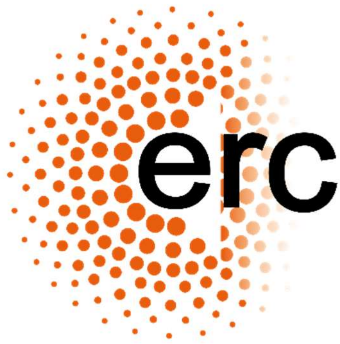

ERC StG EUDAIMONIA (GA: 948473) WORKING PAPER SERIES

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Working Paper 2024/2

Inconsistent administrative enforcement of EU law at Member State level : the Lisbon Treaty's hidden constitutional challenge?

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Introduction

According to Article 291(1) TFEU and apart from exceptional cases, European Union (EU) law is implemented and a fortiori enforced by the Member States. The latter thus remain competent to designate the administrative authorities and provide for the enforcement powers as they see fit. In practice, however, the designation and empowerment of Member State enforcement authorities is no longer solely a case of national law. EU secondary legislation increasingly conditions the design, decision-making powers and judicial review options left to States. It suffices to look at fields as diverse as competition, data protection and migration law to conclude that the EU intervenes ever more directly in Member States' administrative designs and procedures. At the same time, however, EU legislative interventions aimed at enhancing Member States' administrative enforcement seem to take place in an at times contradictory and sector-specific manner.

Questions can be raised therefore as to how the EU constitutional law framework affects this currently fragmented landscape. To that extent, the first section of this paper maps the disparate references to coordinated enforcement of EU law that can be found in the EU's founding Treaties. On multiple occasions, those Treaties refer to Member States' competent authorities or bodies as enforcers of EU law. However, a closer analysis of those provisions shows little coherence and even conceptual confusion. It is submitted that this confusion has contributed to the emergence of a patchwork of sector-specific EU-influenced national institutional arrangements which lack consistency in practice. It will be shown subsequently how Article 197 TFEU, introduced by the Lisbon Treaty, implicitly legitimises this situation.

Confronted with this conceptual diversity, the second section will analyse whether other EU constitutional principles could be relied on to coordinate administrative enforcement of EU law across different sectors. However, it will be submitted that other principles, although candidates for structuring administrative designs, have also limited roles to play in that regard. The focus will be on the principle of sincere cooperation and the fundamental good administration and judicial protection rights recognised by the Charter. Given their particular scope, those provisions alone cannot address enforcement fragmentation and actually risk to enhance such fragmentation.

The third section finally questions to what extent the existing fragmentation identified before is at odds with calls for consistency among policy areas and activities as required by Article 7 TFEU. It revisits and conceptualises the notion of consistency in this context and explores its potential relevance as a means to overcome the constitutional challenges raised by the Lisbon Treaty in terms of inconsistent administrative enforcement. Again, however, it will be submitted that Article 7 plays an at present limited, although not entirely insignificant role. The

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paper will conclude by exploring whether the role of Article 7 could or should be enhanced in order to address administrative enforcement design fragmentation.

Section 1. Inconsistent administrative enforcement structures tolerated and promoted by the EU's Founding Treaties

Article 291(1) TFEU explicitly entrusts the Member States with the implementation and, a fortiori, the enforcement of European Union law. In practice, such enforcement is not always fully left to the Member States, as EU secondary legislation has at times required Member States to set up or upgrade administrative enforcement structures. At first sight, however, such requirements have not taken place in a consistent manner. In the field of the protection of personal data, the EU constitution itself requires independent data protection authorities to be set up.[2] In other fields, the EU legislator has required the setting up of independent administrative agencies at Member State level.[3] By contrast, in yet other domains, Member States have to provide for competent authorities, but are not subject to stringent institutional design requirements.[4] Other fields are characterised by even more choices, leaving Member States the option to entrust competent authorities or criminal prosecution authorities with the enforcement of EU law.[5] Despite the possibility to identify at least some basic building blocks for a common administrative enforcement template across different sectors[6], the overall picture that emerges is one of inconsistent administrative enforcement structures. Those structures do not follow a single template, but rather address sector-specific concerns and have given rise to sector-specific enforcement structures. Because of that sector-specific focus, different resources are allocated in different Member States to the enforcement of different EU legal norms.

Despite obvious sector-specific differences, the current setup of EU administrative enforcement mechanisms is somewhat contradictory, as it would make sense for any instrument of EU legislation containing comparable rights conferred on individuals to be applied and enforced in a similar fashion. However, the EU legislator clearly imposed varied specific enforcement obligations upon Member States depending on the sector that is being regulated. From that perspective, the administrative enforcement of EU law is organised in a rather inconsistent manner across policy fields. Inconsistency in this regard refers to the direct presence of contradictions in the ways in which administrative enforcement mechanisms are set up or provided for (in one sector, an obligation to create an independent authority is created, whereas

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[2] Article 16 TFEU, read in conjunction with Article 8(2) of the Charter of Fundamental Rights of the European Union.

[3] Article 4 of 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 ; Articles 49 and 51 Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), [2022] OJ L227/1 (DSA).

[4] Article 5 of Regulation 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] O.J. L345/1 – see also Article Regulation 93 of 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937, [2023] O.J. L150/40.

[5] Article 111 of Regulation 2023/1114 leaves this choice to Member States.

[6] See for that argument, Pieter Van Cleynenbreugel, 'EU law's contribution in streamlining Member States' enforcement structures: A promising mechanism for convergence? In Marjan Kos, Maja, Sahadzic, Jaka Kukavica, *et al.* (Eds.) *Accommodating Diversity in Multilevel Constitutional Orders - Legal Mechanisms of convergence and divergence* (Routledge 2023) 224-241.

in another, involving similar substantive law obligations[7], that is not the case, making both administrative enforcement structures to some extent logically opposite and therefore contradictory).[8] In that understanding, the absence of contradictions would be necessary to achieve a coherent cross-sector legal framework, which tends to be the aspiration of most modern legal systems.[9]

Questions can therefore be raised whether the EU constitutional framework contributes to those inconsistent administrative enforcement setups. To address that question, this section explores the appearance of administrative enforcement terminology in the EU Treaty framework. That analysis shows varied references to competent authorities and other enforcement structures across the TEU and the TFEU (A.). Those constitutional terminological variations have been complemented by Article 197 TFEU, which on a more general level allows for sector-specific and therefore potentially inconsistent administrative enforcement structures to be set up (B.).

