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Navigating the Complexities of the DSA's Enforcement Framework: Sincere Cooperation in Action?

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PIETRO MATTIOLI

ABSTRACT

The Digital Services Act (DSA) represents an important development in the EU regulation of online services, tackling online disinformation and harmful content. However, its success depends on effective enforcement across the European Union. As the DSA enters its implementation phase, its enforcement regime is under scrutiny, particularly the cooperation mechanisms between Member States' competent authorities. It appears that Member States, while acting in compliance with their institutional autonomy, may have unintentionally created an enforcement structure that is not well-suited for cooperation. Therefore, this article examines the role of the principle of sincere cooperation in the EU legal order and how this principle could enhance cooperation among national competent authorities also in the context of the DSA.

CORRESPONDING AUTHOR:
Pietro Mattioli
University of Liege, BE
pietro.mattioli@uliege.be

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1. INTRODUCTION

In addition to establishing new obligations for providers of intermediary services, Regulation 2022/2065, also known as the Digital Services Act (hereafter, the Act or DSA), creates an EU-structured enforcement framework.[1] In this framework, Member State authorities and the European Commission are responsible for the application of the DSA across the EU. DSA enforcement is partly decentralised. National authorities are responsible for the supervision and enforcement of the Act's obligations on providers of intermediary services established in their respective territories.[2] In parallel, the Commission is primarily responsible for the supervision and enforcement of the Act in relation to very large online platforms (VLOPs) and very large online search engines (VLOSEs).[3]

Notwithstanding this task division, the cross-border nature of the activities regulated by the DSA renders effective compliance with the Act's obligations contingent upon cooperation among enforcement bodies at different levels.[4] Cooperation facilitates the exchange of information and best practices and allows for pooling of expertise among authorities. This not only helps to address resource constraints that may limit these authorities' capacity to monitor and enforce compliance with the DSA effectively, but also ensures a rapid response to violations affecting users in different jurisdictions.

However, as the DSA has entered its implementation phase, concerns have arisen regarding the effectiveness of its enforcement framework. This article argues that the current framework for cooperation among Member States' competent authorities may face significant challenges in its execution. The core complexities emerge from how the EU legislature has balanced national institutional autonomy with consistency and uniformity. While the DSA leaves considerable autonomy to the Member States in setting up their institutional enforcement systems, this autonomy has led to diverse and potentially inconsistent implementations across Member States. To address these challenges, this article argues that the EU principle of sincere cooperation could provide guidance in enhancing cooperation among national authorities. At the same time, recognising that reliance on voluntary cooperation alone may prove insufficient, this article examines how to operationalise this principle in the context of the DSA.

To develop this argument, Section 2 provides an overview of the DSA's enforcement framework and its cooperation mechanisms. Considering the DSA's accommodating stance towards institutional pluralisms in EU law enforcement structures across the Member States, Section 3 recalls how the EU legislature must balance national institutional autonomy with the principles of subsidiarity and proportionality in its regulatory actions. In this context, Section 4 illustrates how the principle of sincere cooperation can be employed to shift this balance in favour of EU interests, potentially at the expense of Member States' autonomy. With this framework in mind, Section 5 examines the implementation challenges associated with the DSA, which could undermine its cooperation system and jeopardise effective and consistent enforcement. Section 6 concludes by examining possible ways to operationalise sincere cooperation within the DSA framework to address these challenges.

2. THE DSA's ENFORCEMENT SYSTEM

The DSA represents a significant development from the previous regulatory framework for digital services. It introduces, for the first time, due diligence obligations that vary according

1 Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277/1. See Pieter Van Cleynenbreugel, 'The Commission's digital services and markets act proposals: First step towards tougher and more directly enforced EU rules?' (2021) 28 *Maastricht Journal of European and Comparative Law*, 667, 678; Martin Husovec, 'The DSA as a Mixed Enforcement System' in Martin Husovec (ed.), *Principles of the Digital Services Act* (Oxford Academic, 2024), 417–420; and Folkert Wilman et al., 'Implementation, Cooperation, Penalties and Enforcement', in Folkert Wilman et al. (eds.), *The EU Digital Services Act* (Oxford Academic, 2024), 344.

2 DSA (n 1), Art 56.

3 ibid, Art 56(2) and (3).

4 ibid, recital 110; Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC [2020] COM(2020) 825 final, 3; European Commission, 'Part 1 of the Commission staff working document: impact assessment accompanying the document proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC' [2020] SWD(2020) 348 final, points 65–59.

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to the type, size, nature, and thus the social impact of intermediary services,[5] while continuing to apply conditional exemptions from liability (hosting, caching, and mere conduit).[6] The DSA's merit is not limited to providing much-welcomed harmonised rules for a safe, predictable, and trusted online environment; it also addresses the inadequacies of the previous oversight and enforcement framework. While Directive 2000/31/EC (e-Commerce Directive) merely prescribed the establishment of national contact points to facilitate cooperation between Member States and the Commission and encouraged alternative enforcement methods such as codes of conduct and out-of-court dispute resolution,[7] the DSA creates a comprehensive institutional framework for enforcing the new obligations.

The following subsections examine the features of the DSA's enforcement framework, with a focus in subsection 2.2 on the cooperation mechanisms.

2.1. THE DSA's HYBRID ENFORCEMENT SYSTEM

In general terms, the DSA establishes a hybrid enforcement system, whereby the Commission and Member States act as co-regulators.[8]

With regard to national enforcement, each Member State is required to appoint a Digital Services Coordinator (DSC), which may be either a newly constituted or an existing body.[9] The DSC is the principal national authority responsible for all matters pertaining to the application and enforcement of the DSA. In addition to the DSC, Member States may designate one or more competent authorities and assign them specific DSA-related tasks.[10] While the DSA allows large flexibility in assigning these tasks at the national level,[11] the DSC is nevertheless subject to specific designated responsibilities. This body is responsible for ensuring overall coordination among national competent authorities, acting as a single contact point with regard to all matters related to the application of the DSA,[12] preparing annual reports,[13] and certifying out-of-court dispute settlement bodies.[14] Furthermore, it is responsible for the oversight and enforcement of the Act in areas not explicitly delegated to other appointed authorities.[15] Moreover, Article 51 DSA outlines a minimum set of powers for the exercise of these tasks.[16] In that regard, Member States also maintain the freedom to determine their own rules and procedures for the exercise of these powers.[17] Finally, the Act lays down independence safeguards for the DSC and other competent authorities.[18] These bodies must be completely independent,[19] possess the

5 Berrak Genç-Gelgeç, 'Regulating Digital Platforms: Would the DSA and the DMA work Coherently?' (2022) 3 *Journal of Law, Market & Innovation*, 90, 91.

6 DSA (n 1), ch 3. See Giancarlo Frosio, 'Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy' (2017) 112 *Northwestern University Law Review*, 19; and Aleksandra Kuczerawy, 'The Good Samaritan that wasn't: voluntary monitoring under the (draft) Digital Services Act' (12 January 2021 Verfassungblog) <https://verfassungsblog.de/good-samaritan-dsa> (last visited 14 October 2024).

7 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178/1, Arts. 16, 17 and 19.

8 Hybrid systems exist in other policy fields, too. Competition law is a notable example of this. See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1, Art. 11(1). See also Maciej Bernatt and Laura Zoboli, 'Competition Law' in Miroslava Scholten (ed.), *Research Handbook on the Enforcement of EU Law* (Edward Elgar Publishing, 2023), 398.

9 DSA (n 1), Art. 49(2).

10 ibid, recital 109 and Art 49(1). There is no obligation to appoint other national competent authorities in addition to the DSC, and Member States have significant flexibility in allocating tasks to these bodies. More details on how Member States have implemented these provisions can be found in Section 5.

11 ibid, Art 49(2) third subparagraph.

12 ibid, recital 110.

13 ibid, Art 55(1).

14 ibid, Art 21(3).

