end of a procedure is seen as the rule, the idea that in soft mechanisms soft law substitutes or constitutes a permanent alternative to law springs to mind.

2177 Article 4 lit e of Regulation 2016/796. Under the old founding regulation of the ERA, Regulation 881/2004/EC, the ERA was not competent to adopt any decisions; see Article 2 lit a and b *leg cit*.

2178 Critically with regard to reverse (qualified) majority voting more generally eg Ruffert, Crisis 1800 ff; Palmstorfer, Majority; Weismann, Central Bank.

2179 See also III.4.4. above.

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As indicated above, the reason for the legislator taking this route may be a lack of legal or political feasibility of a mixed/hard mechanism and/or the conviction that a soft approach is considered more adequate.

As regards the procedure laid down in Article 6 paras 5–7 of Regulation 2019/942, the remarks made above on the scope of the ACER's powers apply. In its legislative proposal for what has become Regulation 713/2009, the predecessor of Regulation 2019/942, the Commission has emphasised that the ACER's decision-making power shall be limited to certain cases with a cross-border dimension (*argumentum* 'concerning the infrastructure in the territory of more than one Member State').[2180] Whether this is what the Commission has originally wanted or whether this is an example of an adaptation of political wishes to legal feasibility must be left open here.

The mechanism laid down in Article 53 of Directive 2019/944 is about the (soft) examination of a national (draft) measure. As a form of on-going supervision of day-to-day MS administration it is considered a sensitive issue.[2181] Even the Commission in the underlying legislative procedure emphasised the importance of 'keeping national regulators' centre role in energy regulation'.[2182] It appears that here the Commission and the legislator did not intend to grant the ACER (further) hard law powers. Therefore in this case the purpose of permanent alternative arguably dominates.

Also the mechanism laid down in Article 33 of Directive 2018/1972 is about the examination of a draft measure of a national authority by the Commission. Here the Commission's lead – with the BEREC being involved as an expert body – was proposed by policy advice the Commission as initiator of the pertinent legislation had received.[2183] While the Commission proposed the involvement of comprehensive hard decision-making power on its part (where the BEREC shared the Commission's concerns), the legislator refused this.[2184] From the legislator's perspective, this points in the direction of the permanent alternative purpose.

2180 Commission Proposal COM(2007) 530 final, 11; with regard to the current Regulation, the Commission held that 'the powers of ACER for those cross-border issues which require a coordinated regional decision' ought to be strengthened; Commission Proposal COM(2016) 863 final, 7.

2181 For the notion of on-going supervision (control) see Busuioc, Accountability 607.

2182 Commission Proposal COM(2016) 864 final, 12.

2183 Commission Proposal COM(2016) 590 final/2, 12 f.

2184 The room for decision-making power now laid down in Article 33 para 5c of Directive 2018/1972 – which was left aside in the above description of the mechanism as an exceptional variant – was significantly reduced in its scope (as compared

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The mechanism laid down in Article 3 para 7 of Regulation 472/2013, concluding from its legal basis, shall concretise Article 121 paras 3 f TFEU (Article 121 para 6 TFEU) with regard to the Euro-MS (Article 136 TFEU). Since Article 121 paras 3 f TFEU only provide for soft law acts of the Council, it is consistent that the concretisation in secondary law does as well. The purpose of soft law here is not to interfere with what is considered a prerogative of the MS, but to flesh out EU powers upon which the MS as Masters of the Treaties have already agreed in the form of Article 121 TFEU. Whether the legislator actually would have preferred to go further is unclear, even though other measures to reinforce the multilateral surveillance procedure seem to suggest so.[2185]

The power of the ESRB to adopt a recommendation as laid down in Articles 16 f of Regulation 1092/2010 was intended to be soft already when the Commission made the respective legislative proposal. Being conceptualised as a mere '"reputational" body', no hard law powers have been envisaged for the ESRB at all.[2186] Therefore this seems to be an example of permanent alternative.

According to Article 6 of Regulation 2019/452, based on Article 207 para 2 TFEU,[2187] the Commission may adopt an opinion on a planned foreign direct investment where it is 'likely to affect security or public order in more than one Member State, or has relevant information in relation to that foreign direct investment'.[2188] Whereas in general the screening of foreign direct investments into the EU is up to the MS, the Commission may exceptionally step in. Since it may only render an opinion, 'Member States keep the last word in any investment screening'.[2189] From a legal perspective, it does not appear that under Article 207 para 2 TFEU the Commission could not have been granted more far-reaching powers, in particular a proper decision-making power.[2190] The relatively weak involvement of the

to the Commission proposal); see Commission Proposal COM(2016) 590 final/2, 12 f.

2185 See eg Regulation 1173/2011 as addressed under 3.6. below.

2186 Commission Proposal COM(2009) 499 final, 5.

2187 For different opinions on the correct legal basis and on the correct legislative procedure see Hindelang/Hagemeyer, Enemy 882 (fn 5); see also Klamert, Loyalty 216.

2188 Article 6 para 3 of Regulation 2019/452.

2189 <https://policy.trade.ec.europa.eu/enforcement-and-protection/investment-screening_en> accessed 28 March 2023.

2190 Sceptically: de Kok, Framework 45.

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Commission seems to have been a political wish (to have law as the regular case substituted by soft law) rather than legal necessity.[2191]

2.4.6. Institutional transformation as a purpose of soft law?

Thus far, we have analysed the immediate purposes of soft law, thereby focusing on the specific acts (legal sources perspective). Now we shall take a more institutional perspective and examine whether soft law may be used as a tool to facilitate institutional transformation in the EU. The main question is the following: Do soft law powers play a core role in the process of secondary law-based specific compliance mechanisms 'competing with' and hence relativising the practical importance of the Treaty infringement procedure, whereby – at least *de facto* – the powers of the Commission and the Court under primary law are shifted in particular towards the Commission (under secondary law) and to European agencies?

It is true that a number of specific compliance mechanisms are laid down in primary law and hence already from a primary law perspective the Treaty infringement procedure is not envisaged as the exclusive compliance mechanism. It is also true that many compliance mechanisms – whether provided for in primary law or in secondary law – do not only allow for the adoption of soft law, but also of hard law acts. However, we have to acknowledge that the large majority of compliance mechanisms – of which only a small sample could be presented in Part IV above – is provided for in secondary law, with only few of them concretising a procedure which is already sketched out in the Treaties. Furthermore, it is apparent that compliance mechanisms frequently provide for the adoption of soft law on the part of the EU bodies in charge, sometimes exclusively, sometimes combined with the possibility to adopt hard law acts.

Against this background, it does not appear far-fetched to assume that soft law and the power to adopt it – whose inconspicuousness and result-

2191 See eg Deutscher Bundesrat, Empfehlungen der Ausschüsse, Drucksache 655/1/17, 1 f <https://www.umwelt-online.de/PDFBR/2017/0655_2D1_2D17.pdf> accessed 28 March 2023; see also Commission Communication 'Welcoming Foreign Direct Investment while Protecting Essential Interests', COM(2017) 494 final, 9: 'The Commission fully acknowledges the need to maintain the necessary flexibility for Member States to screen foreign direct investments'. For the EU regime on foreign subsidies distorting the internal market which provides for a much stronger empowerment of the Commission see Regulation 2022/2560.

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ing capability of facilitating competence creep have been pointed out in this work[2192] – are important tools in bringing about the institutional shift described above comparatively smoothly, with little attention being drawn to it and thereby raising comparatively little (public) controversy. Chronologically speaking, soft law stands only at the end of this process. At the beginning, there is the legislator (and, respectively, the Commission) vesting existing or newly established EU bodies with soft law powers (and, respectively, proposing legislation to this effect). Therefore, at the outset, there is a legislative procedure. On this basis, the EU bodies in charge make use of their soft law powers, which – due to the legal non-bindingness of soft law and the limited possibilities of judicial review – largely exist and function beyond the attention of a broader public. Hence what appears as 'the calibration of different instruments and actors to deliver effective and legitimate forms of governance'[2193] by the legislator may turn out to be strategic action, partly with good intentions and the aim to increase the effectiveness of Union law in the MS, aimed at ousting the Treaty infringement procedure.[2194]

While the role of soft law in transforming the institutional setting underlying the Union regime of ensuring MS' compliance with EU law will be mapped out in particular in Chapter 3 below, it is intended here to raise awareness that this alleged institutional change may not be an altogether incidental development, but that it may actually be promoted by the Commission and the legislator, thereby using soft law and the powers to adopt it purposively as a tool to achieve this objective.

2.5. The deviation from the Treaty infringement procedure

2.5.1. The ubiquity of the Treaty infringement procedure

The specialty of the Treaty infringement procedure (including its variants) as the general compliance mechanism is its involvement of the CJEU, the institution with the highest authority in matters of EU law, more precisely in matters concerning the interpretation of EU law and the validity of

2192 See for example III.5.2.2. above.
2193 Armstrong, Character 214.
2194 For the 'disdain for courts' as a characteristic of new governance more generally see Dawson, Waves 211.

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secondary law. While its application is exceptionally excluded – eg pursuant to Article 126 TFEU – and while MS' compliance with EU law by national acts which have not yet been taken (draft acts) or with legally non-binding acts of EU law cannot be enforced via the Treaty infringement procedure, it may be initiated as a follow-up to most of the procedures addressed above – after all, nearly all of our selection of compliance mechanisms, also the soft ones, are about compliance with (hard) law. Understood that way, these compliance mechanisms are (potentially) upstream to a Treaty infringement procedure. They take place against the background of Article 258 TFEU (or its variants just mentioned), in particular, but not only where they are conducted by the Commission.[2195] Where a special compliance mechanism does not meet its respective primary *telos* (that is to settle the matter pursuant to Union law), the Commission regularly may initiate a Treaty infringement procedure. With a complete Treaty infringement procedure – that is to say: including a CJEU judgement (and possibly a second one pursuant to Article 260 para 2 TFEU) – the concrete case is settled for good. Under EU law, there is no further legal instance to turn to. Not only may the Treaty infringement procedure be used to reinforce or back-up alternative compliance mechanisms – either as a Sword of Damocles whilst the alternative compliance mechanism is applied, or as a follow-up to the (unsuccessful) application of an alternative compliance mechanism.[2196] In turn, also alternative compliance mechanisms may be used (ie menaced to be applied) in order to reinforce a Treaty infringement procedure already initiated – in particular with a view to settling the latter still in its administrative phase. In a case related to fisheries policy, the Commission adopted a letter of formal notice (thereby initiating the Article 258 TFEU-procedure), suggesting that in case of non-compliance therewith it would adopt – in the course of a special compliance mechanism – preventive measures[2197] to protect the threatened fish stock.[2198]

2195 See, with regard to the procedure laid down in Article 7a of Directive 2002/21/EC, the predecessor provision of Article 33 of Directive 2018/1972, Alberti, Actors 39 f; Tobisch, Telekommunikationsregulierung 99.

2196 One example for this are the ECB's opinions on national draft laws; see eg ECB Opinion CON/2019/20 on judicial relief granted to former holders of qualified bank credit, para 2.1.3., in which the ECB explicitly refers to its powers under Article 271 TFEU; see also, for a different policy field, Ştefan/Petri, Review 544, with regard to a soft compliance mechanism involving the ACER.

2197 See Article 26 para 3 of Council Regulation 2371/2002 (now repealed by Regulation 1380/2013).

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2.5.2. Time of intervention, discretion, and confidentiality

A comparison of the Treaty infringement procedure and its variants and other compliance mechanisms in terms of the time of intervention shows that the majority of them envisage a *post factum* monitoring of compliance.[2199] Only sometimes are MS obliged to submit draft measures for *ex ante* scrutiny by EU bodies (eg Article 6 paras 5–7 of Regulation 2019/942 or Article 53 of Directive 2019/944).[2200] The Commission has considered such scrutiny in advance an important tool to prevent future Treaty infringement procedures.[2201] Apart from that, the Commission – with regard to a similar compliance mechanism – mentioned in particular the leeway granted to MS, the possibility for the MS to check whether or not their respective drafts are in accordance with EU law, the dialogue between the Commission and the MS which is thereby facilitated,[2202] and the respect for the subsidiarity principle.[2203]

As regards the amount of power, it is apparent that the Treaty infringement procedure – as an example for 'police-patrol' supervision: monitoring of compliance, remedying of violations, and discouraging of further breaches[2204] – allows for a much wider discretion for the EU body in charge. This is particularly well documented with regard to the Commission's power under Article 258 TFEU. The wide margin of its discretion,

2198 See Commission, Press Release IP/03/1534; see also Andersen, Enforcement 189 f; for the use of the Treaty infringement procedure as a means to steer MS' behaviour in a thematically unrelated field see III.4.3.2.1. above.

2199 This question – *ex ante* or *ex post* intervention – will be revived below in the context of distinguishing between implementation and enforcement (see 3.1.1.2.1.1.).

2200 For a similar procedure see Article 11 para 4 of Council Regulation 1/2003, according to which national authorities have to present the 'envisaged decision or, in the absence thereof, any other document indicating the proposed course of action'; see also Commission Notice on cooperation within the Network of Competition Authorities, 2004/C 101/03, para 46; for the *ex ante* scrutiny of national provisions under the Services Directive (2006/123/EC) see eg its Article 15 para 7.

2201 See already Commission, 'Better monitoring of the application of Community law', COM(2002) 725 final/4, 4 ff.

2202 For the advantages of such dialogue for the EU see Commission, European Governance – A White Paper, COM(2001) 428 final, 25; stressing the dialogical function of multiphase procedures more generally: case T-317/09 *Concord*, para 50.

2203 See eg Commission, 'The Operation of Directive 98/34 in 2009 and 2010', COM/2011/853 final, 10.

2204 Tallberg, Paths 615.

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which has been confirmed by the Court on numerous occasions,[2205] has emerged by default rather than by design, in other words: It have originally been other reasons – initially concerns about the prestige of the MS,[2206] later on the Commission's limited (personnel) capacities[2207] – leading to the Commission's *selection* of the cases it pursues, not an explicit indication in law. On the other hand, the Commission's discretion also reflects its role as a 'semi-political institution',[2208] a role which does follow from the law, that is from the Treaties in a systematic interpretation.[2209] The Commission's discretion includes the power to seek friendly solutions not only in the pre-litigation phase of the Treaty infringement procedure (when it is a matter of course[2210]), but also before that, in what was called a '"pre-pre-litigation" phase'[2211] (see IV.2.1.2. above). In the meantime, the Commission has disclosed in more detail how it selects its cases, how it 'prioritises' that is to say.[2212] In the other compliance mechanisms, the discretion of the EU body in charge is, on a whole, more limited, especially where it is not an institution of the EU and hence, most of the time at least, its powers are not made explicit in primary law.[2213] This more limited room for manoeuvre is particularly visible in cases where the competent EU

2205 See eg joined cases T-479/93 and T-559/93 *Bernardi*, para 31. This discretion has also been acknowledged by the European Ombudsman in its own-initiative inquiry into the Commission's administrative procedures for dealing with complaints concerning Member States' infringement of Community law (1997); see, with further references to the case law, Prete, Infringement 39–41.

2206 See Opinion of AG *Roemer* in case 7/71 *Commission v France*, 1026.

2207 See Börzel/Hofmann/Panke/Sprungk, Member States 1374.

2208 Andersen, Enforcement 69.

2209 For early criticism see Audretsch, Supervision 199: 'It is difficult, and in principle even not quite proper, to combine a political function with that of an independent supervisor. Conflicting interests are then at stake'.

2210 See already the early case 74/82 *Commission v Ireland*, para 13.

2211 Andersen, Enforcement 47.

2212 See Commission, 'Better Monitoring of the Application of Community Law' (Communication), COM/2002/725, 11 f; more recently: Commission, 'EU law: Better results through better application' (Communication), 2017/C 18/02, with reference to further acts which are relevant in the given context.

2213 The freedom to initiate or not to initiate a compliance mechanism amounts to a wide latitude which is not only procedural in nature. After all, it allows for the actor concerned – to some extent at least – to decide whether or not to 'permit' a (suspected) infringement of EU law.

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actor cannot initiate the respective proceedings *sua sponte*, but may act only upon request, recommendation, etc by another actor.[2214]

With regard to confidentiality, it is to be noted that the output adopted in the course of a Treaty infringement procedure is regularly confidential up until the Court has launched its judgement (see IV.2.1.2. above),[2215] in accordance with Article 4 para 2 (third indent) of Regulation 1049/2001, stipulating that institutions 'shall refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure'.[2216] The reason for this is that disclosure of case material would thwart one main objective of the Treaty infringement procedure, that is to find a friendly settlement of the case. This applies in particular to the pre-litigation procedure. But since an amicable solution may be reached between the Commission and the MS even after the Commission has filed an action with the CJEU, confidentiality extends to the litigation procedure.[2217] As soon as the Court has handed down a judgement under Article 258 TFEU, there cannot be confidentiality on the case anymore – not even with regard to a procedure according to Article 260 TFEU (should it be initiated later). This is because the purpose of the latter is not to find a friendly settlement.[2218] Also the output adopted in the course of other compliance mechanisms is regularly confidential in accordance with Article 4 para 2

2214 See eg Article 144 TFEU (Council acts upon Commission recommendation); Article 53 (Commission acts upon request by a national regulatory authority) and Article 63 of Directive 2019/944 (ACER acts upon request from the Commission or a national authority).

2215 The mere fact that a Treaty infringement procedure is on-going, however, is not confidential. The Commission regularly informs the public of the steps taken during a Treaty infringement procedure via press releases; see eg <http://europa.eu/rapid/press-release_IP-96-1239_en.htm> accessed 28 March 2023.

2216 See also case T-36/04 *API*, para 132 f, with further references. A different view – applying a historical interpretation of this provision – is proposed by Krämer, Access 201 f; for a complaint on how the Commission dealt with three requests for public access to documents concerning EU pilot and infringement procedures submitted to the European Ombudsman and for her appraisal see case 383/2022/NK.

2217 See case T-191/99 *Petrie*, para 68. In case of a friendly settlement, the parties have to inform the Court of the abandonment of their claims; see Article 147 para 1 of the Rules of Procedure of the Court of Justice.

2218 See, with regard to the CJEU's case law and with arguments in favour of maintaining this confidentiality policy, European Parliament, 'The relationship between the Commission acting as guardian of the EU Treaties and complainants: Selected topics' (Note, 2012) 10.

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(third indent) of Regulation 1049/2001. This is appropriate, as also these compliance mechanisms principally aim at finding a friendly solution of the matter at issue. That confidentiality is the rule we can also – namely *e contrario* – conclude from the exceptional power of EU actors to publish certain acts (see eg Article 53 of Directive 2019/944 or Articles 16 f of Regulation 1092/2010). As a negative consequence of this confidentiality, it was brought forward that the respective cases cannot become 'comprehensive learning opportunities' for other MS.[2219]

2.5.3. Efficiency concerns and EU Pilot

Another point of difference between the Treaty infringement procedure and the other (hard and mixed) compliance mechanisms of our sample is the fact that in the former only the Court can state the unlawfulness of a MS action/inaction with legally binding effect, not the Commission (or the EIB or the ECB).[2220] In the hard and mixed compliance procedures addressed above, the legally binding acts are taken by functionally administrative EU actors. In light of the amount of time the CJEU normally requires for rendering a judgement (in addition to the regularly extended pre-litigation phase of the procedure),[2221] hard and mixed compliance procedures may be faster – and to that extent: more efficient – in providing for a legally binding account of the matter.[2222] Only where the matter is brought before the Court, either via a Treaty infringement procedure or following an action for annulment submitted in due time, the latter normally being filed

2219 Andersen, Enforcement 204 f, pointing at expert groups dealing with the implementation of directives as another example of a compliance tool which may very well create these learning opportunities.

2220 A fact that has given cause for criticism by the Commission; see Andersen, Enforcement 124 ff, with further references. The High Authority (and after 1967: the Commission) was granted such power pursuant to Article 88 TECSC.

2221 See Bobek, Court 9 f.

2222 The time it takes until a final decision is made in a procedure depends on the time granted to the EU actors involved to render their respective output, and the time to react allowed for the addressees (mostly: the MS). These time frames, if they are made explicit in the Treaties or in secondary legislation at all, vary significantly: see eg Article 126 TFEU (Council shall act 'without undue delay'; MS shall react 'within a given period'), Article 63 of Directive 2019/944 (ACER shall act within three months upon request; MS shall comply within four months), Article 17 of Regulation 1093/2010 (EBA shall act within two months after initiating the investigation; MS shall react within ten working days).

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by the MS addressed, the Court has the possibility to provide the ultimate legal solution of the legal question(s) underlying the case.

The long duration of the pre-litigation phase and of CJEU decision-making is one aspect of said inefficiency of the Treaty infringement procedure, which may have lead to the multiple provision of upstream compliance mechanisms as a means to provide alternative (concurring) routes towards compliance.[2223] The comparative lack of efficiency of the Treaty infringement procedure does not only root in its procedure, though, but also lies in the fact that the Commission neither has the power nor the capacity to investigate compliance within the MS' territories on its own.[2224] Rather, the Commission hinges on MS' cooperation and thus the procedure 'depends to a large degree on deliberation and knowledge-creation'.[2225] Already more than 20 years ago, *Gil Ibáñez* held that 'the Article 226 [now: Article 258 TFEU] procedure is no longer appropriate for a variety of infringements of EC law committed by Member States'.[2226]

Compliance mechanisms laid down in specific policy areas, on the contrary, provide for a more intense monitoring of the MS in the respective field brought about also by closer contact with the relevant national authorities,[2227] whose representatives may – as is normally the case with European agencies[2228] – even take part in the decision-making of the EU body in

2223 See case C-359/92 *Germany v Council*, paras 46–50, appearing to acknowledge the efficiency argument in favour of secondary law compliance mechanisms; see also Gil Ibáñez, Tools 3.2.3.; Andersen, Enforcement 171, with regard to the fact that the Treaty infringement procedure and many other compliance mechanisms only address individual cases, but not 'clusters of compliance failures that apply to a large number of member states'; for the discontent this drawback of the Treaty infringement procedure has resulted in with regard to infringements of the right of establishment and the free movement of services see Commission Proposal for a Directive of the European Parliament and of the Council on services in the internal market, COM(2004) 2 final/3, 18: 'ineffective' and 'unmanageable' to address these infringements individually via the Treaty infringement procedure.

2224 See European Parliament, 'The relationship between the Commission acting as Guardian of the EU Treaties and complainants: Selected topics' (Note, 2012) 10.

2225 See Commission, 'Single Market Scoreboard. Performance per governance tool: Infringements (Reporting period: 12/2015–12/2016)' 13.

2226 Gil Ibáñez, Exceptions 169.

2227 See S Augsberg, Verwaltungsorganisationsrecht, paras 55–59.

2228 For the Boards of European agencies in which exceptionally not all MS (or: not all the relevant national bodies) are (or historically were) directly represented see Chamon, Agencies 66 f.

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charge.[2229] While the Treaty infringement procedure pursuant to Article 258 TFEU addresses a MS as such, but is not preoccupied with the question which body within the State is responsible for the wrongdoing at issue (a federal, a provincial or a municipal body, a legislative, administrative or judicial body, a body bound by instructions or an independent body, etc), special compliance mechanisms often provide for direct interaction between the EU body in charge and the national authority responsible for the wrongdoing. This makes these 'alternative means of problem solving [...] often more effective, quicker, and less expensive' and hence facilitates their introduction and application in order to render redundant 'systematic recourse to infringement procedures'.[2230] These efficiency gains may, to some extent at least, compensate for decreased (democratic) input-legitimacy, eg where compliance mechanisms are governed by independent agencies instead of the Commission.[2231]

Over the past 20 years, the number of reasoned opinions pursuant to Article 258 para 1 TFEU launched by the Commission has considerably decreased from 533 in the year 2003 to 104 in the year 2022.[2232] Also the number of complete performances of the procedure laid down in Article 258 TFEU – from formal notice to CJEU judgement – has become lower and lower, and still the average duration of a case with 112 weeks in 2022 is remarkably long.[2233] What is more, even after the Court has launched its judgement in a case, the time until a MS complies can be considerable (and has been increasing significantly in the past few years), as the Commission's statistics indicate.[2234]

2229 See Commission, 'A Europa of Results – Applying Community Law' (Communication), COM(2007) 502 final, 3; see also Commission Proposal COM(2016) 863 final, 16 f, in which the Commission considers a deviation from this route with regard to the ACER, but eventually discards it; for the positive effects on MS' compliance with soft law this composition may have see III.4.4. above.

2230 Commission, Press Release 'Internal Market: Commission presents ten-point plan for making Europe better off' (2003), IP/03/645.

2231 See Orator, Möglichkeiten 350.

2232 Commission, Report on monitoring the application of Community law 2003, COM(2004) 839 final, 4; number for the year 2022 taken from the Commission's online-database <https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/> accessed 28 March 2023; for the earlier development of related figures since 1995 see Börzel/Knoll, Non-compliance 10.

2233 <https://commission.europa.eu/law/application-eu-law/implementing-eu-law/infringement-procedure/2022-annual-report-monitoring-application-eu-law_en> accessed 28 July 2023.

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In order to tackle these efficiency concerns, the Commission – for the time prior to the initiation of a Treaty infringement procedure – has first introduced its EU Pilot in 2008. It is a confidential online database for communication between Commission services and MS authorities. Via this channel, MS authorities are asked to answer questions with regard to compliance issues, ie a potential (future) Treaty infringement case. The MS have ten weeks to provide answers to the questions, upon submission of which the Commission renders its comments – again within a period of ten weeks. Matters may be solved at this early stage without a Treaty infringement procedure being initiated in the first place.

The Commission deems the introduction of EU Pilot responsible for the decrease in the number of infringement proceedings.[2235] In 2016, 790 pilot cases were opened, 875 processed, and by the end of 2016, 1,175 pilot cases (including the backlog from preceding years) were still open. 72 percent of the closed pilot cases were closed due to a satisfactory answer on the part of the MS concerned.[2236] 233 Treaty infringement procedures were opened in 2016, following closure of EU Pilot cases.[2237] In the years since 2017 the number of handled EU Pilot processes has gone down significantly (with again an increase starting in 2021).[2238] In view of the depoliticised, more technical approach of EU Pilot, it could – even though in the discussion it is often linked to the procedure laid down in Article 258 TFEU – functionally be perceived as a special compliance mechanism. However, it also differs from the special compliance mechanisms presented and discussed above, as it is not about a suspected infringement, but it is about less: unclarities which, if not satisfactorily resolved, may give rise to infringement proceedings.

The legal quality of the Commission's assessment of the response of the MS appears to range below that of soft law. This is also due to the fact

2234 See Commission, 'Single Market Scoreboard. Performance per governance tool: Infringements (Reporting period: 12/2017–12/2018)' 8 f.

2235 See Commission, '28th Annual Report on Monitoring the Application of EU Law', COM(2011) 588 final, 5; for further explanations of the low number of Treaty infringement procedures, in particular in the rule of law context, see Scheppele/Kochenov/Grabowska-Moroz, Values 59-63.

2236 See Commission, 'Monitoring the application of European Union law. 2016 Annual Report', COM(2017) 370 final, 21.

2237 See Commission, 'Monitoring the application of European Union law. 2016 Annual Report', COM(2017) 370 final, 21.

2238 See Commission, 'Enforcing EU law for a Europe that delivers', COM(2022) 518 final, 18 f.

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that EU Pilot preceeds a procedure – the Treaty infringement procedure – which itself begins with an only informal exchange of views which moves below the level of soft law. If at all, and leaving apart its attachment to the Treaty infringement procedure, EU Pilot can be classified as below-soft law mechanism. Due to the extended period of time EU Pilot requires (potentially in addition to the lengthy Treaty infringement procedure), the Commission late in 2016 has decided to stop 'systematically relying on the EU Pilot problem-solving mechanism' and to apply it only when it 'is seen as useful in a given case'.[2239] At least in the short term, the Commission argues, this has resulted in an increase of Treaty infringement procedures.[2240] The *von der Leyen* Commission seems to be more convinced of the merits of EU Pilot (it 'has proven its value', the Commission now stresses), but the numbers are still comparatively low.[2241]

As concerns the special compliance mechanisms, no comprehensive data on their respective efficiency exists. However, against the backdrop of the efficiency concerns related to the Treaty infringement procedure, from the mere fact that special compliance mechanisms have been set in place we can at least deduce that the Commission and the legislator have assumed that their operation will lead to increased compliance rates in the respective policy fields (see also 2.6. below).

2.5.4. The MS' right to be heard

As regards the right to be heard (as one important component of the rights of defence) of the MS concerned, with regard to the Treaty infringement procedure the Court held: '[T]he opportunity for the Member State concerned to submit its observations constitutes an essential guarantee required by the Treaty and, even if the Member State does not consider it necessary to avail itself thereof, observance of that guarantee is an essential formal requirement'.[2242] The Court qualifies 'respect for the rights of the

2239 Commission, 'Single Market Scoreboard. Performance per governance tool: Infringements (Reporting period: 12/2016–12/2017)' 10 f.

2240 See Commission, 'Single Market Scoreboard. Performance per governance tool: Infringements (Reporting period: 12/2017–12/2018)' 10.

2241 Commission, 'Enforcing EU law for a Europe that delivers', COM(2022) 518 final, 18 f.

2242 Case 211/81 *Commission v Denmark*, para 9; see also case C-525/12 *Commission v Germany*, para 21: 'the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its

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defence' as a general principle of Union law which must be observed 'even in the absence of express provisions'.[2243] Against the background of proceedings pursuant to what is now Article 106 TFEU, the Court held that a MS 'must receive, before the decision which will be notified to it is adopted [...], an exact and complete statement of the objections which the Commission intends to raise against it'.[2244] More recently, it held – again (also) with a view to the EU-MS relationship and partly repeating its earlier case law – that 'observance of the rights of the defence [...] requires that the person against whom [...] proceedings have been initiated should be placed in a position in which he may effectively *make known his views on the facts and the infringement of EU law that are raised against him before a decision appreciably affecting his interests is adopted*' (emphasis added).[2245]

In most of the mechanisms examined here the right to be heard is explicitly provided for. In the Treaty infringement procedure, its MS-friendly pre-litigation phase as laid down in Article 258 TFEU may, in the words of *Gil Ibáñez*, 'provoke an excessive and unjustified slowness in the procedure'.[2246] In the other mechanisms the respective provisions are, on a whole, less elaborate. Sometimes even no mention is made at all of possibilities for MS to utter their view on a case.[2247] That does not mean, however, that prior to the adoption of the act at issue no communication takes place between the EU actor and the MS. In general, and in accordance with the above case law, a preliminary exchange of view in a relatively informal communication between the administrator and the *administré* is the rule rather than the exception.[2248] One of the exceptions may constitute the procedures initiated

obligations under EU law and, on the other, to avail itself of its right to defend itself properly against the objections formulated by the Commission'.

2243 Joined cases C-48/90 and C-66/90 *Netherlands v Commission*, para 37, with a further reference; case T-510/17 *Del Valle Ruíz*, para 121, with further references. Where the rights of defence are granted, the EU actor in charge is allowed to gather information about a MS in a certain case even before the official decision to open an investigation has been taken; case C-521/15 *Spain v Council*, para 62.

2244 Joined cases C-48/90 and C-66/90 *Netherlands v Commission*, para 45; see also Hofmann/Rowe/Türk, Administrative Law 210 f.

2245 Case C-521/15 *Spain v Council*, para 61.

2246 Gil Ibáñez, Supervision 97.

2247 See eg Article 106 para 3, Articles 116 f TFEU, Articles 16 f of Regulation 1092/2010. For the problems compliance mechanisms may raise in terms of the right to be heard of the individuals concerned – a topic which shall not be elaborated on in this context – see Gundel, Energieverwaltungsrecht, para 37, with further references.

2248 See Harlow/Rawlings, Process 60.

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upon request of the MS concerned. Here the MS can utter its view in the request. Hence with regard to the mechanisms now laid down in Article 114 paras 4 f TFEU, for example, the Court has held that beyond that the Commission 'is not required to observe the right to be heard before taking a decision'.[2249]

In mixed mechanisms, the soft law act preceding the hard law act may serve as a tool to inform the MS concerned of the allegations made against it and to invite it to utter its view on them. After that, and only if necessary, the EU actor may adopt the hard law act provided for in the procedure. Whether in the course of soft mechanisms – or in mixed mechanisms in which, due to compliance on the part of the MS concerned in a concrete case, only a soft but no hard law act is adopted – MS have a right to be heard before the adoption of the soft law act is unclear.[2250] After all, it is uncertain whether an EU soft law act may 'appreciably affect[] [a MS's] interests'.[2251] This threshold is certainly lower than the 'legal effects *vis-à-vis* third parties' required for an act to be subject to judicial review pursuant to Article 263 TFEU, and hence principally also soft law acts may meet it. In view of the wide range of soft law acts – with varying contents, political authority and consequences (of non-compliance, eg publication of the soft law act or of the fact of non-compliance) – the examination whether or not MS' interests are thereby appreciably affected, in my opinion, unlike with individual-concrete legally binding acts, is to be made case by case.

2.6. Why the compliance mechanisms 'look the way they look'

While one of the main reasons for deviation from the Treaty infringement procedure as the general compliance mechanism – the lack of efficiency of the latter – has been addressed above (2.5.3.), still the question remains unanswered why the alternative compliance mechanisms show such a great variety, particularly in terms of the output provided for, of the procedure to be followed, of the actors involved. For the various compliance regimes

2249 Joined cases C-439/05P and C-454/05P *Land Oberösterreich*, para 43; see also para 38 of this case and case C-3/00 *Denmark v Commission*, para 50.

2250 In the context of mixed mechanisms it is to be noted that it can never be predicted whether or not it will extend beyond the adoption of a soft law act in a concrete case, which is why the right to be heard would *always* have to be granted in advance.