A. Terminological variations of administrative enforcement structures in the EU founding Treaties

An analysis of the EU founding Treaty texts allows rapidly to conclude that the phrasing and framing of administrative enforcement structures has not been done in an overall coherent manner. To arrive at that conclusion, we have coded and compared different references in the Treaties pointing at those structures. Subject to coding were all references present in EU Treaties to the widely understood public authorities, institutions, governmental structures, organizations, bodies and (competent) authorities of Member States, including the cases where the targeted governance level (national or EU) cannot be unambiguously determined from the context of a particular provision. The analysis of these relevant references, dispersed over the TEU, TFEU, the EU Charter, Protocols and Declarations, reveals their considerable variety. On the one hand, such observed variety, as such, does not always have a substantive value, as some individual phrases, even those containing the same keyword, only differ in syntax orders (like "Member States' competent authorities",[10] "the competent authorities of the Member States",[11] and "competent authorities in [the] Member States"[12]). On the other hand, however, the terminological ambiguity leads to twofold, only seemingly contradictory, interim conclusions.

Based on the observed variety of references to national public authorities, the first interim conclusion is that the EU Treaties' negotiators did not follow any particular policy on terminological coherence. This approach manifests itself in four kinds of inconsistencies among the references mapped. First, some phrases repeatedly appear in various EU Treaties' provisions, both in the singular and plural forms, while only the context indicates their distinct meaning. Such examples include numerous phrases centred around the terms 'authority'[13] and

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[7] Compare, by way of example, Article 5 of Regulation 2017/2394 with Article 49 of Regulation 2022/2065.

[8] For that narrow notion of consistency, see Kian Navid, 'How Many Single Rulebooks? The EU's PatchworkApproach to Ensuring Regulatory Consistency in the Areaof Investment Management', (2022) 23 *European Business Organization Law Review* 353.

[9] Esther Herlin-Karnell and Theodore Konstadinides, 'The Rise and Expressions of Consistency in EU law: Legal and Strategic Implications for European Integration', *Cambridge Yearbook of European Legal Studies* (2012-2013), 141-142.

[10] In Article 71 second sentence, Article 87(1) and Article 88(2)(b) TFEU.

[11] Article 88(3), Article 89 TFEU.

[12]Article 50(2)(b), Aricle 105(1) TFEU.

[13] 'The authority designated by the State concerned' - Article 321 second subparagraph first sentence TFEU.

‘authorities’[14], like ‘public authority’,[15] ‘public authorities’,[16] ‘national authority’,[17] ’national authorities’,[18] ‘competent authority’,[19] ’competent authorities’[20] and ‘competent national authorities’.[21]

Second, even in the case of central banks of the Member States, as from Article 123(1) TFEU referred to as ‘national central banks’, the terminological consistency is not ensured over the entire EU Treaty, as that very same term is given a narrower meaning, limited to ‘central banks of Member States whose currency is the euro, for selected provisions of Protocol (No 4).[22]

Third, seemingly synonymous terms are used inconsistently across different provisions, giving rise to uncertainty about their interpretation and, thus, complementarity. Particular illustrations of such a flexible approach to terminology in the EU Treaties constitute the references related to the courts, tribunals and judicial authorities of Member States. The two former terms appear in such variants as ‘tribunal’,[23] ’competent courts of the Member States’,[24] ‘court of a Member State’,[25] ‘(any) court or tribunal of a Member State’,[26] and ‘national court or tribunal’.[27] The latter judicial authorities, in turn, are used in constellations like ’judiciary and judicial staff’[28], ’competent judicial authority’[29], ‘police and judicial authorities and other competent authorities’[30], ‘judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions’[31], ‘national investigating and prosecuting authorities in relation to serious crime’[32], ‘members of the highest national judiciary’.[33]

The fourth kind of terminological inconsistencies present in the EU Treaties relates to the diversity of addressees of particular references to the national public authorities, which, in turn, can be divided into three subgroups. To begin with, some references encompass the entire category of a particular public authority in all Member States, like those to national Parliaments[34] or Heads of State or Government.[35] Next, the EU Treaties’ negotiators included direct references to selected public authority or authorities of a single Member State

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[14]‘ Member States ’authorities ’- Article 70 TFEU; Authorities of the Member States - Article 88(2)(a) TFEU.
[15] Article 11 of the EU Charter.
[16] Article 24(2) of the EU Charter.
[17] Article 299 second subparagraph TFEU.
[18] Article 127(4) TFEU; Article 288 TFEU; 53. Declaration by the Czech Republic on the Charter of Fundamental Rights of the European Union.
[19] Article 299 third subparagraph TFEU.
[20] ‘Member States’ competent authorities’ - Article 71 TFEU, Article 87(1) TFEU; ’Member States’ competent authorities’ - Article 88(2)(b) TFEU); ’Competent authorities in the Member States’ - Article 50(2)(b) TFEU, Article 105(1) TFEU; ’Competent authorities’ - Article 127(5) TFEU; ’Competent authorities of the Member States ’- Article 89 TFEU, Article 88(3) TFEU, Article 5.1., Article 25.1. of Protocol (No 4), ‘competent authorities (…) of the Member State concerned ’- Article 21(3) of the Protocol (No 5) and Article 321 first subparagraph TFEU.
[21] Article 85(1)(a) - (b) TFEU; Article 88(3) TFEU; Article 5.1. of the Protocol (No. 4).
[22] Article 42.4 of the Protocol (No 4).
[23] Article 47 of the EU Charter.
[24] Article 86(2) second sentence TFEU.
[25] Article 19 fourth indent of Protocol (No 3).
[26] Article 267 TFEU; Article 23 first indent of Protocol (No 3).
[27] Article 23 of Protocol (No 3).
[28] Article 81(2)(h) TFEU.
[29] Article 29 of Protocol (No 3).
[30] Article 69 TFEU.
[31] Article 82(1)(d) TFEU.
[32] Article 85(1) TFEU.
[33] Article 3 third indent of Protocol (No 3).
[34] For example Article 12 TEU.
[35] Article 10(2), Article 15(2) TEU.

(Denmark,[36] Italy,[37] Belgium[38] and the Czech Republic[39]). In the end, the EU Treaties contain dubious references which can apply to public authorities at both the EU level and those of Member States. In the context of data protection law, Article 8(3) of EU Charter, Article 39 TEU and Article 16(2) TFEU nevertheless consistently refer to the presence of independent authorities. However, aside from an indirect reference to independence in Article 287(3) TFEU in the context of audit bodies, this notion is not featured in other Treaty provisions.

B. Enforcement varieties exacerbated by the constitutional setup of Article 197 TFEU

Article 197 TFEU highlights that effective implementation of Union law by the Member States' administrations shall be regarded as a matter of common interest. From that perspective, the Treaty clearly indicates that effective implementation is a key objective of the EU legal order. However, the provision only refers to 'effective' implementation rather than consistent implementation. Effectiveness in that context points towards a framework through which the predetermined objectives set by the EU rules concerned can be achieved. Effective enforcement is therefore enforcement that best fits the underlying substantive legal framework. To meet that effectiveness standard in a specific policy field, differentiated enforcement approaches tailored to sector-specific needs may be warranted.

