37 András Jakab – Dimitry Kochenov (eds.) – The Enforcement of EU Law and Values. Ensuring Member States' Compliance (Book Review)

Petra Lea Láncos[*]

András Jakab & Dimitry Kochenov (eds.), The Enforcement of EU Law and Values. Ensuring Member States' Compliance, Oxford University Press, Oxford, 2017, 510 p, ISBN 978-0198746560

In light of Brexit, the stubborn resistance to the implementation of EU asylum law, as well as the creeping downgrading of democratic and constitutional structures (backsliding) in individual Member States – to name only a few of the integration challenges – is a comprehensive volume on the enforcement of EU law and values most welcome. In particular, the initiation of Article 7 proceedings against Poland – that means the use of the so-called 'nuclear option' and its possible failure – sheds new light on the enforcement of Union values, rendering the edited volume all the more topical.

In fact, the editors[1] sought to overcome the traditional scientific perspective and broaden the analysis of enforcement by capturing both legal compliance issues and adherence to European values. A complex analysis suggests that instances of occasional resistance from Member States are merely symptoms of profound issues of political or economic mismanagement, a long-term national political strategy, or problems inherent in weak states. In line with this broad approach, the volume is both thematically and methodologically broadly conceived, including theoretical, comparative and Member State-specific explorations in areas of law, politics and economics. The volume is divided into four comprehensive, complementary parts that discuss different perspectives of the enforcement problem: 'Theoretical Issues', 'Instruments and Methods', 'Comparative Outlook' and 'Case Studies'.

---

* Petra Lea Láncos: researcher, Deutsches Forschungsinstitut für öffentliche Verwaltung, Speyer; associate professor, Pázmány Péter Catholic University, Budapest.

1 András Jakab & Dimitry Kochenov, 'Introductory Remarks', *in* András Jakab & Dimitry Kochenov (eds.), *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, Oxford University Press, Oxford, 2017, pp. 1-5.

The first theoretical part describes the context and outlines the main normative approaches to ensure compliance in the Member States. It starts with Kochenov's contribution and sets out the central problems of the enforcement of Union values. He classifies the values of the EU as enforceable legal principles under Article 2 TEU and distinguishes them from state goals by teleological, historical and systematic interpretation. He criticizes the separation of the acquis from values in Article 2 TEU, as well as the restrictive approach advocated in the literature that the latter should only be enforced through the highly political procedure of Article 7 TEU. He even argues that the enforcement of values should play a key role in the enforcement of EU law.[2] The next author defines the enforcement of values as a matter of choice between different interpretive scales in order to grasp the meaning of the rules to be applied. In his contribution, Itzcovich differentiates between two major approaches to interpretation: *Wertjurisprudenz* and *Geseztespositivismus*, which in turn are shaped by respective social, political and institutional conditions.[3] Avbelj investigates the issue of the 'systemic defiance', that is, the serious breach of Union values in the pluralist structure of the Union. He concludes that, if the Member State cannot provide functioning 'endogenous' mechanisms to enforce Union values, the option remains from a pluralistic perspective, to discipline these Member States incremental remedies and sanctions or even expel them from the Union. However, this is an inadequate solution: young democracies and established right-wing states need time and comprehensive, effective mechanisms to live up to EU ideals.[4]

The second part, 'Instruments and Methods of Enforcement', is a multi-faceted section that discusses both existing tools and their potential for improvement, as well as new solutions and mechanisms. Accordingly, the pieces authored by Gormley[5] and Wennerås[6] are dedicated to exploring the traditional instrument of infringement proceedings, encouraging their more extensive use and interpretation. In his contribution on preliminary ruling proceedings, Broberg criticizes the fact that while the procedure is the most important instrument for enforcing EU law, it does not realize its full potential in the judicial protection of individual rights.[7] Norbert Reich, former director of the *Bremer Zentrum für europäische Rechtspolitik* (Centre of European Law and Politics, University of Bremen ZERP) and former Dean of the Bremen Faculty of Law, to whose memory this volume is dedicated, examines the *Francovich* case law on state liability for non-compliance

2 Dimitry Kochenov, 'The Acquis and its Principles: The Enforcement of the 'Law' versus the Enforcement of 'Values' in the EU', *in* Id. pp. 9-27.

3 Giulio Itzcovich, 'On the Legal Enforcement of Values. The Importance of the Institutional Context', *in* Id. pp. 28-43.