15 ibid, Art 49(2) second subparagraph.

16 ibid, Art 51.

17 ibid, Art 51(6).

18 ibid, Art 49(4) and 50.

19 ibid, Art 50(2) and recital 112. On the meaning of complete independence, see Case C-518/07, *European Commission v Federal Republic of Germany* [2010] ERC I-01885; and Case C-614/10, *European Commission v Republic of Austria* [2012] ECLI:EU:C:2012:631.

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necessary technical, financial, and human resources, manage their budget autonomously, and act impartially, transparently, and promptly.[20]

While each Member State is responsible for supervising and enforcing the Act in relation to providers of intermediary services located within its territory,[21] the Commission is primarily responsible for ensuring that some big platforms of particular economic significance, VLOPs and VLOSEs, comply with the obligations laid down by the Act.[22] The Commission holds exclusive responsibility for overseeing and enforcing the specific obligations outlined in Section 5 of Chapter III of the DSA that pertain solely to these providers,[23] and is primarily responsible for supervision and enforcement of any other obligations concerning VLOPs and VLOSEs, together with DSCs and other national competent authorities.[24]

In summary, the DSA establishes a two-tiered enforcement framework that balances national supervision with centralised EU-level oversight, which is specifically designed to address the specific challenges posed by very large platforms. Nevertheless, the effectiveness of this enforcement structure is contingent upon the existence of mechanisms that facilitate cooperation among the various enforcement actors. Subsection 2.2 explains how the DSA structures cooperation.

2.2. EFFECTIVE ENFORCEMENT OF THE DSA CONTINGENT UPON COOPERATION

Alongside the work division between the DSC and other competent authorities within individual Member States, as well as between Member States and the Commission, the DSA is contingent upon cooperation among different enforcement bodies.

Cooperation is crucial for the DSA's effective functioning for several reasons. Firstly, the establishment of cooperation mechanisms serves to guarantee the consistent application of the DSA throughout the EU. This is particularly relevant given the cross-border nature of digital services operations. The remarkable technological progress that has enabled intermediary service providers to extend their reach across borders necessitates robust cooperation mechanisms to guide national authorities in addressing the transnational activities of these platforms.[25] Secondly, cooperation mechanisms between Member States' authorities are required to address the practical challenges of the country-of-origin principle.[26] While each Member State is responsible for supervising and enforcing the DSA with respect to providers within its territory, the concentration of major companies in a select few countries may result in a significant imbalance in the workload. This is particularly evident in countries such as Ireland, Luxembourg, and the Netherlands, where many big companies are headquartered. Constraints, such as limited access to information and insufficient human and technical resources, may impede the ability of national authorities to investigate potential violations effectively.[27] In contrast, cooperation allows these Member States to leverage the expertise and resources of other countries, fostering a more equitable regulatory environment across the EU. Lastly, scholars highlight the benefits of cooperation mechanisms in terms of the dissemination of best practices, mutual learning, harmonisation, and the promotion of policy implementation.[28]

20 DSA (n 1), Art 50(1) and (2).

21 ibid, Art 56(1).

22 ibid, Arts 33(1) and 56(2) and (3).

23 ibid, Art 56(2).

24 ibid, Art 56(3) and (4) and recital 124.

25 ibid, recital 127. See Hans Schulte-Nölke et al., 'The legal framework for e-commerce in the Internal Market - State of play, remaining obstacles to the free movement of digital services and ways to improve the current situation' (2020) Study for IMCO committee PE 652.707.

26 Conversely, the e-Commerce Directive, while also applying the country-of-origin principle, did not lay down specific mechanisms for cross-border cooperation, opting for a minimum harmonisation approach to facilitate the establishment, exercise of services, and development of information society services within the EU. In more detail see Alexandre de Streel & Martin Husovec, 'The e-commerce Directive as the cornerstone of the Internal Market' (2020) Study for the committee on Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, 214.

27 European Commission (n 4), point 27; Giorgio Monti & Alexandre de Streel, 'Improving EU institutional design to better supervise digital platforms' (2022) Centre on Regulation in Europe (CERRE) <https://cerre.eu/publications/improving-eu-institutional-design/> (last visited 9 April 2025), 56.

28 Morten Egeberg et al., 'The many faces of EU committee governance' (2003) 26 *West European Politics*, 19; Sabino Cassese, 'European Administrative Proceedings' (2004) 68 *Law and Contemporary Problems*, 21, 22; and Martino Maggetti, 'The rewards of cooperation: The effects of membership in European regulatory networks' (2014) 53 *European Journal of Political Research*, 480.

In consideration of the above, cooperation has become a fundamental aspect of the DSA's enforcement framework. The DSA regulates two distinct forms of cooperation regimes: horizontal and vertical (see Figure 1).[29]

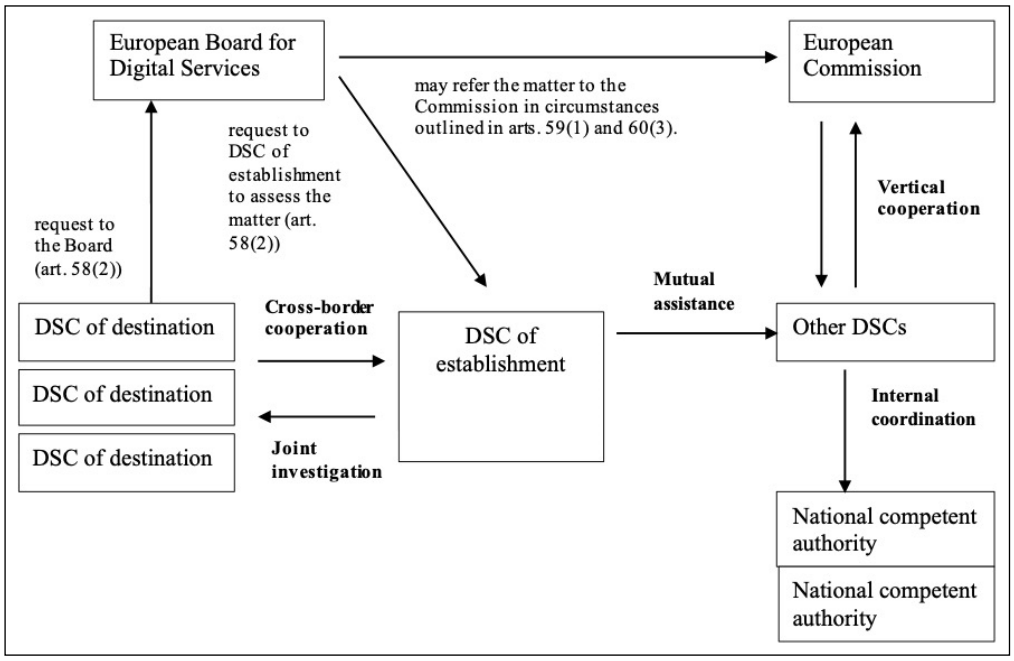

Figure 1 Overview of the DSA cooperation mechanisms.

Horizontally, the DSA establishes three fundamental cooperation mechanisms: mutual assistance, cross-border cooperation, and joint investigations. The first of these is set out in Article 57(2) DSA, which lays down specific procedures for the DSCs of different Member States to request and provide mutual assistance to each other.[30] This assistance primarily includes the exchange of information. However, mutual assistance should also be conceived more broadly, encompassing not only the exchange of information between DSCs, but also involving other national competent authorities, public bodies, the Commission, and the European Board for Digital Services (hereafter, the Board or EBDS).[31]

Secondly, Article 58 DSA establishes the mechanism for cross-border cooperation in instances where an infringement by a provider of intermediary services established in one Member State causes damages to a recipient located in another Member State. In these circumstances, the DSA regulates two scenarios: first, the DSC of destination may request that the DSC of establishment assess the matter and, second, the EBDS may request that the DSC of establishment assess the matter, provided that this is at the request of at least three DSCs.[32] In this context, it is also essential to consider the potential competence of the Commission, which might necessitate that the matter must be investigated by the Commission itself.[33] When the Commission is not exercising its competence, the DSC of establishment is then required to evaluate the request. In this context, when the DSC deems the available information to be insufficient, it may seek further information or initiate a joint investigation. Alternatively, within two months of receiving the request, it must share an assessment of the suspected infringement and any related actions taken.[34]

Finally, when a provider operates in multiple EU countries and there are concerns that its activity might affect recipients across these countries, Article 60 DSA regulates joint investigations, which can be launched by the DSC of establishment with the participation of other DSCs.[35] This

29 Pierre Larouche, 'Coordination of European and member state regulatory policy: Horizontal, vertical and transversal aspects' (2004) 5 *Journal of Network Industries*, 277.

