13 EU law's Contribution in Streamlining Member State Enforcement Structures[Q1]

A Promising Mechanism for Convergence?

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In an attempt to enhance the effective enforcement of its harmonised rules, the EU imposes a series of legislative obligations on Member States aimed at bringing more convergence in their administrative organisation. This chapter illustrates the extent of those convergence mechanisms prior to framing them within the constitutional framework of EU integration. The first part of the chapter will outline how EU law has contributed to streamlining the institutional organisation and enforcement capabilities of national administrative authorities by means of secondary legislation. The second part of the chapter will maintain that the effective enforcement of EU law justifies those initiatives, prior to questioning whether the effectiveness argument could be considered compatible with the overall constitutional setup of EU multi-level governance.

1 Introduction

The implementation and enforcement of EU law still take place predominantly at the level of the Member States.[1] In that context, each Member State retains a degree of autonomy to designate the appropriate bodies and to allocate enforcement capacities in accordance with their national institutional framework and preferences. Although respecting the constitutional and administrative identities of the Member States,[2] this setup poses a significant risk of divergence in the enforcement of otherwise uniform, harmonised or at least converging supranational substantive law norms.

To address those risks, the European Union legislator increasingly determines how national enforcement authorities have to be organised and in accordance with which enforcement activities at Member State level need to take place.[3] To that extent, instruments of secondary legislation – i.e. Regulations or Directives[4] – in an increasing amount of EU policy fields contain obligations to set up independent national authorities and/or to confer a number of minimum EU-imposed enforcement powers and capacities on Member States' enforcement bodies. In doing so, the EU imposes a series of additional obligations on Member States seeking

[1] As confirmed by Article 291 of the Treaty on the Functioning of the European Union (TFEU). It has been note, however, that this traditional understanding of indirect enforcement is increasingly challenged across various EU policy fields. See in more detail Miroslava Scholten, 'Mind the trend! Enforcement of EU law has been moving to Brussels' (2017) 24 *Journal of European Public Policy* 1348–~~13~~66.

[2] As required by Article 4(2) of the Treaty on European Union (TEU); see also Elke Cloots, *National identity in EU law* (Oxford University Press 2015).

[3] See for a more general conceptualisation Lincey Bastings, Ellen Mastenbroek and Esther Versluis, 'The other face of Eurolegalism: the multifaceted convergence of national enforcement styles' (2017) 11 *Regulation & Governance* 299–314.

[4] Per Article 288 TFEU. On the legal acts and legislative procedures of the European Union, see in detail, Kieran St. Bradley, 'Legislating in the European Union' in Catherine Barnard and Steve Peers (eds.), *European Union law* (2nd ~~edition~~edn, Oxford University Press~~OUP~~ 2021), 93–135.

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to bring more convergence in their administrative organisation. Those obligations essentially constitute second-order convergence mechanisms that complement the first-order legal framework of uniform or harmonised substantive law rules.

This chapter undertakes to conceptualise and illustrate the extent of those convergence mechanisms prior to framing them within the constitutional framework of EU integration. The chapter will outline first how EU law has contributed to converging the institutional organisation and enforcement capabilities of national administrative authorities. To that extent, it identifies the building blocks of that template and its contribution to the convergence among different Member States' enforcement structures. Although not fully identical, the EU clearly imposes similar legislative techniques as a means to enhance convergence in the implementation and enforcement of harmonised EU law (Section 2). The chapter subsequently argues that the use of secondary legislation takes place in an attempt to increase and maintain the effective enforcement of EU law. It questions whether that effectiveness policy rationale could be considered compatible with the overall constitutional setup of EU multi-level governance. Although the EU constitutional framework a priori would not seem to resist the use of secondary legislation in the interest of effective EU law enforcement, important practical questions can be raised as to the legitimacy and coherence of the envisaged convergence mechanisms. This part of the chapter, therefore, calls for a broader debate on what kind of administrative convergence the EU legal order wants to achieve (Section 3).

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2 Enforcement Convergence Through EU Secondary Legislation

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Despite the increasing importance and extending competences of European Union (EU) agencies,[5] the enforcement of European Union law has been left traditionally to its Member States.[6] In accordance with the principle of national institutional autonomy, Member States remain free to designate, organise and structure the actors responsible for such enforcement.[7] As a result, enforcement structures and capacities have diverged significantly among different Member States. Apart from general obligations flowing from the principle of sincere

[5] See for an overview of the stakes of the EU agencification debate, Merijn Chamon, *EU Agencies: legal and political limits to the transformation of the EU administration* (Oxford University Press~~OUP~~ 2016).

[6] See Robert Schütze, 'From Rome to Lisbon: "Executive federalism" in the (New) European Union', (201) 47 *Common Market Law Review* 1413.

[7] Sébastien Platon, 'L'autonomie institutionelle des États membres de l'Union européenne – parent pauvre ou branche forte du príncipe d'autonomie institutionnelle et procédurale?' in Laurence Potvin-Solis (ed.), *Le statut d'Etat membre de l'Union européenne* (Bruylant 2018), 461–490.