From that perspective, Article 197 constitutionally enshrines the presence of diversified and therefore potentially inconsistent administrative enforcement mechanisms. Article 197(2) TFEU confirms this by adding that the EU may support the efforts of the Member States to improve their administrative capacity to implement Union law. However, that support may not take the shape of measures harmonising Member States' administrative structures. As a result, supporting mechanisms may not seek to harmonise enforcement structures that are differentiated across Member States and policy fields. As confirmed by Article 197(3) TFEU, the setting up of such support mechanisms in addition shall be without prejudice to the obligations of the Member States to implement Union law or to the prerogatives and duties of the Commission and to other provisions of the Treaties providing for administrative cooperation among the Member States and between them and the Union. Those more sector-specific provisions may therefore require or impose sector-specific administrative enforcement structures to be set up. [40]

As a result, it is submitted that Article 197 allows for differentiated and therefore potentially inconsistent administrative enforcement structures to remain in place. As a result, absent other specific constitutional obligations, Member States remain free to design and structure their administrations, until and unless the EU uses a more specific competence to harmonise and modify the conditions of administrative enforcement in particular sectors by means of EU secondary legislation.

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[36] Danish Government (twice) in Protocol (No 16), the National Bank of Denmark in Protocol (No 17) and the representative of the government of Denmark in Annex to Protocol (No 22).

[37] Government of the Italian Republic in Article 54(1) and Article 55(1) TEU, Italian Government in 49 Declaration concerning Italy.

[38] Belgian parliamentary assemblies of the Communities and Regions in 51. Declaration by the Kingdom of Belgium on national Parliaments'.

[39] National authorities in 53. Declaration by the Czech Republic on the Charter of Fundamental Rights of the European Union.

[40] See for that argument in the context of border controls, Roberta Mungianu, *Frontex and non-refoulement. The international responsibility of the EU* (CUP 2016) 25.

Section 2. The limited potential for constitutional structuring offered by sincere cooperation and EU fundamental rights

The previous section of this paper highlighted that the EU founding Treaties refer to a variety of national actors and authorities responsible for the implementation and enforcement of EU law. The limited scope of Article 197 TFEU exacerbates that potential. As a result, the EU constitutional framework appears to give way to what looks like inconsistent administrative enforcement across policy fields and Member States. Questions nevertheless arise as to whether other provisions of EU primary law could not be construed so as to render the administrative enforcement frameworks more coherent. This section questions whether that has been the case in the EU legal order. It is submitted that two (sets of) constitutional provisions stand out in that regard. First, the principle of sincere cooperation enshrined in Article 4(3) TEU requires Member States to refrain from any measure which could jeopardise the attainment of the EU's objectives. As such, that obligation could be construed as requiring the Member States to design their administrative enforcement structures in compliance with a coherent EU-structured template. In practice, however, neither the EU legislator nor the CJEU have interpreted the principle in that manner (A.) . Second, among the fundamental rights accompanying the scope of EU law, the rights to good administration and effective judicial protection can be found in Articles 41 and 47 of the Charter of Fundamental Rights respectively. Both rights require Member States' administrative processes and review options to be structured in conformity with specific EU requirements. It could therefore be expected that those rights have been interpreted as design standards against which Member States' administrative enforcement structures can be held. However, in practice, the EU legislator has not fundamentally relied on them in that manner (B.). It follows from this that both sincere cooperation and those fundamental rights have played in practice less of a design-centred role than could perhaps have been expected from constitutional principles (C.).

A. Administrative enforcement and the principle of sincere cooperation in EU law

The principle of sincere cooperation serves as a constitutional catch-all provision framing the mutual duties and obligations between the Member States and the European Union. According to Article 4(3) TEU, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. It follows from the foregoing that the principle of sincere cooperation serves as the foremost constitutional expression of the cooperative federalism underlying the EU legal order.[41] It not only imposes obligations on the Member States, but also applies to Union institutions, which has been confirmed by Article 13(2) TEU as well.[42] As such, the principle or duties of sincere cooperation referred to in Article 4(3) TEU incorporate a set of mutual cooperation obligations that frame and structure the interactions between the different EU and Member State administrations and institutions at different governance levels. That being said, Article 4(3) TEU additionally contains obligations directly aimed at Member States. Those obligations have been framed as both positive and negative sincere cooperation duties.[43] By way of positive obligation, the Member States shall

[41] Robert Schütze, 'From Rome to Lisbon: "Executive federalism" in the (New) European Union', 47 *Common Market Law Review* (2010), 1398.

[42] By way of example, CJEU, 6 December 1990, C-2/88, *Zwartveld*, EU:C:1990:440, para 17-18. See also C. Brown and D. Hardiman, 'The extent of the Community institutions' duty to co-operate with national courts - Zwartfeld revisited', 25 *European Competition Law Review* (2004), 299-304.

[43] Barbara Guestaferro, 'Sincere Cooperation and Respect for National Identities' in Robert Schütze and Takis Tridimas (ed.), *Oxford Principles of European Union law – Volume I: the European Union Legal Order* (OUP 2018), 355.

take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. Negatively speaking, Article 4(3) requires the Member States to facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives. Member States also have to assist each other in carrying out obligations which arise from the Treaties in full mutual respect.[44]

In practice, the obligations flowing from the principle of sincere cooperation have been phrased by the Court of Justice as duties incumbent on the EU institutions and the Member States. The Court of Justice has interpreted that provision by specifying how those duties can be operationalised. According to the CJEU, 'under the principle of sincere cooperation enshrined in Article 4(3) TEU, the European Union and the Member States must, in full mutual respect, assist each other in carrying out tasks which arise from the Treaties. In that regard, the Court has held, inter alia, that that principle not only obliges the Member States to take all the measures necessary to guarantee the application and effectiveness of EU law but also imposes on the EU institutions mutual duties to cooperate in good faith with the Member States'.[45] Member States for their part have to 'eliminate the unlawful consequences of a breach of that law, and that such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned'.[46] More specifically, the Court held that, as part of the principle of sincere cooperation, 'Member States are required to eliminate the unlawful consequences of such a breach of EU law. It follows that the competent national authorities, including national courts hearing an action against an instrument of national law adopted in breach of EU law, are therefore under an obligation to take all the necessary measures, within the sphere of their competence, to remedy the failure to carry out an environmental assessment. That may, for a 'plan' or 'programme' adopted in breach of the obligation to carry out an environmental assessment, consist, for example, in adopting measures to suspend or annul that plan or programme' or 'in revoking or suspending consent already granted, in order to carry out such an assessment'.[47] More generally, the principle of sincere cooperation therefore also requires any provision of national law which may be to the contrary to be disapplied, whether the latter is prior to or subsequent to the EU legal rule having direct effect.[48]

In the context of the administrative enforcement of EU law, the duty sincerely to cooperate relates above all to the putting in place structures that allow for the effective application and enforcement of EU legislation. As early as 1970, the Court held that Member States are obliged to do everything in their power to apply the provisions flowing from an EU Regulation, even

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[44] CJEU, 29 June 2023, Joined Cases C-829/21 and C-129/22,, *TE and RU,* EU:C:2023:525, para 73.