30 DSA (n 1), Art 57(2).

31 ibid, Art 57(1). Wilman et al. (n 1), 387.

32 DSA (n 1), Art 58(1) and (2).

33 Wilman et al. (n 1), 395.

34 DSA (n 1), Art 58(3) and (4).

35 ibid, Art 60(1). The second paragraph regulates other cases in which joint investigations may be launched.

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mechanism is designed to assist the DSC of establishment, which may have the competence to supervise and act but lacks the capacity to investigate an infringement when it also occurs in other Member States.[36]

Moreover, the first and third subparagraphs of Article 49(1) DSA refer to internal coordination within each Member State when multiple competent authorities are involved in DSA enforcement alongside the DSC.[37] In this context, the DSA assigns to the DSC a crucial role in coordinating all national authorities engaged in DSA enforcement and ensuring the DSA's consistent application.

The DSA also establishes mechanisms for vertical cooperation between Member States' authorities and the Commission, specifically targeting VLOPs and VLOSEs that fail to comply with their obligations under the Act. These mechanisms manifest in various forms. For instance, when a DSC suspects an infringement by a VLOP or VLOSE, it should send a request to the Commission for assessment.[38] Additionally, the Commission may request DSCs' support when investigating suspected infringements by VLOPs or VLOSEs. DSCs receiving such requests, along with other national competent authorities which they may decide to involve, must cooperate sincerely and promptly with the Commission.[39] Moreover, when the Commission is already conducting an investigation, the DSCs and other competent authorities must provide the Commission with all relevant information.[40] Additionally, officials from the DSCs of the Member State where an inspection is to occur are required to assist the Commission upon request.[41]

An important component of the DSA's institutional architecture is the EBDS.[42] This transnational network is composed by the DSC of each Member State and the Commission. Other national competent authorities entrusted with specific responsibilities for the enforcement of the Act may also participate when provided for by national law.[43] This newly established body is an independent advisory group chaired by the Commission, which, however, does not have a voting right.[44]

The EBDS does not have binding powers.[45] Many of its functions are designed to ensure the consistent application of the Act and effective cooperation between the DSCs and the Commission.[46] For instance, it assists in the coordination of joint investigations,[47] and may launch joint investigations at the request of at least three DSCs or refer the matter to the Commission.[48] In addition, in its advisory role, the Board can issue opinions, recommendations, or advice to the DSCs, and advise the Commission in the exercise of its powers of investigation.[49] It is also tasked with supporting competent authorities in the analysis of reports and audit results of VLOPs and VLOSEs.[50] Finally, the Board is responsible for promoting the development and implementation of EU standards, guidelines, reports, templates, and codes of conduct in cooperation with relevant stakeholders.[51]

36 Wilman (n 1), 409.

37 DSA (n 1), Art 49(1).

38 ibid, Art 65(2).

39 ibid, Art 66(3). In this circumstance, the authorities involved are entitled to exercise their investigative powers, as outlined in Art 51(1) DSA regarding the VLOP or VLOSE in question.

40 ibid, Art 67(5).

41 ibid, Art 69(7).

42 There is an increasing body of literature focusing on transnational networks of national authorities. Notably, Burkard Eberlein & Edgar Grande, 'Beyond delegation: transnational regulatory regimes and the EU regulatory state' (2005) 12 *Journal of European Public Policy*, 89; David Levi-Faur, 'Regulatory networks and regulatory agencification: towards a Single European Regulatory Space' (2011) 18 *Journal of European Public Policy*, 810; Mark Thatcher, 'The creation of European regulatory agencies and its limits: a comparative analysis of European delegation' (2011) 18 *Journal of European Public Policy*, 790.

43 DSA (n 1), Art 62(1).

44 ibid, Art 62.

45 ibid, Art 61(1). The EBDS is described as an 'independent advisory group'.

46 ibid, Art 61(2).

47 ibid, Art 63(1)(a).

48 ibid, Art 60(1)(b).

49 ibid, Art 63(1)(c) and (d).

50 ibid, Art 63(1)(b).

51 ibid, Art 63(1)(e).

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2.3. INTERMEDIARY OBSERVATIONS

The enforcement structure of the DSA is in continuity with pre-existing EU institutional enforcement models.[52] Notably, the DSA relies partly on the decentralised administration of each Member State for its enforcement. In this respect, and in contrast to the increasing tendency of the EU legislature to impose detailed institutional and procedural obligations for the national enforcement of EU law,[53] the DSA adopts a relatively hands-off approach, leaving Member States with significant autonomy in the organisation of their enforcement systems.[54] For instance, with regard to the establishment or appointment, and safeguards of national enforcement authorities, the DSA's administrative design obligations appear to be less detailed than those of the General Data Protection Regulation (GDPR).[55]

At the same time, this approach appears to be counterbalanced by an overly complex network of horizontal and vertical cooperation mechanisms (see Figure 1), within which national authorities are required to operate. While these mechanisms are typically designed to address resource constraints, reinforce cross-border cooperation, and ensure consistency in EU law enforcement, the complexity of the DSA's cooperation framework could hinder its ability to achieve these objectives.

The freedom left to the Member States to organise the enforcement of the DSA according to their domestic constitutional, organisational, and administrative structures seems like a deliberate choice to respect the institutional autonomy of the Member States.[56] This approach also recognises the proactive steps taken by many Member States to address the regulation of digital services prior to the introduction of the DSA. Countries such as Germany and France had already implemented national legislation targeting aspects of online content and platform regulation.[57] Furthermore, by allowing the use of pre-existing authorities, such as communications regulators, media regulators, or competition authorities, the DSA aims to benefit from their experience and capabilities. Therefore, from the perspective of the EU legislature, this approach seemed to be the most appropriate to ensure the effectiveness of the DSA.

However, a closer examination of the implementation challenges related to the DSA's administrative obligations suggests that this approach may not have optimally reconciled the imperative of ensuring effective and consistent enforcement of EU law with the principle of institutional autonomy.[58] Before examining the specific challenges that the enforcement system

52 Regarding the DSA's hybrid enforcement system, another example can be found in competition law, where Regulation 1/2003 allocates enforcement powers to both the Commission and national competition authorities; and see Bernatt and Zoboli (n 8), 398. Moreover, other structures similar to the Board can be found in other pieces of EU legislation. For more details, see Wilman et al. (n 1), 415.

53 Stéphanie De Somer, 'The Europeanisation of the Law on National Independent Regulatory Authorities from a Vertical and Horizontal Perspective' (2012) 5 *Review of European Administrative Law*, 93; and Pietro Mattioli, 'The Quasi-Judicial Role of National Competent Authorities: an Ambiguity that the Principle of Effective Judicial Protection could help address?' (2024) 17 *Review of European Administrative Law*, 99, 101–105.

54 Wilman et al. (n 1), 346, 348.

55 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) [2016] OJ L 119/1, Arts 53–54. Other examples of more detailed EU institutional designs for national enforcement systems can be found in Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code [2018] OJ L 321, 17.12.2018/36, Arts 7, 8, and 9; and Regulation 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 [2017] OJ L 345/1.