4 Matej Avbelj, 'Pluralism and Systematic Defiance in the EU', *in* Id. pp. 44-60.

5 Laurence W. Gormley, 'Infringement Proceedings', *in* Id. pp. 65-78.

6 Pål Wennerås, 'Making Effective Use of Article 260 TFEU', *in* Id. pp. 79-98.

7 Morten Broberg, 'Preliminary References as a Means for Enforcing EU Law', *in* Id. pp. 99-111.

with EU law and the effectiveness of such legal action as an instrument for the enforcement of EU law. Following a detailed analysis of the relevant case-law, he concludes that national courts interpret the criterion of 'sufficiently serious' in respect of *Francovich* actions restrictively, and, in particular, that actions in the field of social law are unsuccessful. Therefore, the infringement procedure is indispensable for the full enforcement of EU law.[8] In his contribution, Besselink criticizes both the restrictive interpretation of the Article 7 procedure by the Council and the view that any control by the Member States should be confined exclusively to the implementation of EU law. In order to give the procedure the necessary bite, he advocates for the exercise of the Council's powers of control even before the preventive procedure is initiated, calling for a full review of national conformity.[9] In the context of economic policy coordination in the framework of the European Economic and Monetary Union, Amtenbrink and Repasi analyze the so-called 'Six Pack', the 'Two Pack', European Stability Mechanism and European Fiscal Compact from a compliance perspective. They conclude that current mechanisms for ensuring conformity have failed. In case a Member State involuntarily violates the stability requirements, disbursements will cease, with the result that the respective state is pushed into an even deeper economic crisis. At the same time, sanctions in this area are ineffective as the Council is reluctant to apply them. The authors plead for capacity building at the national level as well as greater involvement of national parliaments and the EP in developing and monitoring the implementation of the Stability Framework.[10] Cseres describes the decentralized implementation of European competition law, examining CJEU case-law on the distribution of cases and the concept of trade impact. Her conclusion: the decentralized system creates parallel competition systems that lead to a fragmentation of enforcement and unequal legal protection in the competition area.[11] Stefan gives insight into the diversity of EU soft law measures and their various forms of enforcement. She emphasizes the benefits (voluntary compliance, socialization aspect) and functions of soft law (interpretive aid, execution of binding law); at the same time, she stresses that the diversity of Union soft law leads to a variety of enforcement, creating problems of legitimacy, legal certainty and legitimate expectations.[12] Von Bogdandy *et al.* deal with the criticism and further development of the Reverse Solange doctrine, highlighting the shortcomings of the EU framework to strengthen the rule of law and the rule of law dialogue. In addition to the judicial instrument

8 Norbert Reich, 'Francovich Enforcement Analyzed and Illustrated by German (and English) Law', *in* Id. pp. 112-127.

9 Leonard Besselink, 'The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives', *in* Id. pp. 128-144.

10 Fabian Amtenbrink & René Repasi, 'Compliance and Enforcement in Economic Policy Coordination in EMU', *in* Id. pp. 145-181.

11 Katalin J. Cseres, 'Rule of Law Values in the Decentralized Public Enforcement of EU Competition Law', *in* Id. 182-199.

12 Oana Ştefan, 'Soft Law and the Enforcement of EU Law', *in* Id. pp. 200-217.

of Reverse Solange, they also advocate for the establishment of a Systemic Deficiency Committee. This independent committee of experts within the Commission would monitor developments in the Member States and publish a report on compliance with Article 2 TEU.[13] Jan-Werner Müller elaborates on his proposal for the establishment of a Copenhagen Commission and addresses the criticism of unnecessary institutional multiplication, technocratic rule and the (il)legitimacy of committee activities. The proposed commission would resemble the German Office for the Protection of the Constitution, itself a necessary element of the militant democracy. Müller sees the advantage of the proposed institution in its authority, which, in contrast with the CJEU or the Commission, would be comprehensive and unrestricted.[14] András Jakab, co-editor of the volume, argues in favor of a creative, teleological interpretation of Article 51(1) of the Charter of Fundamental Rights, to ensure that the Charter rights are enforced through the application of Article 2 read together with Article 7 TEU before the national courts. The advantage of this solution would be that since illiberal governments usually only pack the highest courts with their cadres, a true community of values may emerge through the fundamental rights dialogue between national courts and the CJEU.[15]

