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RULE OF LAW WITH LEVERAGE: POLICING STRUCTURAL OBLIGATIONS IN EU LAW WITH THE INFRINGEMENT PROCEDURE, FINES, AND SET-OFF

Pekka Pohjankoski[*]

Abstract

Does the European Union have enough leverage to police the rule of law in Member States? To answer this inquiry, this article first outlines how the infringement procedure is functionally adequate to address breaches of the rule of law. It claims that EU law entails "structural obligations" for Member States to uphold the rule of law within their legal systems. Arguably, to the extent respecting such structural obligations is indispensable for observing specific EU law rules, their breach can be the target of the infringement procedure. Second, the article analyses the EU's leverage to guarantee the authority of EU law in case of Member States' non-compliance with fines imposed in that procedure. The article concludes that the recovery of fines by set-off against EU money enables effective policing even if respect for the rule of law is deficient and constitutes, therefore, an essential constitutional guarantee of the EU legal order.

Keywords: EU law, Rule of law, Enforcement, Infringement procedure, Fines, Set-off

1. Introduction

The European Union's (EU) ability to police the rule of law in its Member States ranks among the thorniest problems of its legal order. Independent public institutions, the separation of powers, and free and fair elections are hallmarks of societies founded on the rule of law. While the EU owes respect to its Member States' right to organize their government, the latter must observe the rule of law, as it is understood in the EU legal order. In fact, since respect for the rule of law is indispensable to observe EU law, Member States have an obligation, by virtue of their EU membership, to safeguard it in their legal systems. This obligation is "structural" in that it relates to the foundational guarantees necessary for the observance of specific EU law rules. Can such an obligation be policed with the default tool for enforcing EU law, the infringement procedure in Articles 258 to 260 of the Treaty on the Functioning of the European Union (TFEU)?[1] This inquiry is essential, because that procedure arguably provides the EU with its most effective leverage to uphold the rule of law: fines.[2]

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[1] On this procedure generally, see e.g. Materne, *La Procédure en manquement d'État* (Larcier, 2012), and Prete and Smulders, "The Age of Maturity of Infringement Proceedings", 58 CML Rev. (2021), 285-332.

[2] In this article, "fines" refer collectively to the financial sanctions imposed on Member States pursuant to Article 260 TFEU, the exact terms of which – "lump sum" and "penalty payment" – are employed only when necessary to distinguish between the financial consequences of the two types of fine.

Legal doctrine has already analysed the infringement procedure's potential for policing the rule of law.[3] This article demonstrates how the EU can target Member States' infringements of structural obligations to uphold the rule of law, inherent in specific EU rules. Moreover, it argues that if observance of the rule of law is deficient, it may not be possible to rely on the Member State concerned to faithfully comply with judgments of the European Court of Justice (ECJ) declaring an infringement or subsequently imposing fines. In such cases, the authority of those judgments may be guaranteed through the recovery of fines by set-off. Prior research has overlooked the importance of such recovery.[4] The value of suspending the payment of EU funds to Member States following an ECJ judgment has certainly been noted, but the constitutional significance of recovery by set-off against EU money and the existing procedures have received little close analysis.[5] It is contended that the recovery of fines by set-off is worthy of detailed scrutiny. Indeed, in case of non-observance of ECJ judgments, such set-off may provide the crucial leverage to tip the constitutional balance in the EU's favour and to restore the rule of law.

The article presents its argument in two steps. First, the adequacy of the infringement procedure to police the rule of law is analysed in Section 2. It begins by presenting how specific EU rules produce structural obligations for Member States (2.1) and, to consolidate this argument, discusses "breaches of the rule of law" as infringements of specific EU law rules which imply such obligations (2.2). Second, the enforcement stage of the infringement procedure, namely the imposition of fines, is assessed in Section 3. In view of the particular challenge of deficient respect for the rule of law, it is argued that if a Member State refuses to comply with an ECJ judgment imposing a fine, it is lawful to recover that fine by set-off against the Member State's outstanding claims for EU money (3.1). Finally, the article demonstrates how set-off works in the context of fines, and how EU law treats it as conceptually distinct from

[3] See e.g. Schmidt and Bogdanowicz, "The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU", 55 CML Rev. (2018), 1061-1100; Hillion, "Overseeing the Rule of Law in the EU: Legal Mandate and Means" and Scheppele, "Enforcing the Basic Principles of EU Law through Systemic Infringement Actions" in Closa and Kochenov (Eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016), pp. 59-81 and pp. 105-132 respectively; Blauberger and Kelemen, "Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU", 24 *J. Eur. Public Policy* (2017), 321-336, as well as Gormley, "Infringement Proceedings" in Jakab and Kochenov (Eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP, 2017), pp. 65-78.

[4] See e.g. Kochenov, "On Policing Article 2 TEU Compliance – Reverse Solange and Systemic Infringements Analyzed", 33 PYIL (2013), 145-170, at 167 ("So while 'how to collect the money?' is definitely a legitimate question, it seems to have very little to do with the enforcement of EU values (or, indeed, EU law) in the Member States."); Jack, "Article 260(2) TFEU: An Effective Judicial Procedure for the Enforcement of Judgements?" (2013) ELJ, 404-421, at 413-414 (focusing on Art. 7 of the Treaty on the European Union (TEU) as solution for persistent non-compliance), and Wennerås, "Making Effective Use of Article 260 TFEU" in Jakab and Kochenov (Eds.), op. cit. *supra* note 3, pp. 87-88 (dismissing possibility for Commission to halt EU payments to Member States).

[5] See e.g. Scheppele, Kochenov, and Grabowska-Moroz, "EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union", 39 YEL (2020), 3-121, at 116 (advocating "suspending the payment of EU funds in the amount which would otherwise have been sought as a fine" instead of "waiting to extract a fine from a Member State while it delays compliance"), and Schmidt and Bogdanowicz, op. cit. *supra* note 3, at 1075 ("whether set-offs are permissible … may be very much worth exploring separately").

enforcement (3.2). The conclusion recaps the findings and provides reflections on the recovery of fines by set-off as a constitutional guarantee in the EU legal order.

2. Adequacy of the Infringement Procedure to Police the Rule of Law

2.1 Beyond Article 2 TEU: Structural dimension of specific EU rules

The rule of law is foundational for organized civilization. The idea, already expressed by Aristotle, that "the rule of law is preferable to that of any individual" – that neutral laws, not biased men, should govern societies – remains valid today.[6] As a basic feature of the European constitutional landscape, the rule of law is listed among the EU's founding values in Article 2 TEU.[7] Moreover, it is commonly recognized as a necessary precondition for democracy and fundamental rights.[8] In the EU, the rule of law has been defined as encompassing elements such as the legality of the law-making process (with "transparen[cy], accountab[ility], democra[cy] and pluralis[m]"), legality of executive action (including legal certainty and prohibition of arbitrariness), effective judicial protection (encompassing access to court, judicial independence, and protection of fundamental rights), as well as other structural guarantees (separation of powers, non-discrimination and equality before the law).[9]

This "definition" does not invent the rule of law in the EU legal order. As it relies on previous ECJ case law, it is of a declarative, rather than constitutive, nature.[10] It nevertheless highlights a "EU core" of the rule of law, which straddles formal and substantive elements.[11] According to the European Commission, "[t]his core meaning, in spite of the different national identities and legal systems and traditions that the Union is bound to respect, is the same in all Member States".[12] Though related concepts such as *État de droit*, *Rechtstaat*, and others, are each connected to the constitutional history of different legal and political systems, it appears possible to speak of the rule of law as an

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[6] Aristotle, *Politics* (Jowett, trs and ed, Clarendon Press, 1885), pp. 101-102 (III. 16, 1287a, 3-6) (holding man is "beast" corrupted by "passion" while "[t]he law is reason unaffected by desire").

