



The Conceptual, Constitutional and Theoretical Foundations of Shared Regulation and Enforcement for a stronger Europe – COCOT Building Block

Background

Starting from the RENFORCE Mission Statement, the RENFORCE program focuses on the need for regulatory and enforcement policies to meet societal challenges in the current context of Europe, which can be seen to be in a state of transition and of crisis and contestation in certain respects. The EU is seen both as a cause and as a solution of many societal challenges that need addressing and tackling. The mission statement thus stresses the need to develop a just, sustainable and social market economy, to deal with migration effectively and in a legitimate way, to develop a performing market of technology and digitalization of services, to guarantee security and suppression of transnational crimes in the area of freedom, security and justice, to guarantee and strengthen the position of Europe in the global arena and the respect of fundamental rights and core values in these and other domains and the need to globally “export” and promote the respect for these rights and values. Such cross-border problems affect many Member States and the EU is a key forum within which to develop, implement and enforce policies to address these. Yet, some states and actors question the EU’s ability and competence to do so, turning rather to the national or international levels for this or that of private intervention and responsibility.

The central question of RENFORCE - “How can public tasks and public policy objectives in the social market economy and in the area of freedom, security and justice be better realized in the shared European, national and international legal order, by regulation and enforcement arrangements that safeguard core values and which ensure policy effectiveness?” – must as such be seen and understood in the light of the deeper goal that underlies the European Union as such and in which it finds its *raison d’être*. In the words of Article 3(1) of the TEU: “the Union’s aim is to promote peace, its values and the well-being of its peoples.” Any regulatory and/or enforcement action on the part of the EU, as part of the ‘shared legal order’, must therefore contribute to these goals. As such, the program focuses not only strongly on the interaction between regulatory and enforcement arrangements, but also on the vertical interaction in between such arrangements on the national-EU-international levels, horizontally in-between Member States and also in-between public and private actors and the diverse public/private interests they may pursue.

The added value of the RENFORCE research lies not only in researching these different levels of interaction, but also because of its study of both the legitimacy and effectiveness dimensions of regulatory and enforcement arrangements in different policy areas as well as in enriching



the conceptual, constitutional and theoretical foundations of shared regulation and enforcement in Europe.

The latter brings us to the aim of this RENFORCE building block.