2251 See again case C-521/15 *Spain v Council*, para 61.

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laid down in primary law some explanations can be found. A number of these mechanisms are just variants of the Treaty infringement procedure laid down in Article 258 TFEU. The adaptations (to the procedure as laid down in Article 258 TFEU) are minor and can be explained by the requirements of the respective procedures. In the context of the procedure which is now laid down in Article 108 TFEU, the Court held that State aid 'raises problems which presuppose the examination and appraisal of economic facts and conditions which may be both complex and liable to change rapidly',[2252] suggesting that in these cases constant monitoring and, if need be, a fast reaction may be more important than in cases of other infringements of EU law.

The excessive deficit procedure, to take an example strongly deviating from the Treaty infringement procedure, looks the way it looks because the MS – in view of the highly sensitive policy field, public spending being an epitome of national sovereignty[2253] – consciously opted for a 'political' procedure with 'little automaticity',[2254] a strong Council next to the Commission and no role for the CJEU that goes beyond Articles 263 and 265 TFEU.[2255] The powerful tools the procedure provides (eg sanctions) are mitigated by its strong intergovernmental set-up. The soft procedure laid down in Article 121 TFEU better reflects the weak, only coordinating competence of the EU in the field of economic policy.[2256] Also in the field of employment policy the soft mechanism laid down in Article 148 para 4 TFEU reflects the very limited EU competence.[2257] Article 106 para 3 TFEU serves to complement in particular EU competition law and to avoid its circumvention by the MS with regard to public or privileged undertakings. In this procedure the Commission does not only have a control function but also a regulatory function in the politically very sensitive area of public/privileged undertakings.[2258] Its acts may concern only one

2252 Case C-301/87 *France v Commission*, paras 15 f; sceptically: Gil Ibáñez, Supervision 102.

2253 See references in Hamer, Art. 126 AEUV, para 5.

2254 Fratianni/von Hagen/Waller, Maastricht 45. For the historical development of this 'gentle' approach in economic policy see Braams, Koordinierung 17 f.

2255 For the exclusion of the application of Articles 258 f TFEU see Article 126 para 10 TFEU. This exclusion also encompasses the imposition of sanctions according to Article 260 para 2 TFEU; see Amtenbrink/Repasi, Compliance 162, with a further reference.

2256 See Article 5 para 1 TFEU.

2257 See Article 5 para 2 TFEU; see also Hemmann, Artikel 148 AEUV, para 2.

2258 See Wernicke, Art. 106, paras 79 and 81.

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MS, but may also have a broader scope. Where a MS fails to comply, a Treaty infringement procedure may follow.[2259] Article 144 TFEU addresses an emergency situation in which the deviation from EU law on the part of the MS is exceptionally allowed. It lays down a pronounced 'political' mechanism with the Council as the central EU actor. Articles 116 f TFEU were intended to provide for 'Krisenmanagement' [crisis management] in a case in which a principally lawful MS action causes a serious distortion of the conditions of competitition in the internal market.[2260] It is primarily about finding an economically viable solution (as required by the law), not about establishing the non-compliance of a MS with primary law. Therefore the Treaty infringement procedure may have appeared to be inapt in this case.

In summary, we can say that – while they all serve the purpose of achieving MS compliance – the above mechanisms are nuanced in one or the other way. This shading, as it were, is to be understood against the concurrence of the inter-dependent factors of the category of EU competence at issue, the more detailed purpose of the concrete mechanism (implementation, enforcement,[2261] exchange of views, monitoring, etc, for which 'ensuring compliance' is only an umbrella term) and the actual course of political negotiations in the respective Treaty-making Convention (which is very difficult to trace[2262]).[2263]

Also with regard to the design of the mechanisms laid down in secondary law, the majority of which is about day-to-day, rather 'technical' administration, there is hardly any uniformity; in *Andersen's* words: 'When viewed as a whole, the measures do not form a coherent picture in the sense of a standardised or formalised procedure established with the purpose of supplementing the general EU infringement procedure'.[2264] The question may be raised why they were necessary in the first place and why they vary so strongly from each other, why there is no common model of compliance mechanisms in secondary law.

2259 See also Koops, Compliance 140, describing Article 106 TFEU against this background as 'an extra phase in ensuring compliance'.
2260 Classen, Art. 116 AEUV, paras 2 and 5.
2261 These two purposes are addressed in more depth under 3.1. below.
2262 See eg Thomas Müller, Wettbewerb 23 f.
2263 Similarly with regard to compliance mechanisms laid down in public international law: Shelton, Compliance 120 ff.
2264 Andersen, Enforcement 201; similarly: Gil Ibáñez, Exceptions 174.

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Also for the compliance mechanisms laid down in secondary law, the need for fast-track[2265] procedures – or at least: procedures faster than the Treaty infringement procedure – has been a decisive factor for their creation.[2266] What is more, the activation of these mechanisms rarely attracts the attention of a wider public, even if exceptionally the output may be published. They are regularly down-to-earth procedures not entailing diplomatic consternation, but – ideally at least – an exchange of (legal) views based on facts. Since the compliance mechanisms are primarily an expression of 'prozedurale Kooperation' [procedural cooperation],[2267] a certain degree of mutual trust is necessary to ensure their smooth functioning. Especially with regard to more technical questions, public clamour and national shame are rarely helpful to facilitate cooperation.[2268]

Another reason for special procedures has been the need to involve additional expertise. While the Treaty infringement procedure does not, as a rule,[2269] provide for the involvement of expert bodies, the secondary law mechanisms often make provisions for output from European agencies or other EU expert bodies – not only to (softly) demand compliance, but also to 'stimulate mutual learning processes among national regulatory

2265 *Storr* uses the term 'fast track procedure' in the context of Article 17 of Regulations 1093–1095/2010 and in comparison to the Treaty infringement procedure; Storr, Agenturen 80.

2266 Arguably this holds true for all secondary law compliance mechanisms presented here, but in particular it does for urgency or even emergency procedures such as the ones laid down in Article 13 para 1 of Directive 2001/95/EC (health safety), Articles 70 f of Regulation 2018/1139 (safety), Article 29 para 2 of Regulation 806/2014 (resolution of banks), Article 18 of Regulation 1093/2010 (supervision of banks); with regard to the allegedly limited possibilities of the Commission in cases of urgency: Commission, 'Communication on the handling of urgent situations in the context of implementation of Community rules – Follow-up to the Sutherland report', COM(93) 430 final, 40; see also the Report to the EEC Commission by the High Level Group on the Operation of Internal Market, presided over by Peter Sutherland (1992; so-called 'Sutherland-Report'), in particular Recommendations 20, 27 and 31.

2267 For this term as a component of the European *Verwaltungsverbund* see Schmidt-Aßmann, Einleitung 6.

2268 For the balance between 'management' (in particular coordination, cooperation) and 'enforcement' (in particular sanctions) which ought to be struck in order to ensure compliance see Tallberg, Paths 632 f.

2269 For the possibility of allowing for expert opinions in Court proceedings see eg Article 25 of the Statute of the CJEU.

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authorities'.[2270] Part of their expertise is also to be better informed in their respective field, that is to say to know better what goes wrong in which MS. This increases the likelihood of detection of an infringement. In hard and in particular in mixed procedures, these expert bodies often act together with the Commission,[2271] in soft procedures more frequently alone.[2272] That a European agency – that is to say: a body not established by primary law[2273] – is the only actor in a mixed or hard procedure is the case only exceptionally.[2274] This is in particular due to (actual or politically assumed) legal or political limits to vesting bodies not established by primary law with executive power, above all the requirement, as most prominently expressed in the so-called *Meroni* doctrine, to maintain the EU's institutional balance provided for in the Treaties (see 3.3.1. below).[2275] Some of the secondary law mechanisms presented here are mere concretisations of procedures laid down in the Treaties.[2276] Therefore their respective structure – above all in

2270 Groenleer/Kaeding/Versluis, Governance 1227; for mutual learning effects of peer reviews see Dawson, Soft Law 15; critically: Harlow/Rawlings, Accountability 7.

2271 See the mechanisms laid down in Articles 70 f of Regulation 2018/1139, Article 63 of Directive 2019/944, Article 17 of Regulation 1093/2010, Article 25 of Regulation 2016/796.

2272 See the mechanisms laid down in Article 6 paras 5–7 of Regulation 2019/942, Article 33 of Directive 2018/1972, Articles 16 and 17 of Regulation 1092/2010.

2273 Some EU expert bodies, such as the European Public Prosecutor's Office or the EDA, are explicitly foreseen in primary law, but actually established they are – like all the other European agencies – by means of secondary law (in case of the European Public Prosecutor's Office: in the framework of enhanced cooperation); see also Chamon, Agencies 136 f.

2274 See the mechanisms laid down in Article 7 para 4 and Article 29 para 2 of Regulation 806/2014, Articles 18 and 19 of Regulation 1093/2010; for the ambivalent role the Commission plays in the increasing empowerment of European agencies see Chamon, Agencies 123–126.

2275 See, *ex multis*, Craig, Administrative Law 168–172; for the revisiting of the *Meroni* doctrine by the so-called *ESMA* case see eg Bergström, System. For the continuing relevance of *Meroni* also in the political discussion see the example of the Commission proposal on the establishment of the European Monetary Fund, COM(2017) 827 final, 13 f; in the context of the SRB's powers see case T-510/17 *Del Valle Ruíz*, paras 204 ff, dwelling on the legislative history of Regulation 806/2014; for the (ir)relevance of *Meroni* in the context of the EBA and the other financial market supervisory authorities see Annunziata, Remains.

2276 See in particular Articles 22 f of Council Regulation 2015/1589 (Article 108 TFEU), the excessive imbalance procedure laid down in Regulations 1176/2011 and 1174/2011 (Article 121 TFEU; the latter in conjunction with Article 136 TFEU), Article 3 para 7 of Regulation 472/2013 (Article 121 TFEU, in conjunction with Article 136 TFEU).

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terms of the actors involved and the categories of output – is, to some extent at least, preordained.[2277]

As mentioned above (2.5.2.), the Treaty infringement procedure – like most compliance mechanisms of our sample – provides for an *ex post* scrutiny of MS action, whereas some procedures laid down in secondary law (also) provide for the scrutiny of draft decisions of MS authorities, that is to say *ex ante* scrutiny.[2278] Thereby the violation of EU law shall be barred preventively.[2279] This has an influence on the interaction between the two parties (MS and EU), as at this early stage of decision-/rule-making they are necessarily more flexible in searching for a lawful solution in accordance with the interests/views of both of them.

All mechanisms presented here aim at reaching compliance with EU law on the part of the MS, but the approaches taken (or: the more detailed purposes) may differ from each other. In this context, all of the above 'objective' considerations may contribute to the actual shape of a mechanism. But even in view of such 'objective' factors there is never only one way the compliance procedure could possibly look like. Whether MS may request the initiation of the procedure, whether they have ten working days or three weeks to react to the Commission opinion, but also more fundamental questions, for example whether a mechanism should be mixed or only soft, are eventually – to some degree at least – the result of pure political bargaining (the weighing of the legislator's subjective motivations that is).[2280] Or, as *Gil Ibáñez* has put it in this context: '[I]t seems clear that the creation of new procedures does not seem to obey a general strategy of fulfilling new needs demanded by all the areas characterised by certain features. In reality, nor can the financial consequences for the EC budget serve to justify all the far-reaching enforcing and supervising tools granted

2277 Beyond this predetermination, the actors involved should be selected by the legislator with a view to the 'political, economic, and social characteristics of the sector at stake'; Scholten/Ottow, Design 91.

2278 See the mechanisms laid down in Articles 70 f of Regulation 2018/1139, Article 7 para 4 of Regulation 806/2014, Article 25 of Regulation 2016/796, Article 53 of Directive 2019/944 and Article 33 of Directive 2018/1972.

2279 For such preventive Commission measures more generally see Schmidt/Schmitt von Sydow, Art. 17 EUV, paras 37 ff.

2280 The Commission Proposal COM(2013) 27 final (Article 21) for what has become Article 25 of Regulation 2016/796, for example, has provided for an ERA *recommendation* to be adopted. Article 25 of Regulation 2016/796, however, due to the Council's position at first reading in the ordinary legislative procedure, provides for the ERA to adopt an *opinion*.

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to the Commission […]. Instead, those tools appear to be more the result of political bargaining within the Council [today we would have to add: 'and of the EP'], and between the latter and the Commission, on a case by case basis'.[2281] This is not necessarily harmful for the outcome and it is certainly not an EU-specific characteristic. It is simply a concomitant of collective decision-making of human beings and of the fact that for most policy problems there is more than just one (reasonable) solution.

3. Legal assessment

3.1. Compliance mechanisms: implementation or enforcement?

3.1.1. The characteristics of implementation and enforcement

3.1.1.1. Introduction

As we have seen, the compliance mechanisms presented and discussed above are strongly inhomogeneous – procedurally, institutionally, and not least substantially. What unites them is in particular their shared overall purpose,[2282] namely to ensure compliance with EU law by the MS.[2283] Taking a closer look at this apparently shared purpose, we notice that with regard to the broad objective to ensure compliance with EU law by the MS, the TFEU draws a basic line between the tasks of the Commission and the Council in their function as administrative bodies (let us call this implementation) and the traditional tasks of the CJEU (let us call this enforcement), thereby reflecting upon a material separation of powers within the EU. In substantive terms, it was said, implementation 'concerns putting law into effect',[2284] while enforcement (by the EU) is about compelling the

2281 Gil Ibáñez, Tools 5.3., also with regard to MS' interests in establishing such mechanisms by means of secondary law.

2282 For the more specific purposes of the soft law acts used in (some) of these mechanisms see 2.4. above.

2283 See Article 70 TFEU which provides, without prejudice to Articles 258–260 TFEU, for the possibility to perform an evaluation of the implementation of certain Union policies by MS' authorities.

2284 Andersen, Enforcement 163; for the term 'implementation' see also Christiansen/Dobbels, Rule Making 44 f.

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relevant actors to comply with the law.[2285] Enforcement 'only becomes relevant in the phase succeeding implementation, if the question arises whether EU law has been implemented, applied, and enforced effectively'.[2286] Both fields – implementation and enforcement – are aimed at ensuring compliance with EU law on the part of the MS.[2287] They approach this aim in a different manner, though.

Ideally, the compliance mechanisms presented and discussed above can be allocated to either of these categories – implementation or enforcement. Concluding from the Treaties, no third category is apparent in this context (*tertium non datur*). The allocation to either category is important for numerous aspects of the legal assessment of compliance mechanisms, such as the correct legal basis or the EU's institutional balance, and will thus reoccur throughout this chapter. It shall therefore be addressed right at its beginning. In spite of the lack of a third category, the above-mentioned material separation of powers underlying the distinction between implementation and enforcement does not entail hermetic segregation. Thus, the differentiation between the two categories in practical terms also allows for cooperation between them.

In the specific context at issue here, we talk about procedures performed by EU institutions, bodies, offices and agencies *vis-à-vis* specific MS and their respective authorities. Thus, we have an interest in defining the two terms – implementation and enforcement – only in this individual-concrete relationship. Conversely, we are not concerned with the general-abstract implementation of EU law by EU actors. Neither are we concerned with

2285 See Nollkaemper, Role 161, with further references. The distinction between coercion and persuasion does not represent the distinction between enforcement and implementation. It rather addresses the dichotomy of hard and soft approaches. However, as has been shown throughout this work, also soft regulation – especially if combined with a duty to explain non-compliance – may be rather a tool of coercion than a tool of persuasion; for the antipodes coercion and persuasion see also van Waarden, Harmonization 102; for different conceptions of 'enforcement' in EU law see Scholten, Enforcement 9 f.

2286 Andersen, Enforcement 163.

2287 For the relationship between the terms 'implementation' and 'compliance' on the one hand, and 'enforcement' and 'compliance' on the other hand see Nollkaemper, Role 160 f; see also IV.1. above. The Commission broadly utters: 'the best way to enforce EU law is to prevent breaches from happening in the first place'; Commission, 'Enforcing EU law for a Europe that delivers' (Communication), COM(2022) 518 final, 1.

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the implementation of EU law by the MS or the (in practice increasing[2288]) enforcement of EU law by EU bodies *vis-à-vis* individuals (in a broader sense), eg the transposition of an EU directive by a MS or the enforcement of EU competition law by the Commission *vis-à-vis* an undertaking.

In an attempt to define these two categories more closely in the specific context just recapitulated, we will flesh out the main characteristics of implementation and enforcement as laid down in primary law. On their own, most of these characteristics are not necessary, and none of them is sufficient for the allocation of a mechanism to either of the two categories. Therefore, they will only serve as indicators of the *ratio legis* of the act providing for the mechanism under scrutiny. The multitude of such indicators will create a flexible system which shall allow a concrete compliance mechanism to be assigned, at least by tendency, to either category.

3.1.1.2. Implementation and enforcement under the Treaties

3.1.1.2.1. Main characteristics

3.1.1.2.1.1. Primary aim, time of intervention, and the discretion granted under Article 291 TFEU

Having provided above for a preliminary, rather general definition of the terms implementation and enforcement, we shall now flesh out the characteristics of these concepts – in our specific context, namely in the individual-concrete relationship between EU actors and MS actors – as laid down in primary law. Even though neither of them is defined in the Treaties, we can deduce some indicators from certain core provisions, in particular Articles 16 f TEU as well as Article 291 TFEU in the context of implementation and Article 19 TEU and Articles 258–260 TFEU in the context of enforcement. In a systematic perspective, however, also other provisions[2289] are to be considered, and so is the dynamic case law of the Court. This reveals that Article 291 TFEU is not the only primary law provision which allows for individual-concrete implementing acts to be addressed to the MS (see also 3.1.1.2.1.3. below). Nevertheless, being

2288 See Scholten, Trend 1349.

2289 See the 'autonomous executive powers' referred to by Chamon, Member States 1506, eg Articles 42, 43 para 3, 78 para 3 or 103 para 1 TFEU. These powers directly serve the implementation of certain Treaty provisions.

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the main general provision on the implementation of EU law, Article 291 TFEU certainly is to be given special weight. As regards Articles 258–260 TFEU, it is to be noted that these provisions establish the Court as the body in charge of determining infringements of EU law by the MS and to ensure compliance by the imposition of financial sanctions, if necessary. Thereby the Treaties have, primary law exceptions (eg the excessive deficit procedure) apart, monopolised the enforcement of EU law *vis-à-vis* the MS with the Court (which is, in the Treaty infringement procedure pursuant to Article 258 TFEU, requested to act by the Commission).

While under the Treaties the primary aim of implementation on the part of EU actors (according to Article 291 para 2 TFEU[2290]) is to create uniform conditions for the implementation (by the MS) of legally binding Union acts, more generally that is to say: to concretise EU law,[2291] the primary aim of enforcement is to determine and to end non-compliance with law, in our case: with EU law on the part of the MS (Treaty infringement procedure). Article 291 para 2 TFEU allows for an EU actor to implement (to concretise) EU law so that it is uniformly implemented (applied) by the MS. In the case of enforcement, compliance shall be reached by the determination of an infringement.[2292] Only when this infringement is established authoritatively may a change of action – compliance – be requested.

This dichotomy of ensuring compliance with EU law *vis-à-vis* the MS under the Treaties also has a chronological dimension, in that it is reflected upon by the point of time of intervention. Since concretisation (as a means of ensuring compliance) is their main purpose, implementing measures (of EU actors) will regularly be taken before, exceptionally also in the course of the relevant MS action (constituting the application of EU law).[2293] This can be described as the *ex ante* occurrence and the on-going occurrence of implementing acts, the latter meaning that the EU implementing body is involved eg in a national procedure leading to the adoption of national implementing acts. An example is the procedure laid down in

2290 For the broader understanding of this term prior to the Treaty of Lisbon see Craig, Lisbon 50; for the relevant case law prior to the entry into force of the Treaty of Lisbon see Mendes, Rule Making 31.

2291 See also case C-427/12 *Commission v European Parliament/Council*, para 39: 'providing further detail in relation to the content of a legislative act'.

2292 See also joined cases C-514/07P, C-528/07P and C-532/07P *API*, para 119: 'Article 226 EC is designed to obtain a declaration that the conduct of a Member State is in breach of EU law and to terminate that conduct'.

2293 See also case C-359/92 *Germany v Council*, para 47.

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Article 121 TFEU (see IV.2.2.3.1.1. above), pursuant to which the national decision-making procedure as a whole is monitored. The former – *ex ante* occurrence – is exemplified by the adoption of general-abstract implementing acts – the regular case under Article 291 para 2 TFEU – on the basis of which the administrations of the MS take their respective decisions. Also the procedure laid down in Article 114 paras 4 ff TFEU (on the maintenance or introduction of national provisions; see IV.2.2.1.1.3. above) provides for *ex ante* intervention, since it is normally performed prior to the entry into force of the harmonisation measure.[2294]

In practice, it is sometimes difficult to draw a clear line between *ex ante* and on-going occurrence. For our purposes this is not necessary anyway, because both modes of intervention indicate implementation. For the overlap between on-going and *ex post* occurrence see 3.1.1.2.1.2. below.

Enforcement action, on the contrary, is taken *post factum*, that is to say after the relevant MS action (*ex post* occurrence).[2295] Before the incriminated MS action has been taken, no infringement can be established.[2296] Whereas also *ex post* action, after an assessment of the other criteria, may turn out to qualify as implementation, the reactive character of a measure *in general* indicates enforcement.[2297]

Eventually, one word on the discretion of the legislator in granting implementing powers: As opposed to the regular case of MS implementation according to Article 291 para 1 TFEU[2298] (which normally leaves a certain leeway to the MS and hence may lead to slightly different results in different MS), para 2 makes provision for the case that uniform conditions for the implementation are required by means of implementing acts of the

2294 See Classen, Art. 114 AEUV, para 224, with further references. Article 114 para 9 TFEU again is addressing enforcement (a variant of the Treaty infringement procedure). This exemplifies the sometimes close entanglement between implementation and enforcement.

2295 See also Gil Ibáñez, Supervision 16, who describes enforcement in EU law as 'reactively related to compliance'.

2296 Note the words on the Treaty infringement procedure of Scholten, Trend 1353: 'In any case, it is an *ex post* mechanism, a tool of last resort, a stick rather than a carrot' (emphasis in original).

2297 Also the distinction between on-going and *ex post* occurrence may sometimes turn out to be difficult; see 3.1.1.2.1.2. below.

2298 See already joined cases 89 and 91/86 *CNTA*, para 11, with a further reference; see also European Convention, 'Delimitation of competence between the European Union and the Member States – Existing system, problems and avenues to be explored', CONV 47/02, in particular 9 f.

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Commission (or of the Council). A supplementation or amendment, if only of certain non-essential elements of a legislative act, is excluded from such implementation *qua* Article 290 para 1 TFEU. Even if we applied a wide understanding of the term implementation, Article 290 TFEU would not be relevant in our context, as it does not allow for the adoption of individual-concrete acts directed to a MS.[2299] In the Court's words, the legislator has discretion when it decides to confer an implementing power pursuant to Article 291 para 2 TFEU (as opposed to delegated power under Article 290 TFEU), which is why here judicial review is limited to 'manifest errors of assessment as to whether the EU legislature could reasonably have taken the view [...] that [...] only the addition of further detail, without its non-essential elements having to be amended or supplemented [is required] and, secondly, that [the basic act at issue] require[s] uniform conditions for implementation'.[2300] Its wide wording – interpreted also in light of Article 17 TEU which very generally obliges the Commission 'to ensure the application of the Treaties'[2301] – in combination with this concessive case law makes Article 291 para 2 TFEU a versatile tool in the hands of the legislator.

As mentioned above, implementing acts adopted by the Commission/Council pursuant to Article 291 para 2 – unlike delegated acts pursuant to Article 290 TFEU – may also take the form of individual-concrete decisions.[2302] This does not in principle appear to be contrary to the concept of implementation: While the purpose to create 'uniform conditions for implementing [...] Union acts' primarily addresses general-abstract measures (which also in practice are the regular case of implementing

2299 See Ilgner, Durchführung 227 and 254; Craig, Comitology 176.

2300 Case C-427/12 *Commission v European Parliament/Council*, para 40; confirmed by case C-88/14 *Commission v European Parliament/Council*, paras 28–32; see also the more nuanced approach of AG *Mengozzi* in this case, in particular paras 30–38; for the scope of (non-)essential elements see Ritleng, Domain.

2301 Note that the Commission in its Communication 'EU law: Better results through better application', 2017/C 18/02, states that under Article 17 para 1 TEU it is the Commission's responsibility to ensure not only the effective application of EU law, but also its implementation and enforcement (page 1); see also Senden, Soft Law 318.

2302 See Article 2 para 2 of Regulation 182/2011: 'other implementing acts [than implementing acts of general scope]'; see case C-146/91 *KYDEP*, para 30; see Ilgner, Durchführung 219; Schütze, Rome 1418; see also Nettesheim, Art. 288 AEUV, para 27, who argues that implementing acts may be adopted in all the forms laid down in Article 288 TFEU, also in the form of recommendations and opinions.

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measures), it can be argued that in some cases also the adoption of individual-concrete measures addressed to MS serves the uniformity of application of EU law.[2303]

3.1.1.2.1.2. Different approaches towards ensuring compliance: concretisation and determination

It has already been stated that both implementation and enforcement are aimed at compliance. It should be noted, however, that whereas enforcement is aimed at the determination of an infringement, a different approach is inherent in implementation within the meaning of Article 291 para 2 TFEU. Implementing power on the part of the Commission or the Council is primarily directed towards the concretisation of EU law and thereby does away with or at least reduces the MS' leeway in applying a legally binding Union act. By establishing 'uniform conditions', any deviating application of the basic act becomes unlawful, also an application which would under normal circumstances – that is to say without an implementing act adopted by the Commission or the Council – be well within the MS' room for manoeuvre.[2304]

The distinction between implementation and enforcement becomes particularly difficult where implementation takes the form of an individual-concrete measure directed to a MS *ex post* or in the course of an on-going procedure[2305] – two forms which, in places, overlap. In these cases, both form and time of intervention at least resemble those of enforcement measures. That by means of implementing measures not only the slight deviations (which, for lack of the concrete implementing act, would be lawful) but also – *a fortiori* – the severe breaches of law may be tackled, is a collateral effect – an effect which increases the difficulty to distinguish between implementation and enforcement in this respect. If the procedural characteristics (reflecting upon the substantive differences between imple-

2303 Differently: Schlacke, Komitologie 319; U Stelkens, Unionsverwaltungsrecht 513 ff.

2304 See also Tallberg, Paths 613, with a view to what he describes as the 'Management Approach': 'Non-compliance, when it occurs, is not the result of deliberate decisions to violate treaties, but an effect of capacity limitations and rule ambiguity. By consequence, non-compliance is best addressed through a problem-solving strategy of capacity building, rule interpretation, and transparency, rather than through coercive enforcement'.

2305 See 3.1.1.2.1.1. above.

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mentation and enforcement) are not indicative, we have to find out about the *telos* of the respective mechanism otherwise.[2306] Thereby, we are thrown back to our abstract definition: The focus of implementation is to concretise EU law, thereby reducing the likelihood of infringements, whereas the focus of enforcement lies on the determination of an infringement (or, if that is not possible: a lawful situation).

In order to illustrate the above problems of distinction, *Andersen* takes the example of the procedure laid down in Article 25 of (outdated) Council Regulation 2847/93. This procedure requires MS to carry out certain technical controls to ensure compliance with specific objectives related to the EU's fisheries policy, and empowers the Commission to make proposals to the Council for the adoption of appropriate general measures where it has established that a MS has not complied with the aforementioned duty. *Andersen* claims that 'the establishment of an infringement is not tantamount to an authoritative interpretation' and hence this regime does not encroach upon the powers of the CJEU.[2307] With regard to the procedure at issue, the author would agree on the latter conclusion because here the Commission 'establishes' the infringement *in order to* make proposals to the Council for the adoption of appropriate general measures. It does not establish the infringement in the form of a decision *vis-à-vis* the MS concerned, but this determination is a mere prerequisite for the Commission to adopt proposals, accordingly. As regards the (alleged) difference between the establishment of an infringement and the authoritative interpretation of EU law, the conceptual separation is acknowledged, but in practice the establishment of an infringement by means of a (binding) decision of an administrative EU body certainly entails an interpretation of EU law which bears a significant authority.[2308] It is true that also in this case it is the Court – if it is called upon eg in the course of an annulment procedure – which has the final say. However, if this possibility were the only requirement for rendering lawful administrative output in this context, all mixed and hard compliance

2306 For the difficulty to find out about the purpose of a law and its subjective implications more generally see Schober, Zweck 3–5; see also 3.1.1.2.1.3. below.

2307 Andersen, Enforcement 143.

2308 That the binding interpretation of EU law *vis-à-vis* national authorities is a strong power which not any EU body may be granted is illustrated in case 19/67 *Bestuur der Sociale Verzekeringsbank*, 355, and in case 98/80 *Romano*, para 20, in which the Court declared – in a systematic interpretation of the EEC Treaty – a 'decision' of the Administrative Commission (an EU body) to be non-binding.

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mechanisms would have to be accepted, no further examination of them being required (for this question see also 3.3.3. below).

The legislator's awareness of the fine line between the authoritative determination of an infringement – which is a prerogative of the Court[2309] – and the mere investigation of, and conclusion on, the correct application of EU law which may be necessary for an EU administrative body to perform its implementing powers is illustrated by the following example: While the Commission proposal for what later became (meanwhile outdated) Council Regulation 2371/2002 provided that '[a]ny loss to the common living aquatic resources resulting from a violation of the rules of the common fisheries policy attributable to any activity or omission by the Member State [to be established by the Commission] shall be made good by the Member State',[2310] the wording of the respective provision, in the course of the legislative procedure, was changed to: 'When the Commission has established that a Member State has exceeded the fishing opportunities which have been allocated to it, the Commission shall operate deductions from future fishing opportunities of that Member State'.[2311] Thereby the Commission's power to establish a *violation* of EU law on the part of a MS was replaced by a power to compensate an excess of the allocated fishing opportunities, or in other words: make sure that the regime is uniformly applied. These two versions of the provision exemplify well the difference between (but also the proximity of) implementing measures (aiming at the uniform application of EU law by the MS) on the one hand, and enforcement measures (focussing on its violation) on the other hand.

3.1.1.2.1.3. The indicative value of the material scope of and institutional questions relating to compliance mechanisms

In distinguishing the two realms of implementation and enforcement, the material scope of the mechanism at issue may have indicative value, as well. While the Treaty infringement procedure as the main enforcement mechanism of the EU has a general scope, the Treaties also provide for specific enforcement mechanisms, eg Article 108 TFEU. Implementing mechanisms may also have a broader scope (eg Article 114 paras 4 ff TFEU), but when

2309 Andersen, Enforcement 144.
2310 Commission Proposal COM(2002) 185 final, Article 23 para 4 (first sentence).
2311 Article 23 para 4 subpara 1 of Council Regulation 2371/2002.

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they are laid down in secondary law by tendency their respective scope is much narrower. This is not least due to the fact that Article 291 para 2 TFEU, the main provision on the implementation of Union law by EU actors, prescribes that the Commission (or exceptionally the Council) shall only be empowered where 'uniform conditions' for the implementation of EU law are required. Regularly, it is only specific rules (falling within a specific material scope) which require uniform conditions for implementation – which is why the Commission is empowered specifically in many different acts of secondary law. While the Court over time seems to have loosened the level of determination required for the basic rules, thereby allowing for a broader qualitative scope of implementing powers (that means: a broader measure of discretion for the implementing EU actor),[2312] too broad a quantitative scope (granted eg for a Regulation as a whole) still rather speaks against implementation.

When comparing the various compliance mechanisms, it attracts attention that some of them are directed to 'the Member State' concerned,[2313] others are more specifically directed to the national authority in charge.[2314] This distinction does not appear to be a peculiarity either of implementation or of enforcement. Rather, the more specific compliance mechanisms tend to relate to the national bodies in charge, whereas more general compliance mechanisms – also the Treaty infringement procedure – relate to 'the Member State' concerned. In the former case, the national body requested to comply with EU law is determined in the request for compliance, in the latter case the determination of the specific body or bodies in charge is up to the national sphere. This latter mode appears to consider national sovereignty, *in concreto*: the MS' procedural autonomy, to a larger extent.[2315] In complex (in particular: federally organised) national administrations it may be difficult for EU actors to find out which national bodies are in charge in a concrete case. Therefore EU law allows EU actors to address the MS as a whole, leaving the question of internal (national) competence up to this MS.[2316]

2312 See case C-240/90 *Germany v Commission*, para 41; still more strictly: case 291/86 *Central-Import Münster*, para 13.

2313 For example Article 13 para 1 of Directive 2001/95/EC; see IV.2.2.1.2.1. above.

2314 For example Article 7 para 4 of Regulation 806/2014; see IV.2.2.2.2.5. above.

2315 See already Constantinesco, Recht 299; see also Gil Ibáñez, Supervision 212–215.

2316 For this question see also Schütze, Rome 1418 f, with further references; see case C-359/92 *Germany v Council*, para 38, according to which 'the measures taken for the implementation of Article 100a of the Treaty [now: Article 114 TFEU]

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At the EU level, implementation is performed by administrative EU bodies. According to Article 291 TFEU these are the Commission and exceptionally the Council, but also other bodies, eg European agencies may be vested – on different legal bases – with implementing powers.[2317] Thus, where a legislative act providing for a compliance mechanism does not refer to Article 291 para 2 TFEU (including comitology as laid down in Regulation 182/2011) when regulating (the creation of) the EU output to be adopted in the framework of this mechanism and/or where it empowers an EU body other than the Commission or the Council, this legislative act may still lawfully provide for implementation.[2318] The measure of independence these bodies dispose of varies.[2319] In particular the Commission and European agencies are accountable to at least one of the institutions comprising the (ordinary) EU legislator (that is the Council and the EP). They can normally act upon their own motion, sometimes they can act *also* upon request, rarely *only* upon request, mostly by other EU actors or MS (authorities).