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cooperation.[8] European Union law for a long time paid little attention to any kind of streamlining of Member States' enforcement structures.

With the increase in EU legislative interventions across different policy domains, divergent enforcement structures became increasingly less desirable. As a result, over the past three decades, however, the European Union gradually began to streamline the organisation and enforcement capacities of different enforcement actors across its Member States. In EU policy fields ranging from data protection law and telecom/energy regulation to competition law and digital services, the EU increasingly required Member States' enforcement bodies to be streamlined. Somewhat remarkably, across those different fields, similar convergence tools have been relied on by the EU legislator. In practice, Member States are required to set up independent administrative authorities with a series of harmonised enforcement and sanctioning powers. In addition, those authorities increasingly have to cooperate within EU-structured networks, adding to the need for converging Member State structures. This part of the chapter illustrates how those similar requirements have played out in different policy fields (Section 2.1). The overall picture that follows is an increasingly converging administrative space as a result of increasingly detailed EU secondary legislation obligations on national authorities. Although the intensity with which EU law intervenes in this context still differs across policy fields, a clear tendency towards similar convergence techniques can be highlighted (Section 2.2).

2.1 Legal Obligations Imposed on Member States' Enforcement Structures

In an attempt to streamline how substantive EU law obligations were enforced, EU secondary legislation began to impose requirements on national enforcement authorities or divisions. Those requirements are essentially threefold. First, EU law required, in a number of fields, the establishment of independent administrative authorities at Member State level (Section 2.1.1). Second, in addition to or independently from independence requirements, EU secondary legislation also harmonised minimum enforcement powers and capacities of Member States' administrative enforcement bodies (Section 2.1.2). Third, EU secondary legislation frequently provides for the establishment of an EU-structured enforcement coordination network, seeking to streamline and coordinate enforcement between and across the Member States (Section 2.1.3).

[8] As manifested in Article 4(3) of the Treaty on European Union (TEU), see also Markus Klamert, *The principle of loyalty in EU law* (Oxford University Press 2014).

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2.1.1 Independent Administrative Authorities or Bodies Required by EU Law

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The EU legislator increasingly requires national administrations tasked with the implementation and enforcement of harmonised law to be independent. Independence means that national administrations or authorities need to function separately from private interests or general public administration structures. As a result, different independent administrative authorities have seen the light of day as a direct result of EU secondary legislation. The EU legislator imposes more or less detailed requirements as to how independence is to be rendered operational. This may include conditions and procedures regarding the appointment of members of the authority and their accountability. In general, the obligations imposed leave little room for manoeuvre at the Member State level. Starting in the 1990s in the fields of data protection, telecommunications and energy regulation, independence requirements can now be found in fields as disparate as competition law, budgetary law, digital services law, asylum law and human rights law. Although not all fields covered by EU law have been subject to independent authority requirements, it is clear that a tendency increasingly to impose such requirements is taking place. The following seven illustrations show the variety of independence obligations put in place by EU secondary legislation.

First, in the field of data protection, the 1995 Data Protection Directive required independent data protection supervisors to be set up at Member State level. The reason for this was to ensure transparency of processing in the Member States and to guarantee that the rules of protection are properly respected throughout the European Union.[9] At the end of the 1990s, Article 8(2) of the Charter of Fundamental Rights of the European Union directly confirmed that data protection guarantees need to be enforced by independent authorities. In doing so, EU primary law directly requires data protection authorities to be independent. The EU legislator can only implement that constitutional obligation and make it operational in practice. The 2016 General Data Protection Regulation (GDPR) further developed those requirements.[10] For its part, the Court of Justice confirmed that authorities have to be independent bodies from every public or private actor, although they may depend on their budget on Parliaments.[11]

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[9] Recitals 62–64 and Article 28 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, [1995] OJ L281/31.

[10] See ~~Article~~ Articles 51–52 of Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] OJ L119/1 (hereafter GDPR).

[11] CJEU, Case C-518/07, *Commission v Germany*, EU:C:2010:125 and Case C-614/10, *Commission v Austria*, EU:C:2012:631.