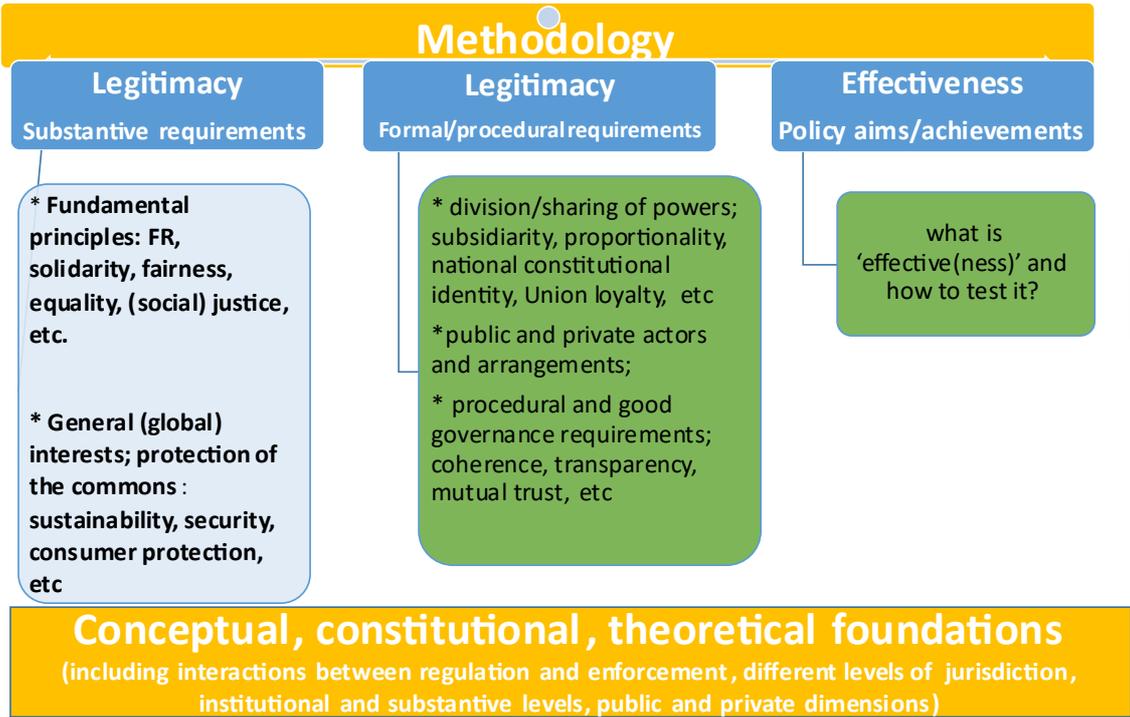
Main question and aims

In this building block we seek to flesh out and enrich the conceptual, constitutional and theoretical foundations of the RENFORCE program, so as to gain more fundamental and overarching insights into the factors that determine the choice for and framing of regulatory and enforcement arrangements in Europe as well as into the use and goals of the law as a means to shape regulation and enforcement in such a way that it contributes to the creation of a European society that enjoys and promotes peace and that guarantees the protection of core values and the well-being of its citizens. In brief, when can regulatory and enforcement approaches and arrangements be considered as ‘good’ or ‘smart’, in the light of both the realization of their policy goals (*effectiveness*) and the protection of core values and public goods and interests Member States in the framework of the EU strive after (*legitimacy*)?

We can visualise this as follows:



Testing existing and future regulatory and enforcement systems: when to consider ‘good’?





The ultimate aim of the project is threefold:

1) *From an internal RENFORCE perspective*

Internally, the aim is to identify and map common ground in the research performed so far within RENFORCE in relation to the key issues identified below and to connect researchers on fleshing these issues further out from a conceptual, constitutional and theoretical perspective. As such, it not only intends to reinforce the existing research community and to develop a more comprehensive approach to the RENFORCE research, but it also seeks to identify and make more visible research findings that already concern the conceptual, constitutional and theoretical foundations of the research program.

2) *From an external academic perspective*

In its starting point, the project aligns with both the ‘Law in Context’ school of thought and the ‘Living Constitution’ school of thought,¹ which tie in very well with one another. In fact, answering the main RENFORCE question imposes a ‘law in context’² and more inter-disciplinary approach, which enables an understanding of the interpretation, functioning and development of the law in its broader, historical, cultural, socio-economic, political context. The notion of the Living Constitution refers on the one hand to the relevance of the formal, written text of the basic Treaties (TEU, TFEU, CFR) and, on the other, to the relevance of unwritten constitutional principles and the scope there is to take into account in their interpretation of the changed economic, social, political and historical realities over time. The perspective of the Living Constitution is also reflected in the interpretation approach of the CJEU. This can be roughly summarized as a three-step approach; combining a linguistic interpretation (i) with a systematic and contextual interpretation (ii) and a functional and purposive one (iii).³ As such, this approach will also allow for laying bare important connections between the institutional level/framework and the substantiation, interpretation and application of the material law.⁴

The Law in Context approach as such induces both a broader empirical and theoretical reflection on shared regulation and enforcement arrangements in Europe. The legal, cross-sectoral as well as overarching, study of regulation and enforcement in the shared European order as conducted within RENFORCE can thus be enriched by connecting it more to insights

¹ D. Curtin, *Executive Power of the European Union: Law, Practice and the Living Constitution*, OUP, 2009.

² W. Twining, *Law in Context: Enlarging a Discipline*, OUP, 1997.

³ G. Beck, *The Legal Reasoning of the Court of Justice of the EU*, Hart Publishing, Oxford, 2012.

⁴ See for an example of this: Manunza, Meershoek and Senden, *Het Ecosysteem voor de militair-logistieke capaciteiten van de adaptieve Krijgsmacht. In het licht bezien van het NAVO-Verdrag, de EU-Verdragen en het nationale aanbestedings- en mededingingsrecht*, 2020.



from multi-level governance, constitutional and regulatory governance (e.g. smart/optimal mix, responsive regulation)⁵ theories as well as political science (institutional⁶ and compliance⁷), socio-economic,⁸ systems,⁹ human rights, justice and other theories. As such, this may generate interesting new doctrinal legal insights as to when the law may be perceived as good, both from a legitimacy and effectiveness perspective. The other way around, this project will also feed those theories with legal insights gained from our regulation and enforcement studies in different policy fields. Regulation theories for example often ignore or do not take the law sufficiently on board as a factor guiding the choice and framing of regulatory and enforcement approaches, at least when it comes to the guarantee function of the law. Therewith it can enrich such theoretical approaches as well and provide insights on their tenability from a legal perspective.