[7] Art. 2 TEU refers to "human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities".

[8] See Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, O.J. 2020, L433/1, Rec. 6 ('There can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa.'). See also e.g. Statute of the Council of Europe (signed 5 May, 1949, entry into force 3 Aug 1949) ETS 1, preamble (referring to 'individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy.'), and European Commission for Democracy Through Law (Venice Commission), 'Report on the Rule of Law' (4 April 2011) Study No 512/2009, CDL-AD(2011)003rev, para 41. On the history of the idea, see Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004).

[9] See Art. 2(a) of Reg. 2020/2092, *supra* note 8.

[10] See Communication from the Commission of 11 March 2014, A new EU Framework to strengthen the rule of law, COM (2014) 158, Annex I, which, itself, codifies the ECJ's case law on the constituent elements of the rule of law.

[11] For an overview of limited and expansive ideas of the rule of law, see e.g. Craig, "Formal and substantive conceptions of the rule of law: An analytical framework", (1997) *PublL,* 467-487.

[12] See Communication from the Commission of 17 July 2019, Strengthening the rule of law within the Union: A blueprint for action, COM (2019) 343, at p.1.

idea enshrined in European constitutional traditions.[13] Within the EU, the ECJ habitually refers to the rule of law, both in regard of the EU institutions and the Member States, without expressing caveats as to national differences in the concept.[14] However, EU membership does not necessarily render the rule of law uniform in the Member States' constitutional systems.[15] What matters, for the purposes of this article, is that EU law imposes certain minimum requirements as regards its core elements.

Can the EU's conception of the rule of law be policed with the infringement procedure? To answer this question it is necessary to clarify how "breaches of the rule of law" should be understood. Whereas, in its broadest sense, the rule of law requires that Member States observe all EU law and carry out their membership obligations faithfully,[16] breaching "*the* rule of law" cannot be equated with breaching *any* rule of law without depriving the concept of its meaning as a structural guarantee. As such, in academic literature, Member States' breaches of the rule of law have been associated with "systemic deficiencies".[17] On this basis, it has been argued that the infringement procedure should target "systemic breaches" of EU law, that is, multiple breaches which demonstrate a violation of Article 2 TEU.[18] However, focusing on Article 2 TEU is highly impractical. While the ECJ arguably has jurisdiction to hear claims based on that

[13] Space precludes addressing this topic here in depth. See generally e.g. Van Caenegem, *An Historical Introduction to Western Constitutional Law* (Cambridge University Press, 1995), pp. 17-21 (sketching trajectory of rule of law from 1200s up to American and French revolutions); Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (Cambridge University Press, 2007), p. 111 (identifying rule of law in medieval Europe when "institutions of law could be criticized by reference to the doctrines they produced"); Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (Cambridge University Press, 2010), pp. 29-44 (synthetizing common elements in rule of law thought of Dicey, Oakeshott, and Habermas).

[14] See already A.G. Roemer in Cases 9&10/58, *Meroni v. High Authority*, EU:C:1958:4, p. 190 (extracting to Community law conditions for delegation of administrative powers from those existing in "a modern State founded on the rule of law"). See also Cases 294/83, *Les Verts v Parliament*, EU:C:1986:166, para 23; C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, EU:C:2013:625, para 91; C-72/15, *Rosneft*, EU:C:2017:236, para 72, and C-216/18 PPU, *LM*, EU:C:2018:586, paras. 35, 48 and 50.

[15] See Von Bogdandy and Ioannidis, "Systemic Deficiency in the Rule of Law: What it is, what has been done, what can be done", 51 CML Rev. (2014) 59-96, at 62-63 (referring to "generally agreed core" of rule of law in Europe); Konstadinides, *The Rule of Law in the European Union: The Internal Dimension* (Hart, 2017), p. 28 (emphasizing "integrative conception of the EU rule of law" within scope of EU law but acknowledging differences outside its scope), and Schroeder, "The Rule of Law As a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?" in Von Bogdandy, Bogdanowicz, Canor, Grabenwarter, Taborowski, and Schmidt (Eds.), *Defending Checks and Balances in EU Member States* (Springer, 2021), p. 109 (arguing there is no uniform concept of rule of law in Europe, but common minimum standards).

[16] For a similar understanding, see von Danwitz, "The rule of law in the recent jurisprudence of the ECJ", 37 FILJ (2014), 1311-1348, at 1335-1336, 1341.

[17] See Von Bogdandy and Ioannidis, op. cit. *supra* note 15; Hillion in Closa and Kochenov (Eds.), op. cit. *supra* note 3, pp. 66-73 (arguing infringement procedure can target "systematic" threats to rule of law); Schmidt and Bogdanowicz, op. cit. *supra* note 3, at 1080.

[18] See Scheppele in Closa and Kochenov (Eds.), op. cit. *supra* note 3 , pp. 107-108 (advocating "bundling a group of specific alleged violations together" to establish a systemic breach). On "systemic compliance", see also Scheppele, Kochenov, and Grabowska-Moroz, op. cit. *supra* note 5, at 23. But see Schmidt and Bogdanowicz, op. cit. *supra* note 3, at 1082 (proposing framing infringement actions on "systemic deficiency in the rule of law" instead of Scheppele's approach involving "broad and simultaneous pursuit of several core norms of EU law").

provision,[19] it is unlikely that an alleged breach of its mere terms "valu[e] … of the rule of law" can rise to the level of specificity required for meaningful adjudication.

Procedurally, a cognizable infringement action against a Member State requires that the claimant – the Commission under Article 258 TFEU or another Member State under Article 259 TFEU – must articulate its allegation with sufficient precision.[20] In view of this, the Commission only targets breaches of the rule of law if they constitute an infringement of a "specific provision of EU law".[21] Considering this procedural posture, a more persuasive doctrinal approach than focusing on a "bundle" of infringements demonstrating a breach of Article 2 TEU is to "operationalize" the rule of law for the purposes of the infringement procedure.[22] In fact, the rule of law in EU law cannot be reduced to Article 2 TEU, but must be understood to inhere in specific EU rules. Focusing the infringement procedure on the structural dimension of such rules, which are the concrete expression of the rule of law in EU law, arguably allows bridging the gap between the need to police "systemic" rule of law violations in Member States and the ability to "only" target particular provisions of EU law.

To illustrate what is meant in this article by "structural obligations", it is helpful to refer to the ECJ's case law on Article 19 TEU. A characteristic of such obligations is that they bind Member States even when these are not, strictly speaking, implementing EU law. For example, in *Associação Sindical dos Juízes Portugueses,* the ECJ underlined that Article 19 TEU applies, based on its wording, in a structural fashion throughout "the fields covered by Union law", irrespective of whether Member States are "implementing" EU law or not.[23] Thus, it was elementary for the ECJ's interpretation of the reach of that provision that, while the Charter of Fundamental Rights of the European Union (the Charter) is, according to its Article 51(1), addressed to Member States only when they are "implementing Union law", not all EU law obligations are thus constrained. In consequence, Member States must observe the structural obligations flowing from specific EU rules which operationalize the rule of law, such as Article 19 TEU, even when they are not actively implementing EU law.

Another feature of structural obligations is they may apply even when Member States act within their retained powers. In *Commission v Poland (Independence of the Supreme Court)*, the ECJ stated that "although the organization of justice … falls within the competence of [the] Member States, the fact remains that, when exercising that competence, [they] are required to comply with their obligations deriving from EU

[19] See, to that effect, Opinion of A.G. Tanchev in Case C-619/18, *Commission v Poland (Independence of the Supreme Court)*, EU:C:2019:325, para 50, and Hillion in Closa and Kochenov (Eds.), op. cit. *supra* note 3, p. 66. Cf. Müller, "Should the EU Protect Democracy and the Rule of Law inside Member States" (2015) ELJ 141-160, at 146.