Second, in the framework of energy regulation, similar independence requirements arrived in the early 2000s. As part of a more general program to liberalise those sectors, EU law required operators and network owners to be separated, in order for competition to emerge between those operators. The obligation to establish national regulatory authorities (NRAs) was directly mandated by 2003 and 2009 Directives.[12] Each Member State is obliged to designate a single regulatory authority at the national level, with the option of creating additional regional authorities and the establishment of specific regulatory authorities for small systems on a geographically separate region.[13] Energy NRAs have to be legally distinct and functionally independent from any other public or private entity and should act independently from any market interest.[14] Authorities cannot seek or take direct instructions from any government or other public or private entity when carrying out regulatory tasks. NRAs should equally exercise their powers impartially and transparently.[15]

Third, matched to the framework of energy regulation, EU electronic communications law also required independent authorities, also referred to as national regulatory authorities or NRAs, to oversee the liberalisation process. In the same way, those authorities have to be legally distinct and functionally independent from any other public or private entity and should act independently from any market interest.[16] Authorities cannot seek or take direct instructions

[12] See Article 23 Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, [2003] OJ L176/37 and Article 25 of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in gas and repealing Directive 98/30/EC, [2003] OJ L176/57 and Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, [2009] OJ L211/53 (and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, [2009] OJ L211/94) (hereinafter referred to as 2009 Natural Gas Directive). The 2009 Electricity Directive has in the meantime been replaced by Directive 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, [2019] OJ L158/125 (hereafter 2019 Electricity Directive).

[13] Article 39(1) 2009 Natural Gas Directive and Article 57(1) 2019 Electricity Directive. See also Article 57(2), stating that the designation of a single authority shall be without prejudice to the designation of other regulatory authorities at regional level within Member States. For general objectives, see Article 40 2009 Natural Gas Directive and Article 58 2019 Electricity Directive.

[14] Article 39(4)(a) 2009 Natural Gas Directive; Article 57(4)(a) 2019 Electricity Directive.

[15] Article 39(4), first sentence 2009 Natural Gas Directive; Article 57(4), first sentence 2019 Electricity Directive; See also Article 39(4)(b)(ii) and 57(4)(b)(ii), which oblige Member States to make sure that management and staff of the NRA do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks.

[16] See originally Article 3 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), [2002] OJ L108/33, currently featuring in Articles 5 to 7 of Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), [2018] OJ L321/36.

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from any government or other public or private entity when carrying out regulatory tasks. NRAs should equally exercise their powers impartially and transparently.[17]

Fourth, in the framework of the budgetary surveillance program set up in the wake of the sovereign debt crisis in the early 2010s, the EU legislator imposed detailed rules on budgetary predictions and controls. Regulation 473/2013 granted an important role to independent bodies in that regard. According to that Regulation, such bodies need to be structurally independent or endowed with functional autonomy vis-à-vis the budgetary authorities of the Member State.[18] Their role is to monitor compliance with EU budgetary rules put in place.

Fifth, in the field of competition law, Directive 2019/1 also imposed independence requirements on national authorities charged with the application of Articles 101 and 102 TFEU. The latter provisions prohibit anticompetitive agreements and abuses of a dominant economic position and are enforced largely by the European Commission. However, since the entry into force of Regulation 1/2003, national authorities are also obliged to apply those provisions in certain circumstances. The latter regulation did not impose requirements on those national competition authorities.[19] Directive 2019/1 imposed more detailed institutional design obligations on national authorities for the sake of effectiveness.[20] It is now required that 'Member States shall ensure that such authorities perform their duties and exercise their powers impartially and in the interests of the effective and uniform application of [Articles 101 and 102 TFEU], subject to proportionate accountability requirements.'[21]

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Sixth, a similar institutional design setup can be detected in the so-called Digital Services Act (DSA), which is still being finalised by the EU legislator. The aim of that Act is above all to regulate digital services providers and to impose important transparency and content moderation obligations on (some of) them.[22] Against that particular background, the DSA requires Member States to designate one or more competent authorities as responsible for its application and enforcement. One of those authorities has to be designated as Digital Services

17 Article 6(1) of Directive 2018/1972.

18 Article 5 of Regulation 473/2013 of the European Parliament and of the Council of 21 May 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, [2013] OJ L140/11.

19 See Article 35 of Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1.

20 Directive 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, [2019] OJ L11/3.

21 Article 4(1) of Directive 2019/1.

22 By way of example, Article 26 of the Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM 2020/825/FINAL (hereafter DSA proposal).

Coordinator.[23] Digital Services Coordinators need to perform their tasks under this Regulation in an impartial, transparent and timely manner. To achieve this, they need to act with complete independence and are required to remain free from any external influence, whether direct or indirect or from instructions from any other public authority or any private party.[24]

Seventh, the field of EU equality law requires Member States to provide for bodies ensuring assistance to victims of discriminatory treatment.[25] The assistance offered must be independent and effective.[26] Although the Directives do not explicitly impose the creation of independent bodies, the European Commission recommends the Member States to set up such bodies.[27] In order to make this happen, modifications to the legal framework are contemplated at present.[28] If implemented, EU secondary legislation would mandate much more explicitly the establishment of independent bodies, directly in line with the Commission's recommendations.

The previous illustrations highlight that the obligation to set up independent administrative authorities has been implemented or is appearing across a wide variety of policy fields. Although independence is not required from national administrations across all fields covered by European Union law, the EU legislator incrementally imposes independence obligations on national authorities in an increasing number of EU policy fields.

