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Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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ENHANCING CENTRALIZED ENFORCEMENT OF EU LAW: PANDORA'S TOOLBOX?

ROLAND BIEBER* and FRANCESCO MAIANI**

Abstract

State compliance with EU Law is crucial to the very existence of the Union. Traditionally, it has been secured through a combination of strong "private" and of weak "centralized" enforcement. However, this arrangement is no longer perceived to be sufficient. By endowing the Union with new tools vis-à-vis its Member States – penalties, conditionality, and the like – current reforms try to complement symbolic sanctioning with real "consequences". The goal is to reinforce the authority of EU Law. In this article, we question whether the new toolbox is fit for the purpose, or whether it risks to produce adverse effects which might even go as far as upsetting the Union's constitutional template.

1. Introduction

Legal orders are by definition founded on the assumption of compliance. In order to maintain its authority, every legal order develops mechanisms intended to avoid or redress breaches of its rules by punishing such breaches and/or by providing for incentives for obedience. The pivotal role of sanctions and of other mechanisms to promote compliance has long been a subject of discussion in legal theory.[1] Attention has focused on the compliance of individuals – and criminal law has been the prevailing area of interest.[2] Less attention has been paid to the understanding and systematization of sanctions

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1. Kelsen, *Reine Rechtslehre* (Deuticke, 1934), s. III, n° 12; Habermas*, Faktizität und Geltung* (Suhrkamp, 1992), p. 106. For a summary of the discussion on sanctions in legal theory, see Bitter*, Die Sanktion im Recht der Europäischen Union* (Springer, 2011), pp. 13–36 (English summary, pp. 275–280).

2. Examples from legal doctrine on EU law: Bitter, ibid., and by the same author "Procedural rights and the enforcement of EC law through sanctions", in Bodnar, Kowalski et al. (Eds.), *The Emerging Constitutional Law of the European Union* (Springer, 2003), pp. 15–46; Poelemans, *La sanction dans l'ordre juridiqe communautaire* (Bruylant, 2004).

against public entities as members of legal orders, be they States within a federation, autonomous bodies such as municipalities, or States within the international legal order.

This latter aspect is however of central significance for the legal order of the European Union. The EU depends on Member States' compliance for the fulfilment of its goals, for the implementation of its laws and, ultimately, for its existence. The Court of Justice has accordingly characterized the deliberate refusal of a Member State to implement EU law as a "failure in the duty of solidarity" that "*strikes at the fundamental basis* of the Community legal order".[3] It is true that uniform and timely implementation of all EU law by all Member States at all times may constitute an ideal to strive for rather than a practical reality. Nevertheless, for an internal market, an area of freedom, security and justice, a common fisheries policy, and so on, to exist at all, the assumption of compliance must be sustainable, and credible means and procedures to detect and terminate breaches must be in place.

In this last regard, EU governance is undergoing important evolutions. The EU has traditionally relied on strong "private" or decentralized enforcement. Through its case law on direct effect, supremacy and liability for breaches of EU law, the Court of Justice has endowed individuals and firms with powerful tools to assert their EU rights before national courts against defaulting national authorities.[4] In traditional, rights-centred areas of EU law, such as the internal market, this has largely compensated for weak centralized enforcement, originally based on a cumbersome and purely declaratory infringement procedure placed in the hands of an administration that is severely under-resourced relative to the (growing) scale of its task.[5] This arrangement is no longer, however, perceived to be sufficient.[6] In an increasing number of areas, such as the Economic and Monetary Union (EMU) or border controls in the Schengen area, "private enforcers" of EU are hardly available, while at the same time interdependencies are so developed

3. Case 39/72, *Commission* v. *Italy*, [1973] ECR 101, para 25 (emphasis added).

4. Case 26/62, *Van Gend en Loos*, [1963] ECR 1; Case 6/64, *Costa* v. *ENEL*, [1964] ECR 585; Case 106/77, *Amministrazione delle Finanze dello Stato* v. *Simmenthal*, [1978] ECR 629; Joined Cases C-6 & 9/90, *Francovich, Bonifaci and others* v. *Italian Republic*, [1991] ECR I-5357. See Dougan, "The vicissitudes of life at the coalface: Remedies and procedures for enforcing Union Law before the national courts", in Craig and De Búrca (Eds.), *The Evolution of EU Law*, 2nd ed. (OUP, 2011), pp. 407–438.

5. Smith, *Centralised Enforcement, Legitimacy and Good Governance in the EU* (Routledge, 2010), pp. 97 et seq.; see also the *incipit* of Wennerås, "Sanctions against Member States under Article 260 TFEU: Alive but not kicking?", 49 CML Rev. (2012), 145–176.

6. See e.g. the remark by the President of the Commission José Barroso on the need for a "better developed set of instruments" to monitor observance of the rule of law in the Member States (State of the Union 2012 Address, 12 Sept. 2012, SPEECH/12/596, p. 10).

that the failures of one Member State have a direct impact on the interests of the others.[7]

Those different factors have led to intense experimentation with centralized enforcement, the beginnings of which date back to the Maastricht Treaty, and which can to a large extent be considered a constitutionally relevant development of recent crises.[8] The thrust of these reform efforts is to try to complement symbolic "sanctioning" for non-compliance – e.g. the traditional declaration of infringement – with real "consequences".

Such developments are not unproblematic. "Sanctions" are never popular with those to whom they are addressed. When it comes to "sanctions" by the EU against its Member States, these may meet strong objections and may lead to challenges to the already contested legitimacy of the EU. A recent example is the statement of the President of the French *Assemblée Nationale,* who objected to a supposed (Brussels) vision of an *"Europe de la sanction"*.[9] More broadly, if they are not carefully designed, sanctioning mechanisms may backfire, upsetting constitutional arrangements in ways that would weaken rather than strengthen the authority of EU law.

In this article, we analyse the ongoing efforts to expand the EU toolbox of measures and procedures intended to guarantee national compliance – especially, but not exclusively, in the EMU "laboratory". Our focus is selective: we will not address all the means through which EU institutions promote on a day-to-day basis full compliance with and effective implementation of EU law.[10] Nor are we directly concerned with the abovementioned means of "private enforcement". In the following sections, we concentrate on the "top-of-the-range" measures at the disposal of the EU to

7. See Bieber and Maiani, "Sans solidarité point d'Union européenne", 48 RTDE (2012), 295–327, especially at 313; Commission Communication, A new EU Framework to strengthen the rule of law, COM(2014)158, pp. 4–5.

8. The expression "constitutionally relevant development" is borrowed from Chiti and Texeira, "The constitutional implications of the European responses to the financial and public debt crisis", 50 CML Rev. (2013), 683–708. For the reasons making centralized enforcement radically more important to the EMU following the 2010 debts crisis, see also Hinarejos, "Fiscal federalism in the European Union: Evolution and future choices for EMU", 50 CML Rev. (2013), 1629 et seq.

9. Vignal, "Claude Bartolone s'en prend violamment à l'Europe sur les Roms", Reuters, 27 Sept. 2013, <fr.reuters.com/article/topNews/idFRPAE98Q01320130927> (last visited 12 Feb. 2014).

10. For a list thereof, see the Commission Communication on better monitoring of the application of community law, COM(2002)725, paras. 2.1 and 3.4. See also Chiti, "The governance of compliance", in Cremona (Ed.), *Compliance and the Enforcement of EU Law* (OUP, 2012), pp. 31–56; Pelkmans and Correia de Brito, "Enforcement in the EU single market" (Centre for European policy studies, 2012).

prevent or counter persistent infringement and intentional defection,[11] i.e. financial penalties (3), conditionality arrangements (4), and the suspension of membership rights (5). We will also consider the proliferation of procedures and arrangements centred on the enhanced monitoring of (potentially) critical situations (6). In doing so, we will raise the question of whether the new elements of the "toolbox" are likely to improve the implementation of EU law. We shall furthermore discuss whether they risk upsetting the constitutional template of the EU, sketched out below in section (2), thus producing the unwanted or dangerous side-effects that are encapsulated in the metaphor of Pandora's box.

2. Structural imperatives and normative principles of centralized enforcement in the EU

The procedures at the disposal of the EU to enforce EU law *vis-à-vis* Member States are all "objective" in character: they tend to disregard completely issues of fault and retribution, and they focus instead on the prevention of breaches of EU law objectively defined and, should such breaches arise, on their swift correction.[12] In addition to object and purpose, they tend to share a number of other features falling in the categories of, respectively, "structural constraints" and "normative principles".

The first such feature – inherent in the nature of the EU itself – is a focus on cooperation. All measures and procedures taken *vis-à-vis* Member States are embedded in a legal system that conceives of State compliance with EU law as a voluntary act. This is different from stating that compliance with EU law is left to the *bon vouloir* of each State. Indeed, the very existence of the infringement procedure presupposes a duty to implement EU law faithfully,

11. For an interesting discussion of capacity limitations and defection as combined causes of non-compliance, and of the managerial and enforcement approaches as complementary solutions thereto, see Tallberg, "Paths to compliance: Enforcement, management, and the European Union", 56 IO (2002), 609–643.

12. See e.g., referring to the infringement procedure, Case C-71/97, *Commission* v. *Spain*, [1998] ECR I-5991, paras. 14 and 15: "… the procedure laid down in Article 169 of the Treaty is based on the objective finding that a Member State has failed to fulfil its obligations under the Treaty or secondary legislation…. When such a finding has been made… it is irrelevant whether the failure to fulfil obligations is the result of intention or negligence on the part of the Member State responsible, or of technical difficulties encountered by it". This sets law enforcement *vis-à-vis* Member States apart from certain procedures that can be instituted against individuals, e.g. under Art. 5(1) of Regulation 2988/95 "on the protection of the European Communities financial interests", O.J. 1995, L 312/1: "*Intentional* irregularities or those caused by *negligence* may lead to the following administrative penalties…" (emphasis added). See also Better Monitoring Communication, cited *supra* note 10, p. 12.

and Article 197 TFEU stresses that the correct discharge of that duty is "essential for the proper functioning of the Union" and, as such, is a "matter of common interest". Still, compliance with EU law by the Member States is ultimately voluntary. Quite apart from the fact that belonging to the EU is a voluntary act in the first place, and remains so even after accession (see Arts. 49 and 50 TEU), the EU is, unlike several federal States, not even theoretically empowered to use coercion in order to enforce EU law against (or *in lieu* of) a recalcitrant Member State.[13] The lack of *force légitime* is indeed a defining feature of the EU as a polity that is not a (federal) State, and whose constituent entities retain full statehood.[14] Short of radical changes in the nature of the polity, then, there is a structural limit to the "tools" with which the EU can be endowed: they may go beyond a purely declaratory infringement procedure if need be, but never so far as the use of force. This also implies that centralized enforcement, even at its strongest, must elicit (and cannot replace) "sincere cooperation" in the sense of Article 4(3) TEU. Its *raison d'être* is thus to render operational a culture of joint and individual responsibility of Member States and of the EU for the social, economic and political situation and for observance of the rule of law within the Member States.