The comparative section provides insight into the enforcement solutions of various federal states and international organizations. It starts with a contribution by Hanschel on the enforcement of federal law against the German states. He describes the autonomous enforcement instruments of the Federal Government, the heteronomous judicial review and the *Federal-Länder* dispute before the General Constitutional Court (*BVerfG)*. He emphasizes that, owing to the interdependence of politics and cooperative federalism, it is rare for such enforcement instruments to be used, instead, in conformity with public expectation, the instruments of uniform and efficient administration and political negotiation are used.[16] Romainville and Verdrussen describe Belgium's 'dynamic', 'bipolar' federal system. Although the system contains a number of principles for the solution of institutionalized defiance (exclusive competences, implicit competences and primacy of federal law *etc.*), conflicts are resolved through dialogue, compromises, that is, the inclusion of minorities and cooperation agreements in complex policy areas. The Belgian Constitutional Court tasked with overseeing the relationship between levels of government, also contributes to the ongoing development of the system.[17] López-Basaguren describes the historical

13 Armin von Bogdandy *et al.*, 'Protecting EU Values: Reverse *Solange* and the Rule of Law Framework', *in* Id. 218-233.

14 Jan-Werner Müller, 'A Democracy Commission of One's Own, or What it Would Take for the EU to Safeguard Liberal Democracy in its Member States', *in* Id. pp. 234-251.

15 András Jakab, 'Application of the EU CFR by National Courts in Purely Domestic Cases', *in* Id. pp. 252-262.

16 Dirk Hanschel, 'Enforcement of Federal Law against the German *Länder*', *in* Id. pp. 265-282.

17 Céline Romainville & Marc Verdrussen, 'The Enforcement of Federal Law in the Belgian Federal State', *in* Id. pp. 283-299.

unification of the regions in Spain and the sovereignty claims of the autonomous regions of Catalonia and Basque Country. He describes the role of the Constitutional Court and the criminal classification of possible independence aspirations of the affected regions, such as rebellion and criminal disobedience as crimes against the Constitution and public order.[18] In his contribution, Tushet reports on the enforcement of federal law *vis-à-vis* US states in a culturally homogeneous, but ethnically and demographically diverse context. He points out that the enforcement of federal law is straightforward, as the national government can act directly on citizens, through or in cooperation with state governments and courts, and through injunctions and damages claims. Meanwhile, the balance between federal and state levels is ensured through the principle of and the anti-commandeering principle and the conditional preemptive effect of federal law.[19] Lambert explores the execution of ECtHR judgments and concludes that, while the reasons for Member States' refusal to comply are diverse (*e.g.* financial, competence-related reasons, governed by public opinion or the extent of the reforms required, and even political considerations), the general strategy of the Council of Europe is to prevent non-compliance, motivating signatory states to act by persuasion, support, exchange of good practices and cooperation, instead of relying on sanctions.[20] Antonella Tancredi's contribution stands out, especially because it compares the enforcement mechanisms of the WTO in detail with those of the EU. She emphasizes that the WTO's mixed diplomatic enforcement instruments defined by reciprocity and bilateralism, offer more room for maneuver to achieve consensual dispute settlement than available EU solutions.[21] Couzigou examines the possibilities for executing ICJ judgments and resolutions of the Security Council. Her analysis shows that the instruments available are used by biased organs in an imprecise and inconsistent manner, rendering the system highly politicized and non-transparent. She proposes the setting up of a judicial institution tasked with monitoring implementation in accordance with common standards and making recommendations to the UN Security Council publicly available in order to improve the predictability and transparency of the system.[22] Closa compares democratic conditionality in the practice of regional organizations. He emphasizes that although the majority of regional organizations had gradually introduced democratic conditionality, imposing the customary sanction of suspending voting rights revealed

18 Alberto López-Basaguren, 'Regional Defiance and Enforcement of Federal Law in Spain: The Claims for Sovereignty in the Basque Country and Catalonia', *in* Id. pp. 300-315.