2.1.2 Streamlined Enforcement Powers and Capacities

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Another means EU secondary legislation relies on to streamline Member States' enforcement practices is by harmonising enforcement powers and procedures at Member State level. In that context, EU legislation imposes minimum enforcement powers and procedures on Member State authorities.

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23 Article 38(2) and 40 DSA proposal.

24 Article 39 DSA proposal.

25 Article 13(1) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L180/22; Article 12(1) of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, [2004] OJ L373/37; Article 20(1) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, [2006] OJ L204/23; Article 11(1) of Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, [2010] OJ L180/1.

26 Article 13(2) of Directive 2000/43/EC; Article 12(2) of Directive 2004/113/EC; Article 20(2) of Directive 2006/54/EC; Article 11(2) of Directive 2010/41/EU.

27 Commission Recommendation C(2018) 3850 final of 22 June 2018 on standards for national equality bodies. See for the text of this 2018 Commission Recommendation, https://ec.europa.eu/info/files/commission-recommendation-standards-equality-bodies-0_en.

28 See more particularly, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13098-Equality-bodies-binding-standards_en.

Six of the seven fields illustrated in the previous section are characterised by EU secondary legislation outlining in detail the enforcement powers authorities must have. First, in the field of data protection, the GDPR contains a detailed list of minimum enforcement powers each data protection supervisor must have in place.[29] Those powers include imposing administrative fines on those disrespecting GDPR provisions.[30] Second, as far as energy regulation goes, national regulatory authorities have to be able to issue binding decisions on electricity and natural gas undertakings, carry out investigations into the functioning of electricity and gas markets and impose effective, proportionate and dissuasive penalties on undertakings.[31] Third, electronic communications regulators need to have powers similar to the ones applying to energy regulators.[32] Fourth, in competition law, Directive 2019/1 outlines inspection, decision-making and sanctioning powers national competition authorities have to put in place.[33] Fifth, EU digital services regulation also outlines in detail the powers and enforcement procedures digital services coordinators would have to respect.[34] Sixth, in the field of equality protection, the EU legislator imposes rather specific requirements on how Member State administrations should handle complaints. Although not formally requiring independent bodies to be in place, EU secondary legislation does not hesitate to streamline enforcement and complaint-handling procedures.[35] It is only in the context of budgetary control that no such streamlining has been provided for. This is since it is the European Commission that ultimately controls, validates and enforces budgetary rules against the Member States.[36]

A similar tendency to harmonise Member States' enforcement powers can also be detected in fields where no direct or indirect independence requirements have been imposed by EU secondary legislation. A good illustration of this is EU consumer law. In that context, no specific independence requirements have been imposed on national enforcement authorities. EU secondary legislation nevertheless outlines the enforcement powers public authorities responsible for the enforcement of this branch of EU law must have.[37]

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29 Article 58 GDPR.
30 Article 83 GDPR.
31 Article 41(4) 2009 Natural Gas Directive; Article 59(3) 2019 Electricity Directive.
32 Article 5(1) Directive 2018/1972.
33 Articles 6 to 16 Directive 2019/1.
34 Article 41 DSA Proposal.
35 Article 13(2) of Directive 2000/43/EC; Article 12(2) of Directive 2004/113/EC; Article 20(2) of Directive 2006/54/EC; Article 11(2) of Directive 2010/41/EU.
36 Article 6 of Regulation 473/2013.
37 See Article 9 of Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, [2017] OJ L345/1.

It follows from the illustrations given here that, although the level of detail varies among sectors, the EU legislator clearly prefers to ensure the enforcement powers of national authorities are uniform or at least converge towards a singular structure. In addition, in fields where EU law does not mandate the establishment of independent Member State administrative authorities, secondary legislation also imposes detailed enforcement powers and sanctioning practices administrations must maintain. It follows from this that harmonising or streamlining enforcement practices also constitutes a means by which EU secondary legislation seeks to bring convergence in the implementation and enforcement of harmonised substantive rules at Member State level.

2.1.3 Participation in EU-Structured Enforcement Networks

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The putting in place of streamlined enforcement authorities and capacities by means of EU secondary legislation generally does not operate in isolation. In the different examples highlighted in the previous section, the newly established or modified enforcement authorities also participate in the framework of an institutionalised EU enforcement network. Although the features and powers of those networks differ across different policy fields, they all seem to serve as an additional tool to enable convergence of enforcement procedures and practices to develop.

First, in the field of data protection law, independent national authorities have to operate within the confines of the European Data Protection Board.[38] The GDPR enforcement framework relies on a one-stop-shop enforcement mechanism, in which one national supervisory authority is the lead supervisor. That supervisor is in principle responsible for the oversight of data processors falling within its jurisdiction. A mutual assistance and cooperation mechanism has nevertheless been set up and coordinated within the Board.[39] The presence of similarly structured national authorities with similar enforcement powers and responsibilities seems to have been considered a precondition To ensure the smooth operations of this mechanism. In cases of conflict, the Board can take binding decisions on case allocation or enforcement action.[40]

Second, within the framework of EU energy law, an institutionalised network, a European Regulators Group for Electricity and Gas (ERGEG) had been set up. In 2009, however, this

[38] Article 68 GDPR.
[39] Articles 60–61 GDPR.
[40] Article 65 GDPR.