[20] See e.g. Case C-395/17, *Commission v Netherlands*, EU:C:2019:918, paras. 52 to 54. On Art. 259 TFEU actions in the rule of law context, see Kochenov, "Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool" 7 HJRL (2015), 153-174.

[21] See e.g. *supra* note 10, at p. 5.

[22] See *supra* note 18. As regards the latter approach, see e.g. Schmidt and Bogdanowicz, op. cit. *supra* note 3, at 1083-1089; Blauberger and Kelemen, op. cit. *supra* note 3, at 326, and Schroeder, op. cit. *supra* note 15, pp. 122-123.

[23] Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117, paras. 29 and 34.

law".[24] In other words, even if the EU cannot legislate to render the national justice systems uniform, Member States are nonetheless precluded, by virtue of the structural dimension of Article 19 TEU, from undermining judicial independence in their national legal orders. Not limited to that treaty provision, this reasoning corresponds to the classic case law regarding the limits on the use of Member States' retained powers in fields such as direct taxation,[25] criminal law and procedure,[26] acquisition and loss of nationality,[27] incorporation and winding-up of companies,[28] collective action,[29] social security,[30] and same-sex marriage.[31]

The logic for endowing specific rules with a structural dimension is that the EU's functioning would be at risk if Member States could validly adopt national measures, which are formally within their competence, but which undermine the fundamentals of the common legal order. In this regard, Advocate General Bobek has argued – again, concerning judicial independence – that any "transversal" measures, which affect the functioning of national judiciaries, are "a matter of EU law".[32] In other words, any structural changes regarding the national judiciary necessarily affect the judicial safeguards also for EU law purposes. According to Bobek:

> if the salaries of national judges are being lowered, or they are forced into early retirement, or, purely hypothetically, they were abusively put into disciplinary proceedings, or pressurized by politically appointed presidents of their courts, or by other hijacked national judicial institutions, as well as any other transversal conditions of their work and function being affected, any suggestion that all of that only matters for their work as "national" judges while, as far as their operation as "EU judges" is concerned, they will remain spotlessly independent, is not even an argument to be seriously discussed.[33]

Similarly, Advocate General Tanchev has emphasized the structural implications of Article 19 TEU. For him, its structural dimension in Member States' legal systems justified the use of the infringement procedure to police breaches of judicial independence under this provision, regardless of whether the Member State was "implementing" EU rules.[34]

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[24] Case C-619/18, *Commission v Poland (Independence of the Supreme Court)*, EU:C:2019:531, para 52. See also Case C-192/18, *Commission* v *Poland (Independence of ordinary courts)*, EU:C:2019:924, para 102.
[25] See e.g. Case C-446/03, *Marks & Spencer*, EU:C:2005:763, para 29.
[26] See e.g. Case C-347/09, *Dickinger and Ömer*, EU:C:2011:582, para 31.
[27] See e.g. Case C-221/17, *Tjebbes and others*, EU:C:2019:189, para 30.
[28] See e.g. Case C-106/16, *Polbud – Wykonawstwo*, EU:C:2017:804, para 43.
[29] See Case C-438/05, *International Transport Workers' Federation and others*, EU:C:2007:772, para 41.
[30] See e.g. Case C-120/95, *Decker*, EU:C:1998:167, paras. 21-23.
[31] See e.g. Case C-673/16, *Coman and others*, EU:C:2018:385, paras. 37-38.
[32] See Opinion of A.G. Bobek in Case C-556/17, *Torubarov*, EU:C:2019:339, paras. 54, 55 and 125.
[33] Ibid., para 54 (footnotes omitted).
[34] Opinion of A.G. Tanchev in Case C-192/18, *Commission v Poland (Independence of ordinary courts)*, para 72 (arguing rules about Charter's scope cannot limit "the duty of the Commission to protect the fundamental values of the Union expressed in Article 2 TEU, forming as they do part of the common European constitutional heritage") (footnote omitted).

The structural dimension of the obligation for Member States to observe the EU's minimum standards of the rule of law finds further support in the duty of sincere cooperation in Article 4(3) TEU. This duty requires that Member States must "refrain from any measure which could jeopardize the attainment of the Union's objectives" and is, according to the case law of the ECJ, not contingent on whether the EU's powers in a given field are exclusive, shared, or only complementary.[35] Rather, it obliges Member States in a general fashion "to ensure, in their respective territories, the application of and respect for [EU] law" and "to take, within the sphere of their competence, all measures necessary to remedy an infringement of EU law".[36] Thus, Member States' must observe any structural obligations to uphold the rule of law proactively and in good faith.

Moreover, as the ECJ held in *Repubblika*, Member States have an obligation under Article 49 TEU to maintain the rule of law at a level committed to upon their accession to the EU.[37] In fact, as the ECJ noted, compliance with the values enshrined in Article 2 TEU, in particular the rule of law, is a precondition "for the enjoyment of all of the rights deriving from the application of the [EU] Treaties". Article 49 TEU requires that Member States not only "respec[t]", but also "promot[e]" the EU's values. According to the ECJ, a Member State "cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU".[38] The required structural respect for the rule of law is thus intrinsically connected to the conditions for EU membership itself.

2.2 Specific EU rules which impose structural obligations to uphold the rule of law

Various EU rules require Member States to uphold the basic elements of the rule of law. First, as regards the independence of public institutions, Article 19(1) TEU, "which gives concrete expression to the value of the rule of law stated in Article 2 TEU", stipulates that Member States "shall ensure effective legal protection in the fields covered by Union law", which presupposes an independent national judiciary.[39] As part of the highly integrated governance system of the European Monetary Union, Article 130 TFEU and Article 7 of Protocol on the Statute of the European System of Central Banks and of the European Central Bank explicitly provide that the Member States must respect the autonomy of national central banks.[40] Besides the judiciary and central banks, EU legislation requires the independence of national regulatory authorities in fields such as data protection, electronic communications, natural gas, and postal services.[41] Inasmuch

[35] See, to this effect, e.g. Case C-246/07, *Commission v Sweden*, EU:C:2010:203, para 71.
[36] See, respectively, *Opinion 1/09 (Agreement creating a Unified Patent Litigation System)*, EU:C:2011:123, para 68, and Case C-395/17, *Commission v. Netherlands,* para 98.
[37] Case C-896/19, *Repubblika*, EU:C:2021:311.
[38] Ibid., para 63.
[39] See e.g. Case C-64/16, *Associação Sindical dos Juízes Portugueses*, paras. 32 to 38.
[40] See also Art. 7 of Protocol on the Statute of the European System of Central Banks and of the European Central Bank. See also Case C-62/14, *Gauweiler and others*, EU:C:2015:400, para 40. On ECJ's annulment jurisdiction regarding national measures violating central bank governors' independence, see Joined Cases C-202/18 and C-238/18, *Rimšēvičs and ECB v Latvia*, EU:C:2019:139, para 70.
[41] See, respectively, Art. 52 of Regulation (EU) 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), O.J.

as these rules specifically oblige Member States to guarantee the independence of certain public institutions, they impose structural obligations within the national legal systems.