Enforcement, on the other hand, idealtypically is performed by the CJEU, an independent body[2320] which acts only upon request – in case of the Treaty infringement procedure this is a request (action) of the Commission (or a MS), which again can act on its (their) own motion.

The lawfulness of implementing acts may be scrutinised by the CJEU, if they are 'intended to produce legal effects *vis-à-vis* third parties' pursuant to Article 263 para 1 TFEU (see also 3.6. below). With enforcement according to Articles 258–260 TFEU the situation is different: Judgements of the Court are final.

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are addressed to Member States and not to their constituent entities'. The Court referred to the division of competences between the *Bund* and the *Länder* in Germany, but its words could also be applied with regard to national authorities.

2317 See also 3.3.4. below.

2318 See case C-270/12 *United Kingdom v European Parliament/Council*, paras 78 ff: with regard to European agencies; case C-521/15 *Spain v Council*, para 43: with regard to the Council.

2319 Note the CJEU which – in the context of national supervisory authorities, but still – stressed the importance of independence in the context of ensuring compliance by uttering that the independence of these bodies 'is intended to ensure the effectiveness and reliability of the monitoring of compliance with the [relevant law]'; case C-362/14 *Schrems*, para 41.

2320 Article 19 para 2 TEU.

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3.1.1.2.2. The preliminary reference procedure, the procedure pursuant to Article 218 para 11 TFEU, and the excessive deficit procedure – special cases

When trying to distinguish implementation and enforcement undertaken by EU bodies *vis-à-vis* the MS, the preliminary reference procedure inevitably attracts attention. Article 267 TFEU provides for a procedure in the course of which the CJEU shall answer questions of a court or tribunal of a MS on the interpretation of EU law, and the validity of EU law (other than primary law) respectively. The answer given by the CJEU is binding for the national court or tribunal which has referred the questions to the former.[2321] When it comes to the classification of this procedure, it is clear that this is not an enforcement procedure within the meaning fleshed out above.[2322] It does not entail the review of MS action in terms of compliance with EU law. Rather, it is a procedure which may only be initiated upon request by a national court or tribunal and which is embedded in an on-going national court procedure. These latter characteristics may speak in favour of implementation. The fact that the Court takes action only upon a mostly[2323] voluntary request by the national court or tribunal feebly speaks against this view. While content-wise it could be called implementation, in institutional terms such qualification would clearly go against the implementation regime set up by the Treaties.[2324] Hence the preliminary reference procedure should be qualified as a procedure *sui generis*. It is to be accepted as a special case of supporting national courts or tribunals in their handling of matters of EU law which – *qua* being provided for in primary law – in legal terms cannot possibly conflict with the implementation and enforcement regimes set up by the Treaties.

2321 Whether and, if so, to which extent the Court's answer is binding also beyond the case at issue is contested; see *Ehricke,* Bindungswirkung 44 ff, with further references; affirming an *erga omnes* effect in practice: Broberg, Preliminary References 107.

2322 For a discussion of the increasing number of preliminary references in the context of enforcement see Commission, 'Enforcing EU law for a Europe that delivers', COM(2022) 518 final, 7.

2323 For obligatory requests see Article 267 para 3 TFEU, the *CILFIT* doctrine and the *Foto-Frost* doctrine of the Court; see case 283/81 *CILFIT* and, more recently, case C-561/19 *Consorzio Italian Management*; case 314/85 *Foto-Frost*.

2324 In the literature, the preliminary reference procedure is sometimes referred to as an enforcement measure, but then this term, unlike here, is not used in conceptual opposition to implementation: see Broberg, Preliminary References 99, with a further reference.

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The procedure according to Article 218 para 11 TFEU may have a character which is similar to that of the preliminary reference procedure, namely where it is initiated by a MS.[2325] The Court's opinion is then addressed to the respective MS. While this procedure is designed to clarify whether or not an agreement envisaged pursuant to Article 218 TFEU is in accordance with primary law, the Court in its past case law has also reflected upon the competences of the MS. While being politically useful, from a legal point of view this has been criticised as falling neither within the scope of Article 218 para 11 TFEU nor within the tasks and powers of the Court more generally.[2326] In the given context, this procedure is to be mentioned only as far as the Court addresses its opinion to a MS, thereby ensuring that it complies with Union law. However, since its opinion determines the legal situation of all the MS (intending to conclude the respective agreement) – and also the EU – its individual-concrete character is strongly diluted. Thus, the procedure pursuant to Article 218 para 11 TFEU is to be mentioned here, but in developing a Treaty-based distinction between implementation or enforcement it is far less important than the procedures laid down in Article 267 TFEU and in Article 126 TFEU, respectively.

The excessive deficit procedure as laid down in Article 126 TFEU (see IV.2.2.2.1.2. above) is another special case. It provides for the determination of an infringement of EU law – namely of the EU's deficit criteria – by a MS and, possibly, the imposition of sanctions, including financial sanctions.[2327] While these indicators clearly point in the direction of enforcement,[2328] it is the Council, together with the Commission, which takes the lead in this procedure. The application of the Treaty infringement procedure is explicitly excluded. This clearly is an exception to the principle of the Treaties that the enforcement of EU law *vis-à-vis* the MS is ultimately performed by the Court. But since it is laid down in primary law, the classification along the lines of the above discussion – like in the case of the preliminary reference procedure – is of secondary importance anyway. Again, this procedure is to

2325 For this procedure see also III.3.5.2.5. above.

2326 See Lorenzmeier, Art. 218 AEUV, para 76; Schmalenbach, Art. 218 AEUV, paras 39–41, both with further references to the Court's case law.

2327 For the application or rather non-application of the sanctions regime in the past see Bieber/Maiani, Enforcement 1066.

2328 At the same time, it ought to be mentioned that the Council recommendations which may be adopted in the course of an Article 126-procedure shall give the MS concerned a guideline on how to remedy the violation of EU law (see 3.1.1.2.1.2. above). This indicator of implementation, however, stands back before the stronger enforcement thrust of Article 126.

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be accepted as a special case which is protected from legal challenge *qua* its belonging to the topmost layer of EU law.

In view of these examples, it may be argued that the conclusion *tertium non datur* uttered above (3.1.1.1.) is challenged. However, these procedures do not form a specific third category of their own. They differ strongly from each other. While the preliminary reference procedure – and, to the limited extent measured above, the procedure laid down in Article 218 para 11 TFEU – could be dubbed 'implementation by the Court' (which in terms of the Treaties would be non-system), the excessive deficit procedure constitutes enforcement performed by administrative bodies – again an oddball under the Treaties. Insisting on an allocation to either of the two categories would be misleading in both cases. Perhaps these procedures in conceptual terms are best grasped as the famous exceptions confirming the rule.

3.1.1.2.3. Two further aspects: soft law and sanctions

We have not yet specifically addressed the issue of soft law and in particular soft mechanisms here. In the given context, they certainly play an ambivalent role. On the one hand, they seem to be rather submissive when it comes to an overlap with other institutions', bodies', offices' or agencies' (hard law) powers. On the other hand, the output created in the course of soft compliance mechanisms is largely excluded from review by the Court. The former means that a possible encroachment upon the competences of other bodies (in particular: the Court) *prima facie* appears to be less serious,[2329] the latter means that the Court with regard to soft law cannot display its genuine role – that is to 'determine[] the scope of the provisions of the Treaties whose observance it is its duty to ensure'.[2330]

Enforcement by the Court shall not take place in the form of soft law. This is why individual-concrete soft law is only adopted by administrative bodies such as the Commission or European agencies, under the heading 'implementation'. This does not, however, as such exclude the possibility

2329 See already Opinion of AG *Roemer* in cases 9–10/56 *Meroni*, according to whom the delegation of powers relating to 'supporting preparatory work and the purely technical implementing measures' to other bodies than the body taking the decision in a certain procedure is unproblematic.

2330 CJEU, Report of the Court of Justice on certain aspects of the application of the Treaty on European Union (Luxembourg, May 1995) 2.

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of a material interference with the Court's enforcement powers by means of soft law. Not least in view of this risk, the institutional balance is to be considered also where only soft law powers are at issue (see 3.3. below).

With sanctions the situation seems to be clear only at first sight. Sanctions are a classical means of enforcement.[2331] Sanctions *vis-à-vis* the MS are an exception (see Article 260 TFEU, Article 126 para 11 TFEU), and they do not only aim at preventing future violations of EU law (deterrent effect), but in particular they serve to punish an actual violation of EU law (penalising effect).[2332] Since the EU cannot normally replace MS action by its own action,[2333] sanctions are the strongest means of ensuring compliance in this context. The reason why sanctions imposed on private actors – eg by the Commission for violation of EU competition law – do not bring about the same legal intricacy and sensitivity is that with regard to individuals/undertakings no general procedure comparable to the Treaty infringement procedure is provided for. Therefore, with EU bodies being empowered to impose sanctions on individuals/undertakings, the Court's role does not seem at risk of being challenged.[2334] But also in the relationship EU-MS – which builds the focus of this discussion – the Court has accepted, to some extent at least, the use of sanctions by the EU administration. In the case *Spain v Council*, the Court has addressed this question, unsurprisingly against the background of a compliance mechanism, namely Article 8 of Regulation 1173/2011. This Regulation, as part of the so-called 'Six Pack',[2335] is intended to cater for 'the effective enforcement of budgetary surveillance in the euro area'. Its Article 8 empowers the Council to impose sanctions on a MS 'that intentionally or by serious negligence misrepresents deficit and debt data relevant for the application of Articles 121 or 126 TFEU,

2331 For the difference between financial correction (administrative measures adopted eg in the context of payments from the European Structural and Investement Funds) and enforcement through eg penalties see Andersen, Enforcement 182 f; on the application of financial corrections see, as an example, case C-332/01 *Greece v Commission* or case C-8/88 *Germany v Commission*, the latter being commented on by: Comijs, Priorities 305.

2332 See Posch/Riedl, Art. 260 AEUV, para 49; Wunderlich, Art. 260 AEUV, paras 21 f.

2333 Note the words of Bieber/Maiani, Enforcement 1061: '[C]entralized enforcement, even at its strongest, must elicit (and cannot replace) "sincere cooperation" in the sense of Article 4(3) TEU'.

2334 See Montaldo, Power 131–136.

2335 For the 'Six Pack' more generally see Gerapetritis, Constitutionalism 53 f; for another compliance mechanism under the Six Pack allowing for the imposition of fines see IV.2.2.2.2.4. above.

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or for the application of the Protocol on the excessive deficit procedure'. These sanctions are of an 'administrative nature'.[2336] The Court may not only annul the sanctioning decision, it may also reduce or increase the fine. Against this background, the Council – in the case at issue – has adopted Implementing Decision 2015/1289 addressed to Spain, thereby imposing on this country a fine of about 19 million euro.

The Court seems to accept the qualification of the Council decision as implementing act, but utters its doubts as to whether the according power could be based on Article 291 para 2 TFEU, as this provision 'relates solely to legally binding acts of the European Union which lend themselves in principle to implementation by the Member States [...] but which, in contrast to the latter acts, must, for a particular reason, be implemented by means of measures adopted not by each Member State concerned, but by the Commission or the Council, for the purpose of ensuring that they are applied uniformly within the European Union'[2337]; and further: 'That is clearly not so in the case of an act which establishes a power consisting in the imposition of a fine on a Member State. Such an act does not lend itself in the slightest to implementation by the Member States themselves, as implementation of that kind involves the adoption of an enforcement measure in respect of one of them'.[2338]

Apparently, the Court does not see implementation and enforcement as opposites here, but rather deems enforcement a sub-category of implementation.[2339] It concludes that the Council decision at issue constitutes an implementing act in a more general sense, but not within the meaning of Article 291 para 2 TFEU. The Court thereby seems to exclude the possibility of granting the power to adopt financial sanctions on the basis of Article 291 para 2 TFEU (in conjunction with a material competence). The AG in this case, *Juliane Kokott*, expresses: 'The concept of "implementation" comprises both the drawing-up of implementing rules and the application of rules (of secondary legislation) to specific cases by means of acts of individual application. Imposing a fine thus appears to be an implementing

2336 Article 9 of Regulation 1173/2011. For the possible lack of a 'moral reproach' underlying these sanctions see Zuleeg, Enforcement 351.

2337 Case C-521/15 *Spain v Council*, para 48.

2338 Case C-521/15 *Spain v Council*, para 49.

2339 In this case the Court was also concerned with the interpretation of Art 51 of the Court's Statute, eventually confirming its jurisdiction (and not that of the General Court) in spite of dealing with an implementing act; case C-521/15 *Spain v Council*, paras 39–51.

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measure [a *sui generis* implementing measure[2340]] and the power to adopt such a measure appears to be an implementing power'.[2341]

In view of the *ex post* occurrence of the fine, the determination of a violation of Union law (by a MS) it entails, and its focus on reacting to a violation of (not: concretising) the underlying material rule,[2342] the better arguments seem to speak in favour of qualifying this mechanism as an enforcement tool according to the regime set up above, irrespective of its legal basis.[2343] Also the fact that the sanction depends on intent or negligence of the actor having infringed the law, which means that the procedure is subjective in nature, points in the direction of enforcement.[2344] The same is true for the CJEU's power to reduce or increase the fine in the course of judicial review. The regular procedure as provided for in Articles 258–260 TFEU – the Commission confronts the MS and the matter may then be decided by the Court – is reversed in this case: the Commission, subject to formal adoption by the Council by reverse qualified majority, sets the fine and it is then the MS which may go to Court, bearing the general risk of litigation, and – above all – bearing the risk that the Court may even increase the fine.

Also from a different perspective the procedure is remarkable. Article 136 and Article 121 para 6 TFEU (in conjunction) – the 'effective enforcement' of which Regulation 1173/2011 is intended to serve – do not (explicitly) provide for any binding EU output, let alone sanctions. What is more, the power to reduce or increase administrative sanctions goes beyond a mere power of annulment (as laid down in Article 263 TFEU).[2345]

2340 Opinion of AG *Kokott* in case C-521/15 *Spain v Council*, para 52.

2341 Opinion of AG *Kokott* in case C-521/15 *Spain v Council*, para 47; see also para 48.

2342 See also case C-521/15 *Spain v Council*, para 53: 'deterring the Member States'; referring to the similarity of this procedure and the Treaty infringement procedure see Opinion of AG *Kokott* in case C-521/15 *Spain v Council*, para 53.

2343 The question whether the enforcement power was lawfully granted by the legislator – and hence whether the used legal basis is correct and sufficient – shall be adressed in a next step; see 3.2. below.

2344 Even though the Treaty infringement procedure is said to be objective, if the procedure reaches the state of sanctions it can be assumed that the MS concerned has intentiously infringed EU law; see also Koops, Compliance 149.

2345 See Article 261 TFEU, though, which allows the EP and the Council, or the Council on its own, to grant the Court 'unlimited jurisdiction with regard to the penalties provided for in [their respective] regulations'; see also 3.6. below; also note the discretion of the Court pursuant to Article 260 para 2 TFEU to deviate – in terms of financial sanctions – from the suggestions of the Commission.

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3.1.1.2.4. Conclusion

The material distinction between implementation and enforcement on the basis of EU primary law is difficult, but worthwhile. It is difficult essentially because both spheres share one important aim – MS' compliance with EU law – and because the Treaties do not provide a comprehensive, let alone an explicit circumscription of these spheres. It is worthwhile because it will increase our understanding of the scope (including, in particular, the limits) of the – in this context – main prerogative of the EU's administration (implementation *vis-à-vis* the MS) on the one hand, and of the main prerogative of the EU's judiciary (enforcement *vis-à-vis* the MS), on the other hand. Eventually, this differentiation will allow us to detect interferences – be they of a singular or of a structural kind – of one sphere with the respective other.

We can summarise the characteristics fleshed out in the course of the above comparison between the implementation and the enforcement of EU law, both undertaken by EU bodies *vis-à-vis* the MS, by using the following table:

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Table: Characteristics of individual-concrete implementation/enforcement by EU bodies vis-à-vis the MS

	implementation	**enforcement**
primary aim	to reach compliance with EU law by concretising this law	to reach compliance with EU law by determining and eventually sanctioning violations of this law
occurrence	*ex ante*/on-going	*ex post*
character of command I	individual-concrete	individual-concrete
character of command II	concretisation	decision on whether there is an infringement; in the affirmative: (possibly) also imposition of a sanction
character of command III	legally binding or legally non-binding	legally binding
independence of body in charge	not required	Court of Justice, independent institution (Article 19 TEU)
initiation of procedure	upon own motion	Commission (MS, ECB or EIB) acts on its own motion; Court judgement upon request by Commission (MS, ECB or EIB)
material scope	rather narrow	narrow or broad
imposition of sanctions	rather not	possible
remedy available	judicial review (if measure intended to produce legal effects *vis-à-vis* third parties)	no remedy available

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As was underlined above (3.1.1.1.), none of these characteristics is, on its own, sufficient. Necessary appears, in our specific context of compliance mechanisms, only the individual-concrete character of the output – a characteristic which both categories share and which thus cannot serve as a differentiator, and, in case of enforcement, the legally binding nature of the output.

The remaining criteria are to be understood as idealtypical characteristics. If one of them is not met in a specific case, this shortcoming may be balanced by a strong stance on (most of) the other criteria. For example: Where a compliance mechanism is clearly focused on the concretisation of EU law, its output occurs *ex ante*, is addressed to a specific MS and, due to its bindingness, subject to judicial review, then the fact that the EU body at issue cannot act *proprio motu* in this procedure does not stand in the way of qualifying this mechanism as an instance of implementation. While the primary aim and the character of the command, if they are clear, appear to be the most significant aspects – a legally non-binding act cannot be qualified as enforcement measure – it does not make sense to give each characteristic a certain weight so that the categorisation of a specific mechanism would be a matter of mere calculation. This could be feasible if we had a large number of characteristics, but in the given case it would only result in *pseudo*-accuracy and we would deprive ourselves of the leeway in analysing these highly heterogeneous mechanisms which is, in my view, necessary to do justice to their respective individuality.

Where safety or health concerns require a fast reaction – to take another example – this may 'compensate' the enforcement tendency of a compliance mechanism, and lead to the conclusion that – also in light of Article 114 paras 4 ff TFEU which protects these policy objectives – the (implementing) mechanism at issue was lawfully based on Article 114 TFEU.

In general, we need to bear in mind that while a clear allocation to either category may be desirable, there may be stalemate cases, or cases where only a tendency in either direction can be established.

What shall follow in the next sub-chapter is an investigation of the compliance mechanisms presented above against the background of these characteristics, with a view to classifying them as either belonging to the realm of implementation of EU law or to the realm of its enforcement. As was stated above, the qualification as enforcement mechanism of a secondary law mechanism performed by an EU administrative body as such raises concerns as to the legality of this measure – in particular against the background of the Treaty infringement procedure as the general regime

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for the enforcement of EU law by EU actors *vis-à-vis* the MS. However, the allocation of a mechanism to either implementation or enforcement can only be a first step in providing a comprehensive legal account of this mechanism. A more thorough analysis would require also to take into account, for example, the primary law provision on which this mechanism is based. Thus, the latter aspect and further legal aspects will be considered in the chapters below.

3.1.2. The categorisation of the compliance mechanisms

3.1.2.1. Introduction

Against the background of the (idealtypical) characteristics elaborated above, we shall now examine the compliance mechanisms presented in Part IV above with a view to allocating them to either category. The Treaty infringement procedure being the standard enforcement procedure of the EU, it does not come as a surprise that it meets all criteria of an enforcement mechanism. The possibility of sanctions is to be confirmed (Article 260 TFEU). A legal remedy is not available because the Treaty infringement procedure is reserved for the Court of Justice.[2346] The criteria are also met by the variants of the Treaty infringement procedure laid down in primary law (see IV.2.2.1.1.2., IV.2.2.1.1.3., IV.2.2.1.1.4., IV.2.2.2.1.3. above), which, for lack of doubt, need not be analysed in more detail in this context.

From among the remaining compliance mechanisms, an analysis of the hard mechanisms shall be followed by an analysis of the mixed mechanisms. Eventually, the soft mechanisms shall be addressed. While soft mechanisms, for lack of legally binding output produced in their respective course, cannot fall within the realm of enforcement, they shall be considered here nevertheless with a view to the other criteria. Even though they cannot be called enforcement mechanisms, they may still display certain similarities with them, thereby possibly interfering with the EU's enforcement regime under the Treaties.

2346 Article 256 para 1 TFEU *e contrario*.

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3.1.2.2. Hard mechanisms

We shall start with the mechanisms laid down in primary law. The procedure laid down in Article 106 para 3 TFEU (see IV.2.2.1.1.1. above) is ambiguous, but eventually an allocation to one category can be made. It may serve either the primary aim of concretisation or the primary aim to end non-compliance which is also why it may be initiated at any time – *ex ante*, in the course of a MS action which may lead to non-compliance, or *ex post*. The implementation list is indicated by the competence of the Commission to adopt, apart from a decision, a directive which *may* have a general-abstract scope.[2347] The legal bindingness of the output and its potential individual-concrete scope, on the contrary, are neutral properties. The other characteristics (Commission in charge, action upon its own motion, no sanctions, judicial review available) speaking in favour of implementation, the mechanism appears to result in implementation rather than enforcement.

The mechanism laid down in Article 114 TFEU (see IV.2.2.1.1.3. above) rather provides for the implementation of EU law. It is mainly about the concretisation of the exceptional possibility of MS to deviate from a harmonisation measure under Article 114 TFEU. It allows for *ex ante*/on-going intervention, because the MS turn to the Commission asking whether they could maintain or introduce deviating national rules (which they present to the Commission). In both cases the national rules may enter into force only after the Commission's authorisation. The Commission's decision may be made subject to judicial review before the CJEU. The fact that the Commission acts only upon notification does not change the mechanism's implementation character. The possibility for the Commission to turn to the CJEU in case a MS makes 'improper use' of its powers in this context is a variant of the Treaty infringement procedure and hence to be qualified as enforcement procedure. This enforcement procedure is related to the implementing mechanism laid down in Article 114 TFEU, but conceptually nevertheless can clearly be distinguished from it.

Also with regard to the protective measures which a MS with a derogation may take in case of a sudden crisis in the balance of payments under Article 144 TFEU (IV.2.2.1.1.5. above) the categorisation is clear. The

2347 Since Article 106 TFEU provides for the power to adopt a decision as an individual-concrete act, it appears that under this regime the directive *normally* is expected to have a general-abstract scope; see IV.2.2.1.1.1. above.

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Council may take a decision upon a Commission recommendation, after the MS at issue has informed the Commission and the other MS of its action. The fact that the Council may not only require the MS to abolish the measures taken, but also to amend or suspend them suggests that the mechanism aims at creating a situation which is in accordance with EU law by concretising the latter (an exceptional deviation competence of the non-euro MS which is nevertheless drafted in comparatively general terms), not at determining an infringement on the part of the MS (even though the Council is acting *ex post*, that is to say after the measures of the MS have taken effect). That the Council acts on a recommendation from the Commission and hence not on its own motion does not challenge the implementation character of this procedure. The decision of the Council can be reviewed under Article 263 TFEU.

Article 13 para 1 of Directive 2001/95/EC (see IV.2.2.1.2.1. above) clearly provides for an implementing mechanism. While it envisages *ex post* intervention, it allows for a reaction to safety concerns in specific MS. The implementing act according to Article 291 TFEU (which is challengeable before the Court) may only be adopted if, among other things, the risk at issue cannot be eliminated other than by adopting this act. The Commission acts on its own motion, thereby concretising the requirements under EU law. The temporary nature of (some of) the Commission output[2348] underlines its implementing (rather than enforcement) character. The Court itself – with regard to the predecessor mechanism of Article 13 of Directive 2001/95/EC – has acknowledged that the Treaty infringement procedure 'does not permit the results set out in Article 9 of the directive [92/59/EEC] to be achieved',[2349] thereby stressing the difference between the two regimes.

In order to determine whether they display an implementation or rather an enforcement thrust, the rules laid down in Articles 70 f of Regulation 2018/1139 (see IV.2.2.1.2.2. above) require some further analysis. The two regimes laid down in these provisions are about safety concerns or urgent unforeseeable operational circumstances or needs in the application of the relevant EU law. The purpose is to ensure a harmonised legal situation in all MS which at the same time does justice to the aforementioned concerns, circumstances or needs. Under the regime laid down in Article

2348 See Article 13 para 2 of Directive 2001/95/EC.
2349 Case C-359/92 *Germany v Council*, para 46.

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70, the MS are allowed to deviate, under certain circumstances, from the relevant EU law to address safety concerns. Under the regime laid down in Article 71, the MS are allowed to deviate (temporarily or under certain circumstances) from the relevant EU law in case of urgent unforeseeable operational circumstances or needs. These characteristics speak in favour of concretisation, not of a focus on determining infringements of EU law by MS. While the mechanisms apparently allow for *ex post* intervention on the part of the EU and while the Commission acts upon a recommendation of the EASA, the EU output is aimed at concretising EU law by ensuring that the possibilities for a lawful derogation from EU law are correctly applied. These exceptional deviations for specific reasons seem to be an expression of implementation in the spirit of the Treaties.[2350] The fact that the Commission's (or exceptionally under Article 70: the EASA's) output can be made subject to judicial review pursuant to Article 263 TFEU underpins this view.

The mechanism laid down in Article 29 para 2 of Regulation 806/2014 (see IV.2.2.1.2.3. above) provides for a possibility of the SRB to directly address an institution under resolution in case a national resolution authority has not complied with an SRB decision. This measure is taken *ex post* upon the SRB's own motion and can be challenged – also by the MS – under Article 263 TFEU. Because of the short route to compliance by ousting the national authority this mechanism raises concerns as regards the principle of MS implementation of EU law pursuant to Article 291 para 1 TFEU.[2351] However, it ought to be taken into account that the national authority has been addressed already by the SRB decision which it allegedly does not comply with. This suggests a certain consideration of the national prerogative of implementation,[2352] but the shortcut also illustrates the focus on reaching compliance rather than concretising the law. After all, if a MS does not comply with EU law (here: an SRB decision), the regular route under the Treaties would be to initiate a Treaty infringement procedure. Apparently, the necessity of a Treaty infringement procedure shall be avoided by the shortcut. This ousting of the regular enforcement

2350 See Article 114 para 10 or Article 192 para 5 TFEU.

2351 See also Scholten, Trend 1350.

2352 Also under the similar regime of Article 17 of Regulation 1093/2010 the EBA decision directly *vis-à-vis* the financial institution/financial sector operator concerned is provided for only as an *ultima ratio*, that is to say when the national authority does not comply even upon request; see 3.2.3. below.

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procedure *vis-à-vis* the MS – a purpose which is also reflected upon in its broad material scope – confirms the strong enforcement tendency of this mechanism. In conclusion, even though the SRB decision may be made subject to an action for annulment also by the MS,[2353] Article 29 para 2 of Regulation 806/2014 tends towards enforcement rather than towards implementation.

Article 63 of Regulation 2019/943 (see IV.2.2.1.2.4. above) provides for a mechanism in the course of which the Commission can ensure compliance with EU law by a MS (national regulatory authority) or exceptionally the ACER. The MS or exceptionally the ACER decide on the exemption from certain requirements under the relevant EU law for new direct current interconnectors upon their respective request. The Commission may scrutinise positive decisions (that is to say: decisions granting the exemption) *ex post* and may approve of them or order the notifying bodies to amend or withdraw them. It is to be acknowledged that here exceptional deviations from EU law (exemptions) are at issue. We have come across the possibility of lawful deviations from EU law for MS above. Here these deviations are requested by undertakings. The effects for our purposes are the same. The handling of exceptional (lawful) deviations from EU law seems to fall within the realm of implementation, as it is strongly connected to the concretisation of these deviations – in the interest of as harmonised an application of Regulation 2019/943 as possible. Under this regime, the Commission normally takes its decisions upon its own motion.[2354] The decisions may be made subject to judicial review (Article 263 TFEU) by the MS. All in all, this regime is to be classified as an implementing mechanism.

The considerations above on the mechanism laid down in Article 29 para 2 of Regulation 806/2014 *mutatis mutandis* also apply with regard to the, in some important respects, similar procedures laid down in Articles 18 and 19 of Regulation 1093/2010 (see IV.2.2.1.2.5. above). The fact that here an emergency situation, and a continuous competence conflict between two or more national authorities respectively, are at issue – that is to say: exceptional and highly undesirable situations – lets the arguable interference with the Court's (enforcement) prerogatives appear in a more mellow light. The question whether European agencies (here: the EBA) – instead of the

2353 Whether this is possible also for the 'skipped' national authority (on the basis of Article 263 para 4 TFEU) is unclear; Article 86 para 2 of Regulation 806/2014 does not seem to support this possibility.

2354 The reopening of the procedures may also take place upon request; see Article 63 para 10 of Regulation 2019/943.

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Commission – may be granted this *pouvoir* under the Treaties in the first place is addressed below (3.3.4.).

With the provisional measures subject to a Union control procedure as allowed for in Article 114 para 10 TFEU, we had a look at three examples laid down in secondary law (see IV.2.2.1.2.6. above). They all provide for the exceptional adoption of provisional national measures deviating from Union law. Immediately after their adoption (that is to say: *ex post*) they shall be scrutinised by the Commission, which may approve of them or request for them to be withdrawn. These exceptions are a possibility to adapt the requirements of EU law to specific concerns, and hence in a way they lead to the concretisation of EU law. The Commission intervention occurs directly after the adoption of the act. It may be made subject to judicial review pursuant to Article 263 TFEU. Not least due to their framing by an explicit Treaty provision concerning the implementation of EU law, these examples of provisional measures qualify as implementing mechanisms.

3.1.2.3. Mixed mechanisms

Articles 116 and 117 TFEU provide for a regime to address MS measures which distort the conditions of competition to a certain extent (Article 116) or where there is at least 'reason to fear' that they will do (Article 117; see IV.2.2.2.1.1. above). In both cases the national measures may principally be lawful, but – due to the distortion the different measures in different MS may create – the EU feels required to intervene. Article 117 provides for *ex ante*/on-going monitoring of rule-making at the national level which may result in a recommendation addressed to the respective MS. This part of the procedure therefore clearly has an implementing thrust. Under Article 116, the EP and the Council in the ordinary legislative procedure may adopt the 'necessary directives' which should be addressed to the MS concerned. This procedure appears to be neither implementation nor enforcement. It is not primarily about concretising or about determining a violation of EU law. Rather, it is about tackling a situation where the divergence of national regulation (the 'difference' pursuant to Article 116 para 1 TFEU) leads to an undesirable result – the distortion of the conditions of competition. Here this is done by legislative intervention aimed at doing away with (or rather: superseding) national measures of a single (or a small number of) MS which cause the distortion. A legislative act does not constitute implementation within the meaning of the Treaties, nor can it qualify as enforcement.

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Therefore, Article 116 TFEU stands outside the above categorisation. As a provision of primary law, it falls outside the scope of legal scrutiny.

The excessive deficit procedure as laid down in Article 126 TFEU has been addressed and qualified as a *sui generis* mechanism above (3.1.1.2.2.).

Article 63 of Directive 2019/944 (see IV.2.2.2.2.1. above) provides for a procedure to scrutinise the compliance of MS acts with network codes and guidelines (binding delegated or implementing acts) of the Commission. Upon request by another national authority or the Commission, the ACER may address an opinion to the national authority concerned. Where the authority addressed does not comply, the Commission – upon request or on its own motion – may investigate the case further (thereby informing the authority at issue) and, if it does so, shall eventually decide either not to raise objections against the national measure or to require the authority to withdraw its decision. It appears that ending non-compliance stands in the foreground here, not the further concretisation of (already concretising) implementing law (the Commission's network codes and guidelines). The measures are taken *ex post*, which further underpins the enforcement character of this mechanism. While the ACER opinion – *qua* non-bindingness – cannot constitute an enforcement measure, the (possibly) ensuing Commission decision can. The fact that a binding decision is preceded by a soft law act does not exclude the enforcement character of the succeeding decision. On the other hand, the Commission may not only act upon request, but also on its own initiative, and its decision can be reviewed by the Court following an action for annulment. These single indicators pointing in the direction of implementation do not, in my view, challenge the strong enforcement thrust of this mechanism. Its *telos* is similar to that of the Treaty infringement procedure. The fact that the Directive sets certain decision-making deadlines both for the ACER and for the Commission suggests that fast decision-making is desired. Comparatively short decision-making periods are a general *desideratum* of legal procedures in a system based on the rule of law. It is not apparent, however, that in this case requirements of urgency or importance of the matter (politically) suggest, when it comes to enforcement, not to rely exclusively on the Treaty infringement procedure.

Articles 22 f and 28 of Council Regulation 2015/1589 flesh out the variant of the Treaty infringement procedure laid down in Article 108 TFEU (see IV.2.2.2.2.2. above). These provisions extend the administrative phase of the infringement procedure, essentially by providing for the competence of the Commission to send a recommendation to the MS concerned, proposing in particular amendments, procedural requirements or the abolition of the aid

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scheme. Where the MS addressed accepts this recommendation, it becomes binding upon it. If it does not accept it or if it fails to comply with the accepted recommendation, the Commission may render a decision that the MS concerned shall abolish or alter the aid at issue within a certain period of time. Where the MS does not comply with the Commission decision, the Commission may refer the case to the CJEU. This is an enforcement procedure, as provided for in Article 108 TFEU, which is complemented by some details by means of Council Regulation 2015/1589.