Though not necessarily inherent in enforcement procedures against the Member States, a further feature follows closely from the previous one. It is at the very least advisable that procedures whose exclusive focus is on preventing or correcting breaches, and doing so through persuasion, leave ample room for mutual communication and negotiated solutions. This is all the more advisable since it makes it possible to weed out efficiently instances of non-compliance that are due to interpretive doubts and misunderstandings, and to avoid resource-intensive proceedings for institutions whose enforcement resources are notoriously scarce.[15]

Shaped by such structural constraints, centralized enforcement of EU law *vis-à-vis* the Member States is, like all the activities of the EU, subject to a number of principles of primary law. The expression "fair enforcement"

13. Cf. e.g. with Swiss *Bundesexekution* (Häfelin, Haller and Keller, *Schweizerisches Bundesstaatsrecht*, 8th ed. (Schulthess, 2012), paras. 1240 et seq.), German *Bundeszwang* (Art. 37 Grundgesetz; see Hömig (Ed.), *Grundgesetz für die Bundesrepublik Deutschland*, 10th ed. (NOMOS, 2013), note on Art. 37) and the Constitution of the United States (Art. I s. 8 clause 15 (Powers of Congress): "To provide for calling forth the Militia to execute the Laws of the Union".

14. See Brunkhorst, "A polity without a State? European constitutionalism between evolution and revolution", in Eriksen, Fossum and Menéndez (Eds.), *Developing a Constitution for Europe* (Routledge, 2004), pp. 90–108; tersely, although focusing on the lack of coercion *in* (rather than *against*) the Member States, Dashwood, "Position paper: EC powers and Member States powers", in Dashwood (Ed.), *Reviewing Maastricht: Issues for the 1996 IGC* (Sweet & Maxwell, 1996), p. 6; Dashwood, "States in the European Union", 23 EL Rev. (1998), 213.

15. Tallberg, op. cit. *supra* note 11, p. 617; Smith, op. cit. *supra* note 5.

summarizes them well.[16] Under Article 4(2) TEU, Member States are protected by the EU's duty to respect their "equality … before the Treaties". In our context, the principle translates into an entitlement to equal treatment on the part of the institutions in the application of EU law, regardless of considerations of size, might or wealth. It is worth stressing that the principle forbids "unjustified" differences of treatment, not all differences of treatment. It "requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified".[17] In light of the wide differences in e.g. size, demography, wealth and administrative capacity existing among the Member States, differences of treatment are indeed enshrined in the Treaties and may be mandated "before" them (i.e. in their application) by the principle of equal treatment itself.

This substantive guarantee is closely related to the procedural guarantees flowing from the understanding of the EU as a "union of law", requiring in principle that measures directed at a Member State be duly reasoned, adopted after a due process of law and amenable to judicial review.[18]

These and other relevant principles – such as the principle of proportionality – are binding on the EU institutions, both when they apply the enforcement procedures provided for in the Treaties and when they devise new ones in secondary legislation. They do not of course override contrary stipulations in primary law[19] – but they still provide relevant reference points in assessing special mechanisms established thereunder, inasmuch as they embody values that are important for the cohesion and legitimacy of the EU.

3. Beyond declaration: The discovery of financial penalties

3.1. *Introductory remarks*

For the best part of the history of the EU, centralized enforcement of EU law has been practically synonymous with the original infringement procedure

16. Better Monitoring Communication, cited *supra* note 10, para 5: "Applying the legislation properly and complying with it are essential to a climate of trust between the Member States, who can be sure that the law will be *fairly enforced*…" (emphasis added).

17. See e.g. Case C-304/01, *Spain* v. *Commission*, [2004] ECR I-7655, para 31.

18. See in particular, on the judicial aspect of the rule of law principle and its connection with the equal treatment of Member States, Case C-336/09 P, *Poland* v. *Commission*, judgment of 26 June 2012, nyr, para 38.

19. See also Opinion of A.G. Cruz Villalón in *Poland* v. *Commission*, ibid., para 31; concerning specifically Art. 4(2) TEU this flows directly from the wording of the provision as noted by Vedder in Vedder and Heintschel von Heinegg (Eds.), *Europäisches Unionsrecht* (Nomos, 2012), Artikel 4 EUV, para 15.

laid down in Articles 169 et seq. EEC. Upon finding that a State was in breach of Community law, the ECJ would issue a declarative judgment entailing an obligation for the State concerned to take corrective action (see now Art. 260(1) TFEU). Failure to do so could lead only to a new infringement procedure *("manquement sur manquement")*, potentially resulting in a further declaration of infringement, without any additional sanction being imposed. It is something of a simplification to say that the effectiveness of this original infringement procedure relied exclusively on the "shaming" of the Member State concerned:[20] according to the Court's own case law on the structural principles of EC law, far-reaching *internal* consequences were already at the time indirectly attached to an infringement finding, such as the inapplicability of national legislation found to be contrary to EC law, and the duty on the State to compensate for any damage flowing from an infringement.[21] Yet it is accurate to say that *in the relationship between the Community and the offending Member State* all that the Community could do was to declare or re-declare a breach.

This was the perfect embodiment of the template sketched out in the previous section: a purely objective and non-coercive procedure, seeking prompt return to legality across the broad spectrum of EC law, usually through cooperation[22] and negotiation, but as a last resort through Court proceedings,[23] and a "fair" procedure, characterized in particular by far-reaching protection of the Member States' rights of defence.[24]

The first step beyond this "pure" template was taken with the Maastricht Treaty, which introduced financial penalties as the possible outcome of *manquement sur manquement* (see below 3.2) and kick-started the proliferation of special procedures potentially leading to financial penalties in the EMU (see below 3.3).

20. Kilbey, "The interpretation of Article 260 TFEU (ex 228 EC)", 35 EL Rev. (2010), 370.

21. See cases cited *supra* note 4. Also Case 6/60, *Humblet* v. *Belgian State*, [1960] ECR 559, para 2, p. 568 et seq.

22. See in particular Case C-494/01, *Commission* v. *Ireland*, [2005] ECR I-3331, paras. 42–45.

23. Statistically, as consistently documented by the annual reports of the Commission on Monitoring the application of EU law, only a small minority of cases is not solved by negotiation at pre-litigation stage and therefore reaches the Court: see Harlow and Rawlings, "Accountability and law enforcement: The centralised EU infringement procedure", 31 EL Rev. (2006), 455. See also Prete and Smulders, "The coming of age of infringement proceedings", 47 CML Rev. (2010), 9.

24. Ibid., at 33 et seq. and 41.

3.2. *Financial penalties in the infringement procedure*

The perception that Member States were no longer complying with the judgments of the ECJ as diligently as required led the Commission to raise the issue of "sanctions" in the 1991 Intergovernmental Conference.[25] Various ideas were canvassed, such as suspending EU payments to the defaulting State, as provided for by Article 88 ECSC; granting additional annulment and/or injunctive powers to the Court; or, as Germany suggested, leaving it ultimately to the Council to decide on appropriate "measures" in case of *manquement sur manquement*.[26] In the event, the Treaty was amended by conferring on the ECJ the power to impose "a lump sum or penalty payment" on Member States found to be in breach of compliance with a previous judgment.

The legal features of this new procedure have since been shaped by abundant administrative and judicial practice.[27] The Commission has developed three criteria for the calculation of penalties, later endorsed by the Court: duration of non-compliance, seriousness, and the "ability to pay" of the Member State concerned, which in turn is calculated on the basis of the gross domestic product of each country and of its voting rights in the Council.[28] The landmark *Commission* v. *France (fisheries)* case has furthermore established that – contrary to the wording of Article 260(2) and to the way in which it was previously understood – the Court may impose "a lump sum *and/or* penalty payment".[29] This has provided the *manquement sur manquement* procedure with two differentiated and complementary arms that can be mobilized independently and, if need be, cumulatively: penalty payments, which aim at bringing to an end ongoing situations of non-compliance;[30] and lump sum

25. See in particular the Seventh annual report on Commission monitoring of the application of Community law, O.J. 1990, C 232/1, para 4(e) and Table 10; Commission Opinion of 21 Oct. 1990 on the Proposal for amendment of the EEC Treaty with a view to Political Union, COM(90)600, p. 24.

26. See in particular the Commission's initial contributions to the IGC, SEC (91) 500, p. 127 et seq. and the Note *(Vermerk)* of the German delegation of 16 May 1991, CONF-UP 1811/91. See also Kilbey, "Financial penalties under Article 228(2) EC: Excessive complexity?", 44 CML Rev. (2007), 745 et seq.

27. On the practice relating to Art. 260 TFEU, see Kilbey, op. cit. *supra* notes 20 and 26; Peers, "Sanctions for infringement of EU law after the Treaty of Lisbon", 18 EPL (2012), 33–64; Wennerås, op. cit. *supra* note 5 and "A new dawn for Commission enforcement under Articles 226 and 228 EC: General and persistent (GAP) infringements, lump sums and penalty payments", 43 CML Rev. (2006), 31–62.

28. See Communication from the Commission, Application of Article 228 of the EC Treaty, SEC (2005) 1658; Case C-387/97, *Commission* v. *Greece*, [2000] ECR I-5047, paras. 84–92.

29. Case C-304/02, *Commission* v. *France*, [2005] ECR I-6263, paras. 80 et seq.

30. See in particular Case C-121/07, *Commission* v. *France*, [2008] ECR I-9159, para 27; Case C-610/10, *Commission* v. *Spain*, judgment of 11 Dec. 2012, nyr, para 96.

payments, which penalize past breaches and, in a forward-looking perspective more consonant to Article 260 TFEU, aim at the "effective prevention of future repetition of similar infringements [by means] of a dissuasive measure", especially *vis-à-vis* States that are repeat offenders in the relevant policy area.[31]

This significant judge-made reform has been followed by Treaty reforms designed to make the procedure swifter and more effective.[32] With the Lisbon Treaty, the *manquement sur manquement* procedure of Article 260(2) TFEU has been simplified by removing the reasoned opinion stage during the pre-litigation procedure,[33] with an expected reduction of the duration proceedings to 8–18 months, down from the previous estimate of 12–24 months.[34] Furthermore, the Commission has been given the power under new Article 260(3) TFEU to request a lump sum or penalty payment directly in the first infringement procedure in narrowly defined cases, i.e. when a Member State fails to notify the transposition of a directive adopted under the legislative procedure.[35]

3.3. *Financial sanctions in the area of macroeconomic policy*

3.3.1. *Sanctions in the case of excessive deficit*

In parallel with the introduction of financial penalties for the purpose of enhancing the authority of ECJ decisions, the Treaty of Maastricht introduced a separate set of financial sanctions which apply only within the Economic and Monetary Union, and only with regard to Member States which have introduced the euro (Art. 139(2)(b) TFEU). These financial sanctions are aimed at remedying "excessive government deficits", prohibited under Article 126(1) TFEU. The "excessive deficit" sanctions are not restricted to

31. See in particular *Commission* v. *France*, cited *supra* note 29, paras. 56 et seq.; Case C-369/07, *Commission* v. *Greece*, [2009] ECR I-5703, para 145.