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network was replaced by a full-fledged European agency,[41] the Agency for the Cooperation of Energy Regulators (ACER).[42] That Agency is nevertheless still structured as an institutionalised network of national regulatory authorities and functions in that manner as well.[43]

Third, in EU electronic communications law, a Board of European Regulators of Electronic Communications (BEREC) allows the different authorities to meet and exchange information and best practices. The European Commission coordinates BEREC's activities, which seek to ensure that authorities of different Member States keep talking to and learning from each other.[44]

Fourth, within the context of EU competition law, a European Competition Network (ECN) has been set up. That network is composed of the representatives of different competition authorities and is chaired by the European Commission.[45] The main ambitions of the ECN members are to inform each other of new cases and envisaged enforcement decisions; coordinate and help each other with investigations; exchange evidence and other information; and discuss various issues of common interest.[46] One of the major tasks that can take place within the network concerns the allocation of cases to the best-placed national competition authority or authorities. The operations of the network have been influential in requiring an increasingly streamlined institutional and enforcement organisation of different national competition authorities by means of Directive 2019/1.[47]

Fifth, the framework set up by the Digital Services Act also seeks to embed freshly established independent digital services coordinators within a networked structure. In an attempt to streamline and coordinate enforcement between different authorities, an EU-structured network of national enforcement agencies will be set up: a European Board for Digital

41 See Commission Decision 2011/280/EU of 16 May 2011 on repealing Decision 2003/796/EC on establishing the European Regulators Group for Electricity and Gas, [2011] OJ L129/14.

42 See for background, https://www.acer.europa.eu/the-agency/about-acer.

43 Article 2(1) Regulation 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, [2009] OJ L211/1; this Regulation has been recast into Regulation 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators, [2019] OJ L158/22 (hereinafter referred to as ACER Regulation). See Marco Zinzani, *Market integration through 'Network Governance'* (Intersentia 2012), 133–134 for an overview of alternative institutional options considered.

44 See Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009, [2018] OJ L321/1.

45 Recital 15 of Council Regulation 1/2003.

46 See https://ec.europa.eu/competition-policy/european-competition-network_en.

47 Wouter Wils, 'The European Commission's "ECN+" Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers"', [2017] *Concurrences* 60–80.

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Services.[48] The Board's role will be to exchange information, to ensure coordinated enforcement and to recommend a Digital Services Coordinator to take action, Should a recommendation by the Board to a Digital Services Coordinator to act be ignored, the Commission and not the Board can request the Coordinator concerned to take action.[49] It would seem that such a request constitutes a binding Commission decision that is binding upon the Coordinator concerned.[50]

Sixth, a European Network of Equality bodies (Equinet) has been set up.[51] The role of the network is to coordinate and exchange information on how discrimination cases are addressed and tackled in different Member States. The network encompasses representatives of other (non-EU Member) States as well, enhancing the scope for potential implementation and enforcement convergence.

Seventh, in the framework of competition law, a Consumer Protection Coordination (CPC) network has been set up. The network regroups the different authorities or bodies at Member State level responsible for the implementation and enforcement of EU consumer law.[52] CPC's role again consists in exchanging information and enhancing best practices among different Member States' authorities.

It follows from the foregoing that across the different policy domains illustrated here, a network of national enforcement bodies of some sort has seen the light of day. EU secondary legislation not only formally establishes those networks but also determines their composition, operations and powers. In doing so, the EU legislator clearly wants to ensure that convergence between national enforcement structures does not only take place on paper. By including the latter in an EU-structured enforcement network coordinated by the European Commission directly or indirectly, Member States are invited to behave in accordance with the network logic that underpins such structures.[53] In practice, that constitutes a clear invitation to streamline and further converge their implementation and enforcement operations.

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48 Article 48 DSA proposal.

49 Article 45(5) DSA proposal.

50 Article 45(7) DSA proposal.

51 See for more information and background on the specifics of this network, https://equineteurope.org/.

52 See for background on the consumer enforcement network, https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/consumer-protection-cooperation-network_en.

53 See for that argument already, Pieter Van Cleynenbreugel, *Market supervision in the European Union. Integrated administration in constitutional context* (Brill 2014), 9–86.

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2.2 EU Secondary Legislation as an Enforcement Convergence Instrument

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Despite the existence of different policy rationales or reasons to envisage more streamlined enforcement structures, the emergence of comparable enforcement structures can be identified. In all the examples highlighted above, EU secondary legislation serves as a tool to bring convergence among previously diverging enforcement practices. Whether it is by mandating the establishment of independent authorities and/or by streamlining enforcement and sanctioning powers, the European Union effectively asks – albeit at times somewhat implicitly – its Member States to converge their administrative enforcement capacities around a comparable template. In doing so, it can hardly be denied that EU law put in place a mechanism aimed at converging enforcement practices.