56 Regulation 2022/2065 (n 1), recital 109.

57 In recent years, Member States have progressively introduced national laws with the intent of updating the e-Commerce Directive's rules on online hate speech. Most notably, France adopted the Avia law which introduced significant amendments aiming to tackle online hate speech. For more information see Ilaria Buri, 'The DSA proposal and France' (12 November 2021, DSA Observatory) <https://dsa-observatory.eu/2021/11/12/france-and-the-dsa-proposal/> (last visited 14 October 2024). Additional examples of anti-hate speech legislation are the German Network Enforcement Act 2017 and the Austria Communication Platforms Act 2020. See Werner Schroeder & Leonard Reider, 'A Step Forward in Fighting Online Antisemitism: The Contribution of the EU's Digital Services Act (DSA)' (18 October 2023, Verfassungblog) <https://verfassungsblog.de/a-step-forward-in-fighting-online-antisemitism> (last visited 14 October 2024).

58 While the exact nature and scope of the (principle) of institutional autonomy of the Member States, which governs their freedom to organise their administrative system, remain poorly defined compared to the principle of procedural autonomy, increasing reference to the principle of institutional autonomy can be found in the literature. For instance, Jan Jans, et al., *Europeanisation of Public Law* (Europa Law Publishing, 2007), 18; Maartje Verhoeven, 'The 'Costanzo Obligation' and the Principle of National Institutional Autonomy: Supervision as a Bridge to Close the Gap?' (2010) 3 Review of European Administrative Law 23, 24. Furthermore, scholars have

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of the DSA may face as a result of particular EU choices, the following Section analyses the foundational principles that govern the EU's intervention in the national administrative sphere.

3. THE EU'S REGULATORY AMBITIONS AND THE INSTITUTIONAL AUTONOMY OF THE MEMBER STATES: HOW DOES THE EU ADDRESS COMPLIANCE ISSUES?

The EU constitutional order conceives Member States as independent entities bearing the responsibility to ensure that the objectives sought by EU sectoral legislation are attained within their respective national legal orders.[59] This specific conception of the Member States within the EU architecture stems from both political considerations and practical necessities.[60] Notably, Member States maintain a strong preference for preserving aspects of their sovereignty. Additionally, it is a fact that the EU does not have the capacity and practical means to implement EU law within each Member State.[61]

In these circumstances, the implementation of EU law, understood as the process through which the Member States comply with the obligations stemming from EU law, is a prerogative of each Member State.[62] Guided by the principle of institutional autonomy, Member States are free to establish their own institutional frameworks for this purpose.[63] This allows the preservation of the heterogeneity of legal and administrative systems across the EU.[64] Nevertheless, while this approach assumes that EU law implementation can be better achieved when each Member State implements EU law in line with its own traditions, the EU continues to encounter issues with the correct execution of its laws at the national level.[65]

The issue of non-compliance with EU law has many facets.[66] Scholarly attention has largely focused on the transposition of EU directives into national legislation.[67] However, the issue extends beyond transposition.[68] It encompasses the improper implementation of EU legislation more generally by Member States and how national authorities enforce EU norms.[69] In essence,

linked institutional autonomy to procedural autonomy. In this regard, Saskia Lavrijssen and Annetje Ottow, 'The Legality of Independent Regulatory Authorities' in Leonard Besselink, Frans Pennings and Sacha Prechal (eds), *The Eclipse of the Legality Principle in the European Union* (Kluwer 2011) 73, 74; Andrea Biondi & Giulia Gentile, 'National Procedural Autonomy' in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press 2019). Reference to institutional autonomy can also be found in the CJEU case law. Most recently, Case C-796/19, *European Commission v Republic of Austria* [2020] ECLI: EU:C:2020:920, paras 60–61 and case law cited; and in Advocate General Opinions, for instance, Case C-355/19, *Asociația "Forumul Judecătorilor din România" and Others* [2020] ECLI:EU:C:2020:746 Opinion of Advocate General Bobek, para 227. In light of this, this contribution refers to the principle of institutional autonomy (as distinct from procedural autonomy) to emphasise the emerging relationship between EU institutional design obligations and broader institutional aspects related to the internal organisation of the Member States. In more detail, see Section 5.

59 Case C-129/00 *Commission v Italy* [2003] ECLI:EU:C:2003:319, Opinion of Advocate General Geelhoed, para 55.

60 Miroslava Scholten & Leander Stähler, 'Introduction to Research Handbook on the Enforcement of EU Law' in Mira Scholten (ed.), *Research Handbook on the Enforcement of EU Law* (Edward Elgar Publishing, 2023), 1–3.

61 Verhoeven, 'The 'Costanzo Obligation' (n 58), 26.

62 Jans, *Europeanisation of Public Law* (n 58), 13. For instance, the authors clarify that the transposition of a directive by national law, or the appointment of a national authority to monitor and sanction the application of EU norms belong to this implementation phase. Once the law has been implemented and the relevant actors identified, the enforcement of these norms takes place and is often carried out by the Member States and their specialised agencies. On the role of specialised national bodies for the enforcement of EU law, see Mark Pollack, 'Delegation, Agency, and Agenda Setting in the European Community' (1997) 52 *International Organization*, 99; and Mark Thatcher, 'Regulation after delegation: independent regulatory agencies in Europe' (2002) 9 *Journal of European Public Policy*, 954.

63 Biondi & Gentile, 'National Procedural Autonomy' (n 58); Michal Bobek, 'The Effects of EU Law in the National Legal Systems' in Catherine Barnard & Steve Peers (eds.) *European Union Law* (Oxford University Press, 2014), 141–142.

64 Dionyssis Dimitrakopoulos, 'The Transposition of EU Law: "Post-Decisional Politics" and Institutional Autonomy' (2001) 7 *European Law Journal*, 442, 444.

65 Jans et al. (n 58), 199–200.

66 Tanja Börzel, *Why Noncompliance: The Politics of Law in the European Union* (Cornell University Press, 2021).

67 Tanja Börzel, 'Non-compliance in the European Union: Pathology or Statistical Artefact?' (2001) 8 *Journal of European Public Policy*, no. 5, 814; Sacha Prechal, 'Implementation of directives' in Sacha Prechal (ed.) *Directives in EC Law* (Oxford University Press, 2005), 73.

68 Lisa Conant, 'Compliance and What EU Member States Make of It', in Marisa Cremona (ed.) *Compliance and the Enforcement of EU Law, Collected Courses of the Academy of European Law* (Oxford University Press, 2012), 20–29.

69 Ibid; Börzel (n 66), 61.

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the compliance issue concerns the way in which Member States and their administrative and judicial bodies execute EU law at the national level.[70]

When looking at how the EU has tried to improve compliance, specifically as regards the administrative enforcement of EU norms, it seems that the EU has intervened by introducing a range of institutional and procedural design requirements within EU sectoral legislation aimed at harmonising enforcement practices across Member States.[71] That said, this regulatory approach, which is often intended to ensure consistent and effective enforcement of EU law, represents a departure from the principle of institutional autonomy that underpins EU regulatory intervention.[72] Therefore, these interventions are allowed as long as they adhere to the conferral, subsidiarity, and proportionality principles.[73]

More specifically, while the principle of conferral governs the limits of the EU's competence, the subsidiarity and proportionality principles define whether and how this competence can be exercised. Both of these principles serve as crucial safeguards for Member States' institutional autonomy against potentially expansive and intrusive EU regulatory initiatives.[74] The principle of subsidiarity regulates the exercise of EU powers, functioning as a counterbalance to EU centralisation tendencies in areas where the EU does not have exclusive competence, and prioritising Member State action where EU intervention is not necessary.[75] The proportionality principle is a broader governance mechanism that serves to constrain the scope and intensity of EU action across all areas of its competence.[76] It represents a last key check on EU powers to ensure that EU action, even when present and necessary, remains circumscribed to what is essential for achieving the objectives outlined in the EU Treaties.[77]

Contrary to expectations, these principles have proved limited in their ability to constrain the EU's regulatory ambitions.[78] The 'EU impulse' regarding institutional and procedural matters related to the national enforcement of EU law has intensified in recent years, showing a crescendo of the EU influence on national institutional matters.[79] However, the issue of implementing and enforcing EU law remains unresolved. Since the European legal order fundamentally relies

70 Edoardo Chiti, 'The Governance of Compliance', in Marisa Cremona (ed.) *Compliance and the Enforcement of EU Law, Collected Courses of the Academy of European Law* (Oxford University Press, 2012), 31. As noted by the author, when applied to the EU sphere, the notion of compliance is broadly defined as 'a process—and in particular the whole of ongoing negotiations, political and legal processes, and institutional change that are involved in the execution of EU law and policies and are functionally orientated to give EU law and policies full effectiveness'.