19 Mark Tushet, 'Enforcement of National Law against Subnational Units in the US', *in* Id. pp. 316-325.

20 Elisabeth Lambert Abdelgawad, 'The Enforcement of ECtHR Judgments', *in* Id. pp. 326-340.

21 Antonella Tancredi, 'Enforcing WTO Law', *in* Id. pp. 341-362.

22 Iréne Couzigou, 'Enforcement of UN Security Council Resolutions and of ICJ Judgments: The Unreliability of Political Enforcement Mechanisms', *in* Id. pp. 363-378.

regulatory shortcomings, arbitrary decision-making and the ensuing lack of legal certainty in the relevant organizations.[23]

The last part, 'Case Studies in the Context of the EU', deals with different cases of EU enforcement failures in individual Member States. This section kicks off with Mayer's contribution on the case law of the German Federal Constitutional Court regarding European integration (*Solange I and II, Maastricht, European arrest warrant, Honeywell, Lisbon and OMT* judgments). His analysis shows that the position of the Federal Constitutional Court hovers between Europe-friendliness and resistance, with the court alternating between a tight and a loose grip in applying ultra vires and identity control. Mayer arrives at the conclusion that the verdicts ultimately reflect the composition of the chamber rendering the judgment.[24] Ziller describes in detail the events that led to the empty chair crisis and the resulting Luxembourg compromise, which had a strong impact on the functioning of the Commission and the Council. He points out that France has brought both the functionalism of Schuman and Monet and the intergovernmentalism of De Gaulle into integration – the empty chair policy was an example of the latter. He emphasizes that both the empty chair as resistance and the Luxembourg compromise as a solution were extra-legal instruments.[25] Lachmayer explains the rise of the FPÖ (Freedom Party of Austria), their perception as a threat to European values and the measures taken by the 14 other EU Member States. The well-known failure of these measures led to the report issued by the 'Three Wise Men', which in turn resulted in the refinement of the system for the enforcement of European values through the development of Article 7 TEU and the establishment of the EU Fundamental Rights Agency. However, Lachmayer points out that the attempted restrictions on minority rights and corruption in Austria under Haider's government had already thrown light on the inadequacy of these solutions, evidenced yet again by the handling of recent events in Hungary.[26] Szente draws the road Hungary travelled from being the democratic pioneer of the former socialist states of Central Europe through facing the challenge of integration to the transformation of the legal and administrative system during the second and third Orbán government. He emphasized that, although various EU and Council of Europe institutions had tried to provide political and legal solutions to halt violations of democracy and the rule of law in Hungary, surprisingly little has been achieved. One explanation for this could be the broad support of the government among the Hungarian population, as well as the fact that the EU was not interested in deepening this internal conflict during the financial crisis. In the absence of powerful enforcement tools, there is a risk that the idea of 'illiberal democracy' will spread to other EU Member

23 Carlos Closa, 'Securing Compliance with Democracy Requirements in Regional Organizations', *in* Id. pp. 379-401.

24 Franz C Mayer, 'Defiance by a Constitutional Court – Germany', *in* Id. pp. 403-421.

25 Jacques Ziller, 'Defiance for European Influence – the Empty Chair and France', *in* Id. pp. 422-435.

26 Konrad Lachmayer, 'Questioning the Basic Values– Austria and Jörg Haider', *in* Id. pp. 436-455.

States as well.[27] Ioannidis describes Greece as a 'weak member' of the EU and points out that the lack of capacity and the widespread corruption in Greek administration and the judiciary resulted in a deficient implementation of EU law, which in turn threatened the enforcement of the rule of law in the sense of Article 2 TEU. He outlines EU financial and technical support requirements as examples for solving Member State defiance that is not political, rather structural and budgetary in nature.[28] The concluding contribution by Łazowski reflects on the possible forms of resistance on the part of the United Kingdom in the context of Brexit. While there are still open questions, the options cited by the author, such as the repeal of the 1972 European Communities Act, the core principles of supremacy, direct effect and CJEU jurisdiction have not been decided on to date. Nevertheless, these considerations continue to be relevant for possible future withdrawals by other EU Member States.[29]

The volume, with its collection of select contributions, brings the reader up to date on European law scholarship regarding the enforcement of Union values and provides an outlook on relevant national and supranational solutions. However, the abrupt conclusion leaves the reader with a sense of puzzlement: it would have been worth summarizing the more promising solutions or even the dead ends in enforcement attempts and analyze them in the context of the EU. Delineating the different implementation contexts and their challenges, staking out national political or legal forms of resistance would also have contributed to a better understanding of the enforcement problem. As it is, however, it is left up to the reader to draw the conclusions from the findings of this volume.

27 Zoltán Szente, 'Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them', *in* Id. pp. 456-475.

28 Michael Ioannidis, 'Weak Members and the Enforcement of EU Law', *in* Id. pp. 476-492.

29 Adam Łazowski, 'Inside and Out, The UK and the EU', *in* Id. pp. 493-510.