Second, as for the EU law requirements of the legality of executive action, legal certainty, and the prohibition of arbitrariness,[42] an illustration of their structural implications for Member States' legal systems is provided by the ECJ's judgment in *Torubarov*.[43] In the context of applications for asylum, Hungarian law enabled administrative courts to only quash the decisions of immigration authorities, but not vary or replace them.[44] When an immigration authority persistently refused to comply with an administrative court's reasoning, the ECJ held that, irrespective of the national law to the contrary, the EU asylum rules and the right to effective judicial protection under Article 47 of the Charter required that, within the national legal order, the court must be empowered to adopt its own decision on the matter.[45] It was clear that EU law did not specifically regulate the powers of national judiciary to vary the decision of the executive.[46] However, since the arbitrary executive acts in question rendered the EU-level protection meaningless, the Hungarian court had the power to rectify the systemic failure and, conversely, the Member State had a structural obligation to erase the effect of the arbitrary executive acts.

Third, the ECJ has consistently affirmed the importance of the separation of powers in Member States.[47] For example, in assessing the system of judicial appointments to the Supreme Court of Poland in the light of Article 19 TEU, the ECJ held in *A.B. and others* that "[i]n accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the

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2016, L119/1, and Cases C-518/07, *Commission v Germany*, EU:C:2010:125, and C-614/10, *Commission v Austria*, EU:C:2012:631; Art. 3(2) 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), O.J. 2002, L108/33, and Case C-82/07, *Comisión del Mercado de las Telecomunicaciones*, EU:C:2008:143; Art. 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 natural gas and repealing Directive 98/30/EC, O.J. 2003, L176/57, and Case C-510/13, *E.ON Földgáz Trade*, EU:C:2015:189; Art. 22 of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, O.J. 1998, L15/14, and Case C-2/15, *DHL Express (Austria)*, EU:C:2016:880.

[42] See Case C-496/99 P, *Commission v CAS Succhi di Frutta*, EU:C:2004:236, para 63 (referring to 'the fundamental principle that, in a community governed by the rule of law, adherence to legality must be properly ensured'); Case 98/78, *Racke,* EU:C:1979:14, para 20 (principle of legal certainty generally precludes EU measure from taking effect before its publication), and Joined Cases 46/87 & 227/88, *Hoechst v Commission*, EU:C:1989:337, para 19 ("protection against arbitrary … intervention [by public authorities] … must be recognized as a general principle of [EU] law").

[43] See Case C-556/17, *Torubarov*, EU:C:2019:626.

[44] Ibid., paras. 33 and 34.

[45] Ibid., para 78.

[46] Ibid., para 76.

[47] See Case C-279/09, *DEB*, EU:C:2010:811, para 58 (noting that Member State's "legislative, administrative and judicial functions" should be "exercised in compliance with the principle of the separation of powers"), and Joined Cases C-174/98 P and C-189/98 P, *Netherlands and Van der Wal v Commission*, EU:C:2000:1, para 17 (holding "a right to a fair trial … comprises the right to a tribunal that is independent of the executive power in particular"). On the separation of powers at the Union level, see e.g. Rosas, "Separation of Powers in the European Union" 41 *Int. Lawyer* (2007), 1033-1046, at 1034 (arguing principles in Art. 6(1) TEU "include the idea of a separation of powers").

judiciary must in particular be ensured in relation to the legislature and the executive".[48] Moreover, in evaluating national authorities which may issue a European arrest warrant, the ECJ has emphasized the separation of the judicial and executive branches of government.[49] Of course, under Article 4(2) TEU the Member States' "national identities, inherent in their fundamental [political and constitutional] structures" are afforded due respect. But this does not imply a blank check. While EU law does not prescribe uniform structures of government, specific EU rules may necessarily require, as in the case of national judiciaries, a certain separation of powers in Member States.

As regards, fourth, democratic participation in law-making processes, Member States must comply with EU law, including the Charter, when they organize the elections of the European Parliament under Article 14(3) TEU.[50] These elections must be "free and secret".[51] What about other elections? According to Article 10 TEU, the functioning of the EU is "founded on representative democracy". As for local elections, Article 20(2)(b) TFEU provides that EU citizens have "the right to vote and to stand as candidates … in municipal elections in their Member State of residence, under the same conditions as nationals of that State".[52] This right, connected to EU citizenship, is "the institutional corollary of a shared interest in the public life of all the Member States".[53] For EU citizens to meaningfully exercise their rights, a structural obligation to guarantee that such elections are free and secret appears implied. Further, the EU's legislature partly consists of Member States' representatives who must, according to Article 10(2) TEU, be "themselves democratically accountable either to their national Parliaments, or to their citizens".[54] National parliaments, too, participate in the EU's rule-making processes.[55] While Member States are fully in charge of their national elections, Article 10(2) TEU arguably implies a structural obligation not to undermine the "democratic accountab[ility]" of the law-making process at the EU level.

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[48] See Case C-824/18, *A.B. and others (Appointment of judges to the Supreme Court – Actions)*, EU:C:2021:153, para 118.

[49] Case C-477/16 PPU, *Kovalkovas*, EU:C:2016:861, para 36 (holding executive organ such as Lithuanian Ministry of Justice cannot be designated as judicial authority for issuing European arrest warrant). See also Schmidt and Bogdanowicz, op. cit. *supra* note 3, at 1092 (arguing ECJ in *Kovalkovas* "expressly defines a clear yardstick by which to measure a purely internal division of powers and the organizational structure in a Member State against a Union value").

[50] See Cases C-300/04, *Eman and Sevinger*, EU:C:2006:545, para 45, and C-650/13, *Delvigne*, EU:C:2015:648, paras. 31-33 (finding Art. 39 of the Charter applicable to deprivation of right to vote pursuant to criminal conviction). See also Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976, O.J. 1976, L278/1. On the infringement procedure and free elections, see Frowein, "The European Community and the Requirement of a Republican Form of Government" (1984) 82 *Mich. L. Rev.*, 1311-1322, 1318.

[51] Case C-650/13, *Delvigne*, para 32.

[52] See also Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, O.J. 1994, L368/38.

[53] Opinion of A.G. Campos Sánchez-Bordona in Case C-78/18, *Commission v Hungary (Transparency of associations)*, EU:C:2020:1, para 124.

[54] See Art. 10(2) TEU.

[55] See Art. 12 TEU ("National Parliaments contribute actively to the good functioning of the Union"). See also Protocol on the Role of National Parliaments in the European Union and Protocol on the Application of the Principles of Subsidiarity and Proportionality.

Fifth, and finally, EU law supports the transparency and pluralism of national law-making processes by protecting individual rights such as the freedom of expression[56] and of association[57], effective judicial protection[58], non-discrimination, and equality before the law guaranteed in Articles 11, 12, 20, 21 and 47 of the Charter. The Charter only applies in Member States when they are implementing EU law, as in when they secure the freedom of associations to exercise their rights under EU law or those of citizens to participate in the elections of the European parliament, for example. Nonetheless, the EU-level rights may be relevant, in practice, even in purely national contexts because of their "spillover" effect. Namely, if breaches of the individual rights necessary for realizing transparent and pluralistic participation occur systematically in a Member State, they are unlikely to concern exclusively "national" situations but may also affect situations under EU law.[59] Advocate General Bobek's reasoning on judicial independence in *Torubarov*, cited earlier, is applicable by analogy.[60] In fact, the ECJ's case law demonstrates that serious structural failures to protect fundamental rights eventually affect rights guaranteed under EU law.[61] When this occurs, the infringement procedure can be used to address the violations of the specific EU rules and their structural dimension.