The mechanism laid down in Article 17 of Regulation 1093/2010 (see IV.2.2.2.2.3. above) procedurally involves the Commission and the EBA. It involves *ex post* intervention for 'breach of Union law' which in this context shall be limited to the legal acts listed in Article 1 para 2 of Regulation 1093/2010. Nevertheless, for an alleged implementing mechanism this is a remarkably broad scope. It is this broad scope and the fact that the determination of an infringement appears to stay in the foreground here which emphasise the enforcement character of this mechanism. On the other hand, it involves two soft law acts (recommendation, formal opinion), and only if these acts are not complied with may the EBA adopt a decision directly addressed to a financial institution/financial sector operator (in certain cases to be preceded by a decision addressed to the competent authority concerned), given this 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'. These factors again limit the scope of the mechanism, even though the latter criterion allows a broad measure of discretion for the EBA. Like under Article 29 para 2 of Regulation 806/2014, the direct intervention *vis-à-vis* the individual actors appears to oust the Treaty infringement procedure which is the general mode of tackling non-compliance with EU law on the part of a MS (see 3.1.2.2. above). In conclusion, this mechanism displays a strong tendency towards enforcement.

The excessive imbalance procedure laid down in Regulations 1176/2011 and 1174/2011 (see IV.2.2.2.2.4. above) is related to Article 121 TFEU which provides for a soft compliance mechanism. The excessive imbalance procedure is mixed in the sense that it may also involve binding acts of the EU. The specific negotiation element underlying Article 121 TFEU is also reflected upon in the excessive imbalance procedure. Compliance does play an important role, but also the development of an appropriate solution. It runs *ex ante* and *ex post*, but also monitors on-going decision-making in the MS. It leaves the putting into effect of EU law up to the MS. They have to submit

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their plans which are then subject to scrutiny by the Commission and the Council. The regime is about concretising EU law acts which are mainly about economic development and hence subject to different views – hence the negotiations – to a larger extent than regular legal norms. So far, it can be assumed that the excessive imbalance procedure is not an enforcement mechanism, but rather entails a very special kind of implementation which is strongly shaped by primary law, namely Article 121 TFEU. But, eventually, the sanctions which are provided for give the procedure an enforcement spin. Whether Article 121 TFEU actually allows for the provision of legally binding acts, including sanctions, by means of secondary law (based on its para 6) will be assessed below (3.2.4.).

The mechanism laid down in Article 7 para 4 of Regulation 806/2014 (see IV.2.2.2.2.5. above) provides for a warning and/or a decision of the SRB being addressed to a national resolution authority. The decision leads to an attraction of principally national tasks by the SRB. The *ex post* intervention and the primary aim to end non-compliance (thereby avoiding the initiation of a Treaty infringement procedure), namely by the SRB exercising certain originally national tasks itself create an enforcement character which is mitigated only to a limited extent by the fact that the SRB acts on its own motion and by the fact that the decision can be made subject to judicial review under Article 263 TFEU. All in all, the mechanism has a clear propensity towards enforcement.

Article 25 of Regulation 2016/796 (see IV.2.2.2.2.6. above) prescribes that the MS submit certain (national) draft rules on certain issues to the ERA and the Commission, which then examine these draft rules with a view to their compliance with the relevant Union law. Where the ERA establishes non-compliance, it addresses an opinion to the MS concerned, at least implicitly requesting it to amend its drafts. If the MS does not react in an appropriate way, the Commission may adopt a decision requesting the MS to modify or repeal the draft rules. This mechanism entails *ex ante* intervention. It is about the concretisation of specific EU law which shall be performed, if need is, in a dialectic process involving the MS and the EU. Only where the MS fails to adequately react to the suggestions coming from the EU (ERA), the Commission may end the discourse by adopting an implementing act according to Article 291 TFEU, which may be challenged before the Court. Having examined the relevant criteria, Article 25 of Regulation 2016/796 clearly qualifies as an implementing mechanism.

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3.1.2.4. Soft mechanisms

While soft mechanisms, due to their lack of legally binding output, cannot possibly qualify as enforcement according to the above scheme (see in particular 3.1.1.2.4.), in order to apply its remaining distinguishing features to further practical examples – thereby enriching the test sample, as it were – they will nevertheless be addressed here. What is more, also soft mechanisms, even though they cannot qualify as enforcement measures, may interfere with the latter, and hence they deserve attention also in this context.

The compliance mechanism laid down in Article 121 TFEU (see IV.2.2.3.1.1. above) is focussed on the concretisation of the economic policies of the MS to the extent they shall be coordinated under Articles 120 ff TFEU (that is to say: to the extent they fall within the competence of the EU). It entails *ex ante*, on-going and partly also *ex post* intervention. In particular, the Council may address recommendations to a certain MS. The Commission initiates the procedure on its own motion. The procedure as laid down in Article 121 TFEU – unlike some of the secondary law based upon it – does not provide for sanctions to be imposed on MS. The mechanism displays a clear implementation tendency.

Article 148 para 4 TFEU provides for a mechanism on MS' compliance with the Council's guidelines for employment according to its para 2 (see IV.2.2.3.1.2. above). Each year the Council shall – *ex post* – examine to which extent the MS have complied with these guidelines, and make recommendations to the MS, if appropriate. The focus of this regime is to monitor compliance and, if need be, to concretise the guidelines in the form of recommendations. Thus, the procedure is similar to Article 121 TFEU – to which it also has a material link.[2355] It appears to facilitate the implementation of EU (soft) law.

Article 6 paras 5–7 of Regulation 2019/942 (see IV.2.2.3.2.1. above) allows for the ACER to scrutinise – *ex post* and only upon request – decisions of national regulatory authorities with a view to their compliance with network codes and guidelines referred to in Regulations 2019/943 and 715/2009 and in Directives 2019/944 and 2009/73/EC, or with any other relevant provision of these legal acts. In the resulting opinion, the ACER may also refer to further information or other components the decision at

2355 The guidelines according to Article 148 para 2 TFEU shall be consistent with the BEPG under Article 121 TFEU.

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issue should have contained. This particularly broad scope of the ACER's power (not only in terms of the EU law threshold of assessment, but in particular in view of all decisions of the national regulatory authorities concerned potentially being under scrutiny) clearly points towards enforcement. This qualification seems to be reflected in the fact that the ACER addresses the national authority concerned by a 'factual opinion', arguably determining instances of non-compliance rather than recommending alternative action.[2356] Whereas, for lack of legal bindingness, its output cannot qualify as enforcement pursuant to the above scheme (see in particular 3.1.1.2.4.), it is also questionable whether this regime could qualify as implementing mechanism.

Under Article 53 of Directive 2019/944 (see IV.2.2.3.2.2. above), the Commission shall examine draft decisions of national authorities upon their respective request. This examination shall result in an opinion addressed to the national authority concerned, of which the latter shall take 'utmost account' when adopting its (final) decision. The *ex ante* intervention suggests concretisation, and together with the relatively narrow scope of the Commission's examination this clearly points in the direction of implementation.

Article 33 of Directive 2018/1972 (see IV.2.2.3.2.3. above) provides for a regime in the course of which a certain category of draft measures to be taken by national regulatory authorities is scrutinised by the BEREC and the Commission in two phases. The scrutiny essentially is an *ex ante*/on-going assessment, with only the Commission recommendation possibly being adopted after the adoption of the national decision. The Commission may initiate the procedure on its own motion. The purpose of the latter is to ensure compliance with EU law on the part of the national regulatory authority, namely by concretising it. All in all, the essential properties of the regime speak in favour of its implementing character.

Article 3 para 7 of Regulation 472/2013 (see IV.2.2.3.2.4. above) empowers the Commission to propose to the Council the adoption of recommendations to a Eurozone-MS (under enhanced surveillance) to take certain measures to do away with significant adverse effects on the financial stability of the Euro area or of its MS which emanate from that MS. This mechanism clearly is about concretisation. The broad concept of measures

2356 See also 2.4.1. above. This specific argument should not be overrated, however, because – as was shown above – the difference between recommendations and opinions in practice sometimes approaches zero; see III.3.1.1. and III.3.9. above.

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aimed at tackling significant adverse effects on the financial stability of the Euro area or of its MS is defined more closely in the form of more concrete instructions. The broadness of the concept at issue here is to be distinguished from a broad quantitative scope of a compliance mechanism as addressed above (see 3.1.1.2.1.3.). The Council here does not ensure compliance with a large number of EU rules, but rather with one (vague) concept. In fact, the vagueness of the latter seems to render it inadequate for enforcement. After all, for a MS a variety of (apparently) adequate steps are available to tackle the significant adverse effects, which may, depending on the economists which are consulted, very well be heterogeneous. Thus, the Council recommends what it deems to be the most suitable from among these steps. While it is an *ex post* measure in the sense that it entails a reaction to the omission of a Eurozone-MS (to take the appropriate steps), the eminent focus on concretisation renders this procedure an implementation regime (in accordance with Article 121 TFEU; see above).

The mechanism laid down in Articles 16 f of Regulation 1092/2010 (see IV.2.2.3.2.5. above) to some extent is similar to the mechanism under Regulation 472/2013 just addressed. This is because the EU law concepts which are to be concretised in its course are relatively broad: significant risks to the stability of the EU's financial system and the adequate policy response thereto. In the given procedure, it is the ESRB which may adopt a recommendation to one or more MS or to one or more of the national supervisory authorities. Like the above procedure in Regulation 472/2013, this mechanism applies *ex post*. That the MS addressed needs to justify non-compliance emphasises the dialogic nature of this process. It suggests that it is not about establishing a wrongdoing on the part of a MS, but rather about supporting a MS in taking appropriate action. All in all, it has an implementing nature.

Eventually, the 'cooperation mechanism' pursuant to Article 6 of Regulation 2019/452 is to be addressed (see IV.2.2.3.2.6. above). It intervenes in on-going national proceedings (screening of one or more foreign direct investments). The interest to be protected by the mechanism is the security or public order of one or more MS which is – not least due to Regulation 2019/452 – also an objective of the EU. Again the concept to be defined more closely by the Commission, thereby taking account of the views of the MS (if uttered), is comparatively broad. The procedure is about concretisation (note the self-description as 'cooperation mechanism'), not about establishing a wrongdoing of a MS. Thus, it qualifies as implementing mechanism.

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3.2. The primary legal bases of compliance mechanisms established through secondary law

3.2.1. Introduction

In Part III above, the explicit legal bases for the adoption of soft law as laid down in primary law were discussed (III.3.4., III.3.5., III.3.6.). In addition to that, the possibility of implicit competences to adopt soft law was addressed (III.3.3.). Bearing these findings in mind, we shall now shift the focus to the primary legal bases of compliance mechanisms, as provided for in secondary law, thereby complementing the classification of the above compliance mechanisms in terms of 'implementation' and 'enforcement' (3.1.). This means that we are not looking at the legal possibilities to adopt soft law in general, but at the legal bases on which the legislator has provided for compliance mechanisms. In case of mixed and soft mechanisms, the underlying procedures (also) allow for the creation of soft law.

The mechanisms established by the Treaties themselves are, for that very reason, in compliance with Union law, rendering redundant a further examination in this respect. The question raised in the given context is whether the establishment of secondary law-based mechanisms – not only, as more generally addressed in Chapter III above, of the soft law parts of it (if any) – is covered by the respective Treaty base. This examination is to be performed not only at the level of the EU's competence (in German literature referred to as *Verbandskompetenz*), but also at the level of different EU bodies (*Organkompetenz*; see III.3.2. above). The latter will also play a role when the EU's institutional balance is addressed (see 3.3. below).

3.2.2. A frequently used legal basis: Article 114 TFEU

3.2.2.1. Overview

The legal basis most frequently used for the establishment of secondary law-based compliance mechanisms (in our sample) is Article 114 TFEU. All kinds of compliance mechanisms have been based on this norm – hard, mixed, and soft ones, those presenting the Commission as the main actor and those providing for governance by European agencies or other bodies, such as the BEREC or the ESRB. For the adoption of Directive 2009/72/EC, the predecessor of Article 114 was used in conjunction with other competence clauses, namely with what are now Article 53 para 1 and

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Article 62 TFEU. The frequent use which is made of it and the vagueness of its wording, two main characteristics of Article 114 TFEU, are certainly interlinked in that the former is due to the latter. It should be emphasised once more that Article 114 TFEU itself, in its paras 4–6, makes provision for a compliance mechanism allowing for the Commission to address a decision to a single MS. It is to be acknowledged, though, that these provisions deal with the special case of an exceptional deviation from a harmonisation measure. Therefore, the existence of this mechanism cannot be used as a general argument in favour of basing compliance mechanisms on Article 114 (para 1) TFEU.

Article 114 TFEU was described as a 'finale Querschnittskompetenz' [final cross-sectional competence],[2357] that is to say its scope is to be concretised by the legislator (and eventually by the CJEU) in each case of application, with a view to the objectives of the internal market. This 'concretisation' is required also in the context of other Treaty provisions, but – due to its malleable wording – it is certainly pronounced in the case of Article 114 TFEU. Acts established on the basis of Article 114 TFEU shall lead to the approximation of the provisions laid down by law, regulation or administrative action in MS which have as their object the establishment and functioning of the internal market.[2358] And while Article 114 by no means allows for a general power to regulate the internal market,[2359] the legislator, according to the Court, has 'a discretion, depending on the general context and the specific circumstances of the matter to be harmonised, as regards the harmonisation technique most appropriate for achieving the desired result, in particular in fields which are characterised by complex technical features'.[2360]

2357 Tietje, Art. 114 AEUV, para 126.

2358 Case C-270/12 *United Kingdom v European Parliament/Council*, para 100. This is in accordance with the general doctrine of the CJEU, according to which 'the choice of the legal basis for a legal act of the Union must rest on objective factors amenable to judicial review, which include *the aim and content of the measure*' (emphasis added); case C-589/15P *Anagnostakis*, para 67, with further references.

2359 See Moloney, Rule-Making 70. The introduction of a general power to regulate the internal market was discussed during the preparation of the SEA; see Streinz, Europarecht (9th edn) para 976.

2360 Case C-66/04 *United Kingdom v European Parliament/Council*, para 45; see also case C-358/14 *Poland v European Parliament/Council*, para 33, with many further references. In terms of the proportionality principle, the Court – in the context of Article 114 TFEU – applies its general standard of review, according to which a measure is unlawful 'only if [it] is manifestly inappropriate having regard to

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A legal act has as its object the establishment and functioning of the internal market where 'it is actually and objectively apparent from th[is] legal act that its purpose is to improve the conditions of the establishment and functioning of the internal market'.[2361] A legal act based on Article 114 TFEU may, however, also contain measures 'for contributing to the implementation of a process of harmonisation' where they are 'closely linked to the subject matter of the acts approximating the laws, regulations and administrative provisions of the Member States. Such is the case in particular where [a Union body] provides services to national authorities and/or operators which affect the homogenous implementation of harmonising instruments and which are likely to facilitate their application'.[2362]

This is particularly relevant for compliance mechanisms because their provision does not approximate the laws itself. However, they may be aimed at MS' compliance with approximating rules, thereby contributing to the implementation of a process of harmonisation. Due to their compliance-enhancing function the existence of a close link to the subject matter of the respective legal act (as required by the Court) is at least probable; for our sample of compliance mechanisms based on Article 114 TFEU the existence of a close link will be tested under 3.2.3. below.

The Court stresses that even where certain measures are not 'aimed directly at improving the conditions for the functioning of the internal market', but whose 'purpose [it] is to ensure that certain prohibitions concerning the internal market and imposed in pursuit of that object are not circumvented', they may be adopted on the basis of Article 114.[2363] In other words, the Court allows for the establishment of a regime ensuring compliance with the EU rules at issue, thereby 'completing' their approximating effect. Scholars have argued that in this context the above criteria must be interpreted as requiring an urgent necessity for a uniform application throughout the EU.[2364] This necessity shall be examined below case by case with a view to the concrete policy field.

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the objective which the competent institution is seeking to pursue'; case C-491/01 *British American Tobacco*, para 123. For a condensed and critical account of the manifest error case law of the Court see Craig, Administrative Law 472–474.

2361 Case C-66/04 *United Kingdom v European Parliament/Council*, para 44; also note the wording in case C-398/13P *Inuit*, para 26: 'genuinely [aim] to improve the conditions for the establishment and functioning of the internal market'.

2362 Case C-217/04 *United Kingdom v European Parliament/Council*, paras 44 f.

2363 Case C-491/01 *British American Tobacco*, para 82.

2364 See references in Michel, Gleichgewicht 120.

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3.2.2.2. An appropriate legal basis for compliance mechanisms?

More specifically with regard to compliance mechanisms, the Court held – in the context of (meanwhile outdated) Regulation 460/2004, establishing, among other things, the European Network and Information Security Agency (ENISA[2365]) – that '[t]he legislature may deem it necessary to provide for the establishment of a Community body responsible for contributing to the implementation of a process of harmonisation in situations where, *in order to facilitate the uniform implementation and application of acts based on that provision*, the adoption of *non-binding supporting and framework measures* seems appropriate' (emphases added).[2366] The measures which the Court referred to here were laid down in the ENISA's founding act, Regulation 460/2004.[2367] According to Article 10 of this Regulation, the ENISA shall provide (individual) advice and assistance falling within its scope, objectives and tasks, among others to national authorities.[2368] A soft compliance mechanism, on the part of the EU actor involved, even if not explicitly foreseen in this provision, would not go beyond these tasks and powers. It is therefore justified to assume that the Court here has in principle (and only implicitly) approved of the possibility to establish soft compliance mechanisms on the basis of Article 114 TFEU.[2369] The Court has also confirmed the close link to the basic act (as mentioned above), as ENISA 'provides services to national authorities and/or operators which affect the *homogenous implementation of harmonising instruments and which are likely to facilitate their application*' (emphasis added).[2370]

2365 Now referred to – under the same abbreviation – as European Union Agency for Cybersecurity; see <https://www.enisa.europa.eu/about-enisa> accessed 28 March 2023.

2366 Case C-217/04 *United Kingdom v European Parliament/Council*, para 44; critically: Ottow/van Meerten, Proposals 24. That material competences (eg Article 114 TFEU) also include certain organisational competences has been accepted even before the *ENISA* case, but the extent of the organisational competences was unclear; see Berger, Einrichtungen 62 f.

2367 This Regulation meanwhile has been replaced first by Regulation 526/2013, then by Regulation 2019/881.

2368 See case C-217/04 *United Kingdom v European Parliament/Council*, para 64; see now Recital 55 and Article 4 paras 1 f of the successor Regulation 2019/881.

2369 Critically as regards the conferral of advisory powers on the basis of this provision: Adamski, ESMA 816.

2370 Case C-217/04 *United Kingdom v European Parliament/Council*, para 45; critically: Opinion of AG *Kokott* in case C-217/04 *United Kingdom v European Parliament/Council*, para 46; see also references made in Görisch, Verwaltung 240 f; for

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While, in general, the extensive interpretation of an already vague provision (Article 114 TFEU) beyond its obvious purpose – here the approximation of national law, regulation or administrative action by EU law – may be criticised, it ought to be stressed that also a focus on verbal interpretation may provide an argument in favour of the Court's far-reaching case law. After all, Article 114 para 1 TFEU does not simply empower the legislator to approximate national rules relating to the internal market, but to adopt 'the measures for the approximation' of them.[2371] This may be understood as including legislative measures which do not themselves approximate national rules, but which provide for mechanisms the application of which (by Union bodies) leads to the approximation of national rules – or the approximation of the MS' application of Regulations based on that provision[2372] – by providing a uniform concretisation of the pertinent (superior) Union law.[2373] In the words of AG *Kokott*: The measure 'can provide for procedures which do not bring about approximation directly but only in a multi-stage model with intermediate steps'.[2374]

In conclusion, the Court has confirmed the feasibility of establishing soft mechanisms on the basis of Article 114 TFEU.[2375] Since empowering a newly established agency in this context is lawful, *a fortiori* this applies where the Commission is in charge. The widely drafted reference of the Court to 'supporting and framework measures' aimed at the 'uniform implementation and application of acts based on Article 114 TFEU' appears to indicate that both general-abstract and individual-concrete (soft law) measures are addressed.[2376]

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the role implied (annexed) powers play in the context of Article 114 TFEU see Orator, Möglichkeiten 214.

2371 See also case C-359/92 *Germany v Council*, para 37.

2372 The adoption of Regulations on the basis of Article 114 TFEU has been considered problematic for their general direct applicability. However, the wording of this provision clearly (and in particular as compared to Article 115 TFEU) does not exclude the adoption of Regulations and by now a number of them has been adopted on Article 114 TFEU, partly even with the explicit approval of the Court; see Classen, Art. 114 AEUV, paras 125 f.

2373 See case C-66/04 *United Kingdom v European Parliament/Council*, para 59.

2374 Opinion of AG *Kokott* in case C-66/04 *United Kingdom v European Parliament/Council*, para 33.

2375 The Court's judgement in the *ENISA* case does not constitute a legitimation of mixed/hard compliance mechanisms, though; see also Moloney, Rules in Action 219.

2376 Case C-270/12 *United Kingdom v European Parliament/Council*, para 44.

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Whether also mixed or even hard compliance mechanisms may lawfully be adopted on the basis of Article 114 TFEU remains to be considered. With reference to the above case law, the Court, in its judgement in the *ESMA* case, added that 'EU legislature, in its choice of method of harmonisation and, taking account of the discretion it enjoys with regard to the measures provided for under Article 114 TFEU, may delegate to a *Union body, office or agency powers for the implementation of the harmonisation sought*. That is the case in particular where the measures to be adopted are dependent on *specific professional and technical expertise* and the ability of such a body to *respond swiftly and appropriately*' (emphases added).[2377] While the Court specifically referred to the ESMA's powers to address legally binding acts to individuals/undertakings (Article 28 of Regulation 236/2012), it is to be noted that this Regulation also empowers the ESMA to adopt an opinion to the MS to ensure compliance.[2378] Only where this opinion is not complied with, the ESMA may make use of its powers under Article 28 *leg cit* (*ultima ratio*).[2379]

The competence to adopt legally binding measures *vis-à-vis* MS – which is a necessary condition of most mixed and hard compliance mechanisms addressed here – appears, in this context at least, to be less problematic than the power to directly address individuals/undertakings.[2380] After all, it is the rule rather than the exception that it is MS who are addressed by

2377 Case C-270/12 *United Kingdom v European Parliament/Council*, para 105. In terms of the level of detail, the Court required that the 'essential elements of the harmonising measure' are defined in the legislative act at issue and that the 'mechanism for implementing those elements [is] designed in such a way that it leads to a harmonisation within the meaning of Article [114 TFEU]'; case C-66/04 *United Kingdom v European Parliament/Council*, paras 48 f. The Court said so in the context of the Commission. These requirements must also (or even: *a fortiori*) apply where mere bodies, offices or agencies of the EU are empowered; overall sceptically: W Weiß, Future 345.

2378 Article 27 of Regulation 236/2012; for the implementing powers of European agencies see already case T-187/06 *Schräder* (implicit confirmation of the CPVO's individual decision-making power); confirmed in case C-38/09P *Schräder*.

2379 See case C-270/12 *United Kingdom v European Parliament/Council*, paras 108 ('where necessary') and 115 ('not taken sufficient measures'). The *ultima ratio* character of the measures directed to a market participant already follows from the pertinent Regulation 236/2012 (in particular its Recital 33 and its Article 28 para 3, last subparagraph *e contrario*). The ESMA opinion which is regularly addressed to the competent national authority in advance pursuant to Article 27 para 2 *leg cit* underpins the hierarchy of this sequence of acts.

2380 This conviction is exemplified by the sequenced procedure laid down in Article 17 of Regulation 1093/2010 (see IV.2.2.2.2.3. above).

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measures adopted on the basis of Article 114 TFEU or by measures adopted (by an EU body) on the basis of EU secondary law (which is again based on Article 114 TFEU).[2381] Such constellations lead to an influence on MS action, but they grant the latter some leeway in executing EU law *vis-à-vis* individuals/undertakings.[2382] The power of EU bodies to address legally binding measures to individuals/undertakings, on the contrary, regularly *replaces* MS competence/action.[2383] On the other hand, the possibility of EU bodies giving instructions to national authorities, thereby creating a hierarchy of these two levels of administration is not reflected in the Treaties, whereas pre-emptive action by EU bodies – at the cost of MS action – has a certain tradition in EU law.[2384]

Thus, from the perspective of EU law, each of the two *modi* has its respective *pro* and *contra*. Specifically with regard to Article 114 TFEU as interpreted by the Court, however, we can conclude: If the power to adopt individual-concrete measures binding upon individuals or undertakings may, under certain circumstances, be feasible, due to the fact that measures based on Article 114 TFEU are normally directed to the MS this must also be true for the power to adopt legally binding individual-concrete measures addressed to one or a number of MS.

In the context of another compliance mechanism involving the adoption of hard law acts,[2385] the Court has expressly confirmed compliance of the mechanism with Article 100a TEEC (today Article 114 TFEU): 'In certain fields, and particularly in that of product safety, the approximation of general laws alone may not be sufficient to ensure the unity of the

2381 See case C-217/04 *United Kingdom v European Parliament/Council*, para 44.

2382 Still critical with regard to such constellations: Gundel, Energieverwaltungsrecht, para 47.

2383 This is also the logic behind tiered compliance mechanisms like the one underlying the *ESMA* case. Another example, taken from our sample, is Article 19 of Regulation 1093/2010; more generally on the problem of the power of EU bodies to 'lift implementation powers' of the MS: Opinion of AG *Jääskinen* in case C-270/12 *United Kingdom v European Parliament/Council*, para 50; critically in the context of Article 291 TFEU: Nettesheim, Art. 291 AEUV, para 31.

2384 See Schütze, Rome 1404 f, with further references. It has been argued by many scholars – under previous Treaty versions – that a power of the Commission or the Council to address legally binding instructions to national authorities would be *ultra vires*: Constantinesco, Recht 299; Eekhoff, Verbundaufsicht 130–139; Gil Ibáñez, Supervision 205; Scheuing, Impulse 334–336; Schöndorf-Haubold, Verwaltung 46; von Bogdandy/Arndt/Bast, Instruments 96; see also Kahl, Verwaltungsverbund 366.

2385 See Article 9 of Directive 92/59/EEC, the predecessor act of Directive 2001/95/EC.

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market. Consequently, the concept of "measures for the approximation" of legislation must be interpreted as encompassing the Council's power to lay down measures relating to a specific product or class of products and, if necessary, individual measures concerning those products'.[2386]

It should not be omitted here to remark that the Court's approach is not uncontested. One of the main issues in this context is whether the power to adopt individual-concrete measures, be they addressed to individuals/undertakings or to MS, can be qualified as *approximation of laws*. In the literature and in legal practice a strong opposition to the individualised application of EU law by an EU body on the basis of Article 114 TFEU can be found.[2387] Suffice it to quote AG *Jacobs* here, who uttered: 'It is one thing to lay down rules which must be uniformly applied in all Member States, another to take the decisions which apply the rules to individual cases. It is clear that, under certain provisions of the Treaty, the Council may delegate to the Commission both the power to lay down rules and the power to take individual decisions.[] Article 100a, in contrast, is concerned exclusively with the harmonisation of national provisions. It follows that Article 100a may be used only to adopt measures which lay down uniform rules; the application of those rules to individual cases is then a matter for the national authorities'.[2388]

2386 Case C-359/92 *Germany v Council*, para 37; see also para 39; repeated in case C-217/04 *United Kingdom v European Parliament/Council*, para 106; see also overview of relevant case law by Schütze, Rome 1393 ff. Still cautiously: Commission Proposal COM(97) 619 final, para 11: 'Conferring on the Commission the power to take a Decision requesting a Member State to take rapid and appropriate measures to remove an obstacle to trade is necessary if one of the objectives of the Community is to be attained [...] and therefore the proper functioning of the internal market [...]. Besides, conferral of this power is not, directly or indirectly, associated with harmonization, within the meaning of Article 100a of the Treaty. The purpose of the Regulation is action by the Commission which does not call into question the laws, regulations and administrative provisions of the Member States as such'. That is why the Commission proposed the flexibility clause – not Article 100a TEC – as the correct legal basis for the respective act.

2387 See Eekhoff, Verbundaufsicht 196, with further references.

2388 Opinion of AG *Jacobs* in case C-359/92 *Germany v Council*, para 36.

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3.2.3. The compliance mechanisms based on Article 114 TFEU

3.2.3.1. Introduction

Against the background of the above analysis in particular of the Court's case law, in the following we shall examine those compliance mechanisms of our sample which were based on Article 114 TFEU with a view to their compliance with this provision, in particular with a view to whether there is a close link to the subject matter of the respective legal act, as required by the Court, and with a view to their respective proportionality.[2389]

The stated objectives of the acts of secondary law based on Article 114 TFEU and containing the compliance mechanisms presented above are the safety of different kinds of products,[2390] to set up an efficient and effective single European framework for the resolution of entities and ensuring the consistent application of resolution rules,[2391] to provide a harmonised framework for cross-border exchanges of electricity,[2392] to provide a system that is in line with the objective of a stable and single Union financial market for financial services,[2393] the creation of a fully operational internal electricity market,[2394] the participation and cooperation of national regulatory authorities in order to facilitate the uniform application of the legislation on the internal markets for electricity and natural gas throughout the Union,[2395] to achieve a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services,[2396] and an effective macro-prudential oversight of the Union financial system.[2397] The examination of these acts

2389 The safeguard clauses according to what is now Article 114 para 10 TFEU (see 2.2.1.2.6. above) shall not be addressed here, because their legal basis (para 10) is much more specific than para 1 *leg cit*, and hence potential incompatibilities would be more apparent. The three examples provided above seem to be in accordance with Article 114 para 10 TFEU (and the respective predecessor provisions).

2390 Directive 2001/95/EC; Directive 2001/18/EC; Directive 2006/42/EC; Regulation 1907/2006; for product safety as an early example of a policy field with an EU-MS network to supervise compliance with and enforce EU law see Gil Ibáñez, Supervision 298 f.

2391 Regulation 806/2014 (Recital 122).

2392 Regulation 2019/943 (Recital 74).

2393 Regulation 1093/2010 (Recital 8).

2394 Directive 2009/72/EC (Recital 62).

2395 Regulation 2019/942 (Recital 16).

2396 Directive 2002/21/EC (Recital 41).

2397 Regulation 1092/2010 (Recital 33).

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shall not be comprehensive, but shall be limited to the compliance mechanisms referred to above, based on the assumption that these acts all comprise measures for the approximation of MS' law, regulation or administrative action (as interpreted broadly by the Court; see 3.2.2.2. above), and based on the assumption that the objectives *stated* in these acts – which all serve the achievement of the internal market as defined in Article 26 TFEU, in particular: the facilitation of at least one of the fundamental freedoms – are their respective *actual* objectives.[2398] The follow-up question is whether this holds true also for the single compliance mechanisms enshrined in these legislative acts, that is to say whether they are at least 'closely linked to the subject matter of the acts approximating the laws', as required in the case law referred to above.

3.2.3.2. Hard and mixed mechanisms

The mechanism laid down in Article 13 para 1 of Directive 2001/95/EC is restricted in different ways. First, it may only be applied in case of a serious risk from certain products to the health and safety of consumers. In addition to that, the following criteria must be met: The MS' approaches to deal with this risk differ significantly from each other, the risk cannot be dealt with otherwise due to the urgency of the matter, and the risk can be eliminated effectively only by adopting 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 (*ultima ratio*).[2399] Second, if scientific questions falling within the competence of an EU scientific (comitology) committee arise, the Commission must consult this committee. Third, MS' competences are not skipped by the Commission decision, but – and that, in comparison, appears as a weaker form of interference with MS' prerogatives – the Commission is requiring a MS to exercise these competences in a certain way. In view of that, there seems to be a close link to the subject matter of Directive 2001/95/EC,[2400] fleshed out in a proportionate way[2401]. Note in particular that – with regard

2398 For the importance of these stated objectives see eg case C-270/12 *United Kingdom v European Parliament/Council*, para 53.
2399 Article 13 para 1 lit a-c of Directive 2001/95/EC.
2400 See case C-359/92 *Germany v Council*, para 35.
2401 See case C-359/92 *Germany v Council*, paras 44 ff.

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to the predecessor mechanism of Article 13 of Directive 2001/95/EC – the Court has confirmed the necessity of the procedure, in particular in view of the urgency required.[2402]

Under the mechanism laid down in Article 29 para 2 of Regulation 806/2014, the SRB may order an institution under resolution to take certain action to comply with an earlier SRB decision which the national resolution authority in charge has not respected. Decisions of EU bodies directly addressed to market participants are, especially where there is an explicit competence of the MS in this respect, considered to be exceptions, sometimes legally problematic exceptions. In this case, the interference with the MS competence by the SRB follows from the breach of an earlier SRB decision on the part of the competent national authority. The decision is obligatory also for the national authority concerned and shall only be taken if it 'significantly addresses the threat' at issue.[2403] Before adopting a decision addressed to an institution under resolution, the SRB shall notify the national resolution authority concerned and the Commission no later than 24 hours in advance.[2404] This very short notice has to be seen in the context of the urgency of the matter.[2405] It reduces to a minimum the possibility of an exchange of views between the EU and the national level. In terms of judicial protection, the MS concerned is not worse off than if the SRB had addressed its decision to the national authority. In both cases, it may file an action for annulment with the Court.[2406] The mechanism is strongly attached to the rest of Regulation 806/2014 and clearly serves the 'efficiency and uniformity of resolution action'.[2407] However, the strong enforcement tendency of this mechanism (already addressed under 3.1.2.2. above) renders it doubtful whether Article 114 TFEU is a sufficient legal basis for it.

Another compliance mechanism of Regulation 806/2014 is laid down in its Article 7 para 4. It allows the SRB 'to exercise directly all of the rele-

2402 Case C-359/92 *Germany v Council*, para 50.

2403 Article 29 paras 2 and 4 of Regulation 806/2014.

2404 Note that a request pursuant to Article 29 para 2 lit c of Regulation 806/2014 is subject to further conditions.

2405 In the course of the negotiations on what became Regulation 806/2014, the ECB and the Commission have stressed the importance of fast-track decision-making in bank crisis management; see Howarth/Quaglia, Road 133. Considering the necessity of urgent decision-making: case T-510/17 *Del Valle Ruíz*, para 414.