71 ibid, 36.

72 Ton Duijkersloot & Rob Widdershoven 'Administrative law enforcement of EU law' in Miroslava Scholten (ed.) *Research Handbook on the Enforcement of EU Law* (Edward Elgar Publishing, 2023), 44–45.

73 Art. 5(2) Treaty on European Union (TEU): 'Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States'. Koen Lenaerts & José Gutiérrez-Fons, 'A Constitutional Perspective' in Robert Schütze & Takis Tridimas (eds.) *Oxford Principles Of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press, 2018), 112–118; and Koen Lenaerts, 'Proportionality as a Matrix Principle Promoting the Effectiveness of EU Law and the Legitimacy of EU Action' (Keynote speech, ECB Legal Conference 2021: Continuity and Change – How the Challenges of Today Prepare the Ground for Tomorrow, 25 November 2021) <https://www.ecb.europa.eu/press/conferences/shared/pdf/20211125_legal/ECB-Symposium_on_proportionality_25_November_2021.en.pdf> (last visited 7 November 2024), 3–5.

74 The 'hidden' potential of Article 4(2) TEU, which enshrines the principle of respect for the national identities of Member States, is also significant in the debate. Scholars have argued that this provision might have the potential to add an extra layer of scrutiny for EU intervention and limit EU competence. However, in practice, this provision has become a de facto limitation on the absolute primacy of EU law, ensuring that it does not interfere with national constitutional identities. Mary Dobbs, 'Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?' (2014) 33 *Yearbook of European Law*, 298, 300–301; Barbara Guastaferro, 'Sincere Cooperation and Respect for National Identities' in Robert Schütze & Takis Tridimas (eds.) *Oxford Principles Of European Union Law: The European Union Legal Order*, Volume I (Oxford University Press, 2018), 352–353.

75 Koen Lenaerts, The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism (1993) 17 *Fordham International Law Journal*, 846, 851–52; and Paul Craig, 'Subsidiarity, a Political and Legal Analysis' (2012) 50 *Journal of Common Market Studies*, 72, 72–73; and Federico Fabbrini, 'The Principle of Subsidiarity', in Robert Schütze & Takis Tridimas (eds.), *Oxford Principles Of European Union Law: The European Union Legal Order*, Volume I (Oxford University Press, 2018, 224.

76 Takis Tridimas, 'The Principle of Proportionality' in Robert Schütze & Takis Tridimas (eds.), *Oxford Principles Of European Union Law: The European Union Legal Order*, Volume I (Oxford University Press, 2018), 244.

77 ibid, 243–244.

78 Rob Widdershoven, 'National Procedural Autonomy and General EU Law Limits' (2019) 12 *Review of European Administrative Law*, no. 5, 13–14. Moreover, specifically on the limited use of the principle of subsidiarity, see Lenaerts & Gutiérrez-Fons (n 73), 115–116; and Xavier Groussot & Sanja Bogojević, 'Subsidiarity as a Procedural Safeguard of Federalism' in Loïc Azoulai (ed.), *The Question of Competence in the European Union* (Oxford University Press, 2014), 234.

79 De Somer (n 53).

on the voluntary compliance and loyalty of its Member States for the execution of its laws, challenges are likely to arise regarding how Member States implement EU law at the national level. Even the establishment of institutional and procedural obligations within EU legislation may not ensure effectiveness if these obligations are not implemented in a timely, consistent and accurate manner across all Member States.

Bearing in mind that the EU must coexist with these issues, the next Section examines the use of the EU principle of sincere cooperation as a mechanism for resolving challenges pertaining to EU law implementation and enforcement.

4. SINCERE COOPERATION

The previous Section has shown that the enforcement of EU law is often carried out by Member States' administrations operating according to their existing practices. To counter the natural shortcomings of this decentralised system, such as inconsistency and lack of cooperation among national systems, the EU legislature has intervened laying down institutional and procedural design obligations. This Section explores how, even in the absence of these obligations or in cases where they are poorly implemented, the EU can leverage the principle of sincere cooperation to advance its integration narrative.[80]

The EU has introduced a 'constitutional frame' to govern the implementation of EU law at the national level: the principle of sincere cooperation.[81] Enshrined in Article 4(3) TEU,[82] sincere cooperation establishes a positive and negative obligation to cooperate. The second subparagraph of Article 4(3) TEU affirms that 'Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'. The last subparagraph establishes a negative obligation upon the Member States to refrain from any measure that may jeopardise the attainment of the EU's objectives.[83] Under these circumstances, sincere cooperation has the potential to operate as a tool to evaluate the loyalty of the Member States' implementation and enforcement actions.

Both obligations have been applied far beyond the wording of Article 4(3) TEU.[84] In fact, despite its codification, the understanding of this principle is largely rooted in the CJEU's case law.[85] With regard to administrative enforcement of EU law, the CJEU has provided important clarifications. The CJEU has affirmed that 'the public authorities of the Member States are bound by a duty of sincere cooperation'.[86] National authorities must therefore also adhere to the positive and negative obligations outlined in Article 4(3) TEU.[87]

Two recent judgments of the CJEU offer significant clarifications on the application of sincere cooperation in the horizontal relationships among national enforcement authorities. These rulings underscore key considerations that are particularly relevant to the analysis of the DSA's enforcement mechanism discussed in this article.

In the *Facebook* case, the CJEU was asked to clarify the responsibilities of data protection authorities within the GDPR's one-stop shop mechanism.[88] The dispute in the main proceedings

80 Marcus Klamert, 'Loyalty and the Constitutionalization of EU Law' in Marcus Klamert (ed.) *The Principle of Loyalty in EU Law* (Oxford University Press, 2014), 63–65.

81 Robert Schütze, *European Constitutional Law* (Cambridge University Press, 2016), 334; and Guastaferro (n 74), 351.

82 For an analysis of the codification process of the principle of sincere cooperation, see Marcus Klamert, 'Introduction' in Marcus Klamert (ed.) *The principle of Loyalty in EU law* (Oxford University Press, 2014), 10–13; and Geert De Baere & Timothy Roes, 'EU loyalty as good faith' (2015) 64 *International and Comparative Law Quarterly*, 829, 834–836.

83 Article 4(3) last subparagraph: 'Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'.

84 John Temple Lang, 'Developments, Issues, and New Remedies – The Duties of National Authorities and Courts Under Article 10 of the EC Treaty' (2003) 27 *Fordham International Law Journal*, 1904, 1906; Guastaferro (n 74), 355–358.

85 Marcus Klamert, 'Deconstructing Loyalty', in M Klamert (ed.) *The Principle of Loyalty in EU Law* (Oxford University Press, 2014), 252; and John Temple Lang, 'Article 5 of the EEC Treaty: The Emergence of Constitutional Principles in the Case Law of the Court of Justice' (1987) 10 Fordham International Law Journal 503.

86 Case C-518/11, *UPC Nederland BV v Gemeente Hilversum* [2013] ECLI:EU:C:2013:709, 59.

87 ibid.