To recap, multiple EU law provisions – other than Article 2 TEU – require that Member States respect the constituent elements of the rule of law. Those mentioned in the non-exhaustive treatment above include: Articles 10, 12, 14(3), 19 TEU, 130 TFEU, as well as 11, 12, 20, 21 and 47 of the Charter, in addition to the case law based rules such as that established in *Torubarov*, and specific rules in EU legislation. Not only the independence of the judiciary, central banks and national regulatory authorities, but also the protection against arbitrariness of executive action, a basic separation of powers, the

[56] Joined Cases C-203/15 and C-698/15, *Tele2 Sverige*, EU:C:2016:970, para 93 ("the right to freedom of expression … constitutes one of the essential foundations of a pluralist, democratic society, and is one of the values on which, under Article 2 TEU, the Union is founded"). See also Von Bogdandy and Spieker, "Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges" 15 EuConst (2019), 391-426, at 394 (conceptualizing broader scope of application for political speech protections pursuant to Art. 2 TEU).

[57] See Case C-78/18, *Commission v Hungary (Transparency of associations)*, EU:C:2020:476, paras. 117 to 119 (emphasizing civil society organizations' right to be free from obligations liable to stigmatize).

[58] Case C-72/15, *Rosneft*, para 73 ("the very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law").

[59] On when such breaches are "systemic", see Von Bogdandy, "Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States" 57 CML Rev. (2020), 705-740, at 718.

[60] See text at *supra* note 33.

[61] See e.g. Joined Cases C-411/10 and C-493/10, *N.S. and others*, EU:C:2011:865 (holding systemic deficiencies in asylum procedure and applicants' reception conditions preclude transfer under EU's Dublin regime), Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, EU:C:2016:198 (holding systemic deficiencies leading to actual exposure to inhuman or degrading prison conditions preclude surrender under European Arrest Warrant), Case C-216/18 PPU, *LM* (holding systemic deficiencies in independence of judiciary leading to actual deprivation of right to fair trial preclude surrender under European Arrest Warrant); Case C-66/18, *Commission v Hungary (Higher education)*, EU:C:2020:792 (requiring authorization to provide higher education services in breach of freedom of expression violates GATS, right of establishment, and freedom to provide services), and Case C-78/18, *Commission v Hungary (Transparency of associations)* (imposing registration, declaration and publication obligations on foreign-funded civil society organizations in violation of freedom of association, right to respect for private and family life and the right to protection of personal data, violates right to free movement of capital).

integrity of elections, as well as general respect for fundamental rights in Member States are matters of EU law. Arguably requiring Member States to respect a common core of the rule of law does not encroach on the essence of national competences which are protected in EU law by the principles of conferral and subsidiarity, the requirement to respect the Member States' national constitutional identity, as well as various public policy exceptions. Instead, the conclusion that Member States have structural obligations to uphold the rule of law, which can be policed with the infringement procedure, is dictated by the necessity to safeguard the essential guarantees without which specific EU rules simply cannot function.

3. Policing the Rule of Law Effectively: Fines and Set-Off

3.1 How to Police the Rule of Law through Fines?

The enforcement of EU law relies on the infringement procedure and the associated possibility to impose fines on Member States. If the ECJ has found, under Article 258 TFEU, an infringement, the Member State concerned must, according to Article 260(1) TFEU, "take the necessary measures to comply with the judgment". However, should the failure to respect EU law persist, the Commission may bring an enforcement action requesting fines pursuant to Article 260(2) TFEU.[62] The function of such an action is to financially coerce the Member State to comply with the ECJ's judgment. The available fines are functionally of two kinds: a "lump sum" to sanction the breach of EU law until the judgment, and a "penalty payment" to be paid periodically until the cessation of a still ongoing violation. Fines can also be imposed in support of interim measures under Article 279 TFEU. In theory, no upper limit exists for the fines. According to the ECJ they must be, however, proportionate to the gravity of the infringement and the Member State's ability to pay.[63]

Fines are instrumental to remedy breaches of the rule of law, as illustrated by the interim measures adopted by the ECJ under Article 279 TFEU in *Commission v Poland (Białowieża Forest)*.[64] In that case, the Commission alleged that Poland had failed to halt illegal logging in a EU-protected primeval forest. The Vice-President of the Court issued a provisional order requiring suspension of the logging activities. However, the Polish government ignored the order.[65] In response to this rule of law violation *par excellence*, the ECJ imposed, following the Commission's request, in a second order, a penalty

[62] On the nature of Art. 260(2) TFEU action as enforcement, see Case C-304/02 *Commission v France*, EU:C:2005:444, para 92 (referring to "a special judicial procedure for the enforcement of judgments, in other words … a method of enforcement").

[63] See e.g. Case C-304/02, *Commission v France*, EU:C:2005:444, para 103. See also Communication from the Commission: Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice of the European Union in infringement proceedings, O.J. 2020, C301/1.

[64] Order of the Court in Case C-441/17 R, *Commission v Poland (Białowieża Forest)*, EU:C:2017:877. On the background of the case, see e.g. Nelson, "Poland Clashes with European Union over Logging in Primeval Forest", NPR Parallels, 1.8.2017, <www.npr.org/sections/parallels/2017/08/01/540097654/poland-clashes-with-european-union-over-logging-in-primeval-forest?t=1533819648504", (last visited 15 Dec. 2020).

[65] See Order of the Court in Case C-441/17 R, *Commission v Poland (Białowieża Forest)*, EU:C:2017:877, para 109 (referring to "sufficient material in the file to give the Court grounds for doubting that the Republic of Poland has complied with that order or that it is prepared to comply with the present order").

payment of EUR 100,000 for every continuing day of non-compliance with the first order.[66] The ECJ made it clear that the sanction under Article 279 TFEU was not a "punishment", but necessary "to guarantee the effective application of EU law" and, in particular, to support "the rule of law, a value enshrined in Article 2 TEU".[67] The threat of fines was effective: the logging halted once the prospect of losing money was established.[68] Fines in support of interim orders may be requested by the Commission in cases brought under Article 258 TFEU as well as by Member States in those brought under Article 259 TFEU.[69]

Requesting fines under Article 260 TFEU to police the rule of law following the finding of an infringement in a particular case is dependent on the policy choices of the Commission, which does not systematically request them.[70] Whether another Member State could bring an action under Article 260(2) TFEU before the ECJ, in case of the Commission's inactivity, is not entirely clear. This provision only refers to the power of the Commission to "bring the case before the [ECJ]", while noting that the procedure "shall be without prejudice to Article 259 [TFEU]". Thus the power is expressly vested only in the Commission, although the logic and purpose of Article 259 TFEU could suggest the right for a Member State to request a lump sum or a penalty payment for another Member State's failure to comply with an ECJ judgment rendered under that provision.[71] That said, regardless of the initiator of proceedings under Article 260(2) TFEU, any fines requested to address a breach of the fundamental elements of the rule of law would have to be consequential to induce a Member State to change its often deliberate conduct.