2406 Article 263 para 2 TFEU.

2407 Recital 87 of Regulation 806/2014; see also Alexander, Banking Union 178, with further references.

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vant powers under this Regulation', either after a warning to the national authority concerned has not been reacted to accordingly or even without a predating warning. But also in the latter case consultations or a request of the national authority concerned must precede. Where neither a warning has been adopted nor a request filed by the national authority concerned, the proportionality of the direct intervention is highly questionable and may only be justified by danger ahead in the concrete case. The Regulation does not make provision for such a restriction of short-term intervention. For the enforcement thrust of this mechanism – which reflects the proportionality concerns uttered here – see 3.1.2.3. above.

The mechanisms laid down in Regulation 1093/2010,[2408] more precisely the '"low-level" enforcement powers'[2409] provided for in its Articles 17–19, shall be addressed together. Article 17 is a general (mixed) mechanism aimed at ensuring compliance with the relevant EU law. It allows for an *ex post* scrutiny of the actions of the competent authorities. It encompasses all kinds of action and the threshold against which this action is to be examined covers the relevant financial market law.[2410] It is carefully drafted, apart from the action taken by the EBA also allowing for Commission intervention. It provides for the possibility of the EBA decision addressed directly to a financial institution/financial sector operator which shall only be adopted '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'[2411] (as an *ultima ratio* measure[2412]). While there are concerns as to the powers the EBA is vested with all in all,[2413] also the mechanism laid down in Article 17 seems to be problematic, in particular with a view to its proportionality. Unsurprisingly, this assessment is related to the strong enforcement tendency of this mechanism (as established above, see 3.1.2.3.),

2408 While the discussion here shall focus on the compliance mechanisms, not on the entire legal act by means of which it is established, it ought to be noted that Regulation 1093/2010 in its entirety much more caters for the harmonisation of law (by the EBA) than it harmonises the law itself; for an examination of the Regulation 1093/2010 against its legal basis see Fahey, Emperor.

2409 Fahey, Emperor 589.

2410 See Article 1 para 2 of Regulation 1093/2010.

2411 Article 17 para 6 of Regulation 1093/2010.

2412 See Weismann, Agencies 138.

2413 Critically with regard to the appropriateness of Article 114 TFEU for the ESMA's (the EBA's sister authority) regulatory powers: Moloney, Rule-Making 71.

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for which it is doubtful whether Article 114 TFEU provides an appropriate basis.[2414]

As regards the procedure laid down in Article 18 of Regulation 1093/2010, it is clear that it is an emergency mechanism which requires – for it to be applied – a Council decision[2415] establishing the existence of an emergency situation and 'exceptional circumstances, where coordinated action by competent authorities is necessary to respond to adverse developments which may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union'.[2416] Also here the EBA decision directly addressed to financial institutions is a measure of last resort. It applies only where a competent authority has failed to comply with a decision from the EBA addressed to it. Again the route via influencing the competent authority (the national authority and potentially also the ECB[2417]) is preferred, and only where it does not lead to the aspired result – compliance with EU law on the part of the competent authority that is – the direct way to the respective market actor is available. Here the exceptionality of the application of this mechanism (reflected also in the requirement of a Council decision establishing an emergency situation) mitigates the concerns on the primary legal basis uttered above with regard to the Article 17-procedure.

In Article 19 of Regulation 1093/2010 the sequence of (possible) acts corresponds to Article 18. The Article 19-mechanism does not require a Council decision to be activated, though. It is about settling disagreements between competent authorities and hence means that also here the EBA intervenes only where the uniform application of the relevant Union law is at risk. While normally the EBA may only get involved upon request by at least one of the relevant competent authorities, provision is made for action by the EBA *proprio motu*, namely in cases specified in the relevant legislation and where, on the basis of 'objective reasons', disagreement

2414 See also Gil Ibáñez, Exceptions 170 and 173, who mentions as legal bases for new enforcement mechanisms either Art 352 TFEU or a new provision introduced in the course of a Treaty revision.

2415 Note that pursuant to the pertinent Commission proposal the Commission should have been in charge here (instead of the Council); see Article 10 of Commission Proposal COM(2009) 501 final.

2416 Article 18 paras 2 f of Regulation 1093/2010; with regard to emergency measures requiring MS to take certain action see case C-359/92 *Germany v Council*, para 33.

2417 Article 2 para 2 lit f of Regulation 1093/2010.

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between competent authorities from different MS can be determined.[2418] Since disagreements between national authorities are likely to constitute obstacles to the functioning of the internal market,[2419] and since such disagreements are (from *an ex* ante perspective) not unlikely to occur,[2420] there seems to exist a sufficiently strong link to the material scope of Article 114 TFEU.

3.2.3.3. Soft mechanisms

The mechanism set out in Article 33 of Directive 2018/1972 provides for the scrutiny of planned MS measures *vis-à-vis* operators – that means, in this context, undertakings providing or authorised to provide a public electronic communications network or an associated facility.[2421] The Commission may notify the national authority concerned (and the BEREC) when it deems the draft measure to 'create a barrier to the single market or [when it has] serious doubts as to its compatibility with Union law'.[2422] The BEREC may issue an opinion where it agrees with the Commission. If not, the Commission may adopt a recommendation to the national authority concerned to amend or withdraw its decision, or it may decide to lift its reservations against the draft. Article 33 of Directive 2018/1972 is entitled 'Procedure for the consistent application of remedies' – a procedure which was considered necessary (and suggested by a study[2423]) to ensure Commission influence on the adoption of remedies by national authorities.[2424] In the relevant Commission proposal, a hard law power for the Commission was envisaged which – in the course of the legislative procedure – was

2418 Article 19 para 1 subpara 2 of Regulation 1093/2010.

2419 See Recital 32 of Regulation 1093/2010: 'to ensure the correct and consistent application of Union law'.

2420 See Report of the High-Level Group on Financial Supervision in the EU (February 2009; so-called *de Larosière* Report) 77.

2421 Article 2 para 29 of Directive 2018/1972.

2422 Article 33 para 1 of Directive 2018/1972. For the comments the Commission may make even if it does not object to the draft measure see subpara 2 *leg cit.*

2423 See Commission Proposal COM(2007) 697 final, 5.

2424 For the remedies to be applied see references in Article 33 para 1 of Directive 2018/1972; for a hierarchisation of these remedies see Article 14 para 3 *leg cit*; for the 'schleichende[n] Machtzuwachs' [creeping increase of power] of the Commission in EU network regulation more generally see Ludwigs, Netzregulierungsrecht 608, with further references.

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converted into a mere soft law power.[2425] In the fast-moving area of telecommunications the Treaty infringement procedure has proved particularly fragile[2426] – an argument which may count in favour of the necessity (as part of the proportionality test) of the compliance procedure(s) laid down in Directive 2018/1972. With a view to Article 114 TFEU, the mechanism – due to its softness, but also due to its focus on the approximation of the administrative action of MS (close link to the general purpose of Directive 2018/1972) and the *ex ante* intervention it provides – seems feasible.

According to the procedure laid down in Articles 16 f of Regulation 1092/2010, the ESRB may issue recommendations – *inter alia* – to MS or their respective supervisory authorities, asking for a policy response on the part of the addressees. It may do so where significant risks to the achievement of the objective of, to put it briefly, maintaining the stability of the financial system of the EU as stipulated in Article 3 para 1 of Regulation 1092/2010 arise. Non-compliance may lead to further interaction and may, as a measure of last resort, result in the publication of the recommendations.[2427] In spite of its limitation to cases of risk (as set out above), the mechanism still leaves a margin of appreciation and a broad scope of action for the ESRB. Practice suggests that the adoption of these recommendations is hardly exceptional – to date (and since its establishment by 1 January 2011) the ESRB has adopted dozens of these recommendations, some of which are addressed to specific MS.[2428] The adoption of recommendations in principle is in accordance with the main objective of Regulation 1092/2010, namely to establish EU macro-prudential oversight of the financial system. However, where the recommendations have a strong enforcement thrust (eg requesting the abolishment of certain administrative decisions *ex post* due to their alleged infringement upon EU law) or where they request a concrete legislative initiative of a certain MS this – not least in view of the potentially broad scope of these recommendations – appears to be problematic; in the former case because enforcement other than by the Treaty infringement procedure and its variants is regu-

2425 See Recital 11 of Commission Proposal COM(2007) 697 final, which lead to the adoption of Directive 2009/140/EC amending – *inter alia* – Directive 2002/21/EC.

2426 See Kühling, Telekommunikationsrecht, para 73, with an example.

2427 The ESRB Secretariat has published a 'Handbook on the assessment of compliance with ESRB recommendations' (2016) <https://www.esrb.europa.eu/pub/pdf/recommendations/160502_handbook.en.pdf> accessed 28 March 2023.

2428 See <https://www.esrb.europa.eu/mppa/recommendations/html/index.en.html> accessed 28 March 2023.

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larly unlawful, in the latter case because of the interference with national sovereignty.[2429]

With a view to Article 114 TFEU, the EU legislator expressly refers to the case C-217/04 *United Kingdom v European Parliament/Council*, stressing the close link of the ESRB's tasks 'to the objectives of the Union legislation concerning the internal market for financial services'.[2430]

3.2.4. Other primary legal bases

3.2.4.1. Hard mechanisms

Article 100 para 2 TFEU empowers the EP and the Council to lay down, pursuant to the ordinary legislative procedure and thereby consulting the Economic and Social Committee and the Committee of the Regions, 'appropriate provisions for sea and air transport'. While the rest of the TFEU's title 'Transport' does not apply to sea and air transport,[2431] Article 100 para 2 provides for regulatory action on the part of the EU in these fields. In spite of this peculiarity, systematically speaking Article 100 para 2 belongs to the title 'Transport', which is why Articles 56 f TFEU do not apply.[2432] The other provisions of primary law do apply to sea and air transport. This includes in particular the internal market objective pursuant to Article 26 TFEU, the other fundamental freedoms and the competition rules. On the level of secondary law, also the freedom of services has been realised in the field of transport. In this context, also the 'additional aim' of Regulation 2018/1139 – the founding act of the EASA which is based on Article 100 para 2 TFEU – is to be mentioned, namely to 'facilitate the free movement of goods, persons, services and capital'.[2433]

The question now is whether Article 100 para 2 TFEU may serve as a legal basis for the compliance mechanism laid down in Articles 70 f of

2429 Article 16 para 1 of Regulation 1092/2010: 'recommendations […] for legislative initiatives'. For these concerns see also 3.3.3. below.

2430 Recital 31 of Regulation 1092/2010.

2431 Article 100 para 1 TFEU.

2432 Article 58 para 1 TFEU: *argumentum* 'transport'; see eg Fehling, Art. 100 AEUV, para 10; for the nevertheless applicable 'principle of the freedom to provide services' see case C-92/01 *Stylianakis*, paras 23 f, with further references.

2433 Article 1 para 2 lit d of Regulation 2018/1139; with regard to the importance of one of the predecessor regulations for the internal market programme of the then Community see Riedel, Gemeinschaftszulassung 4.

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Regulation 2018/1139. The title on transport contained in the TFEU refers to executive functions of the Commission (Article 95 para 4 and Article 96 para 2). Even though these provisions do not apply in the context of sea and air transport, the author would agree with *Riedel* who argues that – in view of the systematic belonging of what is now Article 100 para 2 TFEU to EU transport policy – executive functions on the part of the EU cannot be excluded.[2434] The EASA's powers under its founding regulation have been described as considerable and – in the context of European agencies – as unprecedented.[2435] However, 'the contorted way in which the regulatory powers have been granted, and the multiple controls to which those powers are subjected, show that it was not intended to grant them a clear hierarchical authority over their national counterparts'.[2436] Here it is not the full *pouvoir* of the EASA which is at issue, but the tasks and powers related to ensuring MS compliance which the EASA and the Commission are vested with pursuant to Articles 70 f of Regulation 2018/1139. Article 100 para 2 TFEU entitles the legislator to lay down 'appropriate provisions' for sea and air transport.[2437] As regards the modalities – in particular: the output the Commission or newly established EU bodies may be empowered to adopt – which may be covered by these provisions, Article 100 para 2 TFEU appears to be (even) more encompassing than Article 114 para 1 TFEU. In view of that, it seems adequate to analogously consider the Court's case law adopted in the context of Article 114 TFEU (see 3.2.2.2. above),[2438] both as regards the empowerment of the Commission and the establishment and empowerment of the EASA. While here only the powers specified above are at issue, the legality of the establishment of the EASA is an important preliminary question.[2439] One of the tasks of the EASA is to contribute to

2434 See Riedel, Gemeinschaftszulassung 245.

2435 See Dehousse, Delegation 790, with regard to the EASA's *de facto* regulatory autonomy.

2436 Curtin/Dehousse, Agencies 195, with regard to the predecessor regulation; in agreement with them on this point: Opinion of AG *Jääskinen* in case C-270/12 *United Kingdom v European Parliament/Council*, para 24.

2437 For this broadly drafted Treaty provision and the competences it may possibly confer see already Priebe, Entscheidungsbefugnisse 81–83; see also Riedel, Gemeinschaftszulassung 248–250.

2438 See case T-317/09 *Concord*, paras 46 f for an exemption mechanism laid down in Article 22 (in particular its para 4) of Directive 2003/55/EC, based *inter alia* on what is now Article 114 TFEU, which is similar to that laid down in Articles 70 f of Regulation 2018/1139.

2439 See eg Orator, Möglichkeiten 468–470.

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the uniform application of Regulation 2018/1139.[2440] While this objective corresponds to the (wide) wording of Article 100 para 2 TFEU, the content of the regimes laid down in Articles 70 f of this Regulation – on the monitoring of national safeguard measures and the handling of legal exemptions, respectively, each time providing for a Commission decision adopted upon an EASA recommendation – appears to serve this aim in a proportionate manner.

Regulation 2019/943 is based on Article 194 para 2 TFEU which allows for the EP and the Council, acting in accordance with the ordinary legislative procedure, to establish the measures necessary to achieve the following objectives: to ensure the functioning of the energy market; to ensure security of energy supply in the Union; to promote energy efficiency and energy saving and the development of new and renewable forms of energy; and to promote the interconnection of energy networks. Article 63 para 8 of this Regulation provides that the Commission may, after a market participant (a new interconnector) has requested the competent national authority to take a certain decision (to grant an exemption from certain provisions of this Regulation and of Directive 2019/944[2441]), request the national authority concerned (or exceptionally: the ACER) to amend or withdraw the decision to grant an exemption. The Commission shall do so within an (extendable) period of 50 days (*ex post* scrutiny). The predecessor Regulation – Regulation 714/2009 – in its Article 17 para 8 provided for nearly the same mechanism. It was still based on the more general Article 95 TEC (now: Article 114 TFEU). This reflects the proximity of Article 114 TFEU (as the more general provision) and the legal basis of Regulation 2019/943, Article 194 para 2 TFEU, as the more specific rule. It is apparent that Article 114 paras 4 ff TFEU is similar as regards the *ex post* scrutiny and in that it aims at balancing internal market concerns on the one hand and ensuring MS prerogatives, on the other hand. Since it is contained in Article 114 TFEU, it may – as regards its procedural specificities – be understood as a role model for other compliance (implementing) mechanisms.[2442] This applies first and foremost to mechanisms based on Article 114 TFEU, but also to implementing mechanisms more

2440 See Recital 57 of Regulation 2018/1139.

2441 Article 63 para 1 of Regulation 2019/943.

2442 Paras 4 and 5 of Article 114 TFEU cannot serve as a legal basis for compliance measures laid down in secondary law, though; see case C-359/92 *Germany v Council*, para 18.

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generally, especially if they are based on a somewhat related provision. The compliance mechanism at issue here limits the risk of a heterogeneous application of EU law provisions throughout the EU which the exemption regime handled by national authorities bears. Furthermore, being aimed at ensuring 'the smooth functioning of the internal market for electricity',[2443] it is strongly linked to the rest of Regulation 2019/943. In conclusion, the mechanism seems to be correctly and proportionately established under Article 194 para 2 TFEU.

3.2.4.2. Mixed mechanisms

The mechanism laid down in Article 63 of Directive 2019/944, based on Article 194 para 2 TFEU as well, provides for the intervention of the ACER and the Commission in case a decision of a national regulatory authority does not comply with the Commission network codes and guidelines referred to in this Directive or in Regulation 2019/943. It is a tiered procedure starting with an ACER opinion. Since these acts shall 'provid[e] the minimum degree of harmonisation required to achieve the aim of this Directive',[2444] the link to the subject matter of the Directive appears sufficiently close. *Gundel* held that since no serious conflicts between the Commission and the national regulatory authorities have become known in the energy sector, the Commission's power raises subsidiarity concerns required to be addressed in a justification.[2445] The scarcity of conflicts seems to emphasise that the Treaty infringement procedure not only in a legal but also in a practical perspective would be the adequate procedure to tackle these conflicts.[2446] In that light, coverage by Article 194 para 2

2443 Recital 63 of Regulation 2019/943.

2444 Recital 92 of Directive 2019/944.

2445 Gundel, Energieverwaltungsrecht, para 47 with regard to the predecessor Directive 2009/72/EC. In my view, the lack of such conflicts is also an argument against the likelihood that obstacles to the functioning of the internal market will emerge in the future. This may be one of the reasons why Directive 2019/944, unlike its predecessor, was not based on Article 114 TFEU. For the likelihood of future impediments to the internal market as a requirement for making use of Article 114 TFEU (preventive harmonisation); see also Classen, Art. 114 AEUV, para 71, with references to the Court's case law.

2446 See Orator, Möglichkeiten 472 f, with regard to a similar mechanism (empowering the ACER).

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TFEU may seem questionable, also with regard to proportionality (more concretely: the necessity criterion enshrined in it).

Article 109 TFEU provides for the Council, on a proposal from the Commission and after consulting the EP, to make any 'appropriate regulations' for the application of Articles 107 f TFEU. While this term resembles the wording of Article 100 para 2 TFEU,[2447] it is to be noted that in particular Article 108 TFEU predetermines to a large extent the procedure to be applied in the context of State aid. The main novelty of the compliance mechanism laid down in Articles 22 f of Council Regulation 2015/1589 (based on Article 109 TFEU) is that the proposal of the Commission, if accepted by the MS concerned, becomes binding upon the latter. This innovation seems to be located well within the leeway granted to the Council in Article 109 TFEU, as it allows the Council to flesh out Article 108 TFEU (in accordance with the latter).[2448] In view of the strong coinage of this mechanism by primary law, its enforcement character – which is also reflected upon in the Council Regulation – does not appear to be a problem.

Article 121 para 6 TFEU allows for the EP and the Council to adopt 'detailed rules for the multilateral surveillance procedure referred to in paragraphs 3 and 4' in the form of regulations adopted pursuant to the ordinary legislative procedure. Pursuant to Article 136 para 1 TFEU the Council shall, in accordance with the relevant procedure from among those referred to in Articles 121 and 126 (except for Article 126 para 14), adopt measures specific to the Euro-MS: a) to strengthen the coordination and surveillance of their budgetary discipline; b) to set out economic policy guidelines for them, while ensuring that they are compatible with the guidelines adopted for the whole of the Union and that they are kept under surveillance. Regulation 1176/2011 is based on Article 121 para 6 TFEU and Regulation 1174/2011 on the same provision in conjunction with Article 136 TFEU.[2449]

While the corrective action plans to be submitted by the MS – which are not explicitly foreseen in the Treaties and hence can be considered an invention of Regulation 1176/2011 – do not appear to go beyond 'detailed

2447 The word 'regulations' is to be understood strictly, though. It limits the instruments the Council may make use of under this provision to regulations according to Article 288 TFEU.

2448 See Erlbacher, Art. 109 AEUV, para 4. Accordingly, and unsurprisingly so, the express objective of Council Regulation 2015/1589 is to lay down detailed rules for the application of Article 108 TFEU.

2449 On the importance of Article 136 TFEU for a variety of crisis measures, among them Regulation 1174/2011, see Hinarejos, Crisis 32–34.

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rules',[2450] the sanctions regime of Article 1174/2011 is to be seen critically. After all, an interest-bearing deposit or an annual fine is not even hinted at in primary law.[2451] On the contrary, Article 121 TFEU is clearly established as a tender mechanism based on a dialogue between the EU and the MS which does not seem to envisage any kind of financial sanctions.[2452] Whether Article 136 TFEU which empowers the Council 'to strengthen the coordination and surveillance of the[] budgetary discipline' of Euro-MS allows for such reinforcement (with regard to Euro-MS) is contested.[2453]

It is true that the Court has confirmed, in the context of environmental protection through criminal law, that the EU legislator may provide for 'the application of effective, proportionate and dissuasive […] penalties' in order to ensure that the rules laid down by it are 'fully effective'.[2454] It did so with regard to a Council framework decision which obliged MS to incorporate criminal penalties in their respective national law, thereby leaving to the MS the choice of the criminal penalties to be applied (as long as they met the three criteria above).[2455] However, here a comparatively elaborate procedure to be applied is laid down in primary law, and the legislator shall only complement the 'detailed rules' of it.[2456] What is more, sanctions to be imposed on MS are politically more sensitive and hence less common than sanctions – to be more closely defined by the MS themselves – to be imposed, again by the MS themselves, on individuals or undertakings.[2457]

2450 See Häde, Art. 121 AEUV, para 23, also criticising (with further references) the reverse majority voting which applies to the adoption of Council recommendations in this context.

2451 See also Obwexer, System 227.

2452 See Bieber/Maiani, Enforcement 1071; Häde, Art. 121 AEUV, para 24, with further references.

2453 See Palm, Art. 136 AEUV, paras 21 ff, with further references.

2454 Case C-176/03 *Commission v Council*, para 48.

2455 Case C-176/03 *Commission v Council*, paras 47 f.

2456 Stressing the fact that only the procedure of coordination may be regulated, but that otherwise economic policy rests with the MS: Bieber/Maiani, Enforcement 1090.

2457 This is not least because also under the Treaty infringement regime sanctions *vis-à-vis* the MS are conceptualised as an *ultima ratio* which, for a long time, had not been applied by the Court at all. Thus, there is 'no rooted tradition of coercion-type enforcement in the EU against infringements of EU law'; Andersen, Enforcement 149. That this sensitivity is reflected also in political discourse may be illustrated by the following example: In its 1997 'Action Plan for the Single Market. Communication of the Commission to the European Council', CSE(97)1 final, the Commission proposed that '[i]n cases of serious breach of Community law which gravely affect the functioning of the Single Market, the Commission should be able

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Sanctions to be imposed on MS for non-compliance with EU law, ie as a measure of enforcement, in primary law are primarily provided for in Article 260 TFEU. By the introduction of fines, it was said, 'the EU competence for the coordination of economic policy is surreptitiously transformed into a competence for the adoption of *binding substantive policy decisions*' (emphasis in original).[2458] The objective of Regulation 1174/2011 in its entirety – to create enforcement measures to correct excessive macroeconomic imbalances in the Euro area that is – sits uneasy with the thrust both of Article 136 para 1 and Article 121 para 6 TFEU which is focussed on coordination and plain surveillance.[2459] Apparently, the Court thinks otherwise. In a case on Regulation 1173/2011 on the effective enforcement of budgetary surveillance in the Euro area, again based on Article 136 and Article 121 para 6 TFEU, the Court made no objections to the sanctions provided for therein (see 3.1.1.2.3. above).[2460]

Article 91 para 1 TFEU stipulates that for the purpose of implementing Article 90 on the common transport policy, the EP and the Council shall, in

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to take urgent action against Member States which fail in these obligations, using sanctions where necessary' (page 3). In the ensuing legislative proposal of the Commission, COM(97) 619 final, the Commission sanctions were dropped and the Commission contented itself with the mere power to adopt a decision establishing the infringement, combined with the reference to the fact that individuals could have this decision 'rapidly enforced before the national courts and could, under the ways and means of national redress, obtain provisional measures, combined with penalty payments or fines, to prevent extension or aggravation of the obstacle, to end the alleged infringement and, if appropriate, achieve compensation for the loss suffered' (page 3). In other words, the original plan of Commission sanctions *vis-à-vis* MS gave way to reliance on national means of redress (against the respective MS) which may be open to the individuals concerned; for an earlier contribution to the discussion on the introduction of sanctions in internal market law see Commission, 'Completing the Internal Market', COM(85) 310 final, para 154, according to which the Commission will 'continue its general action [...] in order to correct violations rapidly and effectively. It will closely combine its actions of prevention and cure, and it will consider the possible introduction of sanctions'.

2458 Bieber/Maiani, Enforcement 1071. For the Commission's search for alternative 'incentives' to ensure compliance in economic policy more generally see its Communication 'Enhancing economic policy coordination for stability, growth and jobs – Tools for stronger EU economic governance', COM(2010) 367 final, 8–11. For the conditionality-based incentives, in the context of the so-called 'umbrellas', see III.2.2.4.2.2. above; for traditional and new forms of conditionality in cohesion policy see Bachtler/Mendez, Cohesion 126-130.

2459 See de Sadeleer, Architecture 366 f; Palmstorfer, Krise 170 f, both with further references.

2460 See case C-521/15 *Spain v Council*, eg para 44.

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accordance with the ordinary legislative procedure, lay down: a) common rules applicable to international transport to or from the territory of a MS or passing across the territory of one or more MS; b) the conditions under which non-resident carriers may operate transport services within a MS; c) measures to improve transport safety; d) any other appropriate provisions. In view of the wide wording of this provision, in particular the legislator's competence to adopt 'any [...] appropriate provisions',[2461] it appears that the regime laid down in Article 25 of Regulation 2016/796 – on the scrutiny of (draft) decisions of national authorities, which was qualified above as a clear case of implementation – is in accordance with primary law. While the ERA may only adopt an opinion, the Commission may adopt a binding decision requesting the national authority to modify or repeal the adopted decision, thereby being advised by a comitology committee. Having said that, it is surprising that among the objectives of this Regulation – namely to establish the ERA to formulate common solutions on matters concerning railway safety and interoperability[2462] – no mention is made of its aiming for a uniform application of these common solutions and of the relevant Union law more generally.[2463]

3.2.4.3. Soft mechanisms

According to Article 6 paras 5–7 of Regulation 2019/942 (for its legal basis in primary law, Article 194 para 2 TFEU, see 3.2.4.2. above), the ACER may adopt opinions on the decisions of national regulatory authorities. It examines compliance of these decisions with binding network codes and guidelines referred to in Regulation 2019/943, Regulation 715/2009, Directive 2019/944 or Directive 2009/73/EC, or with other relevant provisions of these directives or regulations. The scope of norms compliance with which is scrutinised overlaps with that of the mechanism laid down in Article 63 of Directive 2019/944, but also goes far beyond it. However, whereas under the latter mechanism the Commission may step in with a binding decision, under Article 6 paras 5–7 of Regulation 2019/942 the ACER opinion is

2461 For the width of the words 'appropriate provisions' see the remarks made above in the context of Article 100 para 2 TFEU (3.2.4.1.).

2462 See Recital 45 of Regulation 2016/796.

2463 Note that the submission of draft national rules to the ERA and the Commission for consideration is also provided for in Article 8 para 4 of Directive 2016/798 and Article 14 para 5 of Directive 2016/797.

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the only output on the part of an EU actor. In view of that there are no concerns with respect to Article 194 para 2 TFEU as the primary legal basis.

Article 53 of Directive 2019/944 lays down a procedure for the case that certification is requested by a transmission system owner or a transmission system operator which is controlled by a person from a third country. Such third country investments are to be treated with care, as transmission system owners or operators controlled by persons from a third country could pose a risk to the security of the energy supply to the Union and hence to the functioning of the internal market. Therefore the Commission shall 'guarantee that companies from third countries respect the same rules that apply to EU based undertakings in both letter and spirit',[2464] a task which is closely linked to the subject matter of Directive 2019/944, namely to provide common rules for the internal market in electricity. The national regulatory authorities have to inform the Commission of their respective draft decisions on such a request. National law shall provide for the national authorities to ask for a Commission opinion in this case, of which they shall take 'utmost account'.[2465] The intervention on the part of the EU constitutes classical implementation in that it envisages an *ex ante* scrutiny of MS action (draft decisions). It is a soft mechanism, and MS may – under the conditions laid down in Article 53 para 8 of the Directive – lawfully deviate from it. This and the delicate scenario which is addressed (risk to the security of the energy supply to the EU) in my view render the mechanism compliant with Article 194 para 2 TFEU.

The mechanism providing for a Council recommendation to adopt precautionary corrective measures or to prepare a draft macroeconomic adjustment programme as laid down in Article 3 para 7 of Regulation 472/2013, the weakest regime based on Article 136 and Article 121 para 6 TFEU which is referred to here (see also 3.2.4.2. above), seems to be in accordance with the coordination framework laid down in primary law.

Article 207 TFEU stipulates that the EP and the Council shall adopt the measures defining the framework for implementing CCP by means of regulations adopted in accordance with the ordinary legislative procedure (para 2). Since the Treaty of Lisbon, this core Treaty provision on CCP in its para 1 explicitly states that this policy field shall be based on uniform principles also with regard to foreign direct investment. On the basis of

2464 Commission Proposal COM(2007) 528 final, 7, leading to the predecessor Directive 2009/72/EC.

2465 Article 53 para 8 of Directive 2019/944.

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this competence clause (Article 207 para 2 TFEU) Regulation 2019/452 was adopted. Its Article 6 allows for the Commission to adopt an opinion where MS' security or public order requires immediate action. In view of the legal non-bindingness of the Commission output and the generous wording of Article 207 para 2, according to which 'the measures defining the framework for implementing the [CCP]' may be regulated, and in light of the fact that this mechanism pertains the main objective of the Regulation, namely to provide 'a policy response to protect legitimate interests with regard to foreign direct investments that raise concerns for security or public order of the Union or its Member States',[2466] it appears that the compliance mechanism laid down in Article 6 of Regulation 2019/452 has a sufficient legal basis in primary law.

3.3. The institutional balance of the EU

3.3.1. Introduction

Having attempted a categorisation of the compliance mechanisms presented above in terms of whether they constitute implementation or enforcement (3.1.) and having assessed whether they are in accordance with their respective primary legal bases (3.2.), we shall now address them with a view to their influence on the EU's institutional balance.

The institutional balance of the EU is an important principle regarding the intra-EU distribution of powers. It was first pronounced, albeit still under a different name, by the Court in its *Meroni* judgements of 1958, in which it referred to the 'balance of powers which is characteristic of the institutional structure of the Community'.[2467] As a principle 'characteristic

2466 Commission Proposal COM(2017) 487, 2.

2467 Cases 9–10/56 *Meroni*, 151; see also case 25/70 *Einfuhr- und Vorratsstelle*, para 4: 'institutional balance', and – more recently – case C-409/13 *Council v Commission*, para 64; case C-928/19P *EPSU*, para 48. For the changing terminology see Michel, Gleichgewicht 74. For the distinction between 'separation of powers' and 'institutional balance' see Opinion of AG *Trstenjak* in case C-101/08 *Audiolux*, paras 104 f; for the nevertheless existing relationship between the two principles see Conway, Separation 319–321, and references in Orator, Möglichkeiten 219 (fn 187). The principle of institutional balance is not expressly mentioned in the Treaties, with the exception of Protocol No 7 annexed to the Treaty of Amsterdam on the application of the principles of subsidiarity and proportionality: '[t]he application of the principles of subsidiarity and proportionality shall respect the general provisions

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of the institutional structure of the European Union', it 'requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions',[2468] that is to say paying tribute to its respective *Organkompetenz*.

The institutional balance, as alluded to in Article 4 para 3 in conjunction with Article 13 para 2 TEU,[2469] is actually struck by the distribution of powers laid down in the Treaties.[2470] Hence it is the concrete balance laid down in law, not a State-theorist, 'ideal' balance which is at issue.[2471] What is more, the balance is not struck between the three separate powers according to *Montesquieu*,[2472] but primarily between all EU institutions, bodies, offices and agencies. This entails a separation in the sense that the powers of the respective other actors (institutions, bodies, offices and agencies) are acknowledged, but also a cooperation aimed at a meshing of the powers of the various actors. Any act of secondary law fleshing out the powers of an EU body may potentially lead to a distortion of the EU's institutional balance.[2473] Thus, also the compliance mechanisms presented above, as far as they are laid down in secondary law, may distort the EU's institutional balance. In this context, the question whether they allow for the adoption of law (mixed and hard mechanisms) or whether they only provide for the adoption of legally non-binding output (soft mechanisms) plays an important role. While soft law powers have the capacity to entail a distortion of the institutional balance, as well,[2474] the interference with other actors' competences it may cause by tendency is smaller. Where the legal norm providing for a compliance mechanism, eg a Regulation, leaves it unclear whether a soft or a hard law power is delegated, it must be perceived as a soft law power. This is because 'a delegation of powers

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and objectives of the Treaty, particularly as regards [...] the institutional balance'; see also Opinion of AG *Wathelet* in case C-425/13 *Commission v Council*, para 68.

2468 Case C-24/20 *Commission v Council*, para 83, with further references.

2469 See case C-413/11 *Germanwings*, para 16.

2470 See Joerges/Vos, Structures 84 f, also with regard to how the concept of institutional balance may as well reflect upon the separation of tasks between the EU and the MS.

2471 See Priebe, Entscheidungsbefugnisse 78 (fn 39); see also case 138/79 *Roquette Frères*, para 33: 'institutional balance intended by the Treaty', and case C-11/00 *Commission v European Central Bank*, para 174.

2472 See, however, Lenaerts/Verhoeven, Balance40 f.

2473 See eg Everson, Governance 147 f, with further references. This applies also to public international law: see eg Rossolillo, Compact.