In the same way, the emergence of coordinating networks is a phenomenon re-appearing in different sectors. Despite the differences in powers and operations of the different networks as illustrated above, it is clear that the streamlining in the organisation and enforcement powers of national authorities are essentially meant to contribute to the effective functioning of those networks or enforcement coordination boards. The use of secondary legislation as a tool to ensure that different authorities can more effectively talk to one another and coordinate their operations is accommodated by the setting up of such networks.

It follows from the illustrations given here that EU secondary legislation itself serves as a means to address divergences in Member States' enforcement practices. As such, EU legal norms and obligations constitute a tool to enable convergence in enforcement practices across different Member States. Although the obligation to set up independent bodies or the establishment of enforcement networks do not feature with the same intensity in all policy fields covered by EU law, it is submitted that the EU legislator's reliance on legal norms to make administrative enforcement capacities converge is no longer a taboo. On the contrary, even, the use of EU secondary legislation as an enforcement convergence instrument does not seem to be questioned at all when doing so. It only seems to make sense to impose, by means of legislation, institutional design and enforcement capacity obligations on the Member States. At first sight, the use of secondary legislation to bring convergence in enforcement structures allows making enforcement convergence choices that are the result of a democratically legitimated process. In that constellation, Member States themselves play a legislative role as members of the Council. As such, they vote on the administrative or procedural reorganisations they will have to implement themselves. That also means that, in most cases, at least a qualified majority of them agreed to the harmonisation of streamlining proposed in EU harmonisation

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instruments.[54] Inserting enforcement convergence mechanisms directly into legislation additionally also gives the Commission or other Member States the tools to act should a Member State fail to comply with the rules adopted. Infringement proceedings in accordance with Articles 258 and 259 TFEU could further force Member States to upgrade their institutional design. The Court of Justice has been given the opportunity to rule on such upgrades in the context of data protection. In those cases, Member States have been forced to adapt their authorities in order fully to comply with EU independence requirements.[55] Having those rules inserted in a binding legal instrument facilitates their monitoring to some extent.

32 Enforcement Convergence Mechanisms: *a priori* Constitutional But Not Free From Challenges

The previous section offered an overview of the use of secondary legislation as an instrument to streamline and enhance convergence in the enforcement of EU law. It is submitted that reliance on secondary legislation directly contributes to a more general objective of enhancing the effective implementation and enforcement of EU rules across different Member States. From that point of view, streamlining national authorities' design and enforcement capacities is not an end in itself, but above all a means to enhance the effective enforcement of EU law. The fact that harmonised national authorities almost always form part of a more general effort at coordinating enforcement between national authorities constitutes the best illustration of that claim. Mostly, coordinated enforcement predominantly takes place within networks of national authorities, with more or less coordinating or binding decision-making powers. At times, however, the European Union has gone farther by transforming some of those networks in EU agencies. The best example of that approach can be found in energy regulation. In that context, a previously existing network of national supervisory authorities had been upgraded to an agency with coordinating and – subsidiary – binding individual decision-making powers. Although the format of such coordination may be different, the agencies thus created essentially also constitute formalised networks of national supervisory authorities. In that template, those authorities also have to be streamlined in order for them to be embedded effectively in the operations of coordinated enforcement taking place within those agencies.

[54] See on the legislative process, Kieran St. Bradley, n. 4, for background on the voting procedures used in EU legislative acts.

[55] As highlighted by Saskia Lavrijssen and Annetje Ottow, 'Independent Supervisory Authorities: A Fragile Concept', (2012) b39 Legal Issues of Economic Integration 419–446.

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The overall picture that emerges from those developments is that the European Union uses harmonised rules to streamline its enforcement processes. Although it may be one step too far to say that the EU requires the Member States to set up European union agents at the Member State level, the rules it imposes most directly serve as a mechanism to impose and further promote convergence in the functioning and operation of national supervisory or enforcement authorities. EU law is in any case relied upon~~?~~ as a mechanism to speed up or stimulate a more converging approach to law enforcement in those fields.

As the EU increases its reliance on convergence through secondary legislation, questions nevertheless deserve to be raised as to whether the EU constitutional framework[56] allows for such mechanisms to be created (Section 3.1~~.~~). At present, the Court of Justice of the European Union has not been able to address that question directly. Absent such assessments, it would seem that, *a priori,* no major EU constitutional issues would arise. Despite streamlined or coordinated enforcement mechanisms not being considered problematic from an EU constitutional law point of view, their increased use warrants attention as they raise coherence and legitimacy challenges within the Member States in which they are implemented. To acknowledge and address those challenges, a more open debate on the scope and format of enforcement convergence appears necessary (Section 3.2~~.~~).