Starting from these two schools of thought and connecting them to these broader empirical findings and theoretical reflections will allow for the development of a more integrated, comprehensive and coherent legal approach towards the attainment of the ultimate goals of the EU by way of regulation and enforcement arrangements and tools. As such, it will also contribute to the development of an own RENFORCE approach and school of thought that can also innovate EU law scholarship, specifically when it comes to the understanding and operationalization of key concepts, principles and doctrines in EU law.

3) From a societal perspective

The approach as sketched above will also allow for drawing alternative solutions for the existing and future societal problems our society has to face. It will enhance cross-sectoral learning and contribute to identifying better regulation and enforcement practices and bring valuable insights for policymakers, legislators and other legal practitioners. Outcomes of the project can be fed into ongoing debates on better regulation and enforcement at the EU and the national level through different fora and networks RENFORCE researchers have already been engaged with in the past years.

Focus areas of research

⁵ Initial mapping of this done in: L. Senden, 'Smart' Public-Private Complementarities in the Transnational Regulatory and Enforcement Space, in: J. van Erp, M. Faure, A. Nollkaemper and N. Philipsen, *Smart Mixes for Transboundary Environmental Harm*, Cambridge University Press, 2018, pp. 25-48

⁶ E.g. W. Scott, *Institutions and Organizations. Ideas, Interests and Identities*, Sage Publications, 2013.

⁷ E.g. Falkner, Hartlapp, Treib

⁸ E.g. J.G. Sutinen and K. Kuperan, A socio-economic theory of regulatory compliance, *Intern. Journal of Social Economics*, 26, 1/2/3, 1999.

⁹ E.g. R. Nobles, D. Schiff, *Observing Law through Systems Theory*, Hart 2012,



I. Conceptualization as a stepping stone for further constitutional and theoretical investigation

How do we conceptualize the core notions involved in the RENFORCE research program and how do they relate to one another and other relevant concepts:

- Regulation
- Enforcement
- Effectiveness
- Coherence
- Legitimacy
- Core values (art. 2 TEU values, a.o.)
- General global interests / protection of the commons
- Peace/security
- Well-being; social market economy, (social) justice, etc.

Within this part of the research, the focus will first of all be on the identification of which (other) key conceptual notions that arise within the various building blocks that would require more fundamental research (e.g. also discretion, coherency, Union loyalty, etc)? In a second step, it will seek to map and identify how these concepts have so far been conceptualised in the framework of the various building blocks and in other research projects carried out within RENFORCE and following which methodological approach (including PhDs, individual articles, 2nd and 3rd money stream projects). In a third step, it will be important to see how the different conceptualizations compare with one another and which ones may be considered more convincing than others, taking also into account the aforementioned law in context and living constitution starting points for the analysis and the theoretical perspectives that can be taken on these or applied to them. In a final step, what does this add to our 'classic' understanding of key notions/concepts/principles within the framework of regulation and enforcement in the shared and multi-level European legal order?

II. Connecting practice to theory: regulatory and enforcement choice in Europe

Within the various RENFORCE building blocks, empirical insights as well as insights from legal practice and doctrine have been gained as to the choice for certain regulatory and enforcement approaches, arrangements and tools within different policy sectors, at the public as well as the private levels of regulation and enforcement. This part of the project envisages to connect these findings to theoretical insights and approaches as to regulatory and enforcement choice. It will scrutinize more in-depth the key drivers for the choice for regulatory and enforcement approaches/arrangements/tools and investigate what the role of the law actually is in making such choices in particular in its instrumental function, vis-a-vis other determinants at the micro-meso- and macro levels of instrumental choice and in view of smart/optimal mix and other



theories.¹⁰ At the macro-level, the factors of time and place are important; at the meso-level, policy sector specificities and path dependency for example; and at the micro-level, personal and cultural elements may play a role for instance. Gaining more insights into these aspects is relevant with a view to developing solutions and making proposals for better regulatory and enforcement approaches in certain fields and to assess the potential of cross-sectoral spill-over and learning effects and the identification of best or good practices. It is also key to determine what knowledge is necessary to make the law function well and who is to decide on that and how, at the stage of development and application of the law.