2474 See Senden, Soft Law 334–336, with further references; Gentile, Review 487.

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cannot be presumed', as the Court held in *Meroni*.[2475] Therefore, in case of doubt as to the power which is delegated, it is the weaker power – in our case: a soft law power – which is to be assumed.[2476]

Exceptionally, the Treaties explicitly allow for the shaping of the relationship between EU institutions, bodies, offices and agencies by means of secondary law. Article 103 para 1 in conjunction with para 2 lit d TFEU allows for the Council to define, by means of regulations or directives, the respective functions of the Commission and of the Court in applying Articles 101 and 102 TFEU. It could be concluded *e contrario* that where the Treaties do not make express provision for this possibility, the relationship between EU bodies may not be re-shaped.[2477] This would also concern our compliance mechanisms. And while this exclusionary deduction appears to be too strict, the EU's institutional balance certainly requires closer examination in the context of compliance mechanisms.

Therefore, in the following sub-chapters, the questions arising from compliance mechanisms in relation to the EU's institutional balance shall be approached in the following order. After addressing – in this specific context – the meaning of the Treaty infringement procedure and the prerogatives of the CJEU it entails (3.3.2.), it shall be explored whether the role the Court may play in other (mixed and hard) compliance mechanisms – in particular via the annulment procedure – can remedy the institutional changes brought about by these alternative compliance mechanisms (3.3.3.). Eventually, the delegation of implementing (and enforcement) powers beyond Article 291 para 2 TFEU shall be assessed. Such forms of delegation are increasingly common, in particular – but not only – where European agencies act as delegates (3.3.4.).

3.3.2. The Treaty infringement procedure

As a general statement with regard to alternatives to the Treaty infringement procedure, the Court has held that 'it must be recalled that special procedures in a directive can neither derogate from nor replace the powers

2475 Cases 9–10/56 *Meroni*, 151.

2476 Similarly in case 98/80 *Romano*, para 20.

2477 Articles 101 and 102 TFEU in practice are primarily applied to private undertakings, but they may be – and actually have been – applied also to public undertakings and to MS more generally; for public undertakings see also Article 106 TFEU; for the indirect obligations of MS in general see case 231/83 *Cullet*, para 16.

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of the Commission under Article 226 EC [now: Article 258 TFEU]'.[2478] It appears that this finding also applies with regard to other acts of secondary law than a directive (which was at issue in the given case).[2479] In other words, it is not allowed – legally infeasible – by means of secondary law to derogate from or to replace the powers of the Commission under Article 258 TFEU. As a consequence, the application also of the administrative phase of the Treaty infringement procedure shall remain untouched by secondary law-based compliance mechanisms – be they governed by the Commission itself or by other EU bodies, eg European agencies.[2480] The latter may be applied next to the Treaty infringement procedure or, if that is what the Commission deems more opportune in a concrete case, either procedure may be applied exclusively.[2481] *In practice* the former possibility – two procedures being applied in parallel – seems to be a rare scenario, which is why the variety of compliance mechanisms laid down in secondary law may have an impact on the role of the Commission under the Treaty infringement procedure. Against this background, it is remarkable that the Commission in its recent Communication 'Enforcing EU law for

2478 Case C-424/07 *Commission v Germany*, para 36, with a further reference. See also case C-156/21 *Hungary v European Parliament/Council*, paras 166-168, with regard to the (questionable) circumvention of the procedure laid down in Article 7 TEU (no 'parallel' procedure).

2479 This view was acknowledged by the Commission (and the legislator): see Commission, 'The European Agencies – The Way Forward', COM(2008) 135 final, 5, in which it emphasises that 'agencies cannot be entrusted with powers which may affect the responsibilities which the Treaty has explicitly conferred on the Commission (for example, acting as the guardian of Community law)'.

2480 See case C-146/91 *KYDEP*, para 30, addressing a 'reminder' by the Commission of the obligations under EU law of a certain MS. A general legal basis for *ad hoc* enforcement procedures was discussed in the negotiations on the Nice Treaty, but was eventually not introduced; see Andersen, Enforcement 144–148. For the 'exclusivity' of the institutions' core competences see Griller/Orator, Everything 25; exemplifying the EP's pushing for an empowerment of agencies in this respect and the Commission's opposition: Alberti, Actors 46.

2481 Case T-461/93 *An Taisce*, paras 35 f; see also order in appeal case C-325/94P *An Taisce*, paras 24–26. The Commission itself has declared, however, that even if no inter-dependence is required by law, in its administrative practice of handling the two procedures – the Treaty infringement procedure on the one hand, and the procedure laid down in Article 24 of Regulation 4253/88 on the other hand – there should be 'a degree of consistency'; Commission, 'Sixteenth Annual Report on monitoring the application of community law – 1998', COM(1999) 301 final, 35. In some cases this is explicitly stipulated in (secondary) law; see eg Article 1 para 4 of Regulations 1093–1095/2010 in general, and Article 17 para 6, Article 18 para 4 and Article 19 para 4 *leg cit* in particular.

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a Europe that delivers', while acknowledging the importance of other 'key bodies' (in particular national courts and authorities) when it come to enforcing EU law, does not expressly acknowledge the role of European agencies in this context.[2482]

However, it is not only the Commission's power as 'guardian of the Treaties' which may be affected by special compliance mechanisms. Also the power of the CJEU as the ultimate interpreter of EU law according to the Treaties may be concerned. On a number of occasions the Court has stressed – thereby referring to what is now Article 344 TFEU – that it does not condone any rivals in this respect.[2483] It is important to note that these cases concerned international treaties to which MS were parties and which provided for the jurisdiction of an international court. In this context it is to be understood when the Court said that a certain agreement 'is likely adversely to affect the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the Community legal order, respect for which must be assured by the Court of Justice'.[2484] This would result in a distortion of the institutional balance and, furthermore, would be problematic in a rule of law perspective. International agreements concluded by the MS must accept 'the binding nature of the Court's case-law or the autonomy of the Community legal order'[2485] for them to be in compliance with Union law. The mere 'risk that a judicial forum other than the Court will rule on the scope of obligations imposed on the Member States pursuant to Community law'[2486] challenges the Court's competences laid down in primary law.[2487] The Court stuck to this line when asked about the possibility of an

2482 See Commission, 'Enforcing EU law for a Europe that delivers' (Communication), COM(2022) 518 final, 8.

2483 What is more, the Court has excluded certain international courts from the category of 'courts or tribunals of the MS' pursuant to Article 267 TFEU: case C-284/16 *Slowakische Republik v Achmea*, in which the Court stressed that the arbitral tribunal established by means of a bilateral investment treaty between two MS – for lack of 'links with the judicial systems of the Member States' – cannot be qualified as a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU (in particular paras 47–49); see also Peers, Form, *passim*, but in particular 71.

2484 Opinion 1/91 *EEA I*, para 35; for the discussion on an unchangeable core of primary law see Calliess, Art. 13 EUV, para 29 f; Curtin, Structure 63–66; see also Bieber, Limites.

2485 Opinion 1/92 *EEA II*, para 29.

2486 Case C-459/03 *Commission v Ireland*, para 177.

2487 See also the Court's critical stance on the 'Fund Tribunal' in Opinion 1/76 *Waterway vessels*, in particular para 22.

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accession of the EC/EU to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR): 'The interpretation of a provision of EU law, including of secondary law, requires, in principle, a decision of the Court of Justice where that provision is open to more than one plausible interpretation. If the Court of Justice were not allowed to provide the definitive interpretation of secondary law, and if the European Court of Human Rights, in considering whether that law is consistent with the ECHR, had itself to provide a particular interpretation from among the plausible options, there would most certainly be a breach of the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law'.[2488]

While the mechanisms at issue in these cases were clearly established outside the EU legal order, namely in public international law,[2489] also with regard to mechanisms established on the basis of Union law the Court emphasised the singularity of its role. In the context of the Treaty infringement procedure, the Court held that 'the rights and duties of Member States may be determined and their conduct appraised only by a judgment of the Court'.[2490] In spite of its important role in the administrative phase of this procedure in law and practice (today, more than 90 % of the infringement cases are settled prior to being referred to the Court[2491]), the Commission here does not act as a rival of the Court (in conformity with primary law), as its decision to discontinue proceedings does not constitute a declaration of lawfulness of the MS behaviour at issue.[2492]

2488 Opinion 2/13 *ECHR II*, paras 245 f; see also case 2/94 *ECHR*, in which the Court made clear (paras 30 and 35) that an accession of the then EC to the ECHR could only be brought about via a Treaty amendment. Due to 'constitutional significance' it could not be based on the flexibility clause (now: Article 352 TFEU).

2489 In the case of the Unified Patent Court the CJEU denied an interference with Union law: see case C-146/13 *Spain v European Parliament/Council*, and case C-147/13 *Spain v Council*. In principle, the Court seems to apply the same criteria, irrespective of whether powers are delegated to a private body (*Meroni* cases) or to a body of public international law (*Laying-up fund* case); see also Priebe, Entscheidungsbefugnisse 115.

2490 Joined cases 142/80 and 143/80 *Amministrazione delle Finanze dello Stato*, para 16; see also case C-191/95 *Commission v Germany*, para 45; case T-258/06 *Germany v Commission*, para 153.

2491 See Commission, 'Enforcing EU law for a Europe that delivers', COM(2022) 518 final, 21. Already nearly 25 years ago, *Ibáñez* conceived that a 'new social complexity requires more active intervention on the part of administrations, so that the maximum number of cases may be resolved in the pre-judicial or pre-litigious phase'; Gil Ibáñez, Supervision 1.

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Also with respect to financial sanctions according to what is now Article 260 TFEU, the Court highlights its sole jurisdiction to impose sanctions on a MS for failing to comply with its judgement.[2493] AG *Geelhoed* mentions a 'functional reason[]' for that: It is 'the Court which is best placed to assess to what extent the situation pertaining in the Member State concerned does or does not comply with its first judgment under Article 226 EC and to assess the seriousness of a continued infringement having regard to all interests involved'.[2494] This is, the Court complements, because the imposition of financial sanctions under Article 260 TFEU 'is not intended to compensate for damage caused by the Member State concerned, but to place it under economic pressure which induces it to put an end to the breach established'.[2495] Article 260 para 2 TFEU must therefore be regarded as a 'method of enforcement'.[2496]

In the above references, the Court has dealt with its role under the Treaties, notably under the Treaty infringement procedure. It has not at the same time addressed, let alone sanctified special compliance mechanisms. The Court does not only clarify the distribution of powers between the Commission (or the MS pursuant to Article 259 TFEU) and the Court within the Treaty infringement procedure, it also seems to imply that in terms of *enforcement* there can be no alternative to the Treaty infringement procedure.

The wide category of compliance mechanisms does not in the first place encompass enforcement measures, but – as we have seen – in particular implementing measures (see 3.1. above). While implementing powers of the EU are explicitly provided for in the Treaties (generally in Article 291 para 2 TFEU) and consequently – on their respective own – the underlying mechanisms 'do not upset the horizontal division of powers and tasks established in the Treaty',[2497] enforcement mechanisms bear a high risk of negatively affecting the Court's powers under the Treaty infringement procedure and of thereby tilting the EU's institutional balance.[2498] This is possible for each

2492 See case 74/69 *Hauptzollamt Bremen-Freihafen*, para 9; joined cases 15–16/76 *France v Commission*, para 27.
2493 See case C-304/02 *Commission v France*, para 90.
2494 Opinion of AG *Geelhoed* in case C-304/02 *Commission v France*, para 24.
2495 Case C-304/02 *Commission v France*, para 91.
2496 Case C-304/02 *Commission v France*, para 92.
2497 Andersen, Enforcement 143; for implementing mechanisms more generally see ibid 163 ff.
2498 See also Gil Ibáñez, Supervision 127.

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single enforcement mechanism established by secondary law which is not grounded on an adequate (in this context that means: explicit) legal basis in the Treaties. Having said that, not only the single (unlawful) mechanisms may threat the EU's institutional balance. Also the entirety of (on their respective own: lawful) compliance mechanisms (as just mentioned: in the majority of cases they are implementing mechanisms), taken collectively, may pose a risk to the Court's prerogatives under Articles 258–260 TFEU. This is because also implementing mechanisms share the broad objective of the Treaty infringement procedure, to ensure MS' compliance with EU law that is (see 3.1.1.2.1.2. above). With the individual-concrete implementation of Union law – in the spirit of Article 291 para 2 TFEU this is assumed to be an exception – becoming more and more frequently provided for in secondary law, the Court's role under the Treaty infringment procedure seems to be under pressure.

With regard to this latter, summative effect, it could be argued that the establishment of compliance mechanisms step by step – even if each single mechanism as such may be lawful – has transformed the institutional balance of the EU without the text of the Treaties having been changed in that respect. The increasing number of such mechanisms and the long-term decrease in the number of Treaty infringement procedures[2499] at least suggest that there is a risk that the Court's role in ensuring compliance is slowly being reduced to cases which cannot be tackled by an alternative compliance mechanism, for example the late transposition of directives.[2500] There may be further explanatory factors, eg fewer late transposition cases due to the significant increase of the regulations-directives ratio in favour of the former, in particular over the past 15 years,[2501] or the effectiveness of EU Pilot. Mention should also be made of compliance-related trends other than the compliance mechanisms at issue here, in particular the

2499 See <https://ec.europa.eu/info/publications/annual-reports-monitoring-application-eu-law_en> accessed 28 March 2023; see also Koops, Compliance 98; Börzel, Noncompliance 97, providing for a timeline stretching from 1978 to 2017.

2500 For the comparatively high proportion of new infringement procedures relating to late transposition see European Commission, 'Monitoring the Application of Union Law. 2018 Annual Report, Part I: general statistical overview' (2019) 18; for a similar trend with regard to EU enforcement *vis-à-vis* individuals see Scholten, Trend 1357 f.

2501 See Börzel, Noncompliance 105.

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increasing popularity of incentive-based measures.[2502] These measures may be applied as a means to ensure compliance with EU law, as well, and may corroborate the just described development away from the Treaty infringement procedure. In addition to that, it is to be acknowledged that the (decreasing) number of Treaty infringement procedures – while still 'the most comprehensive, valid, and reliable measurement of noncompliance in the EU'[2503] – only gives a hint at the development of non-compliance. Most instances of non-compliance are not reported, let alone made subject to a Treaty infringement procedure.[2504]

In the context of the German Federal Constitution this phenomenon of a gradual transformation has been described as 'schleichender Verfassungswandel' [creeping constitutional change].[2505] In EU-related scholarship the broader term 'integration by stealth'[2506] is more common, mostly pertaining to the EU-MS relationship. With reference to the risk emanating from international agreements concluded between the MS, *Pescatore* warned of 'une révision froide' [a cold revision] of the then EEC Treaty.[2507] If at all, we talk about a different kind of transformation here, namely an intra-EU development, but also in this context the above terms are telling metaphors.

The institutional balance of the EU is not a narrowly tailored regime, but one that allows for some flexibility.[2508] However, this flexibility does not mean that the principle of institutional balance is entirely inapt to serve as a limit to integration without Treaty change. It is, as was said before, not only exceptional enforcement mechanisms but also the sheer multitude of (alternative) compliance mechanisms (enforcement and implementing mechanisms based on secondary law) which bear the risk of a re-weighting by stealth of the EU's institutional balance, first and foremost to the detriment of the Court's role under the Treaties.

2502 In the context of the rule of law: Halmai, Possibility 1; for the COVID-19 Recovery Plan see de Witte, COVID-19.
2503 Börzel, Noncompliance 34.
2504 See Börzel, Noncompliance 21 and *passim*.
2505 The term is widely used in German literature; see, as one example, Vorländer, Verfassung 235 f, with further references.
2506 See in particular Majone, Dilemmas.
2507 Pescatore, Ordre 144.
2508 See eg Schmidt-Aßmann, Verwaltungsrecht 396 f.

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3.3.3. Judicial review

A question which arises in the given context is the following: Does the possibility of judicial review following a mixed or hard special compliance mechanism – and hence the possibility of a Court judgement on the case – remedy the ousting of the Court in the procedure up to then? In my opinion, the fact that decisions adopted by the Commission or other administrative bodies of the EU in the context of special (mixed and hard) compliance procedures may be made subject to judicial review on the basis of Article 263 TFEU does not remedy – in terms of the EU's institutional balance – the deviation from the Treaty infringement procedure. While, legally speaking, the applicability of the Treaty infringement procedure (if the respective requirements are met) remains untouched, the existence and application of compliance mechanisms *de facto* relativises the Court's role as 'a single judicial body […] which can give definitive rulings on the law for the whole of the Community',[2509] but in particular it relativises its role under the Treaty infringement procedure by reducing the likelihood of such a procedure being launched in a concrete case. The fact that the Court may be called upon in the course of annulment procedures can hardly serve as a compensation. An increase in the number of annulment procedures cannot remedy a reduced role under the Treaty infringement procedure – at least not qualitatively. After all, the Court's role under Article 263 TFEU is remarkably different from that under Articles 258 and 260 TFEU. Under the Treaty infringement procedure, the Court is asked to examine MS' behaviour and to rule on whether or not it is in accordance with EU law. Under the conditions of Article 260 TFEU, it may even impose financial sanctions on non-complying MS. In the course of an annulment procedure, on the contrary, the Court may – by deciding on the lawfulness of EU output adopted in the course of a specific compliance mechanism – only indirectly utter its view on the lawfulness of MS behaviour. It is a mere review of the assessment of a MS' action[2510] by an EU body which takes

2509 CJEU, 'Report of the Court of Justice on certain aspects of the application of the Treaty on European Union' (Luxembourg, May 1995) 3.

2510 In the compliance mechanisms addressed here it is MS' action which is at issue. As we have seen, it is only exceptionally the case that decisions are addressed to individuals in the framework of these mechanisms.

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place in this procedure, as opposed to the original assessment of MS action by the Court in the course of a Treaty infringement procedure.[2511]

In addition to that, there is a factual aspect which can hardly be over-emphasised: The legally binding acts adopted in the course of (mixed and hard) compliance mechanisms may be brought before the CJEU, but they may as well not. In the former case, it is the MS concerned which has to take action (unlike in the case of Treaty infringement procedures pursuant to Article 258 TFEU, as initiated by the Commission). In the latter case, the EU administrative body has the final say on the assessment of the facts underlying the concrete case. It may be argued that this is also the case with the Commission's decision to end a Treaty infringement procedure prior to a Court decision. However, such a termination does not necessarily settle the matter for good, and certainly it does not settle the matter with a legally binding decision. Also, it does not harm the MS concerned, but is regularly perceived as a relief. Furthermore, this particular power of the Commission is explicitly provided for in primary law.

Where the final output on the part of the EU body in charge is soft, that is to say in soft compliance mechanisms, the path of Article 263 TFEU may not be embarked upon in the first place. Instead, the MS addressed may simply not abide by this output. If it does, however, adapt its behaviour to that prescribed in the respective soft law act (for whichever reason; see III.4. above), the prescription laid down in this act in the given case effectively is final.[2512] Thereby, also mixed mechanisms which *in concreto* end with a soft law act or soft mechanisms may affect the EU's institutional balance or the division of powers between the EU and its MS.[2513] The ESRB's soft powers under Articles 16 f of Regulation 1092/2010 shall serve as an example for the latter. Where the ESRB uses this power to proactively suggest legislative action,[2514] either to the EU or to the MS, this raises concerns. After all, the right to initiate legislative action is – where the EU has the respective competence – up to the Commission (or exceptionally other actors, as laid down in the Treaties) or – where a MS competence is at issue – up to the respective national actors, in particular the MS' govern-

2511 For the purposes of the procedures laid down in Articles 258 and 260 TFEU in the view of the Court see joined cases C-514/07P, C-528/07P and C-532/07P *API*, para 119.

2512 Note the facts referred to in case T-116/89 *Prodifarma*, para 83.

2513 See also Dawson, Soft Law 4.

2514 See Article 16 para 1 of Regulation 1092/2010.

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ments.[2515] The freedom in principle to propose or not to propose legislative action is one of the core guarantees in democratic constitutions. Secondary law does not seem to be an adequate means to allow for interference in this context. The non-binding character of the recommendations may render them comparatively weak, but in the above case they still seem to interfere with other EU and/or national actors' competences.[2516] In the former case, this challenges the EU's institutional balance, in the latter case the principle of conferral.

It is possible – for the final output of hard, mixed and soft mechanisms alike – that the Court gets the chance to examine one of these acts in a separate procedure (eg following an action for the EU's non-contractual liability) or that it is directly made subject to a preliminary reference,[2517] but it is not too probable that such procedures are initiated with direct or indirect regard to an act addressed *to a MS or a national authority*. As mentioned above, the likelihood of judicial review by the Court is not a legal, but a factual issue. Nevertheless, it ought to be taken into account when considering the question whether or not the Court's role envisaged in the Treaties is being ousted by secondary law-based compliance mechanisms.

In conclusion, from an institutional balance perspective the openness of the output adopted in the course of secondary law-based compliance mechanisms to judicial review by the CJEU under different procedures is hardly sufficient to remedy the Court's being skipped in the mechanisms themselves – and mostly also in the Treaty infringement procedure (where the requirements for its application are met in the first place). After all, in practice the performance of a specific compliance mechanism most of the time – factually, not legally – excludes the initiation of a Treaty infringement procedure in the case at issue.

2515 With regard to binding requests to that effect see Andersen, Enforcement 164.

2516 Describing the ESRB's powers, in particular to adopt recommendations, as 'fairly strong tools': Saarenheimo, Policy 31; similarly, but attesting the ESRB to be 'just on the right side of the constitutional line': Ferran/Alexander, Oversight Bodies 23 f.

2517 The option of an *incidenter* ruling pursuant to Article 277 TFEU is only available for acts of general application, hence irrelevant in the given context.

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3.3.4. The neglection of Article 291 para 2 TFEU and the empowerment of European agencies

3.3.4.1. Introduction

The output of the compliance mechanisms at issue here normally ranges somewhere in between EU (legislative) rule-making and the application of these rules in everyday administration (*vis-à-vis* individuals/undertakings) which, in principle, is a prerogative of the MS (pursuant to Article 291 para 1 TFEU). Most of the compliance mechanisms are not located at the poles of this scale, that is to say most of them neither result in rule-making nor in decisions *vis-à-vis* individuals/undertakings. Only exceptionally legislative powers are involved and, again only exceptionally and given that a MS does not comply even upon request by the EU body in charge, the compliance mechanisms provide for the application of EU law *vis-à-vis* an individual/undertaking.

Above all, the compliance mechanisms qualifying as 'implementation' according to the distinction made above (3.1.) are expressions of a strong administrative (in particular: procedural) cooperation between the EU and the national level.[2518] The individual/undertaking concerned by the action of the national authority at issue (eg the grant of a concession) may not take notice of the EU action involved (eg the scrutiny of the draft concession), and may therefore perceive of it as purely national administration.[2519] In a macro-perspective, however, these mechanisms qualify as mixed administration (involving the EU and the national level).[2520] Even if we look at the above mechanisms only from an EU (not from a MS) perspective, many of them display strong links to the national administrations, as expressed, for example, in the activity of European agencies or comitology committees. This development – the increasing administrative entanglement between the EU and the national level – has been going on for decades now,[2521]

2518 Note the remark of *Bilder* who – in the context of (soft) international arrangements – stressed that it is not only compliance that matters in this context, but the facilitation of cooperation between nations; Bilder, Compliance 65.

2519 For this problem see J Hofmann, Protection 464.

2520 See Schütze, Rome 1419 ff; for an alternative (procedural) approach towards this phenomenon see Hofmann/Rowe/Türk, Administrative Law 11–18.

2521 For this development see eg Hofmann/Rowe/Türk, Administrative Law 259–264. For the concept of composite administration (*Verwaltungsverbund*) see Schmidt-Aßmann, Introduction 6–8; for the Commission's vocabulary of 'networks' (in

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and the traditional depiction of the implementation of EU law through the distinction between direct execution of EU law on the one hand and indirect execution on the other hand more and more appears to be insufficient.[2522] Also the general principle of the implementation of EU law by the MS (Article 291 para 1 TFEU) has become strongly relativised. It remains a mere 'Grundlinie mit erheblichen Abweichungstoleranzen' [base line with a significant deviation tolerance], as *Schmidt-Aßmann* has put it.[2523] While the Treaties only rarely request this procedural/institutional mixity, a number of provisions appear to presuppose or at least to facilitate such cooperative approach.[2524]

Here we shall analyse in more depth the fact that European agencies are vested with hard or soft law powers *vis-à-vis* the MS in a number of the above compliance mechanisms, an empowerment which has raised concerns in particular regarding the Commission's constitutional role as guardian of the Treaties.[2525]

German: *Verbundverwaltung*) see Communication 'Management of Community programmes by networks of national agencies', COM(2001) 648 final, 4.

2522 See J Hofmann, Protection 441 f. For the general trend away from direct or indirect execution of EU law towards a cooperative implementation, involving both EU and national administrators see Britz, Verwaltungsverbund 46; Schaller, Intensivierung 415 f, with further references: 'vollzugsprogrammierende und -steuernde Wirkung' [programming and steering effect of national enforcement by EU actors].

2523 Schmidt-Aßmann, Verwaltungsrecht 382.

2524 See, for example, the loyalty principle as laid down in Article 4 para 3 TEU; the reference to the mechanisms for control by MS in Article 291 para 3 TFEU; Article 197 TFEU on administrative cooperation between the EU and the national level; see S Augsberg, Verwaltungsorganisationsrecht, para 12.

2525 See eg the EP's concern (with regard to European agencies) about a 'consequent risk of the Commission's executive role being dismantled and fragmented into a plethora of bodies that work largely in an intergovernmental manner'; European Parliament, Resolution on the draft interinstitutional agreement presented by the Commission on the operating framework for the European regulatory agencies, P6_TA(2005)0460, C.5.

See also the considerations on the role of the Commission as guardian of the Treaties in Commission Proposal COM(2007) 528 final (page 13) for what has become Directive 2009/72/EC; for the Commission's wariness not to challenge its role as guardian of the Treaties see Commission, 'European agencies – The way forward' (Communication), COM(2008) 135 final, 5: 'agencies cannot be entrusted with powers which may affect the responsibilities which the Treaty has explicitly conferred on the Commission (for example, acting as the guardian of Community law)'; see also Groenleer/Kaeding/Versluis, Governance 1227.

A large body of literature on the role of European agencies has emerged in recent years. Suffice it to refer to: Chamon, Agencies, in particular 29–44, with regard to

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3.3.4.2. European agencies and Article 291 para 2 TFEU

Primary law does not explicitly provide for the empowerment of European agencies. Against this background, the fact that agencies – in many compliance mechanisms – are concerned with the weighing of different (public) interests (brought forward by the national authorities) may be considered as affecting the EU's institutional balance.[2526] In a systematic view, however, the Treaties do reveal some hints at the possibility of an empowerment of agencies (see also III.3.7.2.2. above), to which the Court – thereby arguing in favour of the principal possibility to vest agencies with (implementing) decision-making powers – has already referred: 'Under Article 263 TFEU, the Union bodies whose acts may be subject to judicial review by the Court include the "bodies, offices" and "agencies" of the Union. The rules governing actions for failure to act are applicable to those bodies pursuant to Article 265 TFEU. Article 267 TFEU provides that the courts and tribunals of the Member States may refer questions concerning the validity and interpretation of the acts of such bodies to the Court. Such acts may also be the subject of a plea of illegality pursuant to Article 277 TFEU'.[2527] Later it added that since the empowerment of agencies is not mentioned in Article 291 TFEU (nor in Article 290 TFEU), '[i]t is therefore the case-law, and in particular the [*Meroni* judgement], which laid down the principles governing the delegation of powers. Next, the [*ESMA* judgement] applied

agencies' powers/output and many further references; for the soft law powers of agencies see W Weiß, Agenturen 634–637; for the use of agencies as a new mode of governance more generally see Dawson, Waves 213.

2526 See the proposal of the *de Larosière* Group to vest the ESAs with the power to adopt 'binding supervisory standards'; Report of the High-Level Group on Financial Supervision in the EU (February 2009; so-called *de Larosière* Report) 55 f. This proposal was dropped by the Commission 'as it would conflict with the Treaty based responsibilities of the Commission and give the Authorities discretionary powers, requiring a revision of the Treaty'; Commission Staff Working Document, SEC(2009) 1234, 13; see Orator, Möglichkeiten 472 f, with regard to a mechanism empowering the ACER.

2527 Case C-270/12 *United Kingdom v European Parliament/Council*, para 80; see also Nettesheim, Art. 291 AEUV, paras 38 f; Chamon, Line 1633. Arguing against those who claim decision-making powers of agencies *vis-à-vis* MS to constitute a distortion of the EU's institutional balance: Fischer-Appelt, Agenturen 121 f; confirming the legal possibility of vesting European agencies with implementing powers (which principally belong to the Commission's *pouvoir* according to Article 291 TFEU): Orator, Möglichkeiten 402; for the meaning of Article 277 TFEU in the given context see W Weiß, Agenturen 647 f.

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those principles to cases where autonomous powers have been conferred on an agency by the EU legislature'.[2528]

Let us have a closer look at Article 291 TFEU now. This provision allows for the Commission (exceptionally: the Council) – on the basis of a material EU competence[2529] – to be vested with implementing powers in certain cases.[2530] There appears to be a general assumption that the Commission may adopt both individual-concrete and general-abstract measures, addressed to one or more MS or individuals, as the case may be.[2531] While European agencies are not even implicitly mentioned in Article 291 TFEU, against the background of the Court's case law quoted above it cannot be read as excluding European agencies to be vested with like powers.[2532]

2528 Case T-510/17 *Del Valle Ruíz*, para 208; apparently in favour of applying only the criteria laid down in the *ESMA* judgement when assessing European agencies: case T-755/17 *Germany v ECHA*, paras 138 f.

2529 See Schütze, Rome 1398 f, with regard to the question whether Article 291 para 2 TFEU could be seen as an independent legal basis for implementing powers of the Commission (or the Council).

2530 For the wide discretion the creator of the legally binding Union act has with regard to the implementing powers it delegates see case C-427/12 *Commission v European Parliament/Council*, para 40; for the subsidiarity of the empowerment of the Commission (or the Council) under Article 291 para 2 TFEU see Ruffert, Art. 291 AEUV, para 2.

2531 See case 16/88 *Commission v Council*, paras 11 and 16; case C-440/14P *Iranian Oil*, para 36; see also Ilgner, Durchführung 178; U Stelkens, Rechtsetzungen 385, with many further references; for arguments against the lawfulness of basing the Commission's power to adopt individual-concrete acts on Article 291 para 2 TFEU: ibid 285 f; W Weiß, Agenturen 645.

2532 See also Michel, Gleichgewicht 115. Heed the example of regulatory technical standards (RTS) and implementing technical standards (ITS), to be adopted by the Commission with the support of the ESAs (pursuant to Articles 10 ff and 15 of Regulations 1093–1095/2010 which are again referring to Article 290 and Article 291 TFEU); see also Simoncini, Regulation 79 ff; forward-looking: European Parliament, Resolution on the implementation of the legal provisions and the Joint Statement ensuring parliamentary scrutiny over decentralised agencies, P8_TA(2019)0134, recital 21. For the involvement of comitology also in the case of ITS see Moloney, Rule-Making 74 f; for the relativisation of Commission power see Harlow/Rawlings, Process 281–283; critically: statement of the Commission in relation to Articles 290 f TFEU in: Council, Addendum to 'I/A' item note (10 November 2010), 15649/10 ADD 1, 1; see also case C-146/13 Spain v European Parliament/Council, paras 77 f, in which the Court could be understood to suggest that actors other than the Commission (or the Council) may be vested with implementing powers where 'uniform conditions for implementing legally binding Union acts' are not needed.

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What follows from the empowerment of European agencies in this context is that the guarantees laid down in Article 291 para 2 TFEU and, on that basis, in Regulation 182/2011 are being thwarted. In legislative practice, that is to say in the acts providing for agencies' powers, no provision is made for MS control, eg by analogy to Article 291 TFEU. However, it is hard to imagine that where the Commission's powers have to be made subject to specific MS control, agencies may exercise the same kind of powers without such control.[2533] An assumption to that effect could lead to a legislative flight into 'implementation through agencies', the legislator thereby side-lining the MS control provided for in Article 291 TFEU. It was argued that the 'openness' of this provision – listing implementation by the MS, the Commission and the Council as possibilities – suggests that also other actors may be involved in one or the other way.[2534] The wording of Article 291 TFEU does not exclude an involvement of other bodies, such as European agencies, it is true, but only where it is limited to an advisory role.[2535] As soon as MS may be addressed by these bodies, if only by soft law, in my view this would go beyond a merely advisory, assisting capacity. It would constitute the actual *exercise* of implementing powers.

It could be argued that the composition of agencies' main decision-making bodies allows for MS representation pursuant to Article 291 para 3 TFEU anyway,[2536] rendering superfluous the application of comitology.[2537]

2533 Sceptically: Volpato, Delegation 120 (also with regard to the ESMA judgement); for alternative (and diversified) accountability regimes for agencies see ibid 99f, with further references.

2534 See W Weiß, Agenturen 641.

2535 That the Commission may take advice from various actors when exercising implementing powers does not follow from the wording of Article 291 TFEU, but it is clear from the Commission's traditionally applied practice (also under the predecessors of this provision), that is: to regularly take advice from a variety of different sources.

2536 See also W Weiß, Agenturen 656 f. For the representation of each MS as the regular case see Busuioc, Agencies 724; for other voices in the literature in favour of the lawfulness (with a view to Article 291 TFEU) of vesting agencies with implementing powers see references in Volpato, Delegation 97.