In principle, there is nothing that prevents the ECJ from imposing, on the Commission's proposal, fines that are high enough to reflect the gravity of such a breach. For comparison, even private companies are fined billions for breaches of the EU's

[66] See ibid., para 118. See also Art. 3(c) of Reg 2020/2092, *supra* note 8, which defines "lack of implementation of judgments" as a breach of the principles of the rule of law.
[67] Order of the Court in Case C-441/17 R, *Commission v Poland (Białowieża Forest)*, para 102.
[68] See Nielsen, "Poland violated EU laws by logging in Białowieża forest, court rules", *The Guardian* (17 Apr. 2018), <www.theguardian.com/world/2018/apr/17/poland-violated-eu-laws-by-logging-in-biaowieza-forest-says-ecj>, (last visited 15 Jan. 2021). But see the continued proceedings at *infra* note 70.
[69] By Order of 21 May 2021 in Case C-121/21 R, *Czech Republic v Poland* (pending) the Vice-President of the Court ordered Poland to immediately cease potentially harmful mining activities close to the Czech border pending final judgment. In response, the Polish PM Morawiecki reportedly said that Poland was "of course not going to stop mining" following "the wrong and so unjust ruling". See "Poland will not comply with EU top court ruling on Turow, PM says", EurActiv, 25 May 2021,<www.euractiv.com/section/energy/news/poland-will-not-comply-with-eu-top-court-ruling-on-turow-pm-says>, (last visited 27 June 2021). Shortly before this article was submitted for publication, on 15 June 2021, the ECJ's Press Services announced on Twitter that the Czech Republic had asked the ECJ to impose a daily €5 million penalty for not having complied with the order.
[70] But see letters of formal notice [Art. 260(2) TFEU] of 18 Feb. 2021 sent to Poland and Hungary concerning the alleged non-compliance, with ECJ judgments in cases C-441/17 (Białowieża Forest) and C-78/18 (Hungarian law on foreign-funded NGOs). See "February infringements package: key decisions", <ec.europa.eu/commission/presscorner/detail/en/inf_21_441>, (last visited 8 April 2021).
[71] Cf. Opinion of A.G. Fennelly in Case C-197/98, *Commission v Greece*, EU:C:1999:597, para. 16 (considering "[t]he right of action is reserved to the Commission alone"). So far no Member State has introduced an action pursuant to Art. 260(2) TFEU.

competition rules.[72] However, a challenge for the EU is that very high fines may lead to conflict with a Member State which already is known to disregard the rule of law. A consequential fine is little comfort, unless it is actually paid. Who has the last word, the Union or the Member State, if the latter outright refuses to pay a judicially ordered fine? The answer is not black and white. It has been correctly observed that "[i]f a Member State chooses to seek full confrontation with the Union, the Treaties provide no remedy".[73] Financial coercion may prove fruitless, if the Member State is ready to walk away from the Union, which is an option unilaterally available to Member States under Article 50 TEU. Nevertheless, as long as the Member State considers that the benefits of remaining in the EU outweigh the cost of leaving, the EU has budgetary leverage it can use to recover unpaid fines in accordance with EU law.

To understand that leverage, it is necessary to describe what happens once a fine is imposed on a Member State under Article 260 TFEU. The fine must be paid into the Commission-managed "European Union own resources" account.[74] The Commission is responsible for collecting the fines from Member States as part of its duties under Article 317 TFEU to implement the EU budget.[75] If the fine is a lump sum specified in the judgment, there is no doubt as to the amount to be collected. However, in case of a penalty payment to be paid periodically until the infringement has ceased, the Commission must estimate when the Member State has fully complied with the ECJ's judgment to establish the total amount.[76] This can legitimately give rise to different opinions. Assessing compliance is all the more challenging in the case of "systemic" breaches of the rule of law, which may necessitate fundamental changes in national laws or practices. Member States have the right to challenge the legality of the Commission's estimate under Article 263 TFEU.[77] Such an action is heard directly by the ECJ under Article 51(c) of the Statute of the Court of Justice of the European Union.[78]

However, it is conceivable that a Member State could refuse to comply with fines altogether.[79] No rules are explicitly foreseen in the EU Treaties for this situation.[80]

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[72] See e.g. "Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising", Press Release, 20 March 2019, IP/19/1770.

[73] Schmidt and Bogdanowicz, op. cit. *supra* note 3, at 1074.

[74] See e.g. Case C-610/10, *Commission v Spain*, EU:C:2012:781, para 149.

[75] See Case T-33/09, *Portugal v Commission*, EU:T:2011:127, para 62.

[76] On the Commission's margin of assessment, see e.g. Case C-496/09 INT, *Italy v Commission*, EU:C:2013:461 (Commission entitled to base assessment of fine on literal reading of dates in operative part of judgment). But see T-139/06, *France v Commission*, EU:T:2011:605, paras. 77-79 (Commission cannot reduce penalty payment with progress in compliance where ECJ has ordered "set penalty payment" and not "gradually decreasing penalty payment").

[77] See Case C-292/11 P, *Commission v Portugal*, EU:C:2014:3, paras. 53-57.

[78] See also Rec. 3 and Art. 1 of Regulation (EU, Euratom) 2019/629 of the European Parliament and of the Council of 17 April 2019 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, O.J. 2019, L111/1.

[79] For a comparable situation within a (federal) Member State, see Case C-752/18, *Deutsche Umwelthilfe*, EU:C:2019:1114 (concerning refusal by *Land* of Bavaria to comply, despite financial penalty, with court injunction requiring adoption of traffic bans to respect Germany's EU law obligations).

[80] Cf. the open-ended Art. 94(2) of the Charter of the United Nations (signed 26 June 1945, entered into force 24 Oct. 1945) which provides that the judgments of the International Court of Justice may, in case of non-compliance, be referred to the Security Council which can "decide upon measures to be taken to give effect to the judgment" – albeit this has never happened. See Couzigou, "Enforcement of UN Security Council Resolutions and ICJ Judgments", in Jakab and Kochenov (Eds.), op. cit. *supra* note 4, p. 375.

Articles 280 and 299 TFEU provide that, in principle, pecuniary obligations established in an ECJ judgment are enforceable. But Article 299 TFEU only applies to "persons other than States" which, according to the ECJ, means that it "does not apply to acts addressed to Member States".[81] This may be understood in two ways. On the one hand, Article 299 TFEU could be inapplicable to fines under Article 260 TFEU in the sense that it is without prejudice to their enforcement. On the other hand, Advocate General Jääskinen has reasoned that any enforcement of such fines is precluded "both in view of the wording of Article 299 TFEU and by reason of the sovereignty and jurisdictional immunity of States".[82]

The function of Article 299 TFEU in this context is murky. As for its wording, the limitation to "persons other than States" concerns all States, not just Member States. It is conceivable that it simply codifies the public international law doctrine of the jurisdictional immunity of States in order to establish that EU law does not oblige Member States to recover debts from sovereign actors in possible violation of their international obligations.[83] On such a reading, could the reference to "Member States" in Article 260 TFEU constitute a *lex specialis* over the reference to "States" in Article 299 TFEU? Since Member States are "States" too, this interpretation cannot definitively resolve the issue. Further, Article 299 TFEU first emerged already as Article 192 of the Treaty establishing the European Economic Community (EEC) in 1957, that is, long before the ECJ was conferred jurisdiction to impose financial penalties on Member States with the Maastricht Treaty in 1993.[84]

In any event, since the rationale of Article 260 TFEU is to ensure the authority of the ECJ's judgments, it would be detrimental to the EU as a union based on the rule of law to adopt an interpretation of Article 299 TFEU which enables Member States to evade their obligation to pay judicially imposed fines at will. In the absence of its own enforcement officials, the EU cannot apply forcible measures of execution against a Member State treasury to recover a debt incurred under Article 260 TFEU. In this regard the enforcement challenges in the EU are comparable to those encountered in connection with the enforcement of constitutional law obligations on coequal branches of government within a State.[85] Nevertheless, even if enforcement *stricto sensu* is excluded, the purpose of Article 260 TFEU and respect for the rule of law suggest that, within the EU legal order, sufficient leverage should exist to ensure that a Member State cannot unilaterally refuse to pay a lawfully imposed fine. This can be appropriately achieved through recovery by set-off.