[45] CJEU, 4 September 2014, C-192/13 P, *Spain* v *Commission*, EU:C:2014:2156, para 87; 19 December 2019, *Amoena*, C-677/18, EU:C:2019:1142, para 55 and 8 October 2020, C-514/19, *Union des industries de la protection des plantes*, EU:C:2020:803, para 49. See CJEU, 5 December 2017, C-600/14, *Germany* v *Council*, EU:C:2017:935, para 105 and 27 March 2019, C-620/19, *Commission v Germany*, EU:C:2019:256, para 92.

[46] CJEU, 17 December 2020, C-316/19, *Commission* v *Slovenia (ECB archives)*, EU:C:2020:1030, para 119 and 124; 18 May 2021, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România' and Others*, CEU:C:2021:393, para 176; 21 December 2021, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *PM and others*, EU:C:2021:1034, para 173; 8 June 2023, C-407/21, *UFC- Que Choisir and others,* EU:C:2023:449, para 79.

[47] CJEU, 25 June 2020, C-24/19, *A and others*, EU:C:2020:503, para 83. See also CJEU, 28 July 2016, C-379/15, *Association France Nature Environnement*, EU:C:2016:603, para 31 and 32 and 12 November 2019, C-261/18, *Commission* v *Ireland* (*Derrybrien Wind Farm*), EU:C:2019:955, para 75.

[48] CJEU, 8 September 2010, C-409/06, *Winner Wetten*, EU:C:2010:503, para 55 ; 21 January 2021, C-308/19, *Whiteland Import Export*, EU:C:2021:47, para 31 ; 22 February 2022, C-430/21, *RS*, EU:C:2022:99, para 55. See also CJEU, 22 February 2022, C-430/21, *RS (Effect of the decisions of a constitutional court)* EU:C:2022:99, para 53-55 ; 13 July 2023, Joined Cases C-615/20 and C-671/20, *YP and others*, EU:C:2023:562, para 62 ;.

when that Regulation did not put in place a specific or separate enforcement framework.[49] The CJEU in that regard reiterates that Member States are obliged to take all the measures necessary to guarantee the application and effectiveness of EU law.[50] Those measures included notifying relevant obligations to the European Commission[51], reopening procedures when administrative decisions have been adopted in violation of EU law[52] but also ensuring that EU legal norms are effective enforced at Member State level.[53] In addition, 'according to settled case-law, under the principle of sincere cooperation laid down in Article 4(3) TEU, Member States are required to nullify the unlawful consequences of an infringement of EU law[54] and to lay down detailed procedural rules, in respect of actions for safeguarding rights which individuals derive from EU law, which are no less favourable than those governing similar domestic actions (principle of equivalence) and do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (principle of effectiveness)[55] […]. More specifically, in the absence of EU rules on the recovery of national taxes levied though not due, it is for each Member State to lay down the detailed procedural rules governing actions for safeguarding rights derived from EU law, provided, however, that those rules comply with both the principle of equivalence and the principle of effectiveness[56] […] inter alia as regards the setting of time limits or limitation periods applicable to such actions[57]'.[58]

In light of that case law, the principle of sincere cooperation as interpreted by the CJEU could at first sight serve as a constitutional benchmark against which diverging Member State administrative enforcement frameworks could be evaluated and harmonised. In practice, however, the principle does not fulfil that role. Three reasons related to the particular role sincere cooperation plays in the overall EU constitutional framework allow to explain this.

First, the principle of sincere cooperation – and the duties directly flowing from it as codified in Article 4(3) TEU – is set up as a *lex generalis* principle.[59] It imposes mutual assistance and cooperation duties, but only if and to the extent that no other more specific cooperation

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[49] CJEU, 17 December 1970, 30/70, *Scheer*, EU:C:1970:117, para 10.
[50] CJEU, 7 October 2010, C-382/09, *Stils Met*, EU:C:2010:596, para 44; 5 December 2017, C-600/14, *Germany* v *Council*, EU:C:2017:935, paragraph 94; 31 October 2019, *Commission* v *United Kingdom*, C-391/17, EU:C:2019:919, para 93; 8 March 2022, C-213/19, *Commission v United Kingdom*, EU:C:2022:167, para 584.
[51] As could be inferred from Case C-194/94 *CIA Security* EU:C:1996:172, para 50, see also Markus Klamert, *The principle of loyalty in EU law* (OUP 2015), 176.
[52] CJEU, 14 May 2020, Joined Cases C-924/19 PPU and C-925/19 PPU , *FMS and others,* EU:C:2020:367, para 187; 10 March 2022, C-177/20, *Grossmania*, EU:C:2022:175, para 54 and case law references included in those two cases.
[53] By way of example, CJEU, 11 November 2021, C-852/19, *Gavanozov,* EU:C:2021:902, para 57.
[54] See in that regard as well, CJEU, 21 June 2007, C-231/06 to C-233/06,*Jonkman and Others*, EU:C:2007:373, para 37-38; 26 July 2017, C-196/16 and C-197/16, *Comune di Corridonia and Others*, EU:C:2017:589, para 35; 27 June 2019, C-597/17, *Belgisch Syndicaat van Chiropraxie and Others*, EU:C:2019:544, para 54 and 31 October 2019, C-395/17, *Commission v Netherlands*, EU:C:2019:918, para 98.
[55] CJEU, 29 July 2019, C-411/17, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, EU:C:2019:622, para 170 and 171 and 11 September 2019, , C-676/17, *Călin*EU:C:2019:700, para 30.
[56] CJEU, 15 September 1998, *Edis*, C-231/96, EU:C:1998:401, para 19; 11 April 2019, C-691/17, *PORR Építési Kft.*, EU:C:2019:327, para 39), (
[57] see, to that effect, CJEU, 20 December 2017, C-500/16, *Caterpillar Financial Services*, EU:C:2017:996, para 37, and 19 December 2019, C-360/18, *Cargill Deutschland*, EU:C:2019:1124, para 46
[58] CJEU, 14 October 2020, C-677/19, SC Valoris, EU:C:2020:825, para 21. See also for a similar obligation to provide for effective remedies, CJEU, 2 March 2021, C-842/18, *A.B. and others,* EU:C:2021:153, para 39.
[59] See for that perspective, Opinion of Advocate General Reischl in 32/79 Commission v UK EU:C:1980:128, p 2460; see also Timothy Roes, *Sincere cooperation and European integration – a study on the pluriformity of loyalty in EU law*, PhD Thesis 2023, KU Leuven, 65. See also Markus Klamert, *The Principle of Loyalty in EU law* (OUP 2015), 13.