Connected to that, within this framework it will also be further explored how we currently assess and evaluation policy effectiveness or effectiveness of regulatory and enforcement approaches and arrangements within the various RENFORCE building blocks. Next, how could such evaluation be enhanced and what can actually be seen to be the role of the law in this regard?

III. Connecting practice to theory: shaping regulatory and enforcement arrangements in Europe and the balancing act between policy effectiveness and other values, rights, principles and interests

Within the various building blocks empirical insights and insights from legal practice and doctrine have also been gained as to the balancing act that takes place within different policy sectors as to the assessment and weighing of different values, interests, principles and rights vis-à-vis realising the policy objectives of the specific law or legislation that has been put in place, at the national, EU and/or international levels. Importantly, the values of the EU have not only accrued over the past decades, as a result inter alia of the entry into force of the Treaty of Lisbon and the Charter of Fundamental Rights, but their appreciation and weight has also shifted over time, which may lead quite some conflicting situations in practice in which it may be difficult to decide as to what interest, right or values is to prevail. This part of the project will thus focus on the guarantee function of the law and consider more specifically how then are the different values balanced vis-à-vis not only the policy effectiveness interest but also vis-à-vis one another in the framing of regulatory and enforcement arrangements in different policy sectors and how should these be - better - balanced? Addressing this issue at a more fundamental level is key to answering not only the main question of RENFORCE, but also with a view to realising the underlying goal of our research contributing to the goal of a European society that enjoys peace, is provided with protection of core values and whose well-being is ensured.

¹⁰ Building a.o. on L. Senden, 'Smart' Public-Private Complementarities in the Transnational Regulatory and Enforcement Space, in: J. van Erp, M. Faure, A. Nollkaemper and N. Philipsen, *Smart Mixes for Transboundary Environmental Harm*, Cambridge University Press, 2018, pp. 25-48



This raises a host of more specific questions:

> what insights does the ongoing RENFORCE research in the different policy fields reveal as to how this balancing act is conducted; are the same/similar/different tests applied for this and if so, what explanations can be found for this?

> does the RENFORCE and other doctrinal research reveal that in the shaping of regulatory and enforcement arrangements there is a hierarchy of values; that some core values are carrying more weight than others and if so, why? Which values are of a mandatory nature and which are not? (cf AG Bot in Bauer case)? What insights (explanations and/or justifications) may legal theory (e.g. human rights, justice), socio-economic or other theories provide for such differences in weight?

> What is the impact for private actors/regulators/enforcers of the answers to the previous questions, especially where a legal duty of ensuring protection is being imposed on them; what support – or not - can be found for such horizontal effect of EU rights and principles in legal and other theories?

> What is the best level for determining the prioritisation of values, from a constitutional or other perspective?

> How are policy integration/mainstreaming duties put to practice and how can they be enhanced, so as to ensure a better protection of core values in and across policy sectors? Especially in areas in which so far protection of certain values is not speaking for itself or is only gradually being introduced, e.g. in competition law, EMU, etc.; and by comparing these areas of law with those where this protection is a fundamental aim of the whole legal system, e.g. in public procurement law, and investigating the reasons for the different approach.

How can institutional, constitutional, human rights theories or others be helpful in this regard?

IV. The relationships between the different levels of regulation and enforcement from a constitutional perspective

A final element that could be addressed within this project concerns the relevance and meaning of the notion of 'trust' for ensuring good regulation and enforcement in the shared European legal order. Trust is crucial in - shaping - all relationships and in ensuring that the law will be able to meet its instrumental and guarantee goals in regulatory and enforcement arrangements in Europe; without there being trust between the EU institutions and the Member States and actors in the international arena, in-between the Member States and on the part of their citizens vis-à-vis relevant public authorities and private actors, the law by which regulatory and enforcement arrangements have been established will be less or not effective. A key point would thus be to address how trust matters within the framing of regulatory and enforcement arrangements in different policy fields that are investigated in RENFORCE research, why trust



may be lacking and how this impacts on policy effectiveness and the protection of other core values. What is needed to enable trust? What can be learnt e.g. from institutional, trust and civil (contract) law theories so as to enhance trust in these contexts and by using the law as a means to achieve this? What impact is there of – the lack of – trust on the relationships that have emerged between the different levels of regulation and enforcement – European, international, national – across different policy sectors in the past decades, in light of the principles governing these relationships and their operationalisation as well as existing theories on constitutional pluralism.