3.2 Recovery of Fines by Set-off against EU Money

[81] See Case C-584/17 P, *ADR Center SpA v European Commission*, EU:C:2020:576, para 51.
[82] Opinion of A.G. Jääskinen in Case C-292/11 P, *Commission v Portugal*, EU:C:2013:321, para 65. The ECJ did not address this point in its judgment.
[83] On State immunity from forcible execution, see e.g. Fox, "International law and restraints on the exercise of jurisdiction by national courts of States" in Evans, *International Law* (OUP, 2010), pp. 340-379, at 361.
[84] On the introduction of the fining power, see Tallberg, *European Governance and Supranational Institutions: Making States Comply* (Routledge, 2003), pp. 72-82.
[85] See Goldsmith and Levinson, "Law for States: International Law, Constitutional Law, Public Law" 122 *Harv. L. R.* (2009), 1791-1868, at 1868 (arguing international law and constitutional law face comparable enforcement challenges). See also Case C-752/18, *Deutsche Umwelthilfe*, in *supra* note 79.

The infringement procedure is definitively concluded with the imposition of fines under Article 260 TFEU. Afterwards, it is for the Commission to process and, if necessary, collect the fine pursuant to its budgetary powers under Article 317 TFEU. The procedural rules for the recovery of outstanding money claims are in the Financial Regulation[86] and the Commission's Recovery Decision.[87] These rules provide, in essence, that if a Member State refuses to pay its fine voluntarily, the recovery of the fine can be carried out by set-off. In the context of recovering fines imposed as part of the infringement procedure, set-off technically operates between the amount of the fine and the payments the Member State is due to receive from the EU budget.[88] As such, it is capable of ensuring the recovery of fines and providing an effective solution to possible Member State disregard for the ECJ's judgments.

Before assessing the Recovery Decision's approach, it is worth recalling that the doctrine of set-off is well established in EU law. As a legal phenomenon, its origins predate the EU: set-off harks back to Roman law and the concept is known throughout Member States.[89] Set-off is commonly applied not only in private legal relationships within States, but also in cross-border situations and in international law.[90] In EU law, the most relevant application of set-off for the purposes of this article concerns offsetting debt owed to the EU against funds which are owed by the EU to Member States.[91] In the case law of the ECJ, the principle of set-off in relation to EU funds has been regarded as consistent with EU law.[92] The ECJ held in *Commission v CCRE* that such a set-off

[86] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, O.J. 2018, L193/1.

[87] Commission Decision of 3.8.2018 on the internal procedure provisions for the recovery of amounts receivable arising from direct management and the recovery of fines, lump sums and penalty payments under the Treaties, C(2018)5119 final, as amended by Decision C(2020)4584 final.

[88] On EU expenditure in relation to Member States, see 'EU expenditure and revenue 2014-2020', European Commission, DG Budget, <ec.europa.eu/budget/graphs/revenue_expediture.html>, (last visited 21 Jan. 2021).

[89] On the development of set-off in Roman law, see Tigar, "Automatic Extinction of Cross-Demands: Compensatio from Rome to California" (1965) 53 *Cal. L. Rev.* 224-278. For set-off in Member States' legal systems, see e.g. Opinion of A.G. Léger in Case C-341/93, *Danværn*, EU:C:1995:139, paras. 27 ff.

[90] See e.g. UNCITRAL Arbitration Rules (2014), Art. 21(3) ('In its statement of defence, … the respondent may … rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.'); UNIDROIT Principles of International Commercial Contracts 2016, Ch. 8 (titled "Set-Off"); United Nations Convention on the Assignment of Receivables in International Trade (opened for signature 12 Dec. 2002, not in force), A/RES/56/81 (2002), Art. 18 (titled "Defences and rights of set-off of the debtor").

[91] For set-off in other EU law contexts, see e.g. Art. 17 of Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), O.J. 2008, L177/6; Art. 9 of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, O.J. 2015, L141/19.

[92] See e.g. Cases 250/78, *DEKA* v *EEC,* EU:C:1983:49 (claim for damages set off against debt based on duty to reimburse wrongly paid export refunds) and 125/84, *Continental Irish Meat*, EU:C:1985:409 (set-off by public authority in context of agricultural exports and imports). See also Case C-132/95, *Jensen and Korn- og Foderstofkompagniet*, EU:C:1998:237 (set-off between agriculture aid payable to farmer under EU legislation and outstanding VAT debt to Member State).

"extinguishes simultaneously two obligations existing mutually between two persons".[93] The EU institutions are authorized in Article 102 of the Financial Regulation to recover amounts receivable from a debtor through out-of-court set-off. The conditions for recovery by set-off include, in particular, that the Union's money claim on the debtor is properly established and due, and that the debtor's claim on the Union is "certain", of a "fixed amount", and "due".[94]

The Financial Regulation expressly envisages a set-off against a national authority of a Member State. Its Article 102(2) stipulates: "[w]here the debtor is a national authority or one of its administrative entities, the accounting officer shall also inform the Member State concerned of his or her intention to resort to recovery by offsetting".[95] The Commission's Recovery Decision lays out a specific procedure for recovering fines from Member States. When a fine is imposed in the ECJ judgment under Article 260 TFEU, the Commission first requests payment of the amount due, via a letter sent to the Member State's permanent representation, normally within 45 days of receipt.[96] If no payment has been made by the set date, the Commission sends a "letter of formal notice" requesting payment of the fine, with default interest, within 15 days.[97] Finally, if payment has not been received within the additional time allocated to the Member State, the Commission, after having afforded the debtor the opportunity to submit comments, proceeds to recover the amount through set-off. In particular, according to Article 31 of the Recovery Decision, the "total amount of the lump sum or penalty payment imposed by the Court of Justice, plus interest, shall be deducted from payments due to the Member State".

The availability of set-off between the EU and Member States has been confirmed in case law. In *Czech Republic v Commission*, the General Court was called upon to assess the legality of the Commission's recovery decision regarding pre-accession assistance granted to the Czech Republic in the 1990s to modernize its economy.[98] The Commission, having found irregularities in the use of the assistance, requested the reimbursement of the funds and, when the Czech Republic refused, proceeded to set off its claim against amounts due to the Member State under the European Social Fund.[99] The General Court rejected, in particular, the Czech Republic's arguments about the legal basis and conditions for set-off.[100] Moreover, in *Greece v Commission* the General Court and, on appeal, the ECJ, were invited to assess the legality of a set-off between a sum that Greece owed to the Commission for rent of shared diplomatic premises in Nigeria and EU funds for Regional Operational Programme for mainland Greece.[101] In this case, Greece did not contest the power of the Commission to set off the debt against the money

[93] See Case C-87/01 P, *Commission of the European Communities v Conseil des communes et régions d'Europe (CCRE)*, EU:C:2003:400, para 59. See also Case 250/78 *DEKA* v *EEC*, para 20.
[94] See Arts. 98 and 102 of Financial Regulation, *supra* note 86. See also e.g. Case T-37/08, *Robert Walton v European Commission*, EU:T:2011:640, para 33.
[95] See *supra* note 86.
[96] See Art. 28 of Recovery Decision, *supra* note 87.
[97] See Art. 29 of Recovery Decision, *supra* note 87.
[98] Case T-465/08, *Czech Republic v European Commission*, EU:T:2011:186.
[99] Ibid., paras. 33 to 39.
[100] Ibid., paras. 122, 144, and 152. The judgment was not appealed.
[101] Case T-231/04, *Hellenic Republic v Commission of the European Communities*, EU:T:2007:9, para 44.

due to Greece from EU funds, but only argued that that sum was not certain and of a fixed amount, as required by the Financial Regulation in force at the time.[102]

Apparently, then, EU law distinguishes between enforcement *stricto sensu*, as referred to in Article 299 TFEU, and recovery by set-off. On this logic, an out-of-court set-off of a definitive fine, imposed pursuant to Article 260 TFEU, against EU payments due to a Member State is to be viewed as a recovery operation intrinsic in the management of the EU budget, as opposed to "enforcement".[103] Beyond the ECJ's case law on the permissibility of such set-off, support for this reading is found in the Recovery Decision's Article 14 ("Enforcement"), which does not apply to Member State fines, whereas its Article 31 ("Offsetting") does. Moreover, the Recovery Decision treats enforcement and set-off as conceptually distinct: according to Article 14, "enforcement" is only resorted to "in the absence of any possibility of effecting recovery by offsetting". In line with this logic, the Recovery Decision itself has Article 317 TFEU as its legal basis and refers, in this regard, to Article 102 ("Recovery by Offsetting") of the Financial Regulation.