88 Case C-645/19, *Facebook Ireland Ltd and Others v Gegevensbeschermingsautoriteit* [2021] ECLI:EU:C:2021:483.

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originated in the Belgian data protection authority's action against Facebook for an infringement in relation to the tracking of internet users' browsing behaviour. A Belgian court initially ruled in favour of the Belgian authority and ordered Facebook to stop specific data collection practices. However, Facebook's subsequent appeal raised complex jurisdictional questions on the GDPR's implementation, which were brought before the CJEU.[89] In particular, the first preliminary question before the CJEU relates to whether a non-lead supervisory authority can initiate legal proceedings for cross-border data processing violations in circumstances similar to those of the main dispute. In this regard, the CJEU underlined that multiple provisions of the GDPR establish an obligation of data supervisory authorities to cooperate with each other. In particular, the one-stop shop mechanism regulates cooperation between the lead supervisory authority and other relevant supervisory authorities.[90] When implementing this mechanism, these other supervisory authorities must act in such a way as to ensure effective and sincere cooperation with the lead supervisory authority. This implies that a supervisory authority of a Member State, even if not a lead supervisory authority, still has the power to initiate legal proceedings. However, it must do so only in situations permitted by the GDPR and with respect to its cooperation and consistency procedures.[91]

Moreover, in the *Meta Platforms* case, the referring court sought clarification on whether a Member State's competition authority has the power to determine whether a company's personal data processing practices are in breach of the GDPR in the context of its examination of potential abuse of a dominant market position under Article 102 TFEU. In the main proceedings, the German competition authority found that Meta had also violated the GDPR in the context of its investigation of abuse of a dominant position.[92] In this context, the CJEU was specifically asked about the compatibility of the competition authority's finding with Article 4(3) TEU, especially when the competent lead supervisory authority is also investigating that case in accordance with Article 56(1) GDPR.[93]

In this context, there are two essential issues at stake. First, the extent of a competition authority's jurisdiction in assessing GDPR compliance within the scope of its investigations, and whether such assessments can coexist with ongoing GDPR investigations conducted by a designated supervisory authority. Second, there is the question of how the principle of sincere cooperation may reconcile the potentially overlapping competences of different national authorities in the absence of EU norms.

Within this framework, the CJEU emphasised that both competition authorities and data supervisory authorities, when involved in the enforcement of the GDPR, are bound by the duty of sincere cooperation as enshrined in Article 4(3) TEU.[94] In the specific circumstances of this case, this meant that the national competition authorities must consult and cooperate sincerely with the relevant data supervisory authorities when assessing whether the conduct of an undertaking complied with the provisions of the GDPR. This obligation is crucial to ensure the effectiveness of and compliance with the GDPR.[95] Furthermore, the CJEU expanded on how this cooperation should be established and concluded that, in light of the principle of sincere cooperation, a national competition authority may find non-compliance with the GDPR during an abuse of dominance investigation, provided that it consults with and respects the decisions of the relevant supervisory authorities and only if such a finding is necessary to establish the abuse.[96]

In essence, in both cases, the CJEU refers to sincere cooperation, but applies it slightly differently. In the *Facebook* case, the CJEU underlined how existing cooperation mechanisms must operate on the premises of effective and sincere cooperation in order to ensure the correct and consistent application of EU law. By contrast, in the *Meta Platforms* case, the CJEU referred to Article 4(3) to lay down additional procedural rules to guide national authorities' actions

89 ibid 29–41.

90 ibid 53.

91 ibid 75.

92 Case C-252/21, *Meta Platforms and others v Bundeskartellamt* [2023] ECLI:EU:C:2023:537, 28–30.

93 ibid 36.

94 ibid 53.

95 ibid 54.

96 ibid 62–63.

when EU norms are absent. Despite this minor distinction, the CJEU emphasised that sincere cooperation has the potential to function as a mechanism for EU integration and regulatory cohesion.[97] More precisely, it can be seen that the CJEU invoked sincere cooperation to promote the interests of the EU, irrespective of the autonomy of the Member States.[98]

To conclude this analysis, the principle of procedural autonomy in EU law is not an absolute concept but rather a flexible one. It must be carefully balanced with the interest in the uniform application of EU law across the EU. In this regard, however, in the absence of institutional requirements in EU legislation, the EU legal order has demonstrated its capacity to secure effective and consistent administration enforcement of EU law by leveraging the principle of sincere cooperation. Keeping this in mind, the next Section first outlines the specific compliance issues related to the DSA. Following that, Section 6 examines how the recourse to sincere cooperation may also help to address these issues.

5. INSTITUTIONAL AUTONOMY IN THE IMPLEMENTATION OF THE DSA: A DOUBLE-EDGED SWORD

This Section analyses how Member States have implemented the DSA. Two key concerns have emerged: first, notable delays in establishing the necessary institutional frameworks at the national level, and second, the emergence of heterogeneous national institutional structures across Member States. These developments warrant careful consideration as they hold the potential to undermine the DSA's cooperation framework on which the DSA so critically relies.

As a preliminary remark, it should be observed that, under the DSA, Member States maintain considerable freedom on how to organise many key elements related to their DSA's enforcement system. They can choose which national authorities are involved in the enforcement. They are free to appoint one or more competent authorities alongside the DSC and, in that circumstance, to distribute the implementing tasks among them.[99] The DSA does not require the establishment of new or specific authorities but leaves Member States with the choice to designate existing bodies.[100] Moreover, Member States hold full responsibility for ensuring that their respective DSCs and other appointed competent authorities cooperate with each other, and for organising their cooperation with other DSCs and the Commission.[101] Lastly, Member States can establish their own rules and procedures for the exercise of the powers of Article 51.[102]

Within this framework, it should first be pointed out that the Member States have not responded in time to their obligation to designate their respective DSCs by 17 February 2024.[103] These delays have persisted despite the Commission's recommendation to appoint DSCs as soon as possible to assist in the supervision of VLOPs and VLOSEs,[104] to which the DSA already applied.[105] Additionally, the national processes of appointment of DSCs have often been lengthy and unclear. For instance, some national authorities have anticipated their Government's choice, by unilaterally assuming their status of DSC or acting as such.[106] Moreover, on 17 February 2024,

97 David Halberstam, 'Of Power and Responsibility: The Political Morality of Federal Systems' (2004) 90 *Virginia Law Review*, 731, 764–765.

98 Karl-Heinz Ladeur, *The Europeanisation of Administrative Law: Transforming National Decision-Making Procedures* (Ashgate/Dartmouth, 2002), 7; Lenaerts & Gutiérrez-Fons (n 73), 118; Schütze (n 81), 218; and Guastaferro (n 74), 374.

99 Regulation 2022/2065 (n 1), Art 49.

100 ibid, recital 109 and Art 49(1).

101 ibid, recital 110 and Arts 49(2), 57, and 58.

102 ibid, Art 51(6). This approach is in keeping with the principle of national procedural autonomy. Wilman et al. (n 1), 360.

103 Regulation 2022/2065 (n 1), Art 49(3) first subparagraph.

104 VLOPs and VLOSEs designated pursuant to Art 33(4) of Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC [2023] 2023/C 249/02, PUB/2023/821, OJ C 249/2.

105 Commission Recommendation 2023/2425 of 20 October 2023 on coordinating responses to incidents in particular arising from the dissemination of illegal content, ahead of the full entry into application of Regulation (EU) 2022/2065 of the European Parliament and of the Council [2023] C/2023/7170, OJ L, 2023/2425, 7, 8 and 9.

106 For instance, the Spanish National Commission for the Markets and Competition openly declared itself to be the Spanish DSC within its 2023 Action Plan. This statement preceded its formal appointment. In addition, the Netherlands Authority for Consumers and Markets published, on 18 January 2024, draft guidelines that explain

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not all Member States had officially communicated their choices to the Commission. As a result, in April 2024, the Commission initiated infringement procedures against some Member States due to delays in designating and empowering their DSCs.[107] In July and December 2024, for similar reasons, the Commission opened a second and third wave of infringement procedures against six additional Member States.[108]

These delays and uncertainties are clearly not beneficial for effective enforcement, especially as they impact the DSA's cooperation system, which relies heavily on DSCs as the primary reference points within each Member State. The role of DSCs is key for cross-border cooperation and national coordination. These delays also have an impact on the crucial assistance that DSCs are expected to provide to the Commission in the enforcement of the Act against already designated VLOPs and VLOSEs.