obligation exists under EU law. The CJEU in that regard confirmed that the 'failure to fulfil the general obligation of sincere cooperation following from Article 4(3) TEU may be found only in so far as it covers conduct distinct from that which constitutes the infringement of the specific obligations alleged against the Member State'.[60] In other words, the principle and duties flowing from the general sincere cooperation obligation can only be invoked when no more specific EU law obligation exists to that extent. In the context of the administrative enforcement of EU law, however, it has been submitted that Article 197 TFEU presents such a more specific application of the sincere cooperation principle.[61] As highlighted in the previous section, that provision states that the effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest. The fact that effective implementation of EU law is of common interest, implies that the duty to make this happen in a sincere cooperation manner, flows directly from this provision rather than from the general Article 4(3) TEU duties. In practice, however, the previous section highlighted that the current setup of Article 197 TFEU actually contributed to the varied and at times inconsistent administrative enforcement regimes in place. To the extent that this provision would indeed serve as the *lex specialis* for sincere cooperation obligations, trying to design coherent administrative enforcement structures on the basis of sincere cooperation would suffer the same inconsistency risks that are currently underlying Article 197 TFEU. As a result, it would be unlikely that sincere cooperation obligations could play any structuring role at all in the coherent administrative enforcement designs of different EU policy fields.

Second, and related to the previous observation, it has been submitted in legal scholarship that the principle of sincere cooperation presents itself above all as a programmatic principle, the self-standing invocation of which remains at present uncertain.[62] Although the Court of Justice has confirmed on multiple occasions that the principle of sincere cooperation in Article 4(3) TEU can be invoked autonomously in theory, it generally links such interpretations to the existence of another, more specific implementation, consultation or enforcement obligation flowing from another provision of EU law.[63] To the extent that sincere cooperation lays out general guidelines on how to strengthen the cooperative relationships between EU and Member States' institutions in the face of other, more specific obligations, its role is not to serve as a self-standing and sufficiently specific design standard for specific enforcement mechanisms. Against that background, it is not surprising that references to sincere cooperation are indeed scarce in EU legislative instruments harmonising Member States' administrative structures.[64]

[60] CJEU, 14 July 2022, C-159/20, *Commission v Denmark,* EU:C:2022:561, para 75 ; 17 December 2020, C-316/19, *Commission* v *Slovenia (ECB archives)*, EU:C:2020:1030, para 121 and 30 May 2006, C-459/03, *Commission* v *Ireland*, EU:C:2006:345, para 169 to 171.

[61] Markus Klamert, note 59, 13.

[62] Timothy Roes, note 59, 67.

[63] By way of example, see CJEU, 17 December 2020, C-316/19, *Commission* v *Slovenia (ECB archives)*, EU:C:2020:1030, para 122.

[64] It suffices to compare in that regard three relatively recent EU legislative instruments that have sought to harmonise, within a given policy field, the administrative enforcement capacities of the Member States: Directive (EU) 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] O.J. L11/3; Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), [2022] O.J. L277/1 and Regulation 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 , [2023] O.J. L150/40. In neither of those three instruments, nor in their proposals tabled by the European Commission, the notion of sincere cooperation has been relied on. Although recital 139 of

As a result, its use as a more specific backbone for specific administrative designs would seem at odds with its programmatic and general nature.

Third, the principle is above all presented as a conflict-resolving rather than a competence-conferring principle. As such, it is in practice often assimilated with the *effet utile* or the principle of effectiveness underlying the application and enforcement of EU law.[65] However, in practice, the principle of effectiveness is presented above all as a reactive principle, allowing the EU Courts to intervene ex post from a systemic point of view with a view to evaluate whether in a specific case EU law has been enforced to a sufficiently effective extent.[66] In doing so, effectiveness requires the presence of a case-specific problem to trigger its application. From that perspective and despite its systemic potential, effectiveness is not set up to support, at the EU constitutional level, any ex ante institutional design strategy. The assimilation of sincere cooperation obligations with effectiveness requirements therefore additionally also downplays the potential of sincere cooperation as a backbone for the coherent design of administrative enforcement frameworks as a matter of EU law.

It follows from the foregoing that the shape and structure of sincere cooperation in the current EU constitutional framework make it an unlikely candidate for a more pro-active institutional design standard. The fact that sincere cooperation obligations remain vague and complementary to more specific obligations make them, in the current EU constitutional setup, insufficiently adapted to address the challenges flowing from inconsistent administrative enforcement structures tolerated by Article197 TFEU.

B. EU fundamental rights and administrative enforcement

Next to the principle of sincere cooperation, EU fundamental rights could be understood as benchmarks for the (coherent) institutional design of administrative enforcement frameworks. Among the different fundamental rights underlying the EU legal order, the right to good administration and the right to effective judicial protection are the most likely candidates in that regard. Both fundamental rights have been codified in part by Articles 41 and 47 of the Charter of Fundamental Rights of the European Union.

First, Article 41 of the Charter states that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. Although the Charter only confers this right in procedures before institutions, bodies, offices and agencies of the Union, the CJEU has repeatedly stated that the right to good administration is part of a fundamental principles of good administration, which also applies whenever a Member State administration acts within the scope of EU law.[67] Although the Charter provision cannot be invoked directly in such a context, the EU principle of good administration incorporates the same guarantees in that situation.[68] According to Article 41(2) of the Charter, the right includes (a) the right of every person to be heard, before any

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the DSA refers to sincere cooperation, it does so only in relation to cooperation between the European Commission and competent digital services coordinators at Member State level; sincere cooperation is not relied on to justify the structuring of those coordinators within the Member States and the cooperation they have to engage in.

[65] On the link between sincere cooperation and effet utile in that regard, see Markus Klamert, note 59, 266.

[66] See for that conception of effectiveness in the EU legal order, Opinion of AG Bobek in Case C-64/20, *UH*, EU:C:2021:14, para 43.

[67] CJEU, 26 February 2013, Case C-617/10 *Åkerberg Fransson* EU:C:2013:105, para 27

[68] See CJEU, 17 July 2014, C-141/12 and C-372/12, *YS and Others*, EU:C:2014:2081, para 67; 8 May 2014, C-604/12, *N.,* EU:C:2014:302, para 49 and 26 March 2020, C-113/19, *Luxaviation,* EU:C:2020:228, para 47.

individual measure which would affect him or her adversely is taken; (b) the right right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; and (c) the obligation of the administration to give reasons for its decisions.[69]

In practice, the right to (and principle of) good administration appears to contain building blocks for a common administrative enforcement template. It requires that such enforcement takes place in an impartial, fair and timely manner. Those requirements have not been fully developed in the CJEU case law, however, and therefore remain vague.[70] The Court of Justice for its part additionally held that Article 41 of the Charter or the equivalent principle cannot be invoked to force a Member State administrative structure to set up a specific notification or warning mechanism. Whenever such a mechanism is set up, the right to good administration has to be respected. However, when a Member State decides not to set up such a system, Article 41 of the Charter cannot be used as a tool to impose such requirement.[71] In so stating, the CJEU makes clear that the right to good administration has a rather limited potential as a constitutional standard seeking to impose not already existing administrative procedures. It only comes into play whenever procedures have been put in place. That tendency can be noted as well in recent EU secondary legislation initiatives. The EU legislator increasingly pays attention to requirements of good administration, but does so always in a highly sector-specific manner.[72] In the same way, administratees have to be heard, to have access to their file and to a reasoned decision. Those requirements are nevertheless of such a nature that they allow for sector-specific variety. The organisation of a hearing may be tailored to the specifics of any procedure and would not therefore serve as a sufficiently uniform basis to address inconsistent administrative enforcement setups.