2537 See Schütze, Rome 1423 f, with further references; W Weiß, Agenturen 657 f. For the similarity of comitology committees and agencies in that 'they juxtapose technical and scientific information with political discourse': Everson/Joerges, Europeanisation 530. In case of the technical implementing standards according to Article 15 of Regulations 1093–1095/2010, for example, it appears that (also) the legislator was convinced of the adequacy of replacing – some argue: in the form of a *lex specialis* to Regulation 182/2011 – control through comitology committees by

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However, first, there have been decision-making boards of agencies in which not all MS were represented[2538] and, second, it is not always MS representatives in the strict sense of the word of which these boards are composed.[2539] In more recent agencies, such as the SRB, the ESAs or the ACER, it is representatives of independent national authorities taking the most important decisions, not ministerial bureaucrats which are bound by (political) instructions from their respective ministers.[2540] A board composed of such persons is not 'a form of Council of Ministers writ small'[2541] (comparable to comitology committees) anymore, but a body of independent experts, one per each MS.[2542] The latter characteristic also applies to the Commission, by the way, whose general absolution from MS control under Article 291 TFEU would be simply unconceivable. Thus, it is not conclusive that European agencies should be generally exempted from the

control through European agencies; see Weismann, Agencies 130–132, with further references.

2538 See Chamon, Agencies 66 f.

2539 Due to the broad scope of the respective provisions, arguably MS would be free to appoint an independent person as their respective representative. However, overall the secondment of officials from the national ministries seems to be the rule; see III.3.7.2.1. above; see also Egeberg/Trondal, Agencies 871, with a further reference; Simoncini, Regulation 137 f; with regard to the MS' practice, taking the example of Europol: Groenleer, Autonomy 283. Only exceptionally the founding act requires the appointment (by each MS) of an independent person; see Article 12 para 1 lit a of Council Regulation 168/2007, with regard to the European Union Agency for Fundamental Rights.

2540 With the ESAs it is to be noted that they also dispose of a Management Board composed of seven members of the Board of Supervisors (including its Chairperson). The SRB is composed, in addition to the representatives of the national resolution authorities (and non-voting members of the Commission and the ECB), of five full-time members (including its Chair) who – on their own – also form the executive session of the Board which is vested in particular with management and preparatory tasks. The main decision-making body of ACER, its Administrative Board, is composed of nine members appointed by the Council (five), the Commission and the EP (two each). Its Board of Regulators, on the contrary, is composed of one senior representative of the MS' regulatory authorities; see Articles 18 and 21 of Regulation 2019/942.

2541 Hertig/Lee, Predictions 8, with regard to the ESC. For the professional qualities of the Board members as required in EU law (in particular: the agencies' founding acts) see Chamon, Agencies 71.

2542 See also Chiti, Governance 52 f; Ruffert, Unabhängigkeit 407, with a further reference. It ought to be mentioned that also comitology committees may potentially involve other experts than officials; see Schmidt-Aßmann, Verwaltung 1393.

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requirements laid down in Article 291 TFEU and in Regulation 182/2011 when exercising implementing powers.[2543]

The above questions related to the EU's institutional balance are pressing where the *final* output *vis-à-vis* a MS in a (secondary law-based) compliance mechanism is adopted by an agency, but also where an agency's soft law output (*vis-à-vis* a MS) may be followed by Commission output they are by no means irrelevant. Also in the latter case the agency contributes to settling the matter, not least because the procedure in practice may end at the soft law level (due to compliance on the part of the MS concerned), without the MS as a whole having a possibility to exert control in accordance with Regulation 182/2011.

In practice, also the Commission and the Council have been granted implementing powers or at least *prima facie* implementing powers under different secondary law-based regimes.[2544] In particular, it has occurred that the Commission was, by a delegating/implementing act, vested with the power to adopt implementing acts, with no provision being made for MS control according to the Comitology Regulation.[2545] In the context of soft law, the involvement of comitology committees anyway appears to be the exception rather than the rule.[2546] Such bypassing of comitology under Article 291 para 2 raises serious concerns. There is a risk inherent in comitology (namely that the MS participate in controlling their own compliance, and hence may 'protect' each other from administrative action[2547]), it is true, but this cannot lead to ignoring a clear principle of primary law, as enshrined in Article 291 TFEU,[2548] the creators of which certainly took this risk into account.

2543 See also Wörner, Verhaltenssteuerungsformen 371, with regard to the ESAs; for the motives of the legislator to empower European agencies instead of taking the route of comitology-based implementation by the Commission: Armstrong, Character 193 f, with further references.

2544 See case C-521/15 *Spain v Council*, and its analysis above (3.1.1.2.3.).

2545 See F Schmidt, Art. 291 AEUV, para 13. For the example of an even more far-reaching implementing power assumed by the Commission see Andersen, Enforcement 133 f.

2546 That comitology may also be applied to soft law is argued by Senden, Rulemaking 70; for the 'under-proceduralisation' of the adoption of soft law more generally see Chamon, Regulators 334; for the procedures for the adoption of EU soft law (by European agencies) see also Rocca/Eliantonio, Soft Law 15 ff.

2547 See also Gil Ibáñez, Exceptions 170 f.

2548 The bypassing of comitology was considered to be unlawful in joined cases T-261/13 and T-86/14 *Netherlands v Commission*, paras 49 f; with regard to insti-

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3.4. The principles of subsidiarity and proportionality

3.4.1. Introduction

The principles of subsidiarity and proportionality are important precepts of EU law which apply to all EU bodies, regardless of whether they perform legislative, executive or judicative functions. While the principle of subsidiarity applies only in areas which do not fall within the exclusive competence of the EU, the principle of proportionality applies throughout. According to the former, 'the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level'.[2549] The latter – a traditional legal principle in many legal orders[2550] – under EU law requires that 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaty'.[2551] The question of the necessity of compliance mechanisms in addition to the Treaty infringement procedure (and other primary law tools aimed at increasing compliance, such as the preliminary reference procedure or the claim for State liability) in particular is to be understood against the background of what has been dubbed the EU's 'commitment-compliance gap'.[2552]

In the following, the question whether the compliance mechanisms laid down in secondary law (as presented above) are in accordance with the principle of subsidiarity and the principle of proportionality shall be addressed.

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tutional balance concerns of this practice more generally: Bast, Categories 923; Senden/van den Brink, Checks 38.

2549 Article 5 para 3 TEU. Note that the word 'therefore' known from the Maastricht wording of this principle has now been abolished, arguably because it unduly links the examination of the two factors. It was/is a common misunderstanding that if the MS cannot sufficiently achieve a certain objective, the Union is *therefore* in a better position to do so. There may be cases in which there is a correlation with that result, but there is certainly no such causality; critically: Schima, Subsidiaritätsprinzip 107.

2550 For an early reference to proportionality in international case law see case *Portugal contre Allemagne*, Report of International Arbitral Awards II, 1028 (D.2.).

2551 Article 5 para 4 TEU.

2552 See eg Börzel, Governance 12.

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3.4.2. The principle of subsidiarity

3.4.2.1. Compliance mechanisms in general

The outdated Protocol on the Application of the Principles of Subsidiarity and Proportionality (as annexed to the Treaty of Amsterdam) – which was more extensive on the character of subsidiarity than the current Protocol No 2 – described subsidiarity as 'a guide as to how those powers are to be exercised at the Community level'; and further: '[s]ubsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. It allows Community action within the limits of its powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified'. While this Protocol is not in force any more, and while the new Protocol has not taken over the quoted passages, they still appear to be a valid account of the subsidiarity principle.

It has been said that the principle of subsidiarity limits the exercise of the EU's competences.[2553] In order to do justice to this principle, EU actors shall always consider – in the words of Protocol No 2: 'ensure constant respect'[2554] to – subsidiarity when acting on the basis of an EU competence which is not exclusive.[2555] In this vein, the Commission has opted for proposing to the legislator the adoption of a directive instead of a regulation in a number of cases.[2556] In the given context, it is not only the legislative, but also the executive competence which stays in the foreground. The EU has exclusive legislative competence in the policy fields listed in Article 3 para 1 TFEU, but the administrative execution ('implementation') of the legislation adopted in these fields is, pursuant to Article 291 para 1 TFEU, normally up to the MS.[2557] Provision for executive tasks of EU bodies

2553 See eg Craig/de Búrca, EU Law 126; for a different understanding: Goos, Gedanken 39 f.

2554 Article 1 of Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality.

2555 For the limits of this duty to consider see case C-233/94 *Germany v European Parliament/Council*, paras 26–29, according to which an explanation of the legislator as to why it considers that its action is in conformity with the principle of subsidiarity is sufficient, an explicit reference to the principle of subsidiarity not required. For the requirement of legislative drafts to be 'justified with regard to the principles of subsidiarity and proportionality' see Article 5 of Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality.

2556 See Craig/de Búrca, EU Law 126.

2557 See eg Obwexer, Art. 2 AEUV, para 10.

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enshrined in a legislative act (eg the compliance mechanisms at issue here) is only lawful where the Union also has an according executive competence (eg Article 108 TFEU as a specific competence or, as a general competence, Article 291 para 2 TFEU, or Article 352 TFEU).[2558] This applies also to the right to give individual-concrete instructions to national authorities as a form of indirect execution by EU bodies.[2559] On a whole, the Court has taken a generous approach in that respect, implying – with regard to what is now Article 114 TFEU[2560] – such competence to an EU (legislative) competence (see also 3.2.2.2. above).[2561] The outdated Protocol on the Application of the Principles of Subsidiarity and Proportionality states more broadly that '[t]he application of the principles of subsidiarity and proportionality [...] should take into account Article F(4) of the Treaty on European Union, according to which "the Union shall provide itself with the means necessary to attain its objectives and carry through its policies"' (para 2). While 'well established national arrangements and the organisation and working of Member States' legal systems' should be respected, '[w]here appropriate and subject to the need for proper enforcement, community measures should provide Member States with alternative ways to achieve the objectives of the measures' (para 7).

With regard to the compliance mechanisms presented here, it is apparent that many of them are established in a field in which the MS are principally in charge of implementation. The question whether a compliance mechanism was established on an appropriate legal basis was assessed above (3.2.). What matters in the context of subsidiarity is whether, on the assumption that the legal basis chosen by the legislator is appropriate, the action performed by EU actors in the course of a given procedure can actually be better achieved at Union level – in other words: can be achieved only worse at MS level. As regards supervisory mechanisms in which the Commission acts as a supervisor, the Court has once declared that the application of certain EU law provisions (on export refunds) 'is a matter for the national bodies appointed for this purpose and that the Commission

2558 Leaving this question open: case T-31/07 *Du Pont de Nemours*, paras 203–205; for this topic see also Schütze, Rome.

2559 Arguing against a general right of EU bodies to give individual-concrete instructions: Biaggini, Theorie 115; Constantinesco, Recht 299.

2560 For the wide wording of Article 114 TFEU ('measures') which supports such generosity see Schütze, European Union Law 336.

2561 See case C-359/92 *Germany v Council*, paras 37 ff; case C-66/04 *United Kingdom v European Parliament/Council*, paras 47–50.

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has no power to take decisions on their interpretation but may only express its opinion which is not binding upon the national authorities'.[2562] In a different context, the Court held that it is not for the EU and its bodies to 'act in place of the Member States and to prescribe for them the measures which they must adopt'.[2563] Only to the extent that these measures have the effect of distorting the conditions of competition in the internal market – that is to say: the functioning of the internal market (uniform application of the pertinent EU law) – the EU does have a competence to act, thereby taking due account of the MS' discretion.[2564]

Compliance mechanisms are not primarily about replacing MS' executive powers. Normally they apply where national execution in a concrete field or category of situations has turned out to be dysfunctional. Against this background, *Eekhoff* refers to the typical conflicts of interest of the MS which need to be enclosed by empowering an independent EU body, and hence – with regard to 'klassische Aufsichtsverfahren' [classic supervisory processes] – argues in favour of accordance with the principle of subsidiarity.[2565] Also where the MS may make use of legal exceptions under EU law, the risk of MS pursuing their individual interests at the cost of the EU's objectives is apparent. Thus, with a view to subsidiarity considerations, a control regime performed by EU bodies is feasible. Another pertinent case is the adoption of safeguard and/or emergency measures. Here the EU in places may be better equipped to act than the MS.[2566] While maintaining the public order and safeguarding the internal security falls within the

2562 Case 133/79 *Sucrimex*, para 16.

2563 Case C-265/95 *Commission v France*, para 34.

2564 Case C-265/95 *Commission v France*, para 35.

2565 See Eekhoff, Verbundaufsicht 207 f, referring to the Final Act of the Conference of the Representatives of the Governments of the MS (Amsterdam, 2 October 1997), 43th Declaration, according to which 'the administrative implementation of Community law shall in principle be the responsibility of the Member States in accordance with their constitutional arrangements. This shall not affect the supervisory, monitoring and implementing powers of the Community Institutions as provided under Articles 145 and 155 of the Treaty establishing the European Community'. In other cases, most prominently in the field of competition law, subsidiarity considerations (among others) have lead to a de-centralisation of administrative execution by Regulation 1/2003; see Commission, 'Better Lawmaking 2003' (Report), COM(2003) 770 final, 20 f. For the 'tension between the collective Community interest and that of individual [MS]' in the context of subsidiarity see Craig, Subsidiarity 76 f.

2566 See Gil Ibáñez, Tools 5.3., who says: 'In fact, it can be said that a specific area should not serve to justify a specific procedure, but the specificity of the situation

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MS' competences,[2567] the Commission was vested with special powers of control in order to prevent protectionist measures adopted by the MS unilaterally *sub titulo* 'safeguard measures' from disturbing the functioning of the internal market.[2568] Even at the level of primary law such constellations can be found. When it comes to restrict the fundamental freedoms for certain justificatory reasons, such as public morality, public policy, public security, protection of health and life of humans, animals or plants, the MS – to the extent the details of these justificatory reasons have not already been harmonised by legislation – enjoy a measure of discretion.[2569] Where harmonisation measures have been adopted on the basis of Article 114 TFEU, the regime of its paras 4 ff may apply (see IV.2.2.1.1.3. above). Articles 346–348 TFEU follow a similar logic with regard to MS' national security.

When assessing a planned initiative with a view to its compliance with the subsidiarity principle, the most important considerations for the 'Union relevance' are 'the geographical scope, the number of players affected, the number of Member States concerned and the key economic, environmental and social impacts. In addition, the analysis determines in qualitative – and as far as possible in quantitative – terms, whether there is a significant cross-border problem'.[2570] These manifold considerations[2571] – in combination with other factors, such as the Commission's focus with regard to the question whether MS action *is*[2572] (not: *can be*, as the wording of Article 5 para 3 TEU stipulates) sufficient and the lenient case law of the Court[2573] –

(i.e., the urgency or the possibility of irreparable damage), which usually will apply to more than one area'.

2567 See Article 72 TFEU; see also case C-265/95 *Commission v France*, para 33.

2568 See Andersen, Enforcement 179.

2569 See eg Article 36 TFEU for the written justificatory reasons. For the unwritten ones see the pertinent case law starting with *Cassis de Dijon*.

2570 Commission, Annual Report 2016 on Subsidiarity and Proportionality, COM(2017) 600 final, 3.

2571 The risk of diversity in the application of EU law may be said to be inherent in the sheer fact that it is – at the national level – enforced by 27 different administrations; see Craig, Subsidiarity 76, with examples.

2572 Commission, Annual Report 2016 on Subsidiarity and Proportionality, COM(2017) 600 final, 3: 'assess whether action at national, regional or local level is sufficient to achieve the objective pursued'.

2573 See case T-339/04 *France Télécom*, para 73 and the critical discussion by Schütze, Rome 1414 f; see also more generally Kadelbach, Art. 5 EUV, para 47, with references to the pertinent case law. The Court seems to be mainly concerned about compliance with the minimum requirements of the duty to give reasons on the part of the EU actors. Note that the explicit duty of a justification with regard to

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suggest that the subsidiarity test is performed with a certain bias in favour of Union action.[2574] The recent multiple crises – in places disclosing the dysfunctioning of traditional (weaker) forms of cooperation among MS authorities – may have reinforced this tendency.[2575]

3.4.2.2. Implementing and enforcement mechanisms in particular

Also with regard to implementing mechanisms, the core question in this context is: Can implementation be sufficiently achieved by the MS or can it rather be better achieved at Union level? Where Article 291 para 2 TFEU is applied, this question essentially boils down to: Are uniform conditions required for implementation? If that is the case, then there will regularly be no subsidiarity concerns because uniform conditions can regularly be better achieved by one actor (the EU) than by 27 actors.[2576]

With regard to mechanisms displaying an enforcement tendency the matter is less clear. The enforcement of EU law *vis-à-vis* the MS is nothing which the MS could possibly do themselves. They can comply with EU law, in which case enforcement procedures will not have to be applied, but that is a different issue. The introduction of a new enforcement measure *vis-à-vis* the MS does not even impose a new burden on the MS, since even before its introduction EU law could be enforced via the Treaty infringement procedure. The question whether an enforcement mechanism is necessary in view of the existence of the Treaty infringement procedure may

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the principles of subsidiarity and proportionality in Article 5 of Protocol No 2 only relates to legislative acts. For lack of a specific rule, with regard to other acts (also soft law acts) the regular reasoning requirements apply also with regard to subsidiarity/proportionality; for these requirements see case C-62/14 *Gauweiler*, para 70: 'not required to go into every relevant point of fact and law'; critically as regards the sometimes substantially weak reasoning of the Commission: Wittinger, Satelliten 616 f.

2574 See Commission, Report 'Better Lawmaking 2003', COM(2003) 770 final, 23, in which – as a justification for establishing the REACH regime – the large number of MS (by then: soon 25) and the technical complexity of the matter (ie the registration, evaluation, authorisation and restriction of chemicals) are pointed at.

2575 See Moloney, Rules in Action 219, with further references; Senden/van den Brink, Checks 21. With regard to an increased generosity *vis-à-vis* grand anti-crisis measures more generally see Fahey, Emperor 582 and 594 f.

2576 For heterogeneous legal frameworks in the MS as a justification for Union action under the principle of subsidiarity more generally see case C-491/01 *British American Tobacco*, paras 182 f.

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reasonably be posed, but not in the context of 'subsidiarity'.[2577] However, where – in a macro-perspective – the enforcement of EU law *vis-à-vis* individuals/undertakings is at issue (which is the case with most compliance mechanisms addressed above), the question *de lege ferenda* may very well be: Either enforcement by the national authorities on their respective own (potentially combined with some institutional or procedural requirements under EU law), or combined with a monitoring regime governed by an EU body *vis-à-vis* the national authorities in charge,[2578] or enforcement *vis-à-vis* the individuals/undertakings directly by an EU body? Option one is least, option three most likely to interfere with the principle of subsidiarity. With regard to the monitoring by the EU body, again it can be argued that this is nothing which the MS on their own could possibly take care of. The aforementioned old Protocol is more telling in this respect than the wording of Article 5 para 3 TFEU. It states, *inter alia*, the following: 'Regarding the nature and the extent of Community action, Community measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty' (para 7). Applied to our context, these considerations may result, in a concrete case, in the legislator's decision in favour of introducing a mixed rather than a hard mechanism or a soft rather than a mixed mechanism.

In view of the, materially speaking, questionable justiciability of the subsidiarity principle before the Court, it appears that the implementing/enforcement mechanisms presented above, where they are not predetermined to a large degree in primary law or falling within the exclusive competence of the EU anyway, are in accordance with the subsidiarity principle.[2579] It is to be noted that all of them either relate to safety issues, are 'technical' to the extent that expertise beyond legal expertise is required and/or cater for exceptional interventions for the sake of the uniform application of law,[2580] in particular in cross-border cases. In general, these characteristics seem to

2577 For the necessity criterion as part of the proportionality test, which is applicable to both implementing and enforcement mechanisms and which is examined (also) against the backdrop of the Treaty infringement procedure, see 3.4.3.1. below.

2578 These are then either implementing or enforcement mechanism, depending on the concrete procedure envisaged.

2579 For the (contested) issue of the justiciability of the principle of subsidiarity see Panara, Enforceability; Portuese, Subsidiarity.

2580 Sceptically with regard to such direct intervention in the context of the subsidiarity principle: Gundel, Energierecht, para 58.

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be a sound basis for justifying the limitation of what the old Protocol calls 'scope for national decision'.

With a view to the legislative proceedings leading to the adoption of our sample of compliance mechanisms, it ought to be mentioned that the Commission in the older legislative proposals did not find it necessary to provide for an in-depth consideration of the question of subsidiarity.[2581] The most recent proposals are more elaborate in this respect.[2582] Thus, there seems to be an increasing willingness on the part of the Commission to explain its considerations on the subsidiarity principle.[2583]

3.4.2.3. On the issue of soft law

The fact that for safeguard and/or emergency measures – due to the risks at stake – often fast action is required may be used as an argument against extensive exchanges of views between the EU and the MS level within the framework of the respective compliance procedure. By tendency, it also speaks against the use of individual-concrete EU soft law, as it prolongs the time until a legally binding decision is made – by the EU body in charge or by the MS authority, as the case may be. However, the latter reservation can be met by setting in place adequate (tight) deadlines for reaction (to soft law).

Recalling the above quotation from the old Protocol, according to which 'the nature and the extent of Community action […] should leave as much scope for national decision as possible', we can infer that also (the power

2581 It did provide for a brief consideration of subsidiarity in the following proposals: COM(2009) 501 final, 3 f, leading to Regulation 1093/2010; COM(2010) 527 final, Recital 16, leading to Regulation 1176/2011; COM(2010) 525 final, Recital 15, leading to Regulation 1174/2011; COM(2013) 27 final, Recital 36 and page 6, presenting different policy options that where weighed in the light of varying considerations, among them the subsidiarity principle, and leading to Regulation 2016/796; COM(2009) 499 final, Recital 20, leading to Regulation 1092/2010.

2582 See Proposals COM(2015) 613 final, 4 f, leading to Regulation 2018/1139; COM(2013) 520 final, 6 f, leading to Regulation 806/2014; COM(2016) 864 final, 10 f, leading to Directive 2019/944; COM(2016) 863 final, 10 f, leading to Regulation 2019/942; COM(2016) 861 final, 9 f, leading to Regulation 2019/943; COM(2016) 590 final/2, 4 f, leading to Directive 2018/1972.

2583 This does not contradict the arguable bias in favour of Union action referred to above (3.4.2.1.).

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to adopt) soft law acts must meet the subsidiarity threshold.[2584] At the same time, it ought to be stressed that soft law – by leaving a leeway for MS in their respective decision-making – in principle may serve the facilitation of the subsidiarity principle.[2585] This is why the use of soft law in mixed and soft compliance mechanisms *prima vista* is to be welcomed with a view to the subsidiarity principle.[2586] That is, in principle, also acknowledged by EU actors, eg the Commission.[2587] From this it does not follow, though, that soft law powers on the part of EU bodies meet the subsidiarity principle by default.[2588] Nor does it mean that where the subsidiarity principle applies EU soft law must always be considered as a first choice. It appears that regulation by law regularly is the more promising approach with a view to what the old Protocol calls 'securing the aim of [a] measure and observing the requirements of the Treaty', one of the latter being legal certainty.

3.4.3. The principle of proportionality

3.4.3.1. The Treaty infringement procedure as the elephant in the room

The principle of proportionality is traditionally examined in the course of a test, in EU law most prominently when it comes to the infringement of human rights or fundamental freedoms.[2589] This test regularly encompasses the following criteria: objective of general interest, suitability, necessity, and proportionality in the narrow sense, the latter assessing the means-ends relationship of the measure. The proportionality test may also be

2584 See Majone, Agencies 267–269; Snyder, Institutional Practice in the European Community 202 f. This also seems to be the understanding of the legislator; see Commission, Report 'Better Lawmaking 2003', COM(2003) 770 final, 8. For the (non-)applicability of the old protocol with regard to soft law acts and for the risk for subsidiarity the use of soft law may pose see Knauff, Regelungsverbund 413–415; Wörner, Verhaltenssteuerungsformen 288–290 and 354.

2585 See Senden, Soft Law 23 and 206 f: 'preference for recommendations and similar instruments over legislation whenever possible'; Rawlings, Soft law 230.

2586 See also Peters, Soft law 33. Describing international soft law as a measure suitable to protect national sovereignty: Kanehara, Considerations 85.

2587 See examples provided by Andone/Greco, Burden 90 f.

2588 See Braams, Koordinierung 204, with further references.

2589 For an example from the field of Common Agricultural Policy see case 265/87 *Schräder*, para 21.

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applied in the given context,[2590] when the legislator creates compliance mechanisms, irrespective of whether they qualify as implementing or as enforcement mechanisms.[2591] The implementation and the enforcement of EU law generally qualify as objectives of the Treaties and hence meet the criterion 'objective of general interest'. With implementation and enforcement mechanisms deserving this name, suitability can be taken for granted. When it comes to the necessity criterion, with enforcement mechanisms inevitably and in each case the question must be raised whether in particular the Treaty infringement procedure – the regular and universal EU enforcement mechanism applied *vis-à-vis* the MS – is insufficient. But also other (existing) mechanisms may be taken into account (eg Article 114 paras 4 ff TFEU).[2592] These sufficiency arguments must be included in the examination of necessity, and only if the mentioned procedures turn out to be insufficiently effective in the policy field at issue, the creation of a new mechanism can be deemed necessary. Proportionality in the narrow sense means that the means applied (ie the compliance mechanism at issue) may not be disproportionate to the ends achieved (ie – at best – enhanced compliance rates).

The argument that the Treaty infringement procedure is too burdensome in principle and hence should be 'complemented' by various compliance mechanisms laid down in secondary law cannot be accepted without further specifications. The Commission, for example, has uttered its discontent with the Treaty infringement procedure on many occasions, claiming that in certain policy fields it is inappropriate to ensure compliance in due

2590 For the different thrust of the proportionality test, depending on the context in which it is applied, see Schima, Art. 5 EUV, para 71.

2591 For the (alternative) primary aims of compliance mechanisms see 3.1.1.2.1.2. above.

2592 Since implementing and enforcement mechanisms both aim at ensuring compliance, it is in particular the existence of the Treaty infringement procedure (and its variants) and implementing mechanisms laid down in primary law, but, apart from that, also compliance mechanisms established under secondary law which need to be taken into account. In a broader perspective, also other mechanisms aimed at ensuring compliance with Union law, such as the preliminary reference procedure, ought to be considered.

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time,[2593] and that complementary mechanism may be useful.[2594] During the legislative procedure for what later became Council Regulation 2679/98 on the functioning of the internal market in relation to the free movement of goods among the MS, which allows the Commission to demand information from a MS in which 'an obstacle to the free movement of goods among Member States which is attributable to [that] Member State'[2595] occurs and, if need be, to request the MS concerned to take certain measures, the Commission held: '[T]he procedures provided under Articles 169 [now: Article 258 TFEU] and 186 of the Treaty [now: Article 279 TFEU] are not suitable for removing this obstacle in due time' in view of the objectives of the Regulation which are 'to ensure rapid restoration of the free movement of goods when it is impeded in such a way as to seriously disrupt the proper functioning of the internal market'.[2596] It concluded that '[t]hese are consequently special situations to which the appropriate response is specific means of action. The proportionality of the proposed mechanism is therefore based essentially on the speed and the binding force of the Commission's intervention in response to the situations described above'.[2597]

In the field of feed and food safety, to take another example, the Commission complained that '[a]lthough this procedure [ie the Treaty infringement procedure] is a powerful instrument, the time constraints imposed

2593 Note that alternative compliance mechanisms are not only a result of the insufficiency of the Treaty infringement procedure, but may also be seen as instruments to prevent the Treaty infringement procedure from becoming less efficient, because they provide for an interpretation of EU law by an EU body and thus arguably reduce the likelihood of Court proceedings (thereby contributing to faster decision-making by the Court of Justice in the cases submitted to it). As *Hofmann*, *Rowe* and *Türk* said (in a different context, but still): '[I]t would be highly undesirable for reasons of efficiency, and in respect of the workload of the Court, were every issue of interpretation and application of European law to be resolved purely through litigation'; Hofmann/Rowe/Türk, Administrative Law 569; for exemplary evidence of high compliance rates of such preventive regimes see Schmidt/Schmitt von Sydow, Art. 17 EUV, para 42; see also Pelkmans, Recognition.

2594 See Commission, 'Better Monitoring of the Application of Community Law' (Communication), COM(2002) 725 final, 15 f.

2595 Article 1 para 1 of Council Regulation 2679/98.

2596 Commission Proposal COM(97) 619 final, paras 11 f.

2597 Commission Proposal COM(97) 619 final, para 14. For the early warning system laid down in Council Regulation 2679/98 see Leible/Streinz, Art. 34 AEUV, para 138; for 'speedy enforcement' as a requirement potentially justifying the introduction of an alternative compliance mechanism see Gil Ibáñez, Exceptions 166.

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on it render it impractical where a failure to implement Community law requires prompt action to safeguard feed and food safety'.[2598]

Also the Court, in a case on the Commission's power to require a MS, under certain circumstances, to take certain temporary measures in order to tackle a serious and immediate risk from a product to the health and safety of consumers in various MS,[2599] conceded that 'even if [Treaty infringement procedures] were initiated and held by the Court to be well founded, it is not certain that a declaration by the Court to that effect would enable the objectives set out in the directive to be achieved as effectively as would be the case by a Community harmonisation measure'.[2600] The Court thereby addresses one of the main characteristics of the Treaty infringement procedure: its declaratory nature. While MS are required to take the necessary means to comply with a Court judgement,[2601] specific actions can be requested from MS only by means of special procedures (mainly to be found in secondary law).

3.4.3.2. The specific compliance mechanisms

As part of the examination of the necessity criterion, it is required to positively scrutinise whether the proposed mechanism could actually do away with the insufficiency of the existing regime. This can be affirmed eg where the procedure at issue is faster and experience (eg with a similar procedure in a comparable policy field) has shown high compliance rates. Thus, not only the drawbacks of the Treaty infringement procedure but also the (expected[2602]) effectiveness of the new mechanism needs to be scrutinised under the heading 'necessity'. For example: According to Directive 2015/1535 MS have to notify the Commission *ex ante* of certain techni-

2598 Commission Proposal COM(2003) 52 final, Recital 56.

2599 See the mechanism laid down in Article 9 of Council Directive 92/59/EEC.

2600 Case C-359/92 *Germany v Council*, para 49. There is no doubt that the Treaty infringement procedure does not only aim at an authoritative declaration of lawfulness or unlawfulness of MS behaviour, but – in the latter case – also of bringing that behaviour to an end; see joined cases 15–16/76 *France v Commission*, para 27.

2601 Article 260 para 1 TFEU.

2602 While it is true that the actual effectiveness of a measure can only be measured *ex post*, empirical data such as experience with similar measures may reasonably predict a high degree of effectiveness also in the case at issue; for the numerous difficulties in measuring a norm's effectiveness see Shelton, Compliance 131 ff, focussing on international human rights norms.

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cal rules they intend to adopt. In the course of a soft procedure (Articles 5 f), the Commission can suggest amendments to these drafts where it does not deem them to be compliant with internal market law, more concretely: where it thinks that 'the measure envisaged may create obstacles to the free movement of [goods or services] within the internal market' (Article 7 para 2 *leg cit*). In order to emphasise the necessity of this mechanism, the legislator uttered that 'it is essential for the Commission to have the necessary information at its disposal before the adoption of technical provisions [by the MS]' in order to 'promote the smooth functioning of the internal market' (Recitals 5 and 3). What is necessary follows from the needs (ie the concrete problems) of the specific policy field in which a compliance mechanism is intended to be established.[2603] As a consequence, alternative compliance mechanisms may rather be introduced with a focus on specific, problematic situations. With a new general compliance mechanism it would – apart from other serious legal obstacles – be very difficult to prove its necessity.[2604]

With a view to proportionality in the narrow sense, it can be said that the more a compliance mechanism interferes with the MS' sphere, the more specific and problematic the situation thereby tackled must be. The legislator seems to have been guided by this thought when limiting the right of intervention on the part of the EU body in charge to 'clear and manifest' infringements by the MS.[2605]

In procedural terms, it is in particular the form the intervention takes which matters in this context. The legislator may prescribe measures on a scale ranging from relatively weak measures, eg a duty of the MS to inform the EU body in charge *ex post*, to relatively strong measures, eg the possibility for the EU body in charge to arrogate a MS competence, in order to

2603 See Gil Ibáñez, Exceptions 161.

2604 Instead, the Commission has tried to improve the functioning of the existing regime; for efficiency-driven steps taken by the Commission in the context of the Treaty infringement procedure see Commission, 'EU law: Better results through better application' (Communication), 2017/C 18/02, 14–16; for other 'conservative' reforms (that is to say reforms not requiring a Treaty revision) see Gormley, Infringement 75, with further references.

2605 See eg Article 8 of Directive 92/13/EEC or Article 3 para 1 of Directive 89/665/EEC. For the difference between a clear and manifest infringement and a 'regular' infringement according to Article 258 TFEU see case C-359/93 *Commission v Netherlands*, para 14. For one of the compliance mechanisms addressed above, see Article 18 para 4 of Regulation 1093/2010: non-application or 'manifest breach' (and necessity of urgent remedying).

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adjust the intensity of a compliance mechanism. Also the legal (non-)bindingess of the EU output provided for is to be borne in mind. The mere fact that the output adopted within the framework of a certain mechanism is legally binding cannot lead to the disproportionality of a mechanism, though (see III.3.3.2.1. above).[2606] Conversely, also the introduction of a soft mechanism is not *per se* a proportionate means of ensuring compliance. It can be not suitable (to achieve the aim of enhanced compliance) or it can constitute an overreaction (in proportionality terms: 'not necessary'). While the institutions' awareness of the need to justify the use of soft law also against the principle of proportionality is comparatively low,[2607] the considerate use both of soft and hard measures is an important procedural requirement to render a measure proportionate.