32. See the *travaux* of the Convention on the Future of Europe, from which the present wording of Art. 260 TFEU originates: Final report of the discussion circle on the Court of Justice, CONV 636/03, paras. 28 et seq., and the Praesidium's draft Articles on the Court of Justice and the High Court, CONV 734/03, *ad* Art. 228.

33. Henceforth, the only pre-litigation procedural step is the sending of a letter of formal notice, and non-compliance with a previous judgment is to be determined by reference to the deadline specified therein: *Commission* v. *Spain*, cited *supra* note 30, para 67.

34. Communication from the Commission, Implementation of Article 260(3) of the Treaty, O.J. 2011, C 12/1, para 3.

35. On the features of the new procedure, see ibid. and Peers, op. cit. *supra* note 27, p. 39. The particular form of infringement falling under Art. 260(3) has been a longstanding concern of the Commission: see e.g. Seventh annual report on Commission monitoring of the application of Community law, O.J. 1990, C 232/1, para 5(d); Communication from the Commission, A Europe of results – Applying Community law, COM(2007)502, p. 9.

fines. According to Article 126(11) TFEU, they may also comprise other financial sanctions, e.g. non-interest-bearing deposits.

Within the scope of application of Article 126, the possibility of bringing infringement proceedings pursuant to Articles 258 and 259 TFEU cannot be exercised (Art. 126(10) TFEU). Therefore the ordinary instrument of financial penalties, pursuant to Article 260(2) TFEU, is not applicable.

Exclusive within its scope of application, the mechanism foreseen in Article 126 is also specific as to the procedure to be followed and the nature of the sanction. Those specificities bear on its effectiveness, predictability and fairness. In fact, although written in legal terms, the procedure is marked by the complete absence of judicial competence to scrutinize decisions taken in this context. It is the Council which ultimately decides whether a sanction must be imposed on a Member State and what that sanction will be. The highly sensitive issue of national government deficits led to this awkward construct of a prohibition, which is ultimately assessed and decided by a political institution. The same institution "may" (Art. 126(9) and (11) TFEU) impose sanctions. Obviously, such a decision is taken according to political criteria – a fact that raises *inter alia* the question of whether all States are indeed subject to the same discipline, or whether a more lenient treatment is in fact reserved to the larger and most powerful States.[36]

The result of this arrangement is striking: since the introduction of the euro in 1999, the sanctions provided for by Article 126 have not been used in a single case, whilst at the same time the number of Member States found to be in breach of the excessive deficit prohibition was up to 17 in 2013. Especially since the financial crisis from 2008 onwards, the weak efficacy of this instrument has become apparent. Quite rightly, it has been styled in its practical operation as a "macroeconomic constitution of mutual congratulations".[37]

That weakness has not, however, been attributed to the intrinsic contradiction between the Treaty concept of continuing national responsibility for macro-economic policy and common standards as far as the results of national policy are concerned. Hence, instead of treaty reforms aimed at alleviating the contradiction, the EU legislature adopted implementing legislation for Article 126 TFEU attempting to facilitate and sharpen sanctions with the help of a simplified decision-making procedure in the Council. To that end, Regulation 1173/2011 on the effective enforcement of budgetary surveillance in the euro area[38] sets out a system of sanctions for

36. For an early illustration see Case C-27/04, *Commission* v. *Council*, [2004] ECR I-6649.

37. Adamski, "Europe's (misguided) constitution of economic prosperity", 50 CML Rev. (2013), 50.

38. O.J. 2011, L 306/1.

enhancing the enforcement of the "Stability and Growth Pact" as regulated by Article 126 and Regulation 1467/97.[39] In the case of particularly serious non-compliance with budgetary policy obligations ensuing from Regulation 1467/97, the Council may require the Member State concerned to lodge with the Commission a non-interest-bearing deposit amounting to 0.2 percent of its GDP in the preceding year (Art. 5(1) of Regulation 1173/2011). Moreover, the Council may impose fines if a Member State has not taken effective action to correct its excessive deficit (Art. 6).

Contrary to the procedure provided for in Article 126 TFEU, Council decisions pursuant to Articles 4, 5 and 6 of Regulation 1173/2011 are deemed to be adopted by the Council unless it decides, within ten days, to reject the recommendation submitted by the Commission, by a qualified majority (Arts. 4(2), 5(2), and 6(2)).

The same Regulation introduces a new sanction against Member States who intentionally or by serious negligence misrepresent deficit and debt data (Art. 8). In this case also the Council may impose fines. The simplified decision-making procedure does not, however, apply here; instead, a positive decision of the Council on a recommendation of the Commission is required.

3.3.2. *Sanctions in case of non-compliance with macro-economic policy decisions*

Whilst the previous category of financial penalties was in essence already provided for by the TFEU, an additional new system of sanctions has been established in order to enforce corrective measures in respect of excessive macroeconomic imbalances in the euro area. The new system results from two Regulations, 1176/2011[40] and 1174/2011.[41] Pursuant to Article 121(3) TFEU, the former establishes detailed rules for the detection of macroeconomic imbalances for the purpose of "multilateral surveillance". Regulation 1174/2011 introduces sanctions for situations in which Member States have not followed the recommendations of the Council to take corrective action. The sanctions consist either of an interest-bearing-deposit or of an "annual fine" (Art. 3(2)). The decision-making procedure follows the same pattern as sanctions in the case of excessive deficits:[42] decisions to impose sanctions are deemed to be adopted by the Council unless it decides, by a qualified majority,

39. Regulation 1467/97, O.J., 1997 L 209/6, as amended by Regulation 1177/2011, O.J. 2011, L 306/33.

40. Regulation 1176/2011 on the prevention and correction of macroeconomic imbalances, O.J. 2011, L 306/25.

41. Regulation 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, O.J. 2011, L 306/8.

42. See part 3.3.1.

to reject the Commissions recommendation within ten days of its adoption by the Commission (Art. 3 (3)).

The adoption by the EU legislature of "detailed rules for the multilateral surveillance procedure" is explicitly provided for by Article 121(6) TFEU. It is, however, doubtful that this Treaty provision, in conjunction with Article 136 TFEU, authorizes measures beyond those expressly mentioned in the Treaty ("warning", "recommendations"; see *infra* 3.4).

3.3.3. *Sanctions in the context of the Fiscal Compact Treaty*

The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union of 2 March 2012 ("Fiscal Compact Treaty")[43] concluded outside the framework of the TEU between 25 Member States represents a "special agreement" pursuant to Article 273 TFEU[44] and is intended to ensure the transposition of criteria and limitations for the establishment of national budgets into national law (Art. 3(1) of the Treaty).

The system of sanctions provided therein differs from those referred to above in sections 3.3.1 and 3.3.2, inasmuch as it is based on the traditional judicial system of sanctions provided for by Articles 258–260 TFEU. Compared to Article 259 TFEU, Member States enjoy simplified access to the Court. In case of non-compliance with a judgment finding a breach of obligations deriving from the Treaty, the Court may impose a time limit for the adoption of the requested measures. A failure to act within this time limit may lead to the imposition of a lump sum or penalty payment by the Court, the amount of which is limited to 0.1 percent of the gross national product of the offending State.

3.4. *Assessment*

The introduction of Article 260 TFEU into the scheme of the infringement procedure represented a significant evolution, but not a break away from the constitutional template sketched out above in section 2. Procedurally, with the addition of financial penalties as new *ultima ratio* for particularly persistent breaches, the infringement procedure as a whole has retained its former features: negotiation as the prime means to promote compliance,[45] an "objective" and forward-looking approach to infringements,[46] and procedural

43. See <european-council.europa.eu/media/639235/st00tscg26_en12.pdf> (last visited 16 Feb. 2014).

44. See Art. 8(3) Fiscal Compact Treaty.

45. See *supra* notes 22–24.

46. As noted, even lump sum payments, which inherently punish past behaviour, can be reconciled with a non-punitive and preventive philosophy: see *supra* text accompanying note 31.

fairness. Contrary to the suggestions made by the German Delegation at the 1991 IGC, the handling of financial penalties has been wholly entrusted to independent authorities and is based, at least at the judicial stage, thoroughly on the law.[47] As the experience gathered under Article 126 TFEU shows, this is important for the credibility and practical effectiveness of the procedure. It is also consonant with the principles on which the EU is founded, namely the rule of law and equal treatment of the Member States before the Treaties.

It is true that financial penalties – the ultimate outcome of infringement proceedings under Article 260 – inherently tend to have a disparate impact on wealthy and less wealthy Member States. As the Commission noted at the time when they were introduced, "a penalty which hurts one Member State may have little deterrent effect on another" – a problem aggravated by the circumstance that "the Member States which are the most frequent offenders are also those which suffer from difficult economic and financial situations and need Community assistance".[48] This potential shortcoming has however been alleviated by the criteria developed by the Commission.[49] There is an intimate and twofold relationship between these criteria and equality between States. On the one hand, whatever their imperfections,[50] the criteria aim by their very existence to bring a measure of predictability and consistency into the exercise of an otherwise unfettered discretion – hence promoting equal treatment in a formal sense.[51] On the other hand, the criterion of the "ability to pay" of the Member State concerned, which the Court and the Commission both tend to link to "effective deterrence", furnishes an essential correction to the potential bias of the instrument against less wealthy States and promotes substantive equal treatment.