Second, the principle of effective judicial protection stems from the constitutional traditions common to the Member States and from Articles 6 and 13 of the European Convention on the Protection of Human Rights and Fundamental Freedoms.[73] A general principle of EU law, it can also be found in Articles 19(1) TEU and 47 of the Charter of Fundamental Rights of the European Union.[74] As a general principle and an EU fundamental right, it applies in every case falling within the scope of EU law, which includes Member States' actions or rules that seek to apply and enforce EU rules.[75] In essence, effective judicial protection entitles individuals to introduce a claim on the basis of EU law before a national court and to benefit from a fair trial

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[69] For a detailed analysis of the components of this principle, see Rhita Bousta, 'Who Said There is a 'Right to Good Administration'? A Critical Analysis of Article 41 of the Charter of Fundamental Rights of the European Union', (2013), 19, *European Public Law*, 481-488.

[70] As argued by Paul Craig, 'Article 41' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (ed.), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2021), 1133.

[71] CJEU, 26 March 2020, C-113/19, *Luxaviation,* EU:C:2020:228*,* para 49.

[72] By way of examples, recital 118 of the Digital Services Act Regulation 2022/2065 only refers to national good administration principles, although enforcement bodies implementing the DSA would be acting within the scope of EU law; Directive 2019/1 and Regulation 2023/1114 do not refer to the notion at all.

[73] CJEU,10 April 1984, Case 14/83, *von Colson*, EU:C:1984:153*,* para 23-24 and 15 May 1986, Case 222/84 *Johnston*, EU:C:1986:206, para 18. See also Matteo Bonelli, 'Effective judicial protection in EU law: an evolving principle of a constitutional nature' (2019) 12 *REALaw* 35–62

[74] Rob Widdershoven, 'National Procedural Autonomy and EU law limits' (2019) 12 *REALaw* 16.

[75] CJEU, 26 February 2013, Case C-617/10 *Åkerberg Fransson* EU:C:2013:105, para 27; and 16 May 2017, Case C-682/15 *Berlioz Investment Fund SA v Directeur de l'administration des contributions directes* EU:C:2017:373, para 41.

and effective remedies when doing so.[76] Although the principle of effective judicial protection is not absolute[77], its invocation has enabled the Court of Justice more directly to impose positive procedural obligations (the obligation to create new remedies or to organise additional hearings in procedures) on Member States.[78]

In practice, the principle of effective judicial protection shows certain overlaps with the principle of effectiveness.[79] However, its focus is different. Effective judicial protection 'pays closer attention to the *individual* level (existence, *in concreto*, of adequate remedies for the person concerned).[80] In order to invoke the principle, an individual therefore needs to demonstrate that (the absence of) national procedural rules affect her access to justice, fair trial or access to a remedy to address an infringement of her or his EU rights. Whenever that turns out to be the case, the Court will not hesitate to require structural changes in a Member State's judicial or procedural framework.[81] However, those structural changes do not take place in accordance with a pre-established institutional design template. By contrast, the CJEU relies on a case-specific interpretation of the right to call for the adoption of an adapted or new remedy. In addition, the scope of the right is limited to judicial proceedings. In the framework of the administrative enforcement of EU law, the principle therefore only comes into play at the judicial review stage against administrative decisions. As a result, the principle's scope and focus do not make it amenable to functioning as an ex ante institutional design standard for administrative enforcement structures either.

It follows from the brief overview provided here that, despite fundamental rights' institutional design potential[82], both the right to good administration and the right to effective judicial protection have been interpreted in such a way as to limit that potential. Both rights are used as benchmarks against which *existing* administrative and judicial procedures can be evaluated. To that extent, those rights can be relied on to modify or change the procedures or enforcement structures incompatible with those fundamental rights. To that extent, supplementary or upgraded remedies or procedural guarantees may have to be created within a given policy field. However, at the same time, neither the EU legislator nor the CJEU envisage those rights as constitutional law benchmarks that could be relied on to create or update existing inconsistencies across different administrative enforcement mechanisms. Although the EU legislator recently has started to call more explicitly for administrative enforcement procedures to be compliant with fundamental procedural and defence rights outlined in the Charter, such

[76] See Anthony Arnull, 'Article 47 CFR and national procedural autonomy' (2020) 45 *E.L.Rev.* 681-693 and Sacha Prechal, 'Effective Judicial Protection: some recent developments – moving to the essence', (2020) 13 *REALaw* 175-190.

[77] Kathleen Gutman, 'The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?' (2019) 20 *German Law Journal*, 888.

[78] Allison Östlund, 'Effective judicial protection – to what effect and at whose service?' (2022) 47 *European Law Review* 175-199.

[79] Fernando Pastor-Merchante, 'The Overlap Between the Principles of Effectiveness and Effective Judicial Protection in Union Law' in Cristina Izquierdo-Sans et al. (eds.), *Fundamental Rights Challenges : Horizontal Effectiveness, Rule of Law and Margin of National Appreciation* (Springer 2021), 220.

[80] Opinion of AG Bobek in Case C-64/20, *UH*, EU:C:2021:14, para 43.

[81] By way of example, CJEU, 24 June 2019, Case C-619/18, *Commission v Poland*, EU:C:2019:531; Giulia Gentile 'Effective judicial protection: enforcement, judicial federalism and the politics of EU law' (2023) 2 *European Law Open* 138-139.

[82] See also Pieter Van Cleynenbreugel, 'Effectiveness through fairness ? Due process as an institutional precondition for effective decentralized competition law enforcement' in Paul Nihoul and Tadeusz Skoczny (ed.), *Procedural fairness in competition proceedings* (Elgar 2015), 44-83.

calls have not resulted in hose rights becoming common or uniform benchmarks allowing to streamline diversified enforcement frameworks. As those rights continue to be interpreted in a context-specific manner, they allow room for diverging institutional design choices and thus for inconsistencies among different policy domains.