Methodology

In addition to what has been observed already above in terms of building on the ‘Law in Context’ and ‘Living Constitution’ schools of thought, we refer here to the methodological approach as summarized here below and presented at the RENFORCE meeting. Very importantly also and as observed already, the research in this building block will scrutinize previous outputs of various RENFORCE and PhD projects, so as to bring together the insights gained so far. But it will also benefit from and be linked to ongoing research in the other building blocks, that also generate relevant conceptual and constitutional insights. These concern Social Justice, Legislation in an EU Context, Digitalization in Europe, Migration, EU Values in International Trade and Verticalization of Enforcement. As such, this project requires shared responsibility and commitment from the researchers in those building blocks as well. Of course the research will also take into account other relevant studies and legal doctrine.



How do we test these elements?

Choosing from a wide a range of legal methods; **how to choose?**

- ❖ 'Classic' legal methodological toolbox (e.g. descriptive, historical, explanatory, comparative, case law analysis, ...);
- ❖ Choosing from a wide range of ERI methods;
- ❖ Multi-interdisciplinarity and choosing and applying different theories for explanation and interpretation:
 - what is the narrative?
 - what is the relevance of path dependency, culture or behavior?
 - systemic and legal theory/philosophy and beyond
 - how can compliance or smart mix theory be helpful?
 - what can other theories (institutional, compliance, socioeconomic etc.) add to the analysis?

It is to be noted that the research conducted within this building block fits in closely with inter alia the IOS-Hub Gender and Diversity and the IOS-Hub on Social Entrepreneurship and also builds upon close collaboration with a variety of stakeholders, including for example the European Commission, the European Parliament, various Ministries and the National Police.

Way forward and output

- a) Round table with chairs of the various current and previous building blocks so as to discuss the above focus areas and approach and to get to a prioritization of issues to address and a staged approach over time.
- b) Proceed to a mapping exercise of the RENFORCE research output so far in light of the focus areas. To be done in close collaboration with RENFORCE post-doc/Virginia
- c) Build a joint COCOT research group, with the chairs and researchers of the various building blocks and create a pool of selected researchers – internal and external – to work jointly on the focus areas identified and to set concrete goals for them, also in terms of output, including:



- d) Organisation of regular research meetings and workshops
- e) Draft RENFORCE working papers on key concepts and the methodological approach of the projects. Two are in preparation; on effectiveness and coherence
- f) Individual journal articles and joint publications in relation to the prioritised topics.
- g) Contributions to national and international conferences, e.g. within the framework of Ius Commune, ECPR and many other fora

Some relevant outputs so far:

Manunza, E., Meershoek, N.A. & Senden, L.A.J. (13-07-2020). [Het Ecosysteem voor de militair-logistieke capaciteiten van de adaptieve Krijgsmacht - In het licht bezien van het NAVO-Verdrag, de EU-Verdragen en het nationale aanbestedings- en mededingingsrecht.](#) (61 p.). Utrecht University.

M. de Cock Buning and L.A.J. Senden, “Introduction: EU Private Regulation and Enforcement – Mapping its Contextual, Conceptual, Constitutional and Citizens’ Dimensions”, pp. 1-32

M. de Cock Buning and L.A.J. Senden, “Conclusions: Drawing the Lines Together of Regulatory Choice, Public – Private Dynamics and Citizens’ Trust in Private Regulation and Enforcement in the U”, pp. 519-562 in DE COCK BUNING, M, AND SENDEN, L.A.J. (EDS.), *Private Regulation and Enforcement in the EU. A Citizen’s Perspective*, Hart Publishing, Oxford, 2020

Senden, L.A.J., ‘Smart’ Public-Private Complementarities in the Transnational Regulatory and Enforcement Space. In: J. van Erp, M. Faure, A. Nollkaemper & Philipsen (Eds.), *Smart Mixes for Transboundary Environmental Harm* (pp. 25-48) Cambridge University Press, 2019.

Manunza, E.R. and Meershoek, N.A., “Fostering the Social Market Economy Through Public Procurement? Legal Impediments for New Types of Economy Actors”, (2020) 29 *P.P.L.R.*, Issue 6 2020 Thomson Reuters and Contributors (pp. 343-358).