These favourable comments do not detract from the fact that infringement proceedings are still capable of vast improvements. From the moment when a violation of EU law comes to the attention of the Commission, until the time when penalties are eventually imposed, the procedure is extraordinarily long and complex. In the reform process leading up to the Lisbon Treaty, the idea of a drastic reform to enhance the effectiveness of centralized enforcement – i.e. giving the Commission the power to establish infringements directly, subject to an annulment action before the Court[52] – was voiced but discarded, regardless of the fact that the Court finds in favour of the Commission in more than 90 percent of the cases brought before it and that the enforcement

47. *Commission* v. *France*, cited *supra* note 29, para 90.
48. Commission's initial contributions to the IGC, op. cit. *supra* note 26, p. 129.
49. See *supra* text accompanying note 28.
50. For a critique see in particular Kilbey, op. cit. *supra* note 20.
51. *Commission* v. *Greece*, cited *supra* note 28, para 84.
52. Final report of the discussion circle on the Court of Justice, cited *supra* note 32, para 28(c).

capacities of the Commission in particular are notoriously limited.[53] Seen in this light, the adjustments introduced by the Lisbon Treaty appear marginal at best. It is true, and remains so after Maastricht and Lisbon, that in the procedure as a whole emphasis is placed on early compliance through negotiation; that, consequently, taking a Member State to Court is conceptually and statistically meant to constitute an exception; and that the imposition of financial penalties triggered by persistent infringement is the very last resort. The result of having to go through two administrative and judicial procedures, the second being only slightly simplified, is however that persistent offenders may be able to disregard their obligations under EU law for a very long time – even indefinitely, in view of the limited resources of the Commission and the taxing requirements of Articles 258–260 TFEU.[54] This might explain the weak deterrent effect of financial penalties under Article 260.[55]

The deterrent effects of financial penalties aiming at compliance in Economic and Monetary Union has also been very limited, albeit for different reasons.[56] As far as sanctions pursuant Articles 126(9) and (11) TFEU are concerned, the political nature of the procedure is a key factor. As pointed out *supra* in section 3.3.1, decision-making power is entrusted to the Council, in which the representatives of governments, and therefore of the potential addressees of such penalties, meet. It is true that the Council acts on a recommendation from the Commission (Art. 126(13) TFEU). This recommendation does not, however, produce the same effect as a proposal. The Council has the power to adopt a decision different from that recommended by the Commission without being subject to the conditions of Article 293(1) TFEU.[57] The central role attributed to the Council adversely affects the credibility of the procedure. The adoption of sanctions is further complicated by the lack of a clear legal, procedural or political legitimization.

53. See Nicolaides and Suren, "The rule of law in the EU: What the numbers say", (2007/1) *Eipascope*, 34; Smith, op. cit. *supra* note 5.

54. Ibid., p. 36 et seq.

55. Tallberg, op. cit. *supra* note 11, contends at p. 619 that the "unequivocal picture [emerging from available figures] is one of a highly deterrent mechanism". Nicolaides and Suren, op. cit. *supra* note 53, offer the opposite conclusion at p. 39. It is at any rate noteworthy that even after the Court imposed the first penalties and strengthened the mechanism in *Commission* v. *France (fisheries)*, cited *supra* note 29, the number of judgments not complied with has continued to show a roughly upward trend and amounted to 206 in 2004, up from 100 in 2000, and to about 188 – if one excludes the new Member States for the sake of comparability of data – in 2009 (see Annex V of the 22nd and 27th Monitoring reports, SEC (2005) 1147 and SEC (2010) 1144; for the historical series between 1993 and 2000, see Theodossiou, "An analysis of the recent response of the Community to non-compliance with Court of Justice judgments", 27 EL Rev. (2002), 44 et seq.

56. See Hinarejos, op. cit. *supra* note 8.

57. Case C- 27/04, *Commission* v. *Council*, [2004] ECR I-6649, para 91.

The facts that may lead to penalties (failure "to take, within a specified time limit, measures … ") lack precision and may therefore be controversial from the outset. Moreover, the assessment made by the Commission as to whether the Member State in question has taken the measures required by the Council pursuant to Article 126(9) is not made in an adversarial proceeding, nor is it in any way public. Finally, no provision is made for the participation of the European Parliament.

The additional sanctions in the case of excessive deficit, introduced by legislation (*supra*, 3.3.1), may, owing to the system of reversed majority, be more easily adopted in the Council and might therefore have a stronger deterrent effect. As far as the precise definition of the incriminated facts and the lack of parliamentary and judicial accountability are concerned, however, they run up against the same objections as the procedure provided for by Article 126 TFEU. The timid attempt to include the European Parliament in the procedure, by giving it information *ex post facto* ("economic dialogue"), does not remedy this fundamental shortcoming.

The newly introduced penalties to promote compliance with macroeconomic policy decisions (*supra* 3.3.2) give rise to the same objections. In addition, the fact that those sanctions render macroeconomic policy decisions binding on the Member States makes it doubtful that they fall within the competences of the EU to "coordinate" national policies through (non-binding)[58] recommendations. The legislative powers of the EU in this area are limited to the adoption of *procedural rules* for the coordination of national policies. By introducing sanctions, the EU competence for the coordination of economic policy is surreptitiously transformed into a competence for the adoption of *binding substantive policy decisions*. This makes enforcement in this area even more contestable.

Ironically, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union of 2 March 2012 (*supra* 3.3.3) marks a partial return to the general, court-driven system of financial penalties foreseen under the general infringement procedure – albeit a partial return, lending further complexity to centralized enforcement *vis-à-vis* Member States, and making the case for political enforcement procedures in the EMU more fragile than ever.

The various shortcomings listed above are compounded by the fact that the Treaties make no specific provision for the enforcement of financial penalties. It is a matter of debate in the literature whether the Commission could enforce ECJ judgments under Articles 280 and 299 TFEU,[59] whether it could set-off

58. See Art. 288 TFEU.
59. For sanctions imposed by the Council, this is excluded by the clear wording of Art. 299.

the financial penalty against sums that are due to the defaulting Member States,[60] or whether it could resort to the means that were once provided for by Article 88 of the ECSC Treaty, i.e. suspend the sums owed to the State until the judgment is complied with.[61] To date, this has remained an academic debate: as far as could be ascertained, the Member States have either met their obligations or have been expressly excused by the Commission, although in one case the Commission had to threaten to suspend Community aid in order to induce the Member State concerned to pay.[62] Yet, this may change in the future, especially in view of the increasingly frequent use of financial penalties under Article 260(2) and of the new opportunities provided by Article 260(3) and by secondary legislation in the field of economic policy.

In short, if indeed the EU needs stronger centralized enforcement, much would speak in favour of a comprehensive and ambitious reform – radically simplifying infringement procedures, clarifying and minimizing issues of enforceability (e.g. by explicitly authorizing set-offs), doing away to the greatest possible extent with "political" *Ersatz*-procedures for the EMU (especially now that Court competence has been accepted in principle in the ESM Treaty), providing the Commission with adequate resources, etc. But after the missed opportunity of Lisbon, official reflections in this direction are still not perceptible.

In a positive vein, proposals have been submitted that aim at least to reduce the legitimacy deficit of EMU sanctions by way of both Treaty amendments and measures to be adopted under the present Treaties.[63] The proposals comprise *inter alia* a reconsideration of the chapter on economic policy (Arts. 120–126 TFEU) with a view of introducing a competence of the Union to adopt "positive measures" (e.g. minimum standards) in matters of economic policy. Moreover, it is proposed to replace the decision-making procedures in Articles 121, 122 and 126(9), (11) and (14) by the ordinary legislative procedure. As a first step in this direction the Council could undertake to voluntarily consult the European Parliament in all matters concerning EMU.

60. Favourably disposed: Opinion of A.G. Léger in Case C-87/01, *Commission* v. *CEMR*, [2003] ECR I-7617, paras.71–73.

61. For a discussion on these aspects, see Härtel, "Durchsetzbarkeit von Zwangsgeld-Urteilen des EuGH gegen Mitgliedstaaten", (2001) EuR, 617–630; El-Shabassy, *Die Durchsetzung finanzieller Sanktionen der Europäischen Gemeinschaft gegen ihre Mitgliedstaaten* (Peter Lang, 2008); Theodossiou, op. cit. *supra* note 55, pp. 39 et seq.

62. Peers, op. cit. *supra* note 27, p. 52.

63. Bieber, "The rules on the ordinary functioning of EMU – Shortcomings and proposals for reform with regard to democratic principles", in Maduro, de Witte and Kumm (Eds.), *The democratic governance of the Euro*, Robert Schuman Centre for advanced studies, Policy Paper RSCASPP 2012/08, European University Institute, San Domenico (2012), pp. 13–20.

However, as far as enforcement itself is concerned, the current state of affairs has stimulated a growing appetite for alternative mechanisms capable of "reduc[ing] recourse to infringement proceedings".[64] Indeed, in the context of the fisheries policy, the Court of Auditors observed in 2007 that "proceedings for failure to fulfil an obligation are long, cumbersome and effective only exceptionally … allowing serious shortcomings to persist in the Member States", and recommended the introduction of "more responsive instruments of sanction such as, for example, the capacity to suspend payments".[65] Such other mechanisms, however, do not always display the "qualities" of the infringement procedure, as will be pointed out below.

4. The growing role of conditionality *vis-à-vis* the Member States

4.1. *Introduction*

In comparison to *ex post facto* penalties that rely essentially on their deterrent effect and therefore produce rather unpredictable results, "conditionality" at first sight presents several advantages permitting a "fine-tuning" of pressure to comply. It is therefore not surprising that it has gained attention recently as a tool to be used either in combination with or as an alternative to sanctions.

Conditionality is in fact a traditional feature of EU financial assistance to *third* countries, be it pre-accession aid, neighbourhood aid or development aid: partner States are to benefit from such assistance as long as EU institutions are satisfied that they observe specific standards of conduct, including the triad "democracy/rule of law/human rights" and indeed, for those neighbouring States entertaining close and asymmetric relations with the EU, approximation to or implementation of relevant parts of the EU *acquis*.[66]

As for financial assistance to EU Member States, conditionality has played a much more modest role in the past. The Treaty of Maastricht first introduced conditionality in certain areas of economic and monetary policy:

64. Communication from the Commission, A Europe of results – Applying community law, COM(2007)502, note 6.

65. Court of Auditors, special Report 7/2007 on the control, inspection and sanction systems relating to the rules on conservation of Community fisheries resources, O.J. 2007, L 317/1, headings to paras. 96 et seq. and 105 et seq. (see also para 123), and para 133.

66. See e.g. the Cotonou partnership agreement of 23 June 2000, O.J. 2000, L 317/3, Arts. 8–11; Regulations 1085/2006, O.J. 2006, L 210/82, Art. 21; 1638/2006, O.J. 2006, L 310/1, Art. 28; 1905/2006, O.J. 2006, L 378/41, Art. 37. See Hoffmeister, *Menschenrechts- und Demokratieklauseln in den vertraglichen Aussenbeziehungen der Europäischen Gemeinschaft* (Springer, 1998).

Articles 122(2) and Article 143(2) TFEU establish links between granting exceptional financial assistance to Member States and "*conditions*", which in both cases are to be fixed by the Council – without the Treaty laying down any criteria or limitations. A more oblique reference to conditionality, also linked to the EMU, is to be found in the Protocol on Economic, Social and Territorial Cohesion, which makes eligibility to the Cohesion Fund conditional on having "a programme leading to the fulfilment of the conditions of economic convergence as set out in Article 126 [TFEU]". The idea of conditionality in a broader sense – i.e. that the benefit of EU funding is in some way made conditional *inter alia* on compliance with EU law – has long been incorporated to varying degrees throughout the secondary legislation governing EU funding. It is only now, however, that the institutions are starting to make systematic use of conditionality to promote compliance with EU law, both in the EMU (4.2) and under funding regulations (4.3).