C. The limited structuring role of both sincere cooperation and fundamental rights : reactive and sector-specific rather than design-based and cross-sectoral

The overview given in this section has shown that neither the principle of sincere cooperation nor the fundamental rights to good administration or effective judicial protection can compensate for the lack of an overarching coherent and constitutionally sanctioned administrative enforcement template accompanying the EU Treaty framework. As a result, it would seem that absent a clear constitutional frame of reference, enforcement structures are designed more in line of sector-specific needs or sensitivities rather than in compliance with a clear constitutional template in mind.[83] The obligations flowing from sincere cooperation or fundamental rights may therefore result in changes or updates to existing procedural frameworks, but those principles and rights do not directly govern the way in which those procedures come into existence. The EU constitutional framework remains laconic in that regard and existing, better established constitutional principles add little to the existing divergence.

Section 3. Inconsistent administrative enforcement structures: a constitutional challenge in need of resolving?

The previous two sections highlighted that the EU constitutional framework does not as such oppose the current fragmentation accompanying administrative enforcement structures supporting the implementation of EU law. Despite that apparent room for fragmentation, the Lisbon Treaty nevertheless also added a transversal, cross-policy principle of consistency to the EU constitutional framework. It therefore deserves to be questions what kind of consistency is envisaged by that principle and whether it could play a role to address fragmented administrative enforcement structures (A.). Although, at first sight, uncertainty surrounding the scope of the consistency principle risks rendering its application difficult in the administrative enforcement context, the focus on consistency between activities may nevertheless impose a higher burden on the EU legislator than the one currently relied on (B.). When that would be the case, the EU legislator would face a higher consistency burden when designing or adopting administrative enforcement structures (C.).

A. The constitutional principle of 'consistency' and its limited scope and relevance at first sight

According to Article 7 TFEU, the Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers. This provision, which has been introduced by the Lisbon Treaty[84],

[83] References to WP by Julien in rail and in SSM-banking…
[84] See Esther Herlin-Karnell and Theodore Konstadinides, 'The Rise and Expressions of Consistency in EU law: Legal and Strategic Implications for European Integration', *Cambridge Yearbook of European Legal Studies* (2012-2013), 144.

complements another earlier provision which required consistency in the field of EU external relations[85] and a provision asking the different EU institutions to act in a consistent manner.[86]

An even cursory reading confirms that Article 7 TFEU transversally requires European Union actors to ensure consistency between all policies and activities. As such, it does not seem directly involve Member States. The latter do not have to ensure consistency in the ways in which EU law is enforced, given the inherent diversity among them and their different constitutional identities. The provision therefore essentially applies 'horizontally' at the EU level and concerns legislative, executive and judicial actors on that level.[87]

With the entry into force of the Lisbon Treaty, Article 7 TFEU became in principle directly enforceable and invokable before the EU Courts. So far, however, the provision's use in that context has been limited by the judiciary. In *Front Polisario*, the General Court adopted a strict reading of the principle of consistency. According to that interpretation, the principle would be respected if and when a measure adopted at the EU level respected the boundaries set out in the Treaty legal basis on which that measure is based. According to the General Court, 'the various policies of the European Union derive from different provisions of the founding treaties and acts adopted pursuant to those provisions. The supposed 'inconsistency' of an act with the policy of the European Union in a given area necessarily implies that the act concerned is contrary to a provision, a rule or a principle which governs that policy. That fact alone, if it were established, would be sufficient to lead to the annulment of the act concerned, without it being necessary to rely on Article 7 [TFEU]'.[88] From that perspective, invoking a violation of Article 7 without a more specific violation of a Treaty legal basis would seem to be impossible. The Court of Justice essentially confirmed that interpretation in more recent case law, where it interpreted the principle of consistency in conjunction with specific Treaty legal bases rather than as a separate legal principle.[89]

The CJEU's case law is based implicitly on the assumption that consistent policies are the ones adopted in accordance with a correct legal basis and therefore do not contradict the EU constitutional framework. However, that assumption also presumes that the EU constitutional framework as it currently stands is in and of itself coherent and that consistency. Consistency would in that understanding be limited to verifying how far a measure fits the overall legal framework. Inconsistencies would only arise when the boundaries of that framework are disrespected. By contrast, when the correct legal basis is relied on, no inconsistencies would appear in practice. Such an interpretation corresponds to a narrow understanding of consistency

[85] Article 13 TEU;

[86] Article 18(4) TEU.

[87] Christian Franklin, 'The Burgeoning Principle of Consistency in EU law', (2011) 30 *YEL* 59; for an overview, see also Kian Navid, 'How Many Single Rulebooks? The EU's PatchworkApproach to Ensuring Regulatory Consistency in the Areaof Investment Management', (2022) 23 *European Business Organization Law Review* 352-353

[88] General Court, 10 December 2015, Case T-512/12, *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v. Council of the European Union*, EU:T:2015:953, para 153. See also General Court, 2 February 2022, Case T-616/18, *Polskie Górnictwo Naftowe i Gazownictwo S.A. v European Commission*, ECLI:EU:T:2022:43, para 57.

[89] CJEU, 16 February 2022, Case C-157/21, *Commission v Poland*, EU:C:2022:98, para 146.

that equates it with the notion of correct legal basis and, hence, coherence said to underlie the EU constitutional framework.[90]

B. Towards a broader understanding of consistency in the context of administrative enforcement structures?

It follows from the previous section that the notions of consistency and activities in Article 7 TFEU remain fraught with uncertainties. Those uncertainties result in that provision having at first sight only limited relevance to address potential contradictions in the setup of administrative enforcement mechanisms by the EU legislator.

It is nevertheless submitted that such narrow understanding of consistency is not necessarily the only way to understand Article 7 TFEU. In the Court's implicit understanding, consistency equates overall coherence as established by the Treaties themselves. However, nothing in those Treaties either requires that narrow interpretation of consistency or imposes that particular understanding of consistency in relation to presumed constitutional coherence. Two observations can indeed be developed in that regard.

First, the relationship between consistency and coherence is not necessarily clear. In the English language, the two notions refer to different elements, despite the fact that other linguistic versions of the EU Treaties refer to coherence where the English version mentions consistency.[91] By referring explicitly to consistency, it would seem that the Treaty did want to distinguish this notion from the more general idea that the constitutional framework presents a coherent whole.[92] Unfortunately, the precise meaning of consistency appears nowhere to be found. It could be interpreted as an absence of contradictions making the EU legal framework incoherent or as the absence of contradictions in relation to another set of values than simply coherence. It would therefore be possible that a measure is overall compatible with EU legal bases, but nevertheless presents itself as contradictory compared to measures adopted in other policy domains. Such measures could be considered inconsistent when benchmarking them against the value that similar types of rights need to be protected by similar types of enforcement activities. Stated otherwise, consistency as a constitutional concept could be detached from the implicit view that measures are consistent when they are compatible with a Treaty legal basis. So far, the EU Courts have not had to address this question, as consistency arguments have been made in relation to the interplay between different policy areas only. As a result, the exact interpretation and meaning of consistency in relation to fragmented or diversified enforcement activities remains open for interpretation.