Moreover, since it seems that there is no favoured approach related to what type of authority is most appropriately positioned to enforce the Act, choices have also been discordant across Member States. Telecommunications, media, and competition authorities, among others, have been designated or are in the process of being designated as DSCs. For instance, Italy, Austria, and France have appointed their communications authorities as DSCs.[109] In contrast, other Member States, such as Denmark, Luxembourg, Spain and the Netherlands, have preferred to appoint their competition authorities for this role.[110] Additionally, some other trends have emerged. Ireland has appointed the Media Commission as its DSC,[111] while Germany has designated its Federal Network Agency (*Bundesnetzagentur*, *BNetzA*) for the same purpose.[112]

The appointment of competent authorities as defined in Article 49(1) DSA also reveals significant diversity among Member States. For instance, Italy does not openly identify other competent authorities in the meaning of Article 49(1) DSA. Ireland has designated its Competition and Consumer Protection Commission with specific responsibilities related to Articles 30, 31 and 32 DSA.[113] France has designated both its National Data Protection Authority (*Commission Nationale de l'Informatique et des Libertés*, *CNIL*) and the Directorate-General for Competition, Consumer Affairs and Fraud Control (*Direction générale de la concurrence, de la consommation et de la répression des fraudes, DGCCRF*).[114] Meanwhile, Germany attributes specific enforcement tasks to the Federal Centre for Child and Youth Media Protection (*Bundeszentrale für Kinder-*

how it interprets the rules laid down in the DSA, which are available at <https://www.acm.nl/en/publications/acm-publishes-consultation-draft-guidelines-regarding-digital-services-act-dsa-providers-online-services> (last visited 14 October 2024). At that date, however, the process of appointment had not been concluded.

107 For more information see <https://digital-strategy.ec.europa.eu/en/policies/dsa-dscs> (last visited 14 October 2024). The Commission started a first wave of infringement procedures by sending letters of formal notice to Estonia, Poland, and Slovakia for not having designated their DSCs, and to Cyprus, Czechia, and Portugal for not having fully empowered their DSCs. Since then, Estonia and Slovakia have formally designated and empowered their DSCs.

108 For more information see <https://digital-strategy.ec.europa.eu/en/policies/dsa-dscs> (last visited 9 April 2025). In July 2024, the Commission sent letters of formal notice to Belgium for failing to designate its DSC and to Spain, Croatia, Luxembourg, the Netherlands, and Sweden for not fully empowering their DSCs. In December 2024, it issued a letter of formal notice to Bulgaria for failing to empower its nominated DSC and sent reasoned opinions to Belgium and Poland for failing to designate and empower their DSCs, as well as to Spain and the Netherlands for failing to empower their DSCs.

109 Decreto-Legge del 15 settembre 2023, n. 123, 'Misure urgenti di contrasto al disagio giovanile, alla povertà educativa e alla criminalità minorile, nonché' per la sicurezza dei minori in ambito digitale', (GU Serie Generale n.216 del 15-09-2023), Art 15; DSA-Begleitgesetz (DSA-BegG) 2023, Art 1(2); and Loi n° 2024–449 du 21 mai 2024 visant à sécuriser et à réguler l'espace numérique, Art 51.

110 Danish Act on the enforcement of the Regulation of the European Parliament and of the Council on an internal market for digital services (2023) ACT no. 1765 of 28/12/2023. In Luxembourg, projet de loi n°8309 portant mise en œuvre du règlement (UE) 2022/2065 sur les services numériques. In Spain, by press release, the National Commission on Markets and Competition announced its appointment as DSC by the Ministry for Digital Transformation and Public Service, see <https://www.cnmc.es/prensa/coordinador-servicios-digitales-20240124> (last visited 30 October 2024). In the Netherlands, Decision of the Minister of Economic Affairs and Climate Policy of 11 February 2024, no. WJZ/ 45119378, provisionally designating the Netherlands Authority for Consumers and Markets as competent authority and digital services coordinator within the meaning of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC (Digital Services Regulation) (OJ EU 2022, L 277).

111 The Digital Services Bill n. 89 of 2023, Amendment of Section 7 of Principal Act.

112 Digitale-Dienste-Gesetz 2024. For more information, <https://www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/DE/2024/20240514_DSC.html> (last visited 14 October 2024).

113 The Digital Services Bill n. 89 of 2023 (n 111), part 3.

114 Loi n° 2024–449 (n 109), Art 51.

und Jugendmedienschutz, BzKJ), the State Media Authorities (*Landesmedienanstalten*), the Federal Commissioner for Data Protection and Information Security (*Bundesbeauftragter für den Datenschutz und die Informationssicherheit, BfDI*), and the Federal Criminal Police Office (*Bundeskriminalamt*).[115]

Within this context, a primary concern for enforcement and cooperation arising from the designation of diverse authorities as DSCs and competent authorities across the Member States is the diverse regulatory approaches inherent in different types of regulatory bodies. For instance, telecommunications regulators, competition authorities, and other specific authorities have distinct regulatory approaches, evidence-gathering methods, and decision-making processes that may lead to inconsistent interpretations of the DSA's provisions and jeopardise cooperation.[116] Moreover, different types of authorities have typically already established communication channels and cooperation frameworks with their counterparts in other countries.[117] The diversity among the DSA's enforcement authorities makes it hard to leverage existing coordination frameworks of other policy areas. Lastly, scarce resource allocation might penalise cooperation in the DSA's enforcement as each authority might prioritise its own main issues over the implementation of the DSA.

To conclude, this Section has highlighted the tension between EU ambitions and Member State implementation. The EU legislature's decision to leave Member States considerable discretion in choosing their authorities and procedures for implementing the DSA may be seen as being in line with the principle of institutional autonomy. However, this choice may have inadvertently jeopardised the effectiveness of the DSA cooperation system. Not only have the Member States failed to respond in a timely, consistent, and uniform manner to their duty to implement the DSA, but they have also established an enforcement framework that could undermine cooperation.[118] To address this, Section 6 explores possible ways to make this system work despite the diversified enforcement landscape across Member States.

6. SINCERE COOPERATION IN ACTION FOR BETTER ENFORCEMENT OF THE DSA

The implementation issues described in Section 5 indicate that the EU's regulatory choice for the DSA may have placed undue emphasis on Member State autonomy at the expense of effectiveness. This imbalance raises important questions about the DSA's enforcement framework's ability to achieve its objectives and work effectively in its current state. Bearing in mind these circumstances, this Section examines how the principle of sincere cooperation can shift this balance.

It should be remembered that national competent authorities have an obligation to enforce EU law in light of the principle of sincere cooperation.[119] This means that, in the context of the DSA, the DSCs and other national competent authorities must take any appropriate measures to ensure the fulfilment of the obligations arising out of the DSA and refrain from any measures which could jeopardise the attainment of its objectives.[120] Moreover, as underlined by the CJEU, these authorities must cooperate sincerely and effectively, even where EU rules are not sufficiently precise or do not exist, in order to ensure the achievement of the objectives of EU law.[121]

115 Digitale-Dienste-Gesetz (n 112), Art 12.

116 Willem Halffman, 'Science-policy boundaries: national styles?' (2005) 32 *Science and Public Policy*, no. 6, 457; Evam Heims, 'Explaining coordination between national Regulators in EU agencies: the role of formal and informal social organization' (2016) 94 *Public Administration*, 881.

117 For instance, within the European Competition Network (ECN), competition authorities have established working groups or other informal frameworks. See, <https://competition-policy.ec.europa.eu/antitrust-and-cartels/european-competition-network_en> (last visited 14 October 2024).