The conceptual differentiation between enforcement and recovery by set-off has been discussed at the ECJ. In *Commission v CCRE*, Advocate General Léger argued that set-off is essentially a "method of extinguishing obligations", because it produces effects which are "equivalent to the making of actual payments".[104] As such, set-off is a "neutral operation" – and not a "means of execution" which compels a debtor to "make direct payment to the judgment creditor".[105] Recovery by set-off can thus be assimilated to obtaining voluntary payment. In contrast, Léger reasoned that set-off was not comparable to an "administrative or legal measure of constraint" which, under Article 1 of Protocol no 7 on the Privileges and Immunities of the European Union, would require lifting of jurisdictional immunity of the EU.[106] Such measures of constraint include obtaining a garnishee order against the EU,[107] accessing buildings occupied by the EU,[108] judicially requesting the production of inspection documents from EU institutions,[109] or seizing the EU-related archives of a national central bank belonging to the European System of Central Banks.[110] Léger's position appears to have been essentially confirmed by the ECJ's subsequent judgment in that case.[111]

This understanding of set-off is persuasive. Not only does EU law consider an out-of-court set-off as a neutral operation, comparable to payment, but as a measure which impinges neither on the jurisdictional immunity of Member States nor – if performed in reverse – on the privileges and immunities of the EU. When a set-off is

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[102] See ibid., para 53, and, on appeal, Case C-203/07 P, *Hellenic Republic v Commission of the European Communities,* EU:C:2008:606.
[103] See, by analogy, Case T-465/08, *Czech Republic v European Commission*, paras. 106 to 122.
[104] Opinion of A.G. Léger in Case C-87/01 P, *Commission of the European Communities v Conseil des communes et régions d'Europe (CCRE)*, EU:C:2002:501, para 107.
[105] Ibid.
[106] Ibid., paras. 101 to 103.
[107] See e.g. Case 4/62, *Hübner v High Authority*, EU:C:1962:9.
[108] See Case 2/68, *Ufficio imposte di consumo di Ispra v Commission*, EU:C:1968:50.
[109] See Order of 13 July 1990 in Case C-2/88 Imm., *Zwartfeld and Others*, EU:C:1990:315.
[110] See Case C-316/19, *Commission v Slovenia (Archives of the European Central Bank),* EU:C:2020:1030.
[111] See Case C-87/01 P, *Commission of the European Communities v Conseil des communes et régions d'Europe (CCRE)*, para 31 (referring to "actual payment" and "other forms of payment … including set-off").

used to recover a lawfully imposed fine, it simply settles the financial balance between two parties in accordance with the rule of law. Definitive fines are directly recoverable. Although, according to the ECJ, the concept of jurisdictional immunity "is not in itself contrary to the principle of the rule of law", arguably such immunity should not be invoked as a barrier to set-off which does not unduly interfere with the prerogatives of the debtor Member State in a union based on the rule of law, such as the EU.[112] However, while set-off is thus, in principle, available both for the EU and for Member States to extinguish reciprocal obligations, such obligations must be unquestionably final to lend themselves to offsetting. The definitive fines imposed in the infringement procedure pursuant to Article 260 TFEU meet that threshold.

As a final remark on the effects of set-off, money is fungible and the payments from the Commission to the Member States in the context of EU funds are legally independent from those made by the Member State authorities to the final beneficiaries. Hence the recovery of unpaid fines by set-off should not, in principle, affect the availability of funding at the national level for the payments that the Member State concerned is obliged to make under EU law towards the final beneficiaries.[113] Of course, in practice it cannot be guaranteed that, following the set-off, the Member State will continue to observe all its commitments without the EU money originally envisaged. However, the benefits of the recovery by set-off of definitive fines for the rule of law arguably outweigh any such risk, as the diminution of revenue from EU funds to the Member State would in that case contribute, in the end, towards rendering the impact of EU money visible. This, in turn, could lead to the Member State government being held politically responsible at national level, with the possibility to a bottom-up change of policies which disrespect the rule of law.

4. Conclusion

Unquestionably, EU law entails a basic obligation to respect the rule of law not only for the EU institutions, but also for the Member States. This article has argued that EU law establishes structural obligations for Member States to uphold the rule of law within their legal systems. It has suggested that such obligations imply requirements for the national legal systems as to the independence of public institutions, separation of powers, and the integrity of elections, among other guarantees, to enable the operation of specific EU rules. In this respect, EU law does not require uniformity in Member States' systems of government, but establishes minimum requirements for a common core of the rule of law in the EU legal order, which must be observed for that legal order to remain functional.

The rule of law inheres in specific EU rules. This article has presented a number of such rules, which, if violated, can form the subject matter of an infringement action intended to police the rule of law. The substantive scope of EU law is evolutionary and, as such, so is the precise extent of the structural obligations implied. While the EU cannot police whatever "rule of law violations" it chooses, for example pursuant to Article 2

[112] See, by analogy, Case C-316/19, *Commission v Slovenia (Archives of the European Central Bank),* para 104 (referring to "privileges and immunities for international organisations and their institutions"). See also, e.g. Fox, op. cit. *supra* note 83, at 361-367 (highlighting nuances in State immunity from execution under international law as regards State property).
[113] See, by analogy, Rec. 19 of Reg. 2020/2092, *supra* note 8.

TEU, this article has demonstrated that structural obligations to uphold the rule of law exist even in fields which fall within Member States' retained powers. Such obligations constitute a functional necessity for the meaningful existence of specific EU law rules. Failure by Member States to respect the relevant structural obligations amounts to a failure to fulfil membership obligations, which opens the door for infringement proceedings.

As for the effectiveness of the infringement procedure, this article has argued that fines enable the EU to exert significant leverage on Member States in case of breaches of the rule of law. The structural nature of such breaches may complicate the assessment of whether and when a Member State has complied with an ECJ judgment imposing fines and, hence, the determination of the sums to be paid. Nevertheless, any fines should reflect the gravity of the breach in question in order to achieve their potential to correct Member State conduct contrary to EU law. The rule of law itself requires that judgments be observed and fines be paid. However, if a Member State refuses to pay a lawful fine, this failure to respect the rule of law can be remedied through the recovery of the fine by set-off. As such, recovery by set-off provides an essential constitutional guarantee of the EU legal order.

In accordance with the case law of the ECJ, set-off is a form of making a payment. It is conceptually distinct from enforcement *stricto sensu* and no objection of jurisdictional immunity should be available for Member States against its use in connection with definitive fines within the EU legal order. This article has shown that set-off allows the EU to guarantee the effective recovery of fines, even in the case of Member State recalcitrance. Although the EU's ability to force a Member State to act against its will is, in the end, inherently limited, the recovery of fines by set-off provides support for the authority of the ECJ's judgments, if necessary. In those, hopefully rare, cases where the mere value of the rule of law is not enough, the infringement procedure, coupled with fines and their recovery by set-off, thus provides essential leverage for the rule of law.