~~2.~~3.1 Enforcement Convergence and the Constitutional Foundations of EU Law

From an EU constitutional law perspective, few if any limits appear to be imposed at first sight on the establishment of streamlined authorities and enforcement coordination networks. Despite the European Union enjoying no formal legal powers in this realm~~,~~[57]~~,~~ streamlining enforcement structures could be understood as a complement of substantive harmonisation powers.

Although several Treaty provisions would make such enforcement convergence possible, no single provision of EU primary law governs the setup of Member States' enforcement authorities. In the field of data protection, Article 16 TFEU requires the Member States to have in place independent supervisory authorities responsible for overseeing the processing of personal data. That provision does not as such impose minimum powers on those authorities.

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[56] By constitutional, I refer above all to the provisions of EU primary law, as well as the general principles of law accompanying it. Constitutional law in that understanding is used as an umbrella term to cover those provisions and principles.

[57] Article 197 TFEU only allows for supporting measures in Member States' initiatives to improve their administrative enforcement capacities.

However, that provision does grant a broad mandate to those authorities to ensure compliance with data protection law, making it not impossible to envisage harmonised enforcement powers. In other fields, the harmonisation of enforcement structures and powers is understood to be a corollary of existing provisions allowing for the harmonisation of substantive law rules. In competition law, Article 103 TFEU plays a key role and for other domains touching upon the EU internal market, Article 114 TFEU is considered the go-to provision. That provision has been held to allow for enforcement coordination to take place within the confines of an EU agency as well.[58]

In addition, the principle of sincere cooperation featured in Article 4(3) TEU serves as a constitutional catch-all provision governing mutual duties and obligations between the national and supranational levels.[59] In accordance with that principle, both supranational and national authorities are called upon to assist each other in fulfilling the tasks which flow from the Treaties. Member States shall in particular assist the Union and refrain from any action or inaction that could jeopard~~iz~~ise the Union's actions. Thus formulated, the provision reflects a particular set of obligations predominantly imposed on Member States.

The Court of Justice has held that the principle of sincere cooperation also applies to Union institutions.[60] In that understanding, sincere cooperation incorporates a set of mutual cooperation obligations that frame and structure the interactions between different administrations and institutions. That understanding continues to guide the institutional organi~~z~~isation of enforcement structures, albeit to a different extent. In the present regulatory framework, cooperative obligations are matched by the image of cooperative rights. From a sincere cooperation point of view, the ability of EU law to remove national institutional obstacles and the resulting diminution of national institutional autonomy is deemed essential for the functioning of a supranationally integrated enforcement and coordination system. The translation of mutual loyalty obligations into mutual cooperation duties paves the way for more intensified enforcement convergence initiatives. Obligations to cooperate with national authorities imply that EU institutions should be able to effectively intervene in national supervisory operations and the organisation of national authorities. The principle of sincere cooperation appears to justify an increasing intervention in Member States' enforcement designs.

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[58] See on that provision, Pieter Van Cleynenbreugel, 'Meroni circumvented? Article 114 TFEU and EU regulatory agencies', 21 Maastricht Journal of European and Comparative Law (2014), 64–88.

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[59] Geert De Baere and Timothy Roes, 'EU loyalty as good faith', (2015) 64 International and Comparative Law Quarterly 829–874.

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[60] CJEU, Case C-2/88 IMM, *Zwartveld*, EU:C:1990:440, para 17–18.

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A combined reading of relevant EU primary law provisions would therefore seem to conclude that EU law is not opposed to the setting up of streamlined enforcement and coordination mechanisms. Although such mechanisms have not been mandated directly by the Treaties, the latter are not against it either. As a result, the EU constitutional law framework allows for significant leeway to set up such enforcement convergence structures. As long as the principle of sincere cooperation and the limits of what can be harmonised are considered, it would be perfectly constitutional under EU law to proceed with the extension of independence requirements, harmonised enforcement procedures and enforcement coordination networks.

An important nuance nevertheless needs to be added to the previous analysis. At this stage, the Court of Justice has not had the opportunity to pronounce itself explicitly on the scope of sincere cooperation duties in the framework of harmonised enforcement designs. As a result, it remains unclear for now what the exact limits are as to what the EU legislator can do in this context. It cannot be excluded therefore that the contours of how much integration the EU constitutional framework would allow will only become clear in the near future. As long as the Court of Justice has not definitively carved out the limits of sincere cooperation in this context, the constitutionality of the measures taken by the EU legislator to some extent remains in limbo. Although CJEU precedents seem to indicate that no constitutional problems would arise, the question still remains open to some extent.

~~2.~~43.2 Towards a More Transparent Administrative Convergence Discussion in the EU Legal Order?

The fact that the expansion enforcement convergence through secondary legislation may at first sight not seem unconstitutional as a matter of EU law, does not mean it is free from other policy challenges. Those challenges essentially are twofold and concern the internal coherence within Member States and the legitimacy of streamlined authorities' decision-making.