118 For instance, given the limited timeframe, Luxembourg adopted a 'pragmatic approach' by selecting an existing national entity. Specifically, it chose the agency already responsible for overseeing the P2B Regulation and Digital Markets Act (DMA) guidelines; Mark Cole, 'Digital Services Act implementation bill proposed to Parliament' [2023] IRIS 2023-10:1/24 <https://merlin.obs.coe.int/article/9893> (last visited 15 October 2024).

119 Temple Lang (n 84), 1924–1931.

120 Article 4(3) TEU.

121 Case C-645/19 (n 88), para 72.

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Notwithstanding the potential of this principle, its practical implementation still depends on the voluntary efforts of national authorities or on the CJEU's intervention.[122] While the CJEU may provide clarifications that may reinforce the effectiveness of the DSA's enforcement framework, it would be more effective to proactively introduce additional guidelines that assist national authorities in navigating their autonomy while interpreting the existing framework in a manner that fosters sincere and effective cooperation.

Under these circumstances, to start with this article suggests establishing additional guidelines to enhance cooperation. In that regard, the Commission may be well-placed to issue guidelines addressing specific procedural aspects concerning cooperation among DSCs as well as between DSCs and other national competent authorities.[123] Considering that the DSA does not allow the Commission to issue implementing and delegated acts on horizontal cooperation matters, these guidelines will enable the addressing of crucial aspects necessary for the immediate enforcement of the Act. This approach could help to avoid potential lengthy infringement procedures against Member States for non-compliance or preliminary references to the CJEU.[124] In particular, the guidelines should establish clear protocols for communication between DSCs of different Member States and between the DSCs and other national competent authorities,[125] provide guidance on cross-border investigations and enforcement actions, and clarify the scope of powers and responsibilities of DSCs in different cooperation scenarios.

Another approach to operationalising the principle of sincere cooperation may be to fully leverage the role of the EBDS. At first, the Board's mandate to contribute to 'achieving a common Union perspective on the consistent application of this Regulation and to the cooperation among competent authorities' positions this body as a crucial mediator in DSA enforcement.[126] The Board's authority to issue non-binding opinions, requests, and recommendations, which nonetheless oblige DSCs and other authorities to justify non-compliance, could establish a quasi-binding dispute resolution mechanism.[127] This approach, however, intersects with broader debates about the legal implications of the 'comply or explain mechanisms'.[128] Recent scholarship warns that such frameworks, which essentially 'harden' soft law measures, risk contravening the *Meroni* doctrine,[129] which instead aims to exclude the delegation of general regulatory powers to agencies.[130] While this tension merits further scrutiny, the prospect of

122 European Commission, 'Part 2 of the Commission staff working document: impact assessment report, annexes accompanying the document proposal for a Regulation of the European Parliament and the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC' [2020], 147–149. This document highlights that EU Member States must recognise the necessity of establishing a well-designed, efficient and effective cooperation mechanism for addressing cross-border issues.

123 For instance, the Commission has already taken the leadership to guarantee immediate and effective compliance with the Act. In order to operationalise the DSA framework for vertical cooperation, the Commission has published a Recommendation inviting Member States to coordinate their actions to contrast the dissemination of illegal content. European Commission, 'Commission recommends Member States to fast-track DSA governance to enhance response to illegal online content' (18 October 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_5122> (last visited 14 October 2024). Moreover, the Commission has signed or is in the process of signing specific administrative arrangements with Member States' DSCs (France, Ireland, Italy and the Netherlands) to define the procedural framework for the exchange of information, data, and technical systems and tools to assist in identifying and assessing systemic risks.

124 Pieter Van Cleynenbreugel & Pietro Mattioli, 'Digital Services Coordinators and other competent authorities in the Digital Services Act: streamlined enforcement coordination lost?' (30 November 2023, European Law Blog) <https://europeanlawblog.eu/2023/11/30/digital-services-coordinators-and-other-competent-authorities-in-the-digital-services-act-streamlined-enforcement-coordination-lost/> (last visited 30 October 2024).

125 ibid.

126 DSA (n 1), recital 132.

127 ibid, recital 133 and Art 63(2).

128 The 'comply or explain' mechanism, which originates in corporate governance, has now been adopted in EU financial supervision. In this context, the European Supervisory Authorities (ESAs) require national supervisory authorities to either adhere to established guidelines and recommendations or provide justifications for deviations. In more detail, see Robert Böttner, 'The comply-or-explain mechanism in the European Supervisory Authorities, or: Does Meroni allow nudging?' in Petra Lea Láncos et al. (eds.), *The Legal Effects of EU Soft Law* (Edward Elgar Publishing, 2023), 176. Furthermore, it has been observed that similar mechanisms are used by the European Aviation Safety Agency (EASA). In this regard, see (A.) Ton van den Brink & Linda Senden, 'Checks and Balances of Soft EU Rule-Making' (2012) European Parliament Policy Department C: Citizens' Rights and Constitutional Affairs, 44.

129 Case C-9/56, *Meroni v High Authority of the European Coal and Steel Community*, EU:C:1958:7, 149–150.

130 Böttner, 'The comply-or-explain mechanism in the European Supervisory Authorities' (n 128), 181. The author provides a detailed analysis of how the 'comply-or-explain' mechanism exerts pressure on national authorities to align themselves with formally non-binding guidelines and recommendations.

reinforcing the Board's authority under the DSA could prove particularly valuable in mediating conflicts between DSCs in cross-border investigations.

Furthermore, the Board's power to initiate and coordinate joint investigations presents an opportunity to enhance the recourse to this mechanism.[131] The EBDS could foster a more collaborative enforcement culture, potentially surpassing the poor use of joint operations seen under the GDPR framework. Additionally, the Board's mandate to support and promote the development and implementation of European standards, guidelines, reports, templates and codes of conduct, in cooperation with relevant stakeholders, enables it to facilitate knowledge exchange.[132] This function could be expanded to create a platform for sharing expertise among national authorities and external experts.[133]

7. CONCLUSIONS

The objective of this article is to highlight the complexities of balancing Member States' institutional autonomy with stringent and harmonised EU administrative obligations, particularly in the context of the DSA. This analysis began by showing how the EU must balance various interests when regulating. In this regard, in recent years, the EU legislature has shown a clear preference for consistency and harmonisation, irrespective of the boundaries set by the principle of institutional autonomy. At the same time, despite the introduction of institutional and procedural obligations guiding Member States on how to organise their administrative enforcement of EU law, the EU legislature cannot fully anticipate how these obligations will be implemented by the Member States. However, possible shortcomings that may arise from Member States' implementation of EU law are not irreversible. To realign national choices with EU interests, the EU legal order can rely on the principle of sincere cooperation, enshrined in Article 4(3) TEU. The CJEU has also invoked sincere cooperation to enhance solidarity when it comes to the decentralised enforcement of EU law by national authorities.

In light of these considerations, this article argues for operationalising the principle of sincere cooperation in the context of the DSA. For that purpose, it suggests that, instead of deferring to the CJEU's future interpretation of how sincere cooperation applies to the DSA, immediate action should be considered. In this respect, it would be more effective to proactively introduce additional guidelines that assist national authorities in navigating their autonomy while also interpreting the existing framework in a manner that fosters sincere and effective cooperation. While not a solution to the diverse institutional enforcement frameworks across the Member States, these measures offer a practical way to work within them.

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COMPETING INTERESTS

The author has no competing interests to declare.

AUTHOR AFFILIATIONS

Pietro Mattioli orcid.org/0009-0007-9289-7685
University of Liege, BE

131 DSA (n 1), Arts 60(1)(b) and 63(1)(a).

132 ibid, Art 63(1)(e).

133 Suzanne Vergnolle, 'Putting collective intelligence to the enforcement of the Digital Services Act' (2023) <https://arxiv.org/pdf/2305.01959> (last visited 14 October 2024).

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