Second, the CJEU's case law on consistency has been developed in relation to potential conflicts between policy areas, in which it has given rise to a narrow interpretation. However, that narrow interpretation is difficult to transpose to 'activities' also mentioned in Article 7 TFEU.[93] The Treaty contains legal bases which empower the EU to act, but the actual scope of those activities is also governed by other principles such as the principles of subsidiarity and proportionality in the framework of shared competences.[94] Advocate General Rantos held in

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[90] For the inherent lack of clarity surrounding the notion of consistency, see Jurian Langer and Wolf Sauter, 'The Consistency Requirement in EU law', 24 *Columbia Journal of European Law* (2017), 39-74.
[91] Christian Franklin, note 87, 50 for a schematic overview.
[92] On that difficulty, see also Ulrike Schuster, *Das Kohärenzprinzip in der Europäischen Union* (Nomos 2017), 273 p.
[93] See also Christian Franklin, note 87, 60.
[94] Article 5 TFEU and Protocol No. 2 attached to the TEU and TFEU.

Superleague that, 'in accordance with Article 7 TFEU, the various policies of the European Union must be implemented consistently, taking into account all of the objectives which the European Union seeks to protect.[95] Such consistent implementation would not necessarily seem to be limited to using a correct legal basis for each policy.

It is submitted in that regard that a broader understanding of consistency of activities could also imply that, in situations where similar solutions are considered the most proportionate, the EU legislator is to avoid contradictions between activities carried out. To the extent that such an interpretation is maintained, it would appear possible to invoke the principle of consistency next to or as a complement to the principle of proportionality. Absent case law on the consistency of activities[96], however, it remains at present unclear to what extent this interpretation may hold in such cases. That being said, the mere potential that a broader consistency obligation may accompany the design and operationalisation of EU activities may have direct repercussions on the design of administrative enforcement structures. At the time when the Lisbon Treaty was adopted, the number of coordinated administrative design structures was significantly lower than it is today. Questions as to the consistency in the development of that activity did not arise at that time. However, given the increased reliance on coordinated administrative structures, new questions arise as to whether the activities developed by the EU legislator in that realm would meet the consistency requirement set out in Article 7 TFEU. The lack of clarity surrounding the extent and scope of consistency may therefore bring an additional constitutional challenge for the EU legislator, as it remains unclear whether and to what extent such design initiatives need to comply with and respond to certain consistency requirements.

C. Towards a richer consistency-backed legislative justification obligation?

It can therefore be concluded that, absent a clearer idea of what consistency of activities at EU level means and how that notion can be invoked before the EU Courts, it remains doubtful whether and to what extent fragmented and at times inconsistent administrative enforcement structures across different policy fields can be accepted constitutionally. The lack of clarity and the resulting potential fragmentation may therefore be at odds with the constitutional premiss of consistency envisaged by the Lisbon Treaty. We therefore submit that, in order to avoid and anticipatively address such consistency claims, it would be useful for the EU legislator to develop more explicitly why it envisages a particular coordinated administrative enforcement structure in a particular sector. As it turns out that, across those fields, some common characteristics are developing, one could even argue that an emerging common coordinated administrative enforcement template could be detected.[97] As part of that template, a common understanding of what it means to ensure good administration at Member State level, to provide for effective judicial review and to provide for adequate inter-state cooperation seems to have guided the EU legislator in different fields.[98] To the extent that such a common template is

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[95] Opinion of AG Rantos in Case C-333/21 *European Superleague Company SL v. Unión de Federaciones Europeas de Fútbol (UEFA), Fédération internationale de football association (FIFA),* ECLI:EU:C:2022:993, para 35.

[96] The cases in which the CJEU referred to the principle of consistency related to consistency between policies, see CJEU, 16 February 2022, C-157/21, *Commission v Poland*, EU:C:2022:98, para 146 and General Court, 10 December 2015, Case T-512/12, *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v. Council of the European Union*, EU:T:2015:953, para 153.

[97] For a comparison between different policy fields in that regard, we refer to the comparative tables established in the framework of the ERC EUDAIMONIA project, available for consultation via https://www.eulegalstudies.uliege.be/cms/c_8012264/fr/eulegalstudies-eudaimonia.

[98] See also, recently, Pieter Van Cleynenbreugel, note 6, 232.

indeed emerging, one could argue that this template is the background standard with which the consistency of new administrative enforcement structures is to be assessed. A consistent structure would then be a structure that accords the same degree of importance to the basic good administration, effective judicial review and adequate cooperation requirements. Any deviation from that template would risk to be considered inconsistent, unless it would be considered proportionate to the specifics of a given sector.

To counter potential inconsistency claims founded on Article 7 TFEU, the EU legislator would in those circumstances explicitly have to motivate why some features of the coordinated administrative enforcement template are not used. In that understanding, Article 7 TFEU could be understood implicitly to require the coordinated administrative enforcement template that seems to appear across different sectors to be rendered more explicit. The reference to activities in that provision at least leaves room for such an interpretation to be developed. It would be useful, therefore to clarify the scope of that provision and, if needed, to render more explicit the tenets of the coordinated administrative enforcement template. Doing so could contribute to more administrative consistency and to a better understanding of which resources would need to be devoted to setting up such administrative enforcement mechanisms. At present, the constitutional uncertainty accompanying Article 7 TFEU makes this prospect insufficiently likely to materialise.

Conclusion

The European Union legislator has set up and continues to set up coordinated administrative enforcement mechanisms across different policy fields. In practice, however, those mechanisms appear in a fragmented and at times contradictory manner. Starting from that finding, this paper analysed whether and to what extent the EU constitutional framework as consolidated by the Lisbon Treaty tolerates, requires or affects that apparently inconsistent approach. An exploratory overview of references to authorities and administrative enforcement in the founding Treaties allowed to conclude that no consistency exists among different policy areas. In the same vein, Article 197 TFEU, the principle of sincere cooperation and the interpretation given to fundamental good administration and effective judicial review rights directly contribute to the emergence of at times inconsistent arrangements.

Confronted with those findings, the paper questioned whether the principle or requirement of consistency among EU activities emanating from Article 7 TFEU, introduced by the Lisbon Treaty, could address existing fragmentation and inconsistencies. However, an analysis of that provision shows that the concept of ‘activities’ mentioned therein has not been subject to judicial clarification. The only interpretations of that provision have focused on consistency between policies, but that interpretation is tailored directly to the existence of and correct reliance on a legal basis. Given that the basic building blocks of a coordinated administrative enforcement template nevertheless appear to emerge across sectors, it was submitted that more explicit attention to justifying why those building blocks are or are not relied on by the EU legislator could at the very least counter potential future ‘inconsistent activities’ claims based on Article 7 TFEU.