First, the establishment of streamlined authorities with similar powers enables the European Union to have in place similar enforcement bodies in the different Member States. At the same time, however, those bodies at times become increasingly detached from Member States' own administrative enforcement traditions.[61] This phenomenon, which relates to the 'legal transplants' literature, could manifest itself in the EU context as well. To take one example, in some Member States such as Belgium, the concept of independent administrative authorities is

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[61] See for background, Edoardo Chiti, 'Is EU administrative law failing in some of its crucial tasks?', (2019) 22 *European Law Journal* 476–496.

not known in national administrative law.[62] As a consequence, the imposition of such requirements by EU law generates tensions and creates unforeseen legal issues in the day-to-day operations of those authorities embedded in the Member States concerned. It cannot be excluded therefore that despite the overall contribution to EU law's effective enforcement, the convergence initiatives paradoxically create more divergence within Member States' administrative organisation. The risk thus emerges that two separate administrative tracks – one directly conditioned by EU law and one more grounded in national administrative law traditions – will be consolidated and create coherence challenges at Member State level. In any case, Member states would be called upon to accommodate, within their national laws, the EU-structured authorities in one way or another.

Second, the EU-structured authorities have significant powers of enforcement and can intervene very directly in the life of businesses and individuals. Such interventions require that authorities' decisions are perceived as legitimate. To the extent that those authorities emanate from the Member States, the latter must be able to justify and defend the authorities' actions. However, their powers emanate principally from EU legislation and are justified by concerns to increase the effective enforcement of EU law. To that extent, cases may be transferred and information exchanged? within the context of EU coordination mechanisms. It is true that Member States' governments have adopted and accepted those rules in the EU legislative process, but that fact alone is not necessarily sufficient to justify the nature of intrusion made across those decisional processes. The establishment of newfound EU enforcement coordination structures is therefore likely to raise the same legitimacy problems that confront the European Union as a whole.[63] Member States' taking part in those mechanisms are at risk of exacerbating those legitimacy challenges, ultimately risking to undermine the very coordinated system they have set up.

It follows from the foregoing that the convergence mechanisms proposed by means of legal norms streamlining administrative authorities suffer from the same coherence and legitimacy defects that characterise the EU legal order as a whole. The additional risk in this particular context is that, by intervening directly in the organisation of national administrative law systems, those defects are brought closer to individuals and businesses confronted with national

[62] For those difficulties, see Emmanuel Slautsky, *L'organisation administrative nationale face au droit européen du marché intérieur* (Larcier 2018).

[63] On those issues, see Max Haller, 'Is the European Union Legitimate? To what extent?', (2009) 60 International Social Science Journal (2009), 223. See also Fritz Scharpf, *Governing in Europe. Effective and Democratic?* (Oxford University Press 1999); sSee also, Giadomenico Majone, 'Europe's Democratic Deficit', (1998) 4 European Law Journal 5–28.

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administrations. That in itself warrants careful attention, as the effective enforcement of EU law must be accompanied by sufficient attention to rules and enforcement practices being deemed legitimate.

This is not the place to offer a fully developed way forward out of those challenges. It is submitted, however, that one constructive way to address them could be at least to acknowledge their evolution and the challenges brought. So far, the streamlining of national administrative authorities' enforcement powers has taken place as a complement to sector-specific legislation harmonising EU substantive rules. As a result, streamlining efforts have taken place somewhat in the shadow of such harmonisation. A consequence of this is that attention to streamlining developments as convergence tools have received limited general attention beyond the confines of sector-specific regulation. Despite the emergence of a governance template across sectors, limited discussions on the desired scope and consequences of administrative streamlining have taken place. It may therefore be warranted to conduct a more open debate within the confines of the EU institutions – including within the Council, which would be directly between the different Member States – on what kind of administrative law convergence EU law seeks to bring about and how its challenges can be addressed. Doing so would not only recognise the potential for convergence administrative streamlining offers, but also enable the EU better to accommodate the challenges it brings about.

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~~3~~4 Conclusion

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This chapter sketched secondary legislation's contribution to streamlining Member States' enforcement designs in the interest of increasing the effective enforcement of EU law. Despite Member States remaining primarily responsible for the enforcement of EU substantive rules, European Union law has made significant attempts to streamline existing enforcement authorities and powers. The instrument relied on to do so has been EU secondary legislation. In different fields of EU law, secondary legislation imposes more or less rigorous independence, impartiality and procedural fairness requirements on national authorities, in addition to requiring them to hold minimum enforcement powers and to participate in EU enforcement coordination structures. In so doing, EU law essentially seeks to create a converging enforcement framework across different Member States, accommodating Member States diversity to a relatively limited extent only. Although this evolution so far did not raise problems from an EU constitutional law perspective, its increase in use across regulatory fields is likely to raise coherence and legitimacy challenges at Member State level. The chapter submitted that a wider and cross-sector debate on the need for and challenges of this type of

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convergence may be useful to at least acknowledge and potentially address those challenges in the future.