4.2. *The fulfilment of conditions as prerequisite to financial assistance in the context of Economic and Monetary Union*

The fulfilment of conditions in order to qualify for financial assistance from the EU in the context of the EMU represents a particular case inasmuch the area of application is limited to the EMU, while the scope of the conditions is not circumscribed by the Treaty. The Council has interpreted this lacuna as a conferral of the power to lay down far-reaching conditions, covering broad policy areas, from which ordinary legislation of the EU would be excluded because they are outside the scope of the competences delimited by the Treaties.

Two provisions of the TFEU serve as the legal foundations for such conditions: the first is Article 122(2) TFEU, concerning Member States in difficulties or seriously threatened by difficulties by natural disasters or exceptional occurrences beyond their control; the second is Article 143(2), which authorizes the granting of financial assistance to Member States outside the euro area which are in difficulties as regards their balance of payments. For both provisions, implementing legislation has been enacted, which, in general terms, stresses the conditionality of the assistance in question, again without indicating the limits and scope of the conditions. For the implementation of Article 122(2), Regulation 407/2010 establishing a European financial stabilization mechanism states, in Article 3(3)(b), that the Council is to establish the general economic policy conditions which are attached to EU financial assistance with a view to re-establishing a sound economic or financial situation in the beneficiary Member State and to restoring its capacity to finance itself on the financial markets. These

conditions are to be defined by the Commission, in consultation with the ECB.[67]

Regulation 407/2010 has been applied with regard to two Member States (Portugal[68] and Ireland[69]). In both cases, detailed conditions were imposed, extending far beyond general economic policy measures. Portugal, for example, was requested to reorganize and significantly reduce the number of local government administrations, to reduce the maximum duration of unemployment insurance benefits to 18 months, to cap unemployment benefits and so on.[70]

The competence to fix conditions accompanying financial assistance to Member States outside the euro area pursuant to Article 143(2) TFEU has been defined in a similarly open-ended manner. According to the implementing Regulation 322/2002, which establishes a facility providing medium-term financial assistance for Member States' balance of payments, the Council is to decide on the economic policy conditions attached to that financial assistance, the details of which must be set out in a Memorandum of Understanding concluded by the Commission and the Member State concerned.[71] Such conditions have been imposed on Romania in conjunction with a loan granted by the EU pursuant to Regulation 322/2002.[72]

It is interesting to note that the conditions referred to above closely resemble the preliminary stage of the sanction procedure for excessive deficit.[73] In fact, the "measures" required by the Council to be adopted by Greece pursuant to Article 126(9) TFEU are in part identical to those imposed on Portugal pursuant to Article 122(2) TFEU. One formal difference should be kept in mind: the details of the conditions established pursuant to Articles 122(2) and 143(2) are fixed in the "memorandum of understanding" with the agreement of the Member State concerned,[74] whilst "measures" pursuant Article 126(9) TFEU are unilaterally imposed by the Council. It is however doubtful whether this difference matters in practice.

67. O.J. 2010, L 118/1.

68. Implementing Decision 2011/344, O.J. 2011, L 159/88, as amended by implementing Decision 2013/703, O.J. 2013, L 322/31.

69. Implementing Decision 2011/77, O.J. 2011, L 30/34, as amended by implementing Decision 2011/827, O.J. 2011, L 329/7.

70. See Art. 3(6)(f),(h) Implementing Decision 2011/344, cited *supra* note 68.

71. Regulation 332/2002, O.J. 2002, L 53/1, as amended by Regulation 431/2009, O.J. 2009, L 128/1, Art. 3(2)(b) and Art. 3(a).

72. Decision 2009/459, O.J. 2009, L 150/8, Art. 3(5).

73. Art. 126 TFEU, see section 3.3.1.

74. Regulation 332/2002 as amended by Regulation 431/2009, cited *supra* note 71, Art. 3(a): "The Commission and the Member State concerned shall conclude a Memorandum of Understanding … ". A similar clause has been written into Regulation 407/2010, cited *supra* note 67, Art. 3(5).

At least in the area of economic policy, the close connection between sanctions and conditions as instruments for achieving compliance thus becomes apparent.

Conditionality is also a centrepiece of the two successive instruments which have been established separately from the EU Treaties by the euro Member States, with the aim of providing financial assistance to those of them experiencing financial difficulties "caused by exceptional circumstances beyond (their) control". Both the European Financial Stability Facility (EFSF) of 7 June 2010[75] and its successor, the European Stability Mechanism of 2 February 2012[76] render the availability of assistance "conditional … in relation to budgetary discipline and economic policy guidelines and their compliance … " (EFSF)[77] or require that the agreement ("Memorandum of Understanding") between the Commission and the Member State requesting assistance be "fully consistent with the measures of economic policy coordination provided for in the TFEU, in particular with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned".[78] In both cases, the conditions to be fulfilled remain within the realm of economic policy as circumscribed by the TFEU. Yet, as has been demonstrated earlier, the open-ended texture of Articles 121 and 126 has been used for detailed and far-reaching interventions if Member States were in breach of obligations resulting therefrom. It is therefore most likely that Member States requesting assistance under the ESM may face similar interventions in the form of "conditions" to be fulfilled.

4.3. *Conditionality in the context of EU Funds*

For the purpose of the present discussion, only Funds that can be regarded in a broad sense as assistance to Member States are relevant. This includes, first of all, the so-called "European Structural and Investment Funds" (ESI Funds) – i.e. the European Regional Development Fund, Social Fund, Cohesion Fund, as well as Funds established under the Agricultural and Fisheries Policy[79] –

75. See <www.efsf.europa.eu/attachments/20111019_efsf_framework_agreement_en.pdf> (last visited 26 Apr. 2014).

76. See <www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf> (last visited 2 May 2014).

77. EFSF Framework Agreement, Preamble No. 2.

78. ESM Treaty, Art. 13(3).

79. See Regulation 1303/2013 laying down common provisions on the European regional development fund, the European social fund, the Cohesion fund, the European agricultural fund for rural development and the European maritime and fisheries fund, O.J. 2013, L 347/320.

which are by far the largest items of EU expenditure.[80] Also relevant are many of the Funds established in the framework and in support of other internal policies of the EU. Reference will be made here to the EU Funds relating to the common borders, asylum and immigration policies, where the concept of conditionality is gaining significance.

EU secondary law establishes links of varying intensity between compliance with EU law and the disbursement of funds to (or in) the Member State concerned. For analytical purposes, three main types of links can be distinguished: "conformity" of financed actions (4.3.1), "same-sector" conditionality (4.3.2) and "cross-sectoral" conditionality (4.3.3).

4.3.1. *Conformity of financed actions*

Under the principle of "conformity" or "compliance", common to all the Funds under consideration, actions and programmes supported by EU monies must comply with applicable EU law.[81] This refers not only to EU funding regulations but to EU law in general, e.g. non-discrimination law, environmental law, or public procurement law.[82]

The principle is implemented at all the decisive stages of the funding process. Conformity with EU law is one of the elements that the Commission examines in order to approve national implementing programmes under the various Funds.[83] Such preventive action is complemented by corrective action, when actions that are being or have been financed disclose "irregularities" – i.e. breaches of applicable EU law prejudicing the EU budget – capable of entailing the suspension or cancellation of funding.[84] Under the "shared management" arrangements governing these funds,[85] the task of detecting and correcting such irregularities falls in the first place to national authorities.[86] The Commission nevertheless retains the power to

80. Regulation 1311/2013 laying down the multi-annual financial framework for the years 2014–2020, O.J. 2013, L 347/884, annex I.

81. See e.g. Regulation 1303/2013, cited *supra* note 79, Arts. 6–8; Decision 573/2007, establishing the External borders fund for the period 2007–2013, O.J. 2007, L 144/22, Art. 7(3).

82. See e.g. Notice C(88) 2510 to the Member States on monitoring compliance with public procurement rules in the case of projects and programmes financed by the Structural Funds and financial instruments, O.J. 1989, C 22/3, para 2.

83. See e.g. Regulation 1303/2013, cited *supra* note 79, Art. 15(1)(b); Decision 573/2007, cited *supra* note 81, Art. 18.

84. See Regulation 1303/2013, cited *supra* note 79, Art. 2(35), and Regulation 966/2012 on the financial rules applicable to the general budget of the Union (Financial Regulation), O.J. 2012, L 298/1, Art. 135.

85. See Art. 58(1)(b) and 59 of the Financial Regulation. On the distinction between centralized and shared management, see Schneider, "Europäisches Haushaltsverwaltungsrecht", in Terhechte (Ed.), *Verwaltungsrecht der Europäischen Union* (Nomos, 2011), 959–980; Craig, *EU Administrative Law*, 2nd ed. (OUP, 2012), pp. 57 et seq. and 79 et seq.

86. Financial Regulation, Art. 59(2)(a).

intervene *ex post facto*[87] in order to suspend or withhold the reimbursement of sums that have been spent on actions tainted by irregularity. As Paul Craig has observed, "[t]his effectively amounts to liability for amounts not recovered",[88] liability that may *inter alia* be linked to failure to observe applicable EU law by the beneficiaries of the fund. The EU Courts have furthermore consistently held, in relation to older Regulations governing the Common Agricultural Policy and the Structural Funds, that the notion of "irregularity" also encompasses in this context actions or omissions attributable to the national authorities themselves rather than to the end-beneficiaries of the Funds.[89] This amounts to establishing a direct link between the infringement of applicable EU law by national authorities and the suspension or withholding of EU financial assistance. That conclusion is not contradicted by the Court's view that the above-mentioned "correction" of EU payments is not a penalty, and that the procedure leading to it is distinct and independent of the infringement procedure governed by Articles 258 et seq. TFEU.[90]

Through this form of conditionality, EU funding instruments can be said to promote, over and above statutory objectives such as the reduction of economic disparities, also compliance with EU law through all the supported actions.[91]

However, the rules examined above only condition EU payments to the conformity *of the actions financed* with EU law. They do not empower the Commission to suspend or cancel payments to a Member State on account of a bad track-record in the implementation of EU law – not even when the breaches of EU law occur in the very same sector that is covered by the Fund. The form of conditionality discussed here can therefore hardly be considered to be a tool at the disposal of the EU for enforcing EU law *vis-à-vis* Member States *in general* – the function ascribed to Articles 258 et seq. – or even in

87. Ibid., Art. 59(6); Regulation 1303/2013, cited *supra* note 79, Arts. 83 and 85. See also Härtel, op. cit. *supra* note 61, p. 625; El-Shabassy, op. cit. *supra* note 61, p. 162.

88. Craig, op. cit. *supra* note 85, p. 103.

89. Case T-270/08, *Germany* v. *Commission*, judgment of 21 Nov. 2012, nyr, paras. 24 et seq.

90. See e.g. Case C-332/01, *Greece* v. *Commission,* [2004] ECR I-7699, para 63; *Germany* v. *Commission*, cited *supra* note 89, paras. 26 et seq.

91. For interesting examples see Härtel, op. cit. *supra* note 61, pp. 625 et seq. Highlighting complementarity with the infringement proceeding: "Detention conditions in Lampedusa: Malmström expresses serious concern", MEMO/13/1178, 18 Dec. 2013. The compliance-promoting effect is all the more evident when promoting the effective and uniform application of the relevant *acquis* is enshrined as a self-standing goal of a financial instrument: see e.g. Decision 573/2007, cited *supra* note 81, Art. 3(1)(b) and (c).

policy areas somehow connected to the Funds, short of a direct link to the actions financed.[92]

For such an "enlarged" conditionality to exist, special provision must be made by the EU legislature. At the time of writing, provisions of this kind are rare. However, as the examples given in the next sections suggest, there seems to be a discernible trend towards their increased use. In the absence of rules based on "general" conditionality, i.e. making EU financial assistance conditional upon a good track-record in complying with all of EU law, a useful distinction may be made between rules establishing "same-sector" conditionality, and rules establishing "cross-sectoral" conditionality.

4.3.2. *Same-sector conditionality*

The recently agreed Regulation on the European Maritime and Fisheries Fund (EMFF) provides a clear example of same-sector conditionality.[93] It provides for the suspension or cancellation of payments where the Member State concerned has failed to comply with rules established under the Common Fisheries Policy, in particular those that are "essential to the conservation of marine biological resources", and such non-compliance is liable to affect expenditure. The proposed Regulation empowers the Commission to find such an infringement without going through the infringement procedure, subject to an annulment action before the Court.[94]

The proposed Regulation establishing the instrument for financial support for external borders and visa provides another example. In order to make use of the allotted funds at preferential conditions ("operating support"), interested Member States must fulfil the general condition of "compliance with the Union *acquis* on borders and visa", as well as with various EU soft law instruments relating to these fields.[95] Apart from this rather specific aspect, recently enacted legislation in the field of asylum and borders combines same-sector conditionality together with sanctions in the framework of enhanced surveillance procedures (see *infra* 6).

92. For a discussion on whether the EU could react to failure to comply with a financial sanction under Art. 260(2) TFEU by suspending or cancelling payments in areas having a material connection, see Härtel, op. cit. *supra* note 61, pp. 617 et seq. Opposed, with good arguments, El-Shabassy, op. cit. *supra* note 61, p. 159.

93. Formal adoption of the Regulation is still outstanding at the time of writing. The final compromise text is reproduced in Council doc. 6152/14 ADD 1 REV 1 of 10 Feb. 2014.

94. Ibid., Arts. 101–103 and 106–107. For a commentary, see Commission, Guidance fiche No. 6, "Cases of non-compliance with CFP rules leading to possible interruptions and suspensions", version 2, 23 July 2013.

95. See the Commission Proposal, COM(2011)750, Art. 10.

4.3.3. *Cross-sectoral conditionality*

As for cross-sectoral conditionality, the rules in force until recently offered only one significant example. The successive Cohesion Fund Regulations have always empowered the Council, acting on a proposal of the Commission, to suspend or cancel all or part of the financial assistance accruing to a Member State if it had established the existence of an excessive deficit (Art. 126(6) TFEU) and had subsequently decided that the Member State concerned had not taken appropriate action following its recommendations (Art. 126(8) TFEU).[96]

This form of conditionality, which was applied for the first time in 2012 *vis-à-vis* Hungary,[97] "aim[s] to increase incentives for national governments to conduct sound fiscal policies and put in place the right macroeconomic conditions that are needed to ensure an efficient use of Cohesion Fund resources".[98] In terms of our discussion, it is meant to give additional "teeth" to the Treaty rules on excessive deficits and to measures adopted thereunder, complementary to the rather extended arsenal of penalties and coercive measures – essentially directed at members of the eurozone – already examined above (see sections 3.3 and 4.2).

The link between EU funding and European economic governance has now been substantially strengthened under the concept of "macro-economic conditionality" in the Structural and Investment Funds for 2014–2020. In the first place, it has been extended to *all* Structural and Investment Funds – Agriculture, Fisheries, Regional Development, Social and Cohesion Funds – which, as already noted, together make up by far the largest part of EU funding.[99] In the second place, it now supports compliance with a much broader range of Treaty provisions and measures relating to economic governance, including under the ESM.[100] In essence, EU financial assistance – and more particularly, EU financial assistance to States and regions whose GDP per capita falls below the EU average – has to a large extent become conditional upon respect for a selected sub-set of EU (and non-EU in the case of the ESM) rules, guidelines and recommendations – those relating to economic governance – whose "special status" is considerably enhanced.

96. See the first Cohesion Fund Regulation, Regulation 1164/94, O.J. 1994, L 130/1, Art. 6.

97. See Council Decisions 2012/156, O.J. 2012, L 78/19 (suspension), and 2012/323 (lifting suspension), O.J. 2012, L 165/46.

98. See Commission Proposal for a Council Decision suspending commitments from the Cohesion Fund for Hungary, COM(2012)75, para 1.

99. See Regulation 1303/2013, cited *supra* note 79, Art. 23. This provision is placed in Part Two of the Regulation which, under Art. 1 thereof, applies to all ESI Funds.

100. Ibid., Art. 23, in particular para 9.

4.4. *Assessment*

In *Pringle*, the ECJ seemed to accept without question the assumption that "*strict conditionality*" may contribute to promoting compliance with EU law.[101] While conditionality mechanisms have a distinct advantage over "penalties" in terms of ease of use and responsiveness to infringements, they nonetheless raise a number of questions.

The emerging trend towards the reinforcement of "same-sector" conditionality, which by its very nature tends to concern Funds that are strictly linked to one policy such as the fisheries policy or the migration policies, has a certain inherent logic: in order to benefit from EU funding in a given policy area, the Member State concerned should have "clean hands" in that same area. As commentators have convincingly observed, however, such arrangements do not necessarily guarantee that those who are liable to suffer from the loss of funds are the same as those who caused the infringement and are therefore best placed to remove it.[102] This is problematic in terms of both fairness and effectiveness.

Things are even more problematic when it comes to cross-sectoral conditionality, which at this stage is in reality enlarged "economic governance" conditionality. While acceptable under the former Cohesion Fund Regulations – in light of the Fund's own "genetic" link to economic convergence,[103] the Fund's own limited budget relative to the other structural Funds, and the precise link to measures taken under Article 126 TFEU – the enlarged conditionality provided for in the ESI Funds Regulations raises a number of difficult issues. The one point that has been clearly stressed by other commentators is that whatever its advantages for the economic governance of the EU, enlarged macroeconomic conditionality is bad for the structural and cohesion policies. Thus, the Court of Auditors has observed that "the application of the envisaged macroeconomic conditionality would require careful consideration, since it might entail difficulties for the implementation of CSF programmes, legal uncertainties and a potential risk for the fulfilment

101. Case C-370/12, *Pringle* v. *Government of Ireland*, judgment of 27 Nov. 2012, nyr, para 69. The Court referred to the recent amendment of Art. 136 TFEU, which authorized the establishment of a stability mechanism for the Member States of the euro-area. The ESM Treaty of 2 Feb. 2012 stresses "strict conditionality" of stability support as its purpose (Art. 3) and entrusts the Commission to detail the conditionality attached to financial assistance (Art. 13(3)).

102. Verhelst, *Macro-economic conditionalities in Cohesion policy*, Note for the European Parliament PE 474.552 (Brussels, 2012), p. 44. The Commission has displayed awareness of this problem (Communication from the Commission, Enhancing economic policy coordination for stability, growth and jobs – Tools for stronger EU economic governance, COM(2010)367, p. 10), but it is unclear how it has been catered for it under the instruments adopted since.

103. See Protocol 28 on Economic, Social and Territorial Cohesion.

of long-term obligations taken in the framework of partnership contracts by the respective partners at national and regional level".[104]

We would add that macro-economic conditionality has the potential to generate considerable leverage against a clearly delimited subset of Member States,[105] and is designed to elicit compliance for a sub-set of Treaty norms (which are thereby questionably elevated to *über*-Status) and for EU (and non-EU in the case of ESM) measures of dubious democratic legitimacy and sometimes of dubious legal status.

This may seem appealing in the short-term perspective of consolidating fiscal discipline in a shaky EMU, but it is difficult to see how in the long run such an unbalanced arrangement could contribute to strengthening the cohesion and legitimacy of the EU. Without denying the potential utility of carefully crafted conditionality, much would speak in favour of strengthening the general enforcement procedure, which, as stated, benefits from considerable advantages over these alternative mechanisms from a constitutional perspective.

5. The road not taken: Suspension of membership rights

For a polity such as the EU, with no access to coercion and unable to enforce financial penalties against the will of a recalcitrant State, suspending rights and benefits appears to be the most practical "sanction". Conditionality as just discussed is merely the application of this idea in the financial realm. But the idea itself is capable of a much broader application.

As the Treaties stand, the suspension of membership rights *per se* is only provided for by Article 7 TEU, as the extreme reaction of the EU to equally extreme breaches of the values on which the EU is founded.[106] This provision has been analysed elsewhere, and we may dispense with an analysis of its

104. Court of Auditors, Opinion 7/2011, O.J. 2012, C 47/1, para 20. See also Verhelst, op. cit. *supra* note 102, pp. 46 et seq.

105. According to the projections of the Commission on the allocation of Structural Funds in the period 2014–2020, and taking into account the respective gross national product, the main recipients of the Structural Funds (i.e. those most sensitive to macro-economic conditionality) are the 14 "Cohesion States" plus Cyprus, Spain and Italy. The projections are available at <ec.europa.eu/regional_policy/what/future/eligibility/index_en.cfm> (last visited 17 Feb. 2014).

106. Indeed, according to Lenaerts and van Nuffel, *European Union Law*, 3rd ed. (Sweet & Maxwell, 2011), p. 98, "revocation of membership is not possible". Contrary: Chalmers, Davies and Monti, *European Union Law*, 2nd ed. (CUP, 2010), p. 146. The Treaties do not however include a parallel provision to Art. 8 Statute of the Council of Europe ("Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such

terms here.[107] Several flaws in the conception of Article 7 must however be pointed out. On the one hand, this provision establishes the strongest threat provided for by EU law, whilst on the other hand it lays down the least precise criteria for its application (e.g. breach of "democracy", "rule of law"). Moreover, the procedure envisaged by the TEU for its application is based on the weakest legal considerations and offers hardly any legal protection to the State in question. It lies essentially in the hands of the political rather than judicial organs.

Here too, as in the case of Article 126 sanctions, vague criteria and the unpredictability of political procedures have severely constrained the preventive and corrective effects of Article 7. In fact, in contrast to the ordinary infringement procedures, the EU institutions have never used Article 7 TEU, not even in its preliminary stage (Art. 7(1) TEU). This reluctance certainly cannot be explained by the absence of any misgivings about the constitutional practice in all Member States: since the introduction of Article 7, risks of breaches of the values listed in Article 2 TEU have increased rather than diminished.

Even though the EU institutions display an increasing awareness of the problem, they have so far shunned Article 7 proceedings – but without finding a consistent approach to solving the problem. In 2013, for instance, the Council stated: "The developments in Hungary in 2012 and 2013 have increased *concerns about the judiciary's independence*".[108] The only conclusion which it drew from this finding was recommending to Hungary to "strengthen further the judiciary".[109] A possible breach of Article 2 TEU was not even mentioned. In 2012, instead of initiating a procedure under Article 7 TEU, the Commission opted for launching "technical" proceedings under Article 258 TFEU against Hungary, even though the context of the alleged breaches – the constitutional reforms and their implementation since 2011 –

member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine").

107. For general analyses of Art. 7 TEU, see Smith, op. cit. *supra* note 5; Serini, *Sanktionen der Europäischen Union bei Verstoß eines Mitgliedstaats gegen das Demokratie – oder Rechtsstaatsprinzip* (Duncker & Humblot, 2009); Azoulai and Burgorgue-Larsen, *L'autorité de l'Union européenne* (Bruylant, 2006); Schorkopf, *Homogenität in der Europäischen Union – Ausgestaltung und Gewährleistung durch Art. 6 Abs. 1 und Art. 7 EUV* (Duncker & Humblot, 2000); Palombella and Walker (Eds.), *Relocating the Rule of Law* (Hart, 2009).

108. Council Recommendation of 9 July 2013 on the National reform programme 2013 of Hungary and delivering a Council opinion on the Convergence Programme of Hungary, 2012–2016, O.J. 2013, C 217/37, Recital 15 (emphasis added).

109. Ibid., recommendation No. 5.

raised the more general issue of respect for the rule of law.[110] Eventually, the Court found indeed that the reform of the Hungarian judiciary had breached equality on grounds of age, but the essential questions of the independence of the judiciary and freedom of expression were not expressed.[111] The Court was rather more explicit in Case C-288/12, finding that the independence of the Hungarian data commissioner had been compromised by the Hungarian authorities.[112]

It is interesting to note that with regard to third countries, the EU institutions are less hesitant about launching proceedings which may ultimately lead to a suspension of the rights flowing from membership in common organizations. The possibility of such a suspension is envisaged *inter alia* by the Treaty of 25 October 2005 establishing the Energy Community.[113] By Decision 2013/04 of 24 October 2013, the Ministerial Council of the Energy Community (which comprises two representatives of the EU, one from the Council, one from the Commission) stated that Bosnia-Herzegovina had failed to comply with certain obligations under Article 91(1) of that Treaty, and declared that it would consider this situation as "a serious and persistent breach by a Party of its obligations" pursuant to Article 92 of the Treaty, if Bosnia-Herzegovina did not rectify the breaches before June 2014.[114]

One explanation for the recourse to certain "technical" remedies rather than direct challenges to fundamental breaches of constitutional principles within the EU may be the absence of a systematic monitoring mechanism, based on previously established and sufficiently precise objective criteria. Such criteria – and a formal procedure for their application – do indeed seem to be a precondition for legitimating decisions imposing sanctions under Article 7. In its present, rather primitive, form this provision is regarded on the one hand as

110. For a detailed analysis of the situation in Hungary, see European Parliament resolution of 3 July 2013 "on the situation of fundamental rights: standards and practices in Hungary", No. P7_TA(2013)0315 of 3 July 2013, O.J. 2013, C 319E/92.

111. Case C-286/12, *Commission* v. *Hungary*, judgment of 6 Nov. 2012, nyr. For a different approach to the matter, see the Opinion 661/2012 of the European Commission for democracy through law (Venice commission) on Act CLXII of 2011 on the legal status and remuneration of judges and Act CLXI of 2011 on the organization and administration of courts of Hungary, 19 March 2012.

112. Case C-288/12, *Commission* v. *Hungary*, judgment of 8 Apr. 2014, nyr.

113. O.J. 2006, L 198/18.

114. 11th Energy Community Ministerial Council, Meeting Conclusions, Belgrade, 24th Oct. 2013, No. 14. See <www.energy-community.org/pls/portal/docs/2388178.pdf>. Art. 92(1) of the Treaty reads as follows: "At the request of a Party, the Secretariat or the Regulatory Board, the Ministerial Council, acting by unanimity, may determine the existence of a serious and persistent breach by a Party of its obligations under this Treaty and may suspend certain of the rights deriving from application of this Treaty to the Party concerned, including the suspension of voting rights and exclusion from meetings or mechanisms provided for in this Treaty".

being too strong symbolically – a "nuclear option",[115] which everyone knows will not be used precisely because it is "nuclear" – and on the other hand as not technically suitable for governing the relations of the EU with its Member States.

The European Parliament pointed out this shortcoming in 2013, when it not only criticized the situation in Hungary in detail, but also proposed a mechanism for a permanent control of the situation in the Member States with a view to ensuring compliance by all Member States with the common values enshrined in Article 2 TEU.[116] To that end the European Parliament proposed the establishment of a new mechanism and recommended that this mechanism should:

"– be independent from political influence, as all European Union mechanisms which relate to monitoring Member States should be, as well as swift and effective;
– operate in full cooperation with other international bodies as regards the protection of fundamental rights and the rule of law;
– regularly monitor respect for fundamental rights, the state of democracy and the rule of law in all Member States, while fully respecting national constitutional traditions;
– conduct such monitoring uniformly in all Member States to avoid any risks of double standards among its Member States;
– warn the EU at an early stage about any risks of deterioration of the values enshrined in Article 2 TEU;
– issue recommendations to the EU institutions and Member States on how to respond and remedy any deterioration of the values enshrined in Article 2 TEU".

In the context of Article 7 TEU, monitoring would reflect the much more profound and general concept of *mutual responsibility* for the respect of common values by all Member States rather than occasional and potentially haphazard "punishment". If carried out systematically, it might be an appropriate tool for avoiding the development of pathological situations, and could as a result pre-empt sanctions.

Much in the same line of thinking, the Commission issued in March 2014 a Communication on "A new EU Framework to strengthen the Rule of Law"[117] which sets out a new mechanism, "complementing" Articles 258 TFEU and 7 TEU, designed to respond to "threats to the rule of law" of a systemic nature in

115. See *supra* note 6.
116. See European Parliament Resolution N°. P7_TA(2013)0315, cited *supra* note 110, paras. 73–81.
117. COM(2014)158 final of 11 March 2014.

a Member State. The proposed mechanism consists of a three-step procedure, based on dialogue, which can potentially lead to the issuance of a "rule of law opinion", of a "rule of law recommendation" and, should the latter not be appropriately followed up, to the possible opening of proceedings under Article 7 TEU against the offending State. While there is much in the Communication that is unconvincing or debatable,[118] the general approach of coupling sanctions with preventive monitoring and dialogue, with an emphasis on equality of treatment,[119] has much to recommend it. As we will see in the next section, such an approach is increasingly finding expression in sector-specific "enhanced monitoring" procedures.

6. Complementing enforcement with "enhanced" monitoring?

6.1. *The proliferation of "enhanced monitoring" procedures*

The idea of monitoring Member State action for the purpose of promoting compliance is a familiar one in the Treaties. According to Article 17(1) TEU the Commission shall "oversee the application of Union law".[120] This notion designates a very broad activity, which comprises all forms of legally permissible collection, assessment and publication of information on compliance with EU law.[121]

118. In particular, the Communication seems to imply that a "new" procedure is needed because some "threats to the rule of law" cannot be effectively addressed through Art. 7 (see para 3). To our mind, however, it is questionable that the situations described as "threats to the rule of law" (para 4.1) escape Art. 7. The Commission's claim that it needs a new tool is further weakened by the fact that even in situations clearly falling under Art. 7, no initiative has been taken to apply it. Moreover the new "mechanism" does not rest on any clearly defined legal basis, other perhaps than Art. 292 TFEU as far as "rule of law recommendations" are concerned. Instead of presenting yet another "ad hoc" procedure, it would have been conceptually and constitutionally more sound to present the Communication as a statement of the policy the Commission intends to follow in exercising its power of initiative under Art. 7 TEU.

119. Ibid., para 4.2.

120. This general mandate is complemented by sector-specific mandates entrusted to the Commission by secondary legislation: see e.g. Directive 2009/16 on port State control, O.J. 2009, L 131/57, Art. 35.

121. The English version of the Treaties does not use the term "monitor" to designate this function of the Commission. The term does occur in Art. 156 TFEU, which empowers the Commission to prepare "the necessary elements for *periodic monitoring and evaluation*" in matters of social policy (emphasis added). In this context, however, "monitoring" is not conceived as an instrument to promote compliance with EU law, but rather as a tool alternative to legislation, and as an instrument to encourage cooperation between the Member States. This terminological nuance does not justify the conclusion that the general function of the Commission under Art. 17(1) TEU is anything less than "monitoring". In fact, other language

A similar general function is assigned to the Court of Auditors as far as the EU's revenue and expenditure are concerned. The task of the Court of Auditors "to carry out the Union's audit" comprises *inter alia* the examination of the lawfulness and regular nature of EU revenue and expenditure. To that end, the Court can carry out audits in the Member States (Art. 287(2), (3) TFEU).

Although the Commission stated in its White Paper on Governance that "monitoring closely the application of Community law is an essential task for the Commission",[122] this task has hardly been performed in an active and systematic manner and has therefore not fulfilled its potential for enhancing compliance. Moreover, both the Commission and the Court of Auditors have to rely under normal circumstances on information provided by the Member States themselves or by private parties, and can only exceptionally carry out inspections on the spot.[123]

The economic and financial crisis, as well as crises in the operation of other EU policies, and an increasing awareness of difficulties experienced by new Member States in complying with fundamental requirements of EU law, has led to the recent "discovery" of monitoring as a tool to prevent major breaches of EU law, and to the introduction of a broad array of enhanced surveillance procedures.

According to Article 36 of the Act concerning the conditions of accession of Croatia of 5 December 2011,[124] the Commission is to closely monitor all commitments undertaken by Croatia in the accession negotiations. Under Article 38, it may adopt "appropriate measures" if there are serious shortcomings or any imminent risk of such shortcomings in Croatia in the transposition or state of implementation of acts adopted by the EU law institutions.

In the EMU, the most sophisticated and at the same time the most problematic forms of monitoring have been introduced since 2010: following serious doubts about the accuracy of statistical data transmitted by Member States to the EU, Regulation 479/2009 on the application of the Protocol on the excessive deficit procedure was amended to strengthen the controls carried

versions are worded in identical terms or with an identical meaning for both tasks: French: "surveille"/"surveillance"; German:"überwacht"/"Überwachung"; Italian: "vigila"/"controllo".

122. European Commission, European governance – A white paper, O.J. 2001, C 287/21.

123. See Smith, op. cit. *supra* note 5. For an example of problems concerning the performance of an audit by the Court of Auditors in a Member State, see Case C-539/09, *Commission* v. *Germany*, [2011] ECR I-11235.

124. O.J. 2012, L 112/21.

out by Eurostat.[125] In the same context, systematic "surveillance missions" and "enhanced surveillance missions" may be carried out by the Commission (and in certain cases by the Council) in order to ascertain the economic and budgetary situation of Member States.[126] Moreover, Regulation 473/2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area[127] establishes "monitoring requirements" (Art. 6) and an "assessment" of national draft budgetary plans (Art. 7).

While most of those monitoring powers of the Commission apply to all Member States, an increased and at the same time extended power of monitoring is envisaged in the two mechanisms which provide for financial assistance to Member States, the EFSM and the ESM. Articles 4 and 5(2) of Regulation 407/2010 establishing the European financial stabilization mechanism (EFSM) oblige the Commission "to verify at regular intervals the economic policy of a Member State which benefits from financial assistance under this mechanism". To this end, the Member State must provide all the necessary information to the Commission and give its full cooperation.[128] Similarly, according to Article 13 of the Treaty on the European Stability Mechanism (ESM), the European Commission – in liaison with the ECB and, wherever possible, together with the IMF – is entrusted with monitoring compliance with the conditionality attached to the financial assistance facility. On this basis, the well-known "Troika" regularly performs its tasks in the Member States concerned.

Recently adopted legislation on asylum and border control also reflects the trend towards the establishment of enhanced monitoring procedures. As noted at the outset, these are legal areas in which the unwillingness or inability of a Member State to comply with EU law can have direct repercussions on the common interest.[129] New mechanisms are therefore being devised in order to "complement" the infringement procedure, which would allow the EU to prevent and correct in good time massive deviations from the relevant

125. O.J. 2009 L 145/1, as amended by Regulation 679/2010, O.J. 2010 L 198/1. See in particular new Art. 11(1) of the Regulation.

126. See Regulation 1176/2011, cited *supra* note 40, Art. 13; Regulation 1466/97 on the strengthening of budgetary positions and the surveillance and coordination of economic policies, O.J. 1997, L 209/1, as amended by Regulation 1175/2011, O.J. 2011, L 306/12, Art. 11; and Regulation 1467/97, cited *supra* note 39, Art. 10. See also Regulation 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, O.J. 2013, L 140/1, Arts. 2, 3.

127. O.J. 2013, L 140/11.

128. Regulation 407/2010, cited *supra* note 67.

129. See *supra* note 7.

international and EU standards.[130] Both the "Dublin III" Regulation and the new "Schengen governance legislative package" therefore include mechanisms for enhanced monitoring and procedures for crisis prevention and management once a problem has been detected:[131] the Member State concerned will be asked to submit national action plans, and to implement them under the surveillance and guidance of the Commission and Council. In steering the process, the EU institutions will be empowered to decide as appropriate on enhanced assistance, financial or otherwise, with a view to remedying the situation. They will also be empowered, in some cases of serious and persistent breach, to react with strong measures such as the temporary exclusion of the defaulting State from the Schengen border-free zone.[132]

6.2. *Assessment*

Enhanced monitoring arrangements are in themselves a potentially valuable addition to the EU's enforcement toolbox. Especially when combined with sanctions or conditionality, they are likely to produce considerable pressure on the Member States concerned, while at the same time generating a flow of mutual information and communication capable of lending more sense and legitimacy to EU "top-end" measures. Indeed, as noted above, the suspension of membership rights could become a more realistic option – and perhaps even gain wider application, through treaty amendments, beyond the politically loaded cases of Article 7 TEU – were it supported by carefully crafted monitoring arrangements.

When subjection to enhanced monitoring is combined with a promise of assistance – as in the Schengen/Dublin arrangements – this may give rise to an apparent contradiction. In fact, enhanced assistance ends up being premised on (a risk of) failure to implement EU law, rather than on full compliance with EU law. Two considerations may, however, help resolve this apparent

130. Communication from the Commission on enhanced intra-EU solidarity in the field of asylum, COM(2011)835, para 4.1.

131. See Regulation 604/2013 establishing criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III Regulation), O.J. 2013, L 180/31, Art. 33; Regulation 1053/2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*, O.J. 2013, L 295/27, Arts. 14–16.

132. For a fully-fledged "carrot and stick" system, see Regulation 1051/2013 amending Regulation 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, O.J. 2013, L 295/1, Recitals 8–12 and Arts. 19(a), 26 and 26(a). Implicitly replying on conditional assistance, Regulation 604/2013, cited *supra* note 131, Art. 33(4).

contradiction. On the one hand, enhanced assistance of this kind might be seen as a remedy in situations where the Member State concerned is *unable* to fully implement the relevant *acquis* – even short of a situation of *force majeure* excusing this failure under the strict conditions laid down by the Court in the context of infringement proceedings.[133] On the other hand, if embedded in enhanced monitoring procedures, conditionality can play a dynamic rather than a static role, akin to the role it plays in the context of the excessive deficit procedure: rather than a reward for initial conformity with the *acquis*, it would be the "carrot" to incite the defaulting Member State to submit an action plan and subsequently adhere to EU guidance. This could be in the framework of a "carrot-and-stick" system also encompassing penalties or "sanctions" in a broader sense such as temporary exclusion from the border-free zone. What the EU institutions still need to develop in this regard is a sufficiently clear doctrine on the contested distinction between unwillingness and inability to comply.

Beyond those aspects, enhanced surveillance mechanisms also need to be carefully crafted. The EMU mechanisms, in particular, display a number of shortcomings as to their legal foundations and their legitimacy. Most of those measures aim at preventing the occurrence of situations that would be contrary to the Treaties. However, according to the system of division of competences operated by the Treaty, it is the Member State's responsibility to eliminate such situations. In this respect, monitoring in areas which are not clearly within the realm of EU substantive policy competences raises questions about a creeping shift of competences from the Member States to the EU. This is particularly apparent with regard to economic policy coordination, where the EU competence is limited to the adoption of "rules for the multilateral surveillance *procedure*" (Art. 121(6) TFEU). Nor can compulsory monitoring, which imposes numerous duties on Member States, be justified on grounds of Member States' duty of sincere cooperation (Art. 4(3) TEU). Although the duty to cooperate may also apply in areas not covered by EU competences,[134] this duty cannot serve as a foundation for a transfer of competences to the EU. More generally, establishing enhanced monitoring procedures is not a suitable substitute for the lack of legislative competences attributing clear political responsibilities to the EU.

Moreover, as is demonstrated by the perception of the activities of the "Troika" in Greece, "monitoring", "surveillance" and other forms of direct

133. Case 101/84, *Commission* v. *Italy*, [1985] ECR 2629; Prete and Smulders, op. cit. *supra* note 23, p. 41 et seq. Tallberg, op. cit. *supra* note 11, highlights the complementarity of "enforcement" and "management" (read also: support) approaches to non-compliance, precisely because the sources of non-compliance may equally be calculated defection or inability to comply.

134. Case 208/80, *Lord Bruce*, [1981] ECR 2205.

inspection raise doubts as to the legitimacy of such activity. This is particularly apparent in matters of primary concern to the citizens, e.g. in social and economic policy. Those measures are often perceived as being outside intervention by institutions which have no strong public support comparable to national institutions and which are not familiar with the specific situation and culture of a Member State. As a result such monitoring may weaken the legitimacy of the EU institutions.

One final observation must be made from the point of view of efficacy. As already noted several times, the Commission has for years had only limited resources for law-enforcing. These have not been augmented in parallel with its increasing tasks. In these circumstances, additional tasks can hardly be handed over to it with the expectation that they will be effectively exercised. "Outsourcing" enhanced monitoring to bodies not subjected to the same accountability as the Commission – the only imaginable alternative to a serious increase in the latter's resources – would in turn aggravate the legitimacy problem mentioned above.

Legally speaking, there would of course be no problem in systematically strengthening monitoring at EU level. Such a system could be established on the basis of Articles 7 TEU, 17 TEU and 352 TFEU as they stand.

7. Concluding remarks

In this article we have focused on the increasing role that sanctions and conditionality play in EU law enforcement *vis-à-vis* the Member States. This must not be misunderstood as suggesting that such measures are becoming the fulcrum of the centralized enforcement of EU law. It is debatable whether they could achieve such a role at all. In particular, as noted, the deterrent effect of sanctions seems modest[135] – be it because of their present form, or because they are inherently inadequate instruments to steer the behaviour of actors as powerful (and as impersonal) as States. All such measures must still be conceptualized as "top end", exceptional, instruments in a toolbox that is still primarily aimed at preventing breaches, for which the primary instruments remain communication and cooperation.[136]

Nonetheless, the increasing emphasis placed on penalties and conditionality, as well as their proliferation and diversification, is in itself a significant development. It reflects the maturing of a legal system that, because of its very growth, is ever more acutely confronted with issues of compliance and enforcement. At the same time, it underscores the nature of

135. See in particular *supra* note 55 and text preceding it, as well as text following note 107.
136. Communication from the Commission cited *supra* note 35, in particular pp. 5–9.

the EU as a "federation of States" that, as such, cannot rely on coercion as a measure of last resort. It is however also a potentially risky development. "Penalties" broadly understood are a delicate instrument. If designed and applied in full knowledge of the structural constraints and in keeping with the normative principles evoked above in section (2), they may contribute to reinforcing the authority of EU law. However, they may also open Pandora's box and trigger unintended consequences.

The trends that have been highlighted in this article could produce, first of all, the paradoxical result of undermining the authority of Union law. That would be the case, for instance, if the new tools in the toolbox, such as the new EMU instruments, were repeatedly applied to no effect, or if increasing responsibilities of the Commission in this area, e.g. in special monitoring procedures, were not matched with a corresponding increase of its resources – a point on which reflection does not appear even to have started. New sanctioning procedures, including through financial conditionality, may also undermine the legitimacy of the EU if they are not supported by adequately legitimizing procedures or if they are perceived as inequitable in their design or application. In particular, the traditional risk of lenient enforcement *vis-à-vis* big and powerful States, inherent in the political procedures of the EMU,[137] is now compounded by the differential treatment reserved to less prosperous States under the "macroeconomic conditionality" scheme of the ESI Funds.[138]

Finally, putting too much stress on sanctions holds an inherent risk for the essentially cooperative relations between the EU and its Member States, vital to the integration project itself.

137. See *supra* note 36 and text accompanying it.
138. See *supra* text following note 100 and text accompanying note 105.

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