3.4.2.3. Inter-institutional proportionality considerations in the legislative process and the final decision-making power of the Court

The example of Commission Proposal COM(2000) 162 final shows that, with a view to the co-decision procedure, the trilogue between Commission, Council and EP – institutions which often have different agendas in a given policy field – serves well the purpose of 'sanding off' the original Commission proposal. This may result in the suppression of ambitious innovations, but it may also do away with disproportionalities in the proposal. The proposal referred to here suggested providing the Commission *inter alia* with the power to suspend the putting into circulation within the Community and exports to third countries of a product to be used in animal nutrition which was likely to pose a serious risk to human or animal health or to the environment. In case of emergency, it should be possible to take this measure without prior consultation of the MS. The Council pointed out that – were the Directive adopted as proposed by

2606 See Knauff, Regelungsverbund 412 f (fn 88). However, the adoption of hard law may very well go beyond the EU's competences. The line between these two questions – Is a certain measure proportionate? Does the adoption of a certain measure fall within the competence of the EU (and the EU body at issue)? – may sometimes be particularly fine; against the background of the proportionality principle – and given that the relevant criteria are met – in favour of a general preferability of soft law: R Geiger/Kirchmair, Art. 5 EUV, para 18; Schima, Art. 5 EUV, para 73, with further references.

2607 See Andone/Greco, Burden 91.

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the Commission – there would be a 'risk of abuse' on the part of the Commission. The result of the legislative procedure, Directive 2001/46/EC, relied more strongly on MS powers and, for the case that the Commission interferes, for stronger MS involvement.[2608] While here the main issue was dubbed 'risk of abuse', this can be translated into 'possibility of an excess' which reveals that it is essentially a question of proportionality.

Eventually, the proportionality of a measure is decided upon by the Court, applying a relatively liberal threshold ('manifestly incorrect'[2609]). In assessing the relevant factors, the Court has emphasised the 'legislature's broad discretion, which implies limited judicial review of its exercise'.[2610] This limited judicial review, however, requires 'that the Community institutions which have adopted the act in question must be able to show before the Court that in adopting the act they actually exercised their discretion, which presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate. It follows that the institutions must at the very least be able to produce and set out clearly and unequivocally the basic facts which had to be taken into account as the basis of the contested measures of the act and on which the exercise of their discretion depended'.[2611] The Court has stressed that especially in a policy field 'which entails political, economic and social choices on [the part of the legislator], and in which it is called upon to undertake complex assessments […] the legality of a measure […] can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue'.[2612] Therefore, the fault tolerance of the Court towards the legislator's proportionality considerations in these constellations is relatively high.

In conclusion, it is to be noted that there are many ways in which a proportionate (special) compliance mechanism may be built. The core issues of whether a certain measure is 'necessary' and whether it is proportionate in the narrow sense depends in particular on the policy field, on the nature of the competence on the part of the EU, and on the situations to be tackled.

2608 For the Commission proposal and the ensuing legislative negotiations see Andersen, Enforcement 191–195.

2609 See eg case C-233/94 *Germany v European Parliament/Council*, para 56.

2610 Case C-310/04 *Spain v Council*, para 121.

2611 Case C-310/04 *Spain v Council*, paras 122 f.

2612 Case C-508/13 *Estonia v European Parliament/Council*, para 29; case T-510/17 *Del Valle Ruíz*, paras 107 f, each with further references; see also case C-210/03 *Swedish Match*, para 48 and the references made therein.

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Commission Proposal COM(2017) 487 final for introducing the compliance mechanism for the screening of foreign direct investments into the EU (the legislative result of which is addressed above; see IV.2.2.3.2.6.), for example, displays an elaborate consideration of proportionality, addressing a number of different points (which the author has italicised), thereby suggesting that the necessity of the Regulation in general, but also of the compliance mechanism at issue here, was pondered:

> 'Moreover, the proposal introduces the possibility for the Commission to screen foreign direct investments which are likely to affect projects or programmes of *Union interest on security and public order grounds*. Projects or programmes of union [sic] interest include in particular those involving a substantial EU funding, or established by Union legislation regarding critical infrastructure, critical technology or critical inputs. In order to ensure transparency and legal certainty, an *indicative list* of projects or programmes of Union interest is included in the annex to the Regulation. The scope of the screening remains *limited to likely threats to security and public order*. The Commission will be able to provide an *opinion to the Member States* in which the investment is planned or completed, *while entrusting the final decision on the appropriate response to those Member States*' (emphasis added).[2613]

3.5. The effects of soft law in compliance mechanisms: varying degrees of authority?

3.5.1. Introduction

The legal effects of soft law have been addressed in Part III above (4.2.). The findings elaborated in this chapter apply also in the given context. While the Court's rather casuistic case law draws limits to any attempt to make generalisations, there seems to be a principal duty of MS to consider EU soft law which is addressed to them (see III.4.2.2.1.2. above).[2614] We may repeat *Senden's* words that in this context there is an 'obligation of effort, as opposed to an obligation of result'.[2615] This excludes a *general* duty to

2613 Commission Proposal COM(2017) 487 final, 9.

2614 See, as an example from the more recent case law, case C-28/15 *Koninklijke*, para 41.

2615 Senden, Soft Law 350.

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give the reasons for non-compliance.[2616] In some cases, however, a duty to give reasons is explicitly laid down in law.[2617] This is an obligation (of result) the MS has *vis-à-vis* the EU (body concerned), but potentially also *vis-à-vis* individuals/undertakings. Where the follow-up action of the MS is addressed to an individual/undertaking, this individual/undertaking has a right to a sufficiently reasoned act – under the respective national legal standards. In addition to that, where the national authority is implementing Union law[2618] the individual/undertaking has a right based on EU law to be given the reasons for the decision,[2619] and hence (if applicable) also the reasons for non-compliance with the EU soft law act at issue (addressed to the decision-maker).[2620] In this context, the then Court of First Instance held, with a view to the requirements of an adequate reasoning under EU law, that the decision-making body, to the extent it disregards the opinion at issue (here: a scientific assessment provided by an expert committee), 'must provide specific reasons for its findings by comparison with those made in the opinion and its statement of reasons must explain why it is disregarding the latter'. The expressed reasons (for disregarding the opinion) 'must be of a scientific level at least commensurate with that of the opinion in question'.[2621] While the legally non-binding acts dealt with here are rarely scientific in nature, it can be abstracted from this case law that the more

2616 Differently: H Adam, Mitteilungen 83.

2617 Article 17 para 1 of Regulation 1092/2010, for example, stipulates that a national authority shall provide 'adequate justification' for inaction with regard to ESRB recommendations.

2618 Article 51 para 1 CFR.

2619 For the enhanced reasoning requirements in case of decisions (here: of the Commission) entailing a power of appraisal see case C-269/90 *Technische Universität München*, paras 14 and 27.

2620 Article 41 para 2 (third indent) CFR. Only where the meaning for the eventual output of the soft law act is entirely subordinate, it (ie the arguments made therein) may legitimately be skipped in the reasoning. This is in accordance with the Court's case law, pursuant to which '[i]t is not necessary for the reasoning to go into all the relevant facts and points of law'; case C-89/08P *Commission v Ireland*, para 77, with a further reference; for further specifications – the reasoning also depends on the content of the measure at issue, the nature of the reasons and the interest of the addressees (or other concerned parties) in obtaining explanations – see case T-63/16 *E-Control*, para 68, with further references. This case law on what is now Article 296 TFEU may be applied also with regard to Article 41 CFR; see also the Explanations relating to the Charter of Fundamental Rights with regard to the latter provision.

2621 Case T-13/99 *Pfizer*, para 199.

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specific an act is, the more specific the reasons for non-compliance must be (where a duty to give reasons in the case at issue has been affirmed).

Against the background of these general remarks, in the following we will consider the varying obligations to react to soft law, as laid down in the compliance mechanisms addressed above, and at their respective effects.

3.5.2. Degrees of authority or mere legislative wordiness?

Against the background set out above, we shall – in the context of our selection of compliance mechanisms – address the question whether the soft law acts provided for therein display different degrees of authority. While it is remarkable that nearly all soft or mixed secondary law-based compliance mechanisms at issue provide for the adoption of opinions and/or recommendations, that is to say those two categories of legally non-binding acts explicitly provided for in Article 288 TFEU, an examination of the individual degrees of authority is suggested by the varied wording of explicit duties to consider soft law in the legal acts setting out these mechanisms. These duties may oblige EU actors – eg the Commission has to 'take into account' the EBA recommendation under the regime of Article 17 of Regulation 1093/2010 or the ESAs shall take 'utmost account' of ESRB warnings/recommendations pursuant to Article 36 para 6 of Regulations 1093–1095/2010 – but, more importantly in the given context, may also be imposed on MS (and their authorities). The latter shall eg 'appropriately address[]' the SRB warning adopted under Article 7 para 4 of Regulation 806/2014, give 'due consideration' to a Commission opinion (Article 6 of Regulation 2019/452) or 'pay[] sufficient heed' to the ERA opinion launched on the basis of Article 25 of Regulation 2016/796; they are obliged to take 'utmost account' of EU soft law (Article 53 of Directive 2019/944, Article 10 para 2 of Directive 2018/1972), to provide a 'reasoned opinion' for non-compliance (Article 33 of Directive 2018/1972) or to 'adequately justify any inaction' (Articles 16 f of Regulation 1092/2010). Do these seeming qualifications actually increase the authority of the soft law concerned, do they elevate the duty to consider of the addressee to a duty to provide the reasons for non-compliance?

As a first – apparent – finding we can state that all these *epitheta*, as it were, give proof of the non-bindingness of the acts at issue.[2622] On a second

2622 See also case T-295/06 *Base*, paras 63 f; case C-689/19P *VodafoneZiggo*, para 55.

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level, we need to reiterate the distinction between obligations of effort and obligations of result. The latter are established with the requirement to provide a 'reasoned opinion' for non-compliance or to 'adequately justify any inaction'. These are clear commands that go beyond a duty to consider and hence non-compliance with these soft law acts – *qua* secondary law – entails an obligation to provide the reasons for that. It is important to note that the obligatory effect of these soft law acts does not emanate from the soft law acts themselves, but from the relevant secondary law.[2623] Let us take an example: The national competent authorities' duty to inform the ESAs in case of non-compliance with their guidelines and recommendations according to Article 3 para 2 subpara 2 of Regulations 1093–1095/2010 is laid down in secondary law, not in the guidelines or recommendations themselves.[2624] As regards the duty to report according to subpara 4 *leg cit*, which applies '[i]f required by that guideline or recommendation', it ought to be highlighted that this does not lead to the partial bindingness of these guidelines/recommendations.[2625] Such an effect, if it were confirmed, from a legal perspective would be highly questionable, like the adoption by European agencies of general-abstract rules binding upon MS more generally.[2626] In order to ensure conformity with primary law, this passage must be interpreted as a general duty to report cases of non-compliance (which is based on secondary law) regarding which the ESAs may state – with regard to certain guidelines/recommendations – that they do (not) insist on compliance with this duty to report. The declared non-insistence

2623 Stressing, in the context of public international law, this separation of the soft law act on the one hand and the act stipulating certain duties with regard to this soft law act, on the other hand: Griller, Übertragung 156, with many further references. Also the exceptional case of soft law being transformed into hard law is effected by secondary law, in our example by Articles 22 f of Council Regulation 2015/1589 (see 3.2.4.2. above); mitigating the meaning of this distinction: Tridimas, Indeterminacy 61.

2624 Further examples of the authority of certain soft law acts being increased by secondary law are Article 17 para 2 lit b of Regulation 2018/1139, according to which the Commission may not change the content of the EASA's draft implementing measures 'without prior coordination with the Agency', or Article 10 para 1 subparas 6–8 of Regulations 1093–1095/2010 which also require coordination (defined in more detail in the *lex citata*) of the Commission with the ESAs when the former intends to change the content of a draft regulatory technical standard as prepared by one of the ESAs.

2625 See also Russ/Bollenberger, Leitlinien 811.

2626 For the exceptional adoption of general-abstract legally binding rules by European agencies see Bergström, System 219 and *passim*.

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(by not mentioning the duty to report in the guideline or recommendation) binds the ESAs, but entitles the national authorities.[2627]

The obligations of effort are expressed by a duty to 'take into account', or even to take 'utmost account' of the soft law act at issue, or to 'pay[] sufficient heed' to it.[2628] Assuming that there is a general duty to consider soft law (see also 3.5.1. above), it is unclear to which extent these special requirements add anything thereto.[2629] They could as well be considered merely declaratory in nature. But even if the duties of MS were thereby increased, practically compliance with them could be scrutinised only where there was a related duty to give reasons or even to justify non-compliance.[2630] In case of the compliance mechanisms presented here, such duty may emanate from the duty to provide the reasons for a decision addressed to an individual/undertaking – however, if not explicitly regulated otherwise, this duty exists only *vis-à-vis* the (individual) addressee (see above), not *vis-à-vis* the creator of the respective soft law act.[2631]

In case C-424/07 *Commission v Germany*, the Court of Justice quotes the duty of national authorities to take 'utmost account' of certain Commission output, at the same time stressing their 'broad discretion in order to be able to determine the need to regulate a market according to each situation on a case-by-case basis'.[2632] In another case, the Court deduced from the duty to 'take utmost account' of Commission recommendations in combi-

2627 For the self-obliging effect of soft law see III.4.2.2.2.4. above.

2628 It is unclear in general which of these terms ought to be most compelling. Only sometimes the legislator in one and the same act uses two different terms, thereby explicating different duties: see, for example, Regulation 2019/452, stipulating that MS have to take (only) 'due consideration' of a Commission opinion in one procedure (Article 7 para 7), but 'utmost account' of it (including the provision of an explanation in case of non-compliance) in the other procedure (Article 8 para 2 lit c).

2629 Arguing that in these cases non-compliance is only justified where otherwise a breach of EU law or of national law (interpreted in accordance with EU law) would occur: von Danwitz, Verwaltungsrecht 251, with further references; see also Koenig/Neumann/Senger, Ausgestaltung 367, who tautologically say that 'besonderes Gewicht' [special emphasis] should be granted to acts of which, according to the law, 'utmost account' is to be taken.

2630 See Láncos, Core 763. Such a duty seems to be assumed by Tobisch, Telekommunikationsregulierung 105.

2631 In case C-69/13 *Mediaset*, para 31, the Court – invoking Article 4 para 3 TEU – seems to address the EU-MS relationship (not: the relationship of the national body *vis-à-vis* the individual), and mentions a duty to state reasons. The Court does not elaborate on this duty, though (eg in the following paragraph).

2632 Case C-424/07 *Commission v Germany*, para 61.

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nation with a duty to provide the reasons for non-compliance that the national authorities shall 'follow, as a rule, the guidance contained in [the] Recommendation', and shall only depart where the recommendation 'is not appropriate to the circumstances'.[2633] This seems to suggest that the 'utmost account' requirement, materially speaking, ought not to be overestimated. The effects of other *epitheta* – such as: 'appropriately address[]' – are not explicit on whether or not they include a duty to justify inaction, either. While it does not seem to imply a duty to justify non-compliance *vis-à-vis* the creator of the soft law act at issue, it may be interpreted as emphasising a duty to provide – in case of non-compliance – an appropriate reasoning in the final act (addressed to an individual/undertaking). From a competence perspective this would be acceptable, as the EU legislator may certainly increase the threshold for the reasoning required in the output *vis-à-vis* the individual/undertaking – after all, in such a case Union law would be implemented within the meaning of Article 51 para 1 CFR, which renders applicable the CFR. The effect would be limited and (more importantly) substantially questionable, though: According to Article 41 CFR, there is a general duty to state the essential reasons for administrative output. According to this understanding, the above epithet would – in addition to that – require consideration in the form of a statement of reasons also where the soft law act at issue did not contain essential arguments for the final output. In light of this odd result, it can be doubted that this is what the legislator intended to prescribe. Rather, the additions in question may be understood as a merely declarative hint to the addressee to have a close look at essential arguments which may (possibly) be contained in the soft law act at issue.

3.5.3. Considerations in the legislative process and conclusions

While the above considerations were focussed on the literal interpretation of these additions, their respective effect needs to be examined also by taking into account the context and other specificities of the concrete case.[2634] For example: The Commission proposal for what later became Directive 2009/72/EC – the predecessor of Directive 2019/944 – concerning common

2633 Case C-277/16 *Polkomtel*, para 37.
2634 See Brohm, Mitteilungen 163 f; Thomas Müller, Soft Law 116.

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rules for the internal market in electricity[2635] in its Article 8b paras 8 and 10 – in the context of certifications relating to third countries – provided for a Commission decision by means of which a national regulatory authority could be obliged to amend or withdraw its decision on certification. In the course of the political negotiations on the legislative proposal, the decision-making power of the Commission was replaced by a mere power to adopt an opinion. In order to 'ensure the consistent application of those rules across the Community', the Directive states that the regulatory authorities 'should take utmost account of the Commission's opinion when the former take decisions on certification'.[2636] It appears that here setting the requirement for the national authorities to take utmost account corresponded to an attempt to mitigate the effects of the replacement of the originally envisaged decision by an opinion. It is not a legislative command, but – bearing in mind the objective to ensure the consistent application of the relevant Union law – a strong legislative prompt to comply with the opinion, and – we could add, with a view to the genesis of the Directive – to deviate from it only when important reasons so suggest. This goes beyond the effects of 'regular' EU soft law.[2637] Since there is no duty to provide the reasons for non-compliance in this case, it is difficult for EU actors (in particular: the Commission or the Court) to examine whether or not utmost account was taken of the Commission opinion. It is first and foremost the follow-up output of the addressee, in our example the decision addressed to the individual applicant for a certification, in particular the reasoning contained therein, which will indicate the arguments for non-compliance the national authority has employed (see also 3.5.2. above). Also the national authorities themselves will have an interest in making clear their respective reasons for non-compliance. Otherwise, they may be held responsible for non-compliance without good reasons.

2635 Commission Proposal COM(2007) 528 final.
2636 Recital 24 of Directive 2009/72/EC.
2637 See Tobisch, Telekommunikationsregulierung 104, with many further references.

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All in all, the 'qualification' of soft law may lead – in a concrete case[2638] – to a hierarchy of different soft law acts.[2639] A hierarchy of acts – as long as it is provided for by the law-maker, which regularly is the case – may exist also among the different layers of legally binding acts, eg primary or constitutional law and, relatively lower-ranked, secondary or sub-constitutional law.[2640] The norms of the different layers are equally binding, but they differ in rank, and the respective lower layers of norms need to be in compliance with the respective higher layers. True soft law remains to be legally non-binding (or, in the understanding of Article 263 para 1 TFEU: not intended to produce legal effects *vis-à-vis* third parties), but non-compliance with soft law acts with a qualification (set by law) may trigger legal duties, such as the duty to give reasons or the duty not to deviate for reasons of minor importance.[2641] The effect in practice is comparable to that of a binding rule allowing for certain exceptions (possibilities of lawful deviation, eg in case of 'important reasons'; see II.2.1.3.1. above). What is more, in a systematic view this approach may bear a slight risk of trivialising the meaning of soft law without such attributes. However, and as we have seen above (III.4.2.2. and III.4.2.3.), also this *regular* EU soft law is to be 'considered', ie to be dealt with – at least for the time being. In the long run, and with the use of qualifications increasing, the comparison with these qualified acts may downplay the authority of regular soft law, though. Once again, it ought to be emphasised that this hierarchy is created not by the respective soft law itself, but by the legal framework established in particular by secondary law.

The effectiveness of this qualified soft law does not only depend on the legal duties just addressed. There is also a factual side to the effectiveness of (both qualified and 'unqualified') soft law, viz the factual authority of its

2638 There does not seem to be a general hierarchy of soft law acts in EU law, though. If at all, it is due to a strong connex with law; see Knauff, Regelungsverbund 501 f; AG *Kokott* in her Opinion in case C-398/13P *Inuit*, para 92, appears to suggest such a hierarchy when claiming that a certain (legally non-binding) act 'has the status of *at least* a recommendation' (emphasis added).

2639 See case 815/79 *Cremonini*, para 8, in which reference is made to a hierarchy of national/international standards set up by EEC law; see, as another example, Article 17 of Regulation 1093/2010, according to which the EBA's recommendation only needs to be 'taken into account' when the Commission takes a follow-up action on the case at issue (in the form of a formal opinion; para 4 *leg cit*), whereas the EBA, when taking a decision following the formal opinion, has to make sure that it is 'in conformity with' the latter (para 6 *leg cit*); see 2.2.2.2.3. above.

2640 For the only implicit hierarchy between *legally binding* acts in the then Community legal order see Senden, Soft Law 54 f.

2641 See also Arndt, Sinn 166.

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creator and of the 'procedural surroundings'. If a soft law act contains an irresistibly convincing line of argumentation, or where it may be followed by a legally binding decision, or where a soft procedure is paralleled by a mixed or hard procedure on the same or a related matter which may end if the addressee complies with the soft law act, these factors, on their respective own or in combination, may as well increase the likelihood of compliance with it (see 2.4.1. above).

3.6. Legal protection for the Member States

3.6.1. Introduction

In complementation of what was said above on the possibilities of applying for judicial review of soft law (see III.6. above), we shall now turn to the legal, in particular judicial protection available for MS affected by acts adopted by EU bodies in the course of a compliance mechanism.

Where these (binding) decisions are adopted by European agencies, they may be appealed against before the respective agency's appeal body (normally named 'Board of Appeal'),[2642] given its competence to review the act at issue; non-binding agency output such as opinions normally may not.[2643] While not all agencies dispose of an appeal body, the founding regulations of the more recent decision-making agencies regularly provide for one.[2644] They are composed of a couple of experts in the policy field concerned (three or more). A MS (authority) addressed by an agency decision may turn to the Court only after it has turned to the appeal body (if set up and if an appeal is admissible).[2645] The action for annulment then has to

2642 Whether the procedures before these appeal bodies are administrative or judicial in nature is contested, but need not be elaborated on further in this context; see Chamon, Agencies 338 f; for the treatment of soft law by agencies' Boards of Appeal more generally see Alberti, Position 271.

2643 See eg case T-63/16 *E-Control*, para 49.

2644 See eg Article 85 of Regulation 806/2014; Articles 58 f of Regulations 1093–1095/2010; Articles 25 f of Regulation 2019/942; Article 165 of Regulation 2017/1001, referring – in the context of the EUIPO – to several Boards of Appeal, among them a Grand Board.

2645 Heed, in this context, the reform of Article 58a of the Court's Statute, as requested by the Court late in 2022; <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-12/demande_transfert_ddp_tribunal_en.pdf> accessed 28 March 2023.

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be brought against the appeal decision.[2646] Only where an agency does not have an appeal body or where its decision is not appealable may the MS (authority) file an action for annulment against the (original) agency decision.[2647]

3.6.2. The action for annulment and the action for failure to act

Beyond the fundamental statement that legally binding acts may be subject to an annulment procedure, whereas legally non-binding acts may (principally) not, we shall take a look at one of the procedural specificities of most compliance mechanisms addressed above, that is their tiered structure. The Court has determined that '[i]t is […] settled case-law that, in the case of acts adopted by a procedure involving several stages, and particularly where they are the culmination of an internal procedure, it is in principle only those measures which definitively determine the position of the Commission or the Council upon the conclusion of that procedure which are open to challenge and not intermediate measures whose purpose is to prepare for the final decision'.[2648] Acts of an entirely preparatory kind cannot as such be complained against, but they may be considered in the course of the (annulment) procedure against the final act (the preparation of which they served).[2649] Thereby an indirect, incidental judicial control of preparatory, potentially soft law acts may be achieved – not only where the final decision explicitly refers to the preparatory output and/or where the creator of the final decision is bound to consider or even to conform to the preparatory output (addressed also to the MS concerned),[2650] but also where the linkage is only implicit.

2646 See case T-102/13 *Heli-Flight*, paras 27 f.

2647 See eg Article 61 of Regulations 1093–1095/2010 (Board of Appeal) or Article 86 para 1 of Regulation 806/2014 (Appeal Panel).

2648 Case C-147/96 *Netherlands v Commission*, para 26, with a further reference; with regard to procedures involving both EU and national actors see case C-219/17 *Berlusconi*, paras 43 ff.

2649 See case 60/81 *IBM*, para 10; case T-55/01R *Asahi*, para 62; case T-317/09 *Concord*, para 44, each with further references; see also more recently: case T-671/15 *E-Control*, paras 26–28, and the discussion by Ştefan/Petri, Review 543 f; joined cases C-551/19P and C-552/19P *ABLV*, paras 40 ff.

2650 Take Article 17 para 6 of Regulation 1093/2010 as an example, according to which the EBA decision needs to be 'in conformity' with the preceding formal opinion of the Commission, as addressed to the national authority concerned.

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Thus, where the MS addressed in the course of a mixed or hard mechanism does not share the legal view of the EU body/bodies in charge – and where it does not manage to convince the latter of its own view – it is well advised to have the respective procedure performed in its entirety. Thereby it may achieve that a (final) legally binding act is adopted, against which it may then turn to the Court by filing an action for annulment pursuant to Article 263 TFEU. In the exceptional cases of mechanisms providing for binding acts preceding the respective final (binding) act, MS can also file an action against these acts. Legally binding acts with a specific addressee cannot be supposed to have a merely preparatory character.

Where the mechanism is soft, the MS can lawfully deviate from the EU body's output anyway, without having to challenge it before the Court. However, in case of doubt, it is advisable to address the Court, if only to have it dismiss the action for lack of (intended) legal effects on third parties of the challenged act. Otherwise, there remains a risk that the act turns out to be binding – eg in the course of a Treaty infringement procedure which the Commission or another MS may launch – and the addressee ends up having violated EU law, although it merely intended to ignore a soft law act. Having said this, a conviction under a Treaty infringement procedure would be a rare exception, as the Court has to take account of the addressee's trust in the appearance of the act – a trust which is, if justified (ie if the act is akin to a soft law act), legally protected.[2651]

When it comes to the active legitimation under Article 263 TFEU, the question arises whether national authorities fall within the privileged category of 'Member State[s]' (para 2) or whether they qualify as non-privileged actors pursuant to para 4. A qualification of any national authority as 'Member State' within the meaning of para 2 would result in the power of national authorities to challenge any legally binding output of EU institutions, bodies, offices and agencies – a power which would be entirely non-system.[2652] Thus, it is not surprising that the Court has confirmed that territorial authorities such as municipalities or *Länder* are non-privileged

2651 Also in other procedures, eg with regard to State liability, this trust has to be taken into account (by the competent national court or, upon a preliminary request, by the Court of Justice), most suitably in the context of the 'sufficiently serious breach'; see the settled case law beginning with joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur*, para 51.

2652 Note Article 267 TFEU which limits a related power – namely to ask the Court about the validity of secondary law – to national courts and tribunals (where this question is relevant in a concrete case before them).

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claimants.[2653] Other national authorities disposing of legal personality or at least the power to act as a party in procedures according to national law may as well file an action under Article 263 para 4 TFEU.[2654] Public bodies which do not meet these criteria regularly act for a legal person, in federally organised States in particular for a territorial authority. Then it is, legally speaking, the latter authorities which are addressed or otherwise directly and (as regularly required) individually concerned by the EU output rendered in the course of compliance mechanisms, and which may hence file an action for annulment. As a 'Member State' within the meaning of Article 263 para 2 TFEU only the central (federal) government of a MS may file an annulment action with the Court.[2655]

Mixed and hard compliance mechanisms provide for national authorities to be addressed by binding EU output. Thus, in these cases it will not be difficult to prove that the requirements for an action under Article 263 para 4 TFEU ('addressed') are met. Where a national authority intends to challenge, under Article 263 TFEU, EU output addressed to another national authority (or to any other addressee for that matter), it has to prove its direct and – unless in case of regulatory acts pursuant to para 4 – individual concern.[2656]

Alternative (and less practicable) routes to a (possibly only incidental) review of acts adopted in the course of a compliance mechanism are a subsequent Treaty infringement procedure, a subsequent preliminary reference procedure (following, for example, an action for State liability) or a subsequent procedure pursuant to Article 340 para 2 TFEU (see III.6.3. and III.6.4. above). The final decision whether or not such procedures are

2653 See, each with further references, case 222/83 *Differdange*, para 8; case C-15/06P *Regione Siciliana*, in particular para 29; case C-444/08P *Açores*, para 31; case C-872/19P *Venezuela v Council*, paras 44–46; joined cases T-132/96 and T-143/96 *Sachsen/Volkswagen*, para 81 (see also references in para 72). This appears to be consistent also against the background that State liability applies to the MS in their entirety. Thus, the alternative step – not to be held responsible for a breach of EU law, but to challenge the respective act of EU law before the Court – should be up to the MS as a whole (not to its single bodies). For the conceptual linkage between a MS' liability (here: under the State aid regime) and Article 263 para 1 TFEU see the Commission's argumentation in joined cases T-132/96 and T-143/96 *Sachsen/Volkswagen*, para 68.

2654 See eg joined cases C-177/19P to C-179/19P *Germany v Commission*, paras 69 f, with further references; see also Stotz, Aktivlegitimation, paras 69 f.

2655 See Dörr, Art. 263 AEUV, para 11.

2656 See joined cases T-269/99, T-271/99 and T-272/99 *Guipúzcoa*, para 41.

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initiated may be influenced by the MS authority concerned, but eventually it is taken by different actors.

The possibility to launch an action for failure to act under Article 265 TFEU – which has turned out to be practically insignificant[2657] – is to be mentioned here for the sake of completeness. While MS may not only invoke the failure to adopt a binding act, but also the failure to adopt a non-binding act 'in infringement of the Treaties', non-privileged claimants (including MS authorities) are limited to complain about the failure to adopt binding acts.[2658] In the compliance mechanisms presented above the decision whether or not to adopt a soft law act regularly falls within the discretion of the respective EU body (*argumentum* 'may'). Therefore – in addition to the limited admissibility of related actions under Article 265 TFEU – the non-adoption of such acts regularly will not constitute an 'infringement of the Treaties' (ie of EU law). Also with regard to the adoption of binding acts under the compliance mechanisms presented above, the EU bodies regularly dispose of a certain room for manoeuvre. But even if they do not, MS (or its authorities) regularly have no interest in receiving a decision urging them to comply with EU law, which makes actions for failure to act highly improbable also in this context.

3.6.3. The MS' motivation to seek judicial protection

Whether or not the MS seek judicial protection against acts of the EU (or – exceptionally – an EU body's failure to act) normally depends on a variety of factors, among which is what could be referred to as the 'legal context'. A special case to be mentioned here is the Court's power to scrutinise fines imposed on a MS by an EU body. In the example addressed above (see 3.1.1.2.3.), namely Article 8 of Regulation 1173/2011, the Council was granted the power to impose a fine on a MS who has intentionally or by serious negligence misrepresented its deficit and debt data to be transferred to the Commission. Being in charge of reviewing this fine, if requested, the Court may confirm, reduce or – and this is remarkable – increase the respective amount. This power has a deterrent effect in that it may prevent the MS concerned from filing an action even if it deems the Council act (including

2657 See eg Dörr, Art. 265 AEUV, para 3.

2658 *Argumentum* 'other than a recommendation or an opinion'; see also W Cremer, Art. 265 AEUV, para 5, with further references.

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the fine) to be unlawful, especially where the fine is comparatively low.[2659] The risk of the Court refusing the action and eventually even increasing the fine may be considered too high – if justifiably so or not is irrelevant. The possibility of a *reformatio in peius* increases the power of the Court, it could be said, and *de iure* this is correct.[2660] In view of the chilling effect just mentioned, however, *de facto* it is the power of the Council which is enhanced (because the likelihood of its decision being judicially reviewed is reduced). In light of that, the given example – while *prima facie* adequately reflecting upon the Court's systematic importance in the EU – can be interpreted as another example of the Court's being ousted from its dominant role in the enforcement of EU law as epitomised by the Treaty infringement procedure.

On the other hand, what was referred to above as 'legal context' may also increase the likelihood of a MS (authority) seeking judicial protection. For example: Where a MS violates certain rules of the EU's excessive deficit regime (as laid down in primary and secondary law), in addition to the sanctions provided for therein EU law (in the context of 'macroeconomic conditionality') allows for other negative effects, such as the partial or complete suspension of financial support coming from the EU's Structural and Investment Funds.[2661] Similar conditionality dynamics have been known in EU law eg in connection to Treaty infringement procedures, which may be applied once the Commission has addressed a reasoned opinion to a specific MS.[2662] Regularly, these suspensions are based on the contract concluded between the EU and the respective MS ('Partnership Agreements')[2663] which renders the possibilities of judicial review directed

2659 For a practical example, note the case of Austria which was fined because of a misrepresentation of deficit and debt data concerning the *Land* Salzburg and which eventually refused to challenge the respective Council act, even though it deemed the act to be unlawful; see <https://www.consilium.europa.eu/en/press/press-releases/2018/05/28/land-salzburg-austria-fined-for-misreporting-government-debt-data/> accessed 28 March 2023.

2660 For the principal possibility of vesting the Court with such power see Article 261 TFEU; with specific regard to the possibility of a *reformatio in peius* see Booß, Art. 261 AEUV, para 15; W Cremer, Art. 261 AEUV, para 6; Ehricke, Art. 261 AEUV, para 8, each with further references.

2661 See Article 23 para 9 of Regulation 1303/2013; for the broader framework see Klamert, Durchsetzung 164 f.

2662 See European University Institute, Research 22 and 47.

2663 The limited number of suspensions in practice cannot do away with the legal *problematique* these arrangements entail; see European Court of Auditors, 'Ex

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specifically to these suspensions very limited. If applied, these arrangements exert a strong pressure on the MS concerned.

These circumstances may lead to the MS pushing for judicial review in the related compliance mechanism, hoping for the Court to confirm the respective MS's own legal view. However, it may as well cause the MS to give in and to comply without further ado in order to do away with the financial disadvantages it is confronted with. These concerns are not directly related to the compliance mechanisms at issue here, but in the larger 'legal context' they certainly ought to be taken into account.

ante conditionalities and performance reserve in Cohesion: innovative but not yet effective instruments' (Special Report, 2017) 47; see also European University Institute, Research